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All Aboard the Bruton Line

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ALL ABOARD THE *BRUTON* LINE

Gray v. Maryland, 118 S. Ct. 1151 (1998).

I. INTRODUCTION

In *Gray v. Maryland*,[1] the Supreme Court held that the introduction, at a joint trial, of a codefendant's incriminating confession violated the defendant's Sixth Amendment right of confrontation, even though the confession was redacted to replace the defendant's name with neutral, non-identifying terms such as "deleted."[2] Such a redaction was considered to be of the same legal consequence as the original confession.[3] The Supreme Court found that the blank spaces and words "deleted" or "deletion" were facially incriminating and simply invited the jury to fill in the blanks.[4]

This Note argues that the majority's rule for determining the admissibility of a codefendant's incriminating confession was correct. The majority's rule permits the justice system to strive for, and achieve, competing goals.

Next, this Note argues that the majority and dissent, in fact, agreed on the appropriate approach to determining the admissibility of redacted confessions. Both the dissent and majority employed a facially incriminating analysis.[5] Where the majority and dissent divided camps, however, is whether or not the confession in *Gray v. Maryland* was admissible under that approach.[6] The majority was correct in holding that the redacted confession in *Gray v. Maryland* was inadmissible under the facially incriminating analysis because the jury was compelled to link the

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[1] 118 S. Ct. 1151 (1998).
[2] *Id.* at 1155.
[3] *Id.* at 1156.
[4] *Id.* at 1155.
[5] *Id.* at 1157.
[6] *Id.* at 1151.

confession to the codefendant, which violated Gray's Sixth Amendment constitutional guarantees.

II. BACKGROUND

The Confrontation Clause commands that "[I]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him."[7] The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment,[8] includes the right of cross-examination.[9]

In early cases examining the Confrontation Clause, the Court held that it was "reasonably possible for the jury to follow sufficiently clear instructions" to disregard a confessor's incriminatory statement against his codefendant.[10] In *Delli Paoli v. United States*, for example, five men were convicted of conspiring to "possess and transport alcohol in unstamped containers and to evade payment of federal taxes on the alcohol."[11] Codefendant Whitley did not testify at trial, but confessed to the crime in an out-of-court statement, which specifically implicated all four codefendants.[12] Whitley's confession was introduced into

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[7] U.S. CONST. amend. VI. *See generally* Alfredo Garcia, *The Winding Path of* Bruton v. United States*: A Case of Doctrinal Inconsistency*, 26 AM. CRIM. L. REV. 401, 403-5 (1998) (detailing the history of the Confrontation Clause); Williams S. Pittman, Note, Barker v. Morris *and the Right? to Confrontation*, 14 HASTINGS CONST. L.Q. 839, 844 (1987) (explaining the origin of the Confrontation Clause).

[8] Pointer v. Texas, 380 U.S. 400, 403 (1965).

[9] Bruton v. United States, 391 U.S. 123, 126 (1968). The United States Court of Appeals for the Sixth Circuit succinctly explained the object of the Confrontation Clause as follows:

> The primary object . . . [is] to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Marsh v. Richardson, 781 F.2d 1201, 1205 (6th Cir. 1986).

[10] Delli Paoli v. United States, 352 U.S. 232, 239 (1957).

[11] *Id.* at 233.

[12] *Id.*

evidence in its entirety, along with limiting jury instructions.[13] Only codefendant Orlando Delli Paoli appealed his conviction based on the introduction of Whitley's unredacted statement into evidence.[14] The Court found that limiting jury instructions can adequately safeguard a defendant's Sixth Amendment right of confrontation, even where a codefendant's incriminating confession is introduced in whole form.[15] The Court reasoned that if the jury truly disregarded the "reference to the codefendant, no question would arise under the Confrontation Clause, because by hypothesis the case [would be] treated as if the confessor made no statement inculpating the nonconfessor."[16] The key principle in *Delli Paoli* was that "unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense."[17]

The Court next addressed a defendant's Sixth Amendment right to confrontation in *Jackson v. Denno*.[18] The *Jackson* Court examined a New York State procedure for determining whether

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[13] *Id.* The jury was instructed that Whitley's statement "will be considered by you solely in connection with your determination of the guilt or innocence of the defendant Whitley. It is not to be considered as proof in connection with the guilt or innocence of any of the other defendants." *Id.* at 239-40.

[14] *Id.* at 233. Pertinent parts of Whitley's unredacted confession implicating Orlando Delli Paoli read as follows:

> Just before Carl went to jail in 1950, he introduced me to Bobby. I have been shown a photograph bearing ATU 3643 N.Y. dated 12/29/51 of Orlando Delli Paoli, and I identify it as that of the man known to me as Bobby. This was sometime in the summer of 1951. Bobby would come to my house to see me. If I placed an order with him he would set the date and the time for seven or eight o'clock in the evening when I was to pick up the alcohol.
>
> ....
>
> My purchases from Bobby would consist of two or three 5-gallon cans of alcohol at a time and were made once or twice a week. The last two times I paid Bobby $38 a can.

Id. at 245-46.

[15] *Id.* The Court did comment that "there may be practical limitations to the circumstances under which a jury should be left to follow instructions but this case does not present them." *Id.* at 243.

[16] Bruton v. United States, 391 U.S. 123, 126 (1968).

[17] *Delli Paoli*, 352 U.S. at 242.

[18] 378 U.S. 368 (1964).

a confession was made voluntarily.[19] The Court concluded that a defendant in a criminal case cannot be convicted based upon, in whole or in part, an involuntary confession, regardless of whether the statement is true or false, or whether other evidence supports the conviction.[20]

The New York State procedure allowed the trial judge to exclude a confession if it was clearly made involuntarily.[21] Whether the confession was made voluntarily became a jury question, however, in situations where it could be reasonably disputed.[22] This procedure posed a significant danger in instances where a confession, albeit true, was found to have been made involuntarily, raising the question whether a jury would be able to disregard this real and incriminating information when determining a defendant's guilt.[23] The Court ultimately agreed that a jury, when deciding a confessor's guilt, could not be depended upon to ignore her confession of guilt should it find the confession involuntary.[24] For this reason, the Court concluded that the trial judge, and not the jury, must decide whether a confession was given voluntarily.[25]

Eleven years later, *Bruton v. United States* expressly overruled *Delli Paoli*.[26] The *Bruton* Court relied on the rationale in *Jackson* to overrule *Delli Paoli,* even though the facts in *Jackson* were not

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[19] *Id.* at 377.

[20] *Id.*

[21] *Id.*

[22] *Id.* The jurors' task, embodied in the jury instructions in *Jackson,* read as follows:

> Should you decide under the rules that I gave you that [the confession] is voluntary, true and accurate, you may use it, and give it the weight you feel that you should give it. If you decide that it is involuntary, exclude it from the case. Do not consider it at all. In that event, you must go to the other evidence in the case to see whether or not the guilt of Jackson was established to your satisfaction outside of the confession, beyond a reasonable doubt.

Id. at 375 n.5.

[23] *Id.* at 382. The Court explained that the jury may not understand the policy reasons behind excluding from evidence a true, but involuntary, confession. *Id.*

[24] *Id.* at 389.

[25] *Id.* at 391. The Court further stated that "whether the trial judge, another judge, or another jury, *but not the convicting jury,* fully resolves the issue of voluntariness is not a matter of concern here." *Id.* at 391 n.19 (emphasis added).

[26] Bruton v. United States, 391 U.S. 123, 126 (1968).

directly analogous to the facts in *Delli Paoli*.[27] The basic premise of *Jackson*, according to *Bruton*, altogether repudiated the supposition behind *Delli Paoli*.[28]

In *Bruton*, codefendant Evans' out-of-court oral confessions to a postal inspector were introduced into evidence at his joint trial for postal armed robbery with petitioner George Williams Bruton.[29] The trial court gave the jury a limiting instruction prior to the introduction of the confession and cautioned the jury at the close of the Government's direct case as well.[30] Evans and Bruton were both found guilty of armed postal robbery by the jury.[31] Bruton's conviction was affirmed on appeal, even though Evans' confession directly incriminated him, solely because the jury had been given a limiting instruction.[32] The Supreme Court, however, overturned Bruton's conviction due to the substantial risk that the jury had, indeed, considered Evans' confessions in determining Bruton's guilt.[33] The Court believed that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequence of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."[34] The Court still acknowledged the reliability of the jury system in most circumstances.[35] The Court thus created the *Bruton* principle, which stands for the proposition that limiting instructions

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[27] *Id.* at 128.

[28] *Id.*

[29] *Id.* at 124.

[30] *Id.* at 126 n.2. The judge explained that Evans' confession implicating Bruton "if used, can only be used against the defendant Evans. It is hearsay insofar as the defendant George Williams Bruton is concerned, and you are not to consider it in any respect to the defendant Bruton, because insofar as he is concerned it is hearsay." *Id.*

[31] *Id.* at 124.

[32] *Id.* at 125. Interestingly, Evans' conviction was overturned on appeal on the basis that his oral confessions to a postal inspector should not have been admitted into evidence against him. *Id.* The oral confessions had been prompted by an earlier unconstitutional police investigation in which Evans did not have counsel and was not given preliminary warnings of any kind. *Id.*

[33] *Id.* at 126.

[34] *Id.* at 135.

[35] *Id.*

in this specific context have virtually the same effect as if no instructions had been given at all.[36]

Justice White[37] dissented in *Bruton* from what he labeled as "an excessively rigid rule."[38] Justice White argued that the confession in *Jackson* was entirely distinct from the confession in *Bruton* and thereby raised extremely different questions of credibility and jury reliability.[39] The confession in *Jackson* came from the defendant himself, "the most knowledgeable and unimpeachable source of information about his past conduct."[40] Thus it was no wonder that it might have been difficult, if not impossible, for the jury to disregard the statement in determining the defendant's guilt, especially if the statement was true.[41] The jury may not have fully understood the policy behind foregoing truthful, incriminating evidence in order to preserve other constitutional guarantees.[42]

In contrast to the majority, Justice White noted that the confession in *Bruton* was made by Evans, Bruton's codefendant.[43] This, explained Justice White, raised a real issue of credibility.[44] A confessor's statements are less trustworthy than other hearsay evidence, according to Justice White, because he is tainted by the strong motivation to inculpate his codefendant and thereby absolve himself of all or any of the blame.[45] Justice White believed that a jury, with a proper limiting instruction, would be able to recognize and understand the need to ignore this category of particularly suspect hearsay.[46]

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[36] *Id.* *See also* Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) (Hand, J., analogizing a limiting instruction to a mere placebo or "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's").

[37] Justice Harlan joined in Justice White's dissenting opinion.

[38] *Id.* at 139 (White, J., dissenting).

[39] *Id.* at 139-40 (White, J., dissenting).

[40] *Id.* at 140 (White, J., dissenting).

[41] *Id.* (White, J., dissenting).

[42] *Id.* at 141 (White, J., dissenting).

[43] *Id.* (White, J., dissenting).

[44] *Id.* (White, J., dissenting).

[45] *Id.* at 141-42 (White, J., dissenting). "Whereas the defendant's own confession possesses greater reliability and evidentiary value than ordinary hearsay, the codefendant's confession implicating the defendant is intrinsically much less reliable." *Id.*

[46] *Id.* at 142 (White, J., dissenting).

Finally, Justice White's dissent in *Bruton* briefly addressed the future use of a redacted codefendant's confession, a topic not discussed by the majority.[47] The dissent's only guidance on this issue was that a redacted confession must not change the statement so as to unduly prejudice either the confessor or the Government.[48]

The dissent's thought proved to be directly on target as the next stop on the *Bruton* line was an examination of the introduction of a codefendant's redacted confession. In *Richardson v. Marsh*, respondent Clarrisa Marsh, Benjamin Williams and Kareem Martin were charged with assaulting Cynthia Knighton and murdering her son and aunt.[49] Marsh and Williams were tried together despite Marsh's objection.[50] Williams did not testify at trial, but a confession given to the police after his arrest was admitted into evidence.[51] That confession detailed a conversation between Williams and Martin in the car on the way to the robbery and corroborated the events in Knighton's testimony.[52] The confession, however, was redacted so as to completely eliminate all reference to Marsh.[53] Additionally, the jury was cautioned only to use the confession against Williams.[54]

At the trial, Marsh testified that she had been in the back seat of the car with Martin and Williams, but said that she could not hear the conversation because the radio was too loud.[55] Marsh admitted entering the Knighton home but stated that she had not intended to rob or kill anyone and did not have prior knowledge of Martin's and Williams' plan.[56] During his closing argument, the prosecutor linked Marsh to part of William's con-

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[47] *Id.* at 143 (White, J., dissenting). The dissent also voiced their concerns that the ruling in *Bruton* would hinder the occurrence of joint trials, which are more economical and efficient and promote consistency in judgments and sentencing. *Id.*

[48] *Id.* (White, J., dissenting).

[49] 481 U.S. 200, 202 (1987).

[50] *Id.* Martin was unavailable for trial as he was a fugitive at that time. *Id.* Marsh's motion to sever her trial from Williams was denied. *Id.*

[51] *Id.* at 203-04.

[52] *Id.* at 203 n.1.

[53] *Id.* at 203.

[54] *Id.* at 204.

[55] *Id.*

[56] *Id.*

fession, when he stated "if [Marsh] admits that she heard the conversation and she admits to the plan, she's guilty of at least armed robbery."[57]

The jury found Marsh guilty of one count of assault with intent to commit murder and two counts of felony murder in the perpetration of an armed robbery.[58] The Michigan Court of Appeals affirmed, and the Michigan Supreme Court denied leave to appeal and Marsh's motion for reconsideration.[59] The United States Court of Appeals for the Sixth Circuit reversed her conviction based on an "evidentiary linkage" or "contextual implication" approach.[60] The Sixth Circuit contended that in the context of all admissible evidence at trial, the account of the conversation in the confession was "powerfully incriminating to Marsh with respect to the critical element of intent."[61]

The United States Supreme Court granted certiorari and determined that William's statement, which was redacted so as to exclude any reference to Marsh, did not violate Marsh's Sixth Amendment right of confrontation, even though extrinsic evidence at trial linked her to the confession.[62] The Court characterized *Bruton* as a narrow exception to the premise that juries follow limiting instructions.[63] It likened the *Bruton* principle to a facially incriminating analysis, where a confessor's statement is

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[57] *Id.* at 205 n.2.

[58] *Id.* at 205.

[59] Marsh v. Richardson, 781 F.2d 1201, 1204 (6th Cir. 1986). Marsh then filed a petition for writ of habeas corpus, contending that her Sixth Amendment right to confrontation was violated by the introduction of William's confession into evidence. *Id.* at 1205. Marsh also asserted that she was "denied due process by denial of her motion for directed verdict when the evidence was insufficient for conviction." *Id.* The district court denied Marsh's petition. *Id.* The United States Court of Appeals for the Sixth Circuit soon after "granted a certificate of probable cause and appointed counsel." *Id.*

[60] *Richardson*, 481 U.S. at 206. To explain further, "the Sixth Circuit resolved that the inculpatory value of a co-defendant's extra-judicial statement was to be measured not solely by the four corners of the statement, but also by reference to other evidence admitted in the trial." Judith L. Ritter, *The X Files: Joint Trials, Redacted Confessions and Thirty Years of Sidestepping* Bruton, 42 VILL. L. REV. 855, 879-80 (1997).

[61] *Marsh*, 781 F.2d at 1213.

[62] *Richardson*, 481 U.S. at 200.

[63] *Id.*

inadmissible only if it expressly inculpates one's codefendant.[64] The *Richardson* court believed that the redacted version of a codefendant's confession yielded an inference that the jurors were able to look past when determining the defendant's guilt.[65] The Court thus rejected a contextual analysis approach and explained that the question was not whether the confession incriminated Marsh but whether it was correct to assume that the jury did not use it against Marsh.[66] Since the confession was not incriminating on its face, as the confession was in *Bruton*, it was appropriate to assume that the jury did not improperly use the confession.[67]

Justice Stevens argued in his dissent that the *Bruton* principle encompassed both a contextual analysis approach and a facially incriminating approach and therefore applied "without exception to all inadmissible confessions that are powerfully incriminating."[68] Justice Stevens characterized the majority's differentiation between a confession that names a defendant and one that does not as illogical because the latter can be just as devastating or powerfully incriminating to a defendant as the former when linked with other evidence at trial.[69] Justice Stevens contended that the proper test for admitting a codefendant's confession should not be based solely on whether the defendant is specifically named in the confession; instead, a court should look at each confession on a case-by-case basis and assess whether it was powerfully incriminating or not.[70] In this particular instance, Justice Stevens stated that the confession

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[64] *Id.* at 208. The Supreme Court reasoned that "specific testimony that 'the defendant helped me commit the crime' is more vivid than inferential incrimination, and hence more difficult to thrust out of the mind." *Id.* at 208.

[65] *Id.* The Court concluded that "in short, while it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton*'s exception to the general rule." *Id.* at 208.

[66] *Id.*

[67] *Id.* at 208-09.

[68] *Id.* at 211-12 (Stevens, J., dissenting). Justice Stevens was joined by Justices Brennan and Marshall. *Id.* at 211.

[69] *Id.* at 212 (Stevens, J., dissenting).

[70] *Id.* (Stevens, J., dissenting).

became facially incriminating when linked with the other evidence at trial and thus should not have been admitted at trial.[71]

None of the Supreme Court's prior cases addressed the question of "the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun."[72] *Gray v. Maryland* addressed this final stop on the *Bruton* line.[73]

III. FACTS AND PROCEDURAL HISTORY

Stacey Williams was beaten to death on November 10, 1993.[74] After a preliminary investigation, the police arrested Anthony Bell for the murder.[75] Bell gave a written statement to the Baltimore police in which he specifically implicated himself, Jacquin Vanlandingham ("Tank"), and petitioner Kevin Domonic Gray.[76] Bell also stated that "several other guys" were involved in the beating of Stacey Williams.[77] Gray was subsequently arrested for the beating and gave an "exculpatory oral statement to the police."[78] Tank was subsequently unavailable for trial because he was mortally wounded in an unrelated incident two days after William's death.[79]

Gray and Bell were tried jointly.[80] The Circuit Court for Baltimore City denied Gray's motion to sever his trial from Bell's

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[71] *Id.* at 216 (Stevens, J., dissenting).

> This confession was of critical importance because it was the only evidence directly linking respondent with the specific intent, expressed before the robbery, to kill the victims afterwards. If Williams had taken the witness stand . . . [he] could have [been] cross-examined to challenge his credibility and to establish . . . [the volume of the car radio].

Id. at 215 (Stevens, J., dissenting).

[72] *Id.* at 211 n.5.

[73] *See* Gray v. Maryland, 118 S. Ct. 1151 (1998).

[74] Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Respondent at 1, Gray v. Maryland, 118 S. Ct. 1151 (1998) (No. 96-8653).

[75] *Id.*

[76] Petitioner's Brief at 2, *Gray* (No. 96-8653).

[77] Brief for the United States as Amicus Curiae Supporting Respondent at 2, *Gray* (No. 96-8653).

[78] Petitioner's Brief at 2, *Gray* (No. 96-8653). Gray told the police that he was speaking to his girlfriend on a public phone at the time of the beating. *Id.* at 5.

[79] *Id.* at 2.

[80] *Id.* at 2-3.

trial and, alternatively, his motion to exclude Bell's incriminating confession.[81] The trial court believed that Bell's confession "[could] be sanitized in about three different spots so as to remove the names of Tank and Mr. Gray . . . ."[82] The trial court believed that such measures would ensure that the jury would not be "left with the unavoidable inference or implication that the person Mr. Bell is referring to in the statement is Mr. Gray."[83] The trial court further found that "where you've got group activity and the evidence here is, apparently, going to be that there were at least five, and maybe as many as six men involved in the assault on the victim, to redact this statement . . . will not unduly prejudice Mr. Gray."[84]

Bell did not testify at trial; instead, Detective Homer Pennington read his confession to the jury.[85] Detective Pennington

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[81] Brief for the United States as Amicus Curiae Supporting Respondent at 2, *Gray* (No. 96-8653).

[82] Gray v. Maryland, 667 A.2d 983, 988 (Md. Ct. Spec. App. 1995).

[83] *Id.*

[84] *Id.*

[85] Petitioner's Brief at 3, *Gray* (No. 96-8653). The pertinent part of the trial transcript reads as follows:

> Question, what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?
>
> Answer, an argument broke out between deletion and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran into Wildwood Parkway. Me, deleted, and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.
>
> Question, when Stacey was beaten on Wildwood Parkway, how was he beaten?
>
> Answer, hit, kicked.
>
> Question, who hit and kicked Stacey?
>
> Answer, I hit Stacey. He was kicked but I don't know who kicked him.
>
> Question, who was in the group that beat Stacey?
>
> Answer, me, deleted, deleted, and a few other guys.
>
> Question, do you know the other guy's name?
>
> Answer, deleted, deleted and me. I don't remember who was out there.
>
> Question, did anyone pick Stacey up and drop him to the ground?
>
> Answer, no, when I was there.
>
> Question, what was the argument over between Stacey and deleted?
>
> Answer, some money that Stacey owed deleted.
>
> Question, how many guys were hitting on Stacey?
>
> Answer, about six guys.
>
> Question, do you have a black jacket with Park Heights written on the back?
>
> Answer, yes.

used the words "deleted" or "deletion" in lieu of the names of Gray and Tank.[86] Written copies of the confession were admitted into evidence as well.[87] Those copies used blank white spaces set apart by commas in place of the names of Gray and Tank.[88] Additionally, before the confession was introduced into evidence, the judge specifically instructed the jury to use the confession only against Bell and not to use the confession in any way against Gray.[89]

After Detective Pennington read Bell's confession into evidence, however, the prosecution asked him whether "after [Bell] gave you that information, you subsequently were able to arrest Mr. Kevin Gray?"[90] The Detective responded that he was able to arrest Gray based upon the information in the confession.[91]

> Question, who else has these jackets?
> Answer, deletion.
> Question, after reading this statement, would you sign it?
> Answer, yes.

Id. at 3-4.

[86] Brief for the United States as Amicus Curiae Supporting Respondent at 3, *Gray* (No. 96-8653).

[87] *Id.*

[88] Gray v. Maryland, 118 S. Ct. 1115, 1153 (1998).

[89] Brief for the United States as Amicus Curiae Supporting Respondent at 3, *Gray* (No. 96-8653). The jury instructions read as follows:

> Ladies and gentlemen of the jury, you're about to hear evidence concerning the statement provided by Mr. Bell when he was interviewed by the detective. You should understand, and I will remind you later, that this evidence concerning the statement provided by Mr. Bell is to be considered by you as *evidence against Mr. Bell only* and in no way is Mr. Bell's statement provided to the detective about which he's about to testify to be considered by you as evidence against Mr. Gray. It is *evidence against Mr. Bell only*, and as I will instruct you later, you will *consider the evidence against each of the defendants individually* and reach a separate verdict as to each defendant.

Petitioner's Brief at 3, *Gray* (No. 96-8653) (emphasis added).

[90] *Id.* at 5. *See also* Gray v. Maryland 118 S. Ct. 1151, 1161 n.2 (1998) (Scalia, J., dissenting). Interestingly, the defense did not object to this "follow-up" question at trial. This "failure to object deprive[d] petitioner of the right to complain of some incremental identifiability added to the redacted statement by the question and answer." *Id.*

[91] Petitioner's Brief at 5, *Gray* (No. 96-8653). The prosecution questioned the Detective as follows:

In addition to the redacted confession, two witnesses testified against Gray at the trial.[92] Tracy Brumfield stated that she saw Gray, Tank, and ten other young men chase Stacey Williams down the street.[93] Shay Yarberough actually identified Gray as a participant in the fatal beating of Stacey Williams.[94] Yarberough testified that Gray, Bell, Tank, and three other men approached Stacey Williams and asked him "'where their money at.'"[95] Tank then hit Williams in the mouth, kicked him several times and dropped him on his head three times.[96] According to the testimony, although Gray could not lift Williams completely into the air, Gray managed to drop him on his head as well.[97] Yarberough further testified that Gray, Bell, Tank, and three others kicked Stacey Williams in the head and body repeatedly.[98] On cross-examination, however, Gray's attorney impeached Yarberough by introducing an earlier statement to the police in which Yarberough said that he had seen the beating but could not identify the participants.[99]

Gray denied beating Williams in both his statements to the police and at trial.[100] Gray testified that he was on a public phone speaking with his girlfriend, Chanel Brown, during the beating.[101] Three witnesses confirmed Gray's story.[102] Chanel Brown testified that Gray had called her from a public phone

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Q, All right, now officer, after he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?

A, That's correct.

Id. at 5.

[92] *Id.*

[93] *Id.* at 5.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* Yarberough also stated, in accordance with Bell's confession, that the participants in the beating wore jackets that said "Park Heights." *Id.*

[98] Brief for the United States as Amicus Curiae Supporting Respondent at 3, *Gray* (No. 96-8653).

[99] Gray v. Maryland, 667 A.2d 983, 990 (Md. Ct. Spec. App. 1995).

[100] Brief for the United States as Amicus Curiae Supporting Respondent at 3, *Gray* (No. 96-8653).

[101] *Gray*, 667 A.2d at 984.

[102] *Id.* at 984-85.

and told her that Tank was fighting up the street.[103] Renardo Bell and Lamont Mathews testified that they did not see Gray in the group beating Stacey Williams.[104] Further, Mathews stated that he saw Gray at a phone booth half a block away from the incident.[105]

Gray was convicted of involuntary manslaughter by the jury for the death of Stacey Williams.[106] The judge sentenced him to ten years imprisonment with all but seven years suspended.[107]

Gray appealed his conviction to the Court of Special Appeals of Maryland.[108] The Court of Special Appeals of Maryland reversed Gray's conviction, holding that the introduction of Bell's inculpatory confession, although redacted to exclude Gray's name by using the words "deleted" or "deletion," violated Gray's rights under the Confrontation Clause of the Sixth Amendment, despite any limiting instructions.[109] The court placed this case at "a point on the continuum between *Bruton* and *Richardson*," and explicitly adopted the contextual analysis approach.[110] The court explained that "in order to determine whether a substantial risk exists, the trial court must consider the degree of inference the jury must make to connect the defendant to the statement and the degree of risk that the jury will make that linkage despite a limiting instruction."[111] Further, that determination must be made in the context of all other evidence at trial.[112] Using a "substantial risk" criterion, the court found that "the jury need only have taken a short step in inferring" that Gray participated in the beating.[113] It deemed Bell's

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[103] *Id.* at 985.
[104] *Id.* at 984.
[105] *Id.*
[106] State v. Gray, 687 A.2d 660, 662 (Md. 1997).
[107] *Id.*
[108] *Gray*, 667 A.2d at 983.
[109] *Id.* at 985.
[110] *Id.* at 990.
[111] *Id.* at 988.
[112] *Id.*
[113] *Id.* at 990.

confession "facially incriminating and constitutionally violative," and therefore reversed Gray's conviction.[114]

The State of Maryland subsequently appealed to the Court of Appeals of Maryland.[115] The Court of Appeals of Maryland rejected the contextual analysis approach adopted by the Court of Special Appeals of Maryland.[116] It stated that simply because "the jury could have reasonably connected Gray to Bell's confession is not sufficient to raise a *Bruton* challenge."[117] Rather, the court determined that "a *Bruton* violation occurs when a codefendant's confession, either facially or by compelling and inevitable inference, inculpates a nonconfessing defendant."[118] The court's reasoning thus lay in between the "contextual analysis" and "facially incriminating" approaches.[119] The court explained that "'unless [t]he compulsion to make the impermissible inference [is] compelling, inevitable, and subject to little or no debate[,] . . . the general and strong presumption that jurors follow their instructions is not overcome, and the requirements of *Bruton* are therefore satisfied.'"[120] Emphasizing that at least six other individuals participated in the beating, the court found that the jury was not compelled to abandon the judge's limiting instructions and infer that Bell's confession implicated

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[114] *Id.*

[115] State v. Gray, 687 A.2d 660 (Md. 1997). The Court of Appeals of Maryland is the highest state court in Maryland.

[116] *Id.*

[117] *Id.* at 669. The court further stated that "[w]hile we agree that the jury could have reasonably inferred that one of the deleted names belonged to Gray, that inference was not compelled." *Id.* at 668.

[118] *Id.* at 668.

[119] *Id.* at 666-67. The Court stated that

> [T]he better approach is that typified by the holding in United States v. Pendegraph, [791 F.2d 1462 (11th Cir. 1986)], where the United States Court of Appeals for the Eleventh Circuit held that 'a redacted confession may still violate the Bruton rule if the statement *compels* a directly inculpating inference' between the redacted confession and the nonconfessing defendant, 791 F.2d at 1465 (emphasis added) (where the word 'individual' was substituted for Pendegraph's name in his codefendant's confession, the jury could infer that Pendegraph was that 'individual' if only because there was no other possibility)....

Id. at 666 (emphasis in original).

[120] Brief for the United States as Amicus Curiae Supporting Respondent at 4, *Gray* (No. 96-8653) (quoting State v. Gray, 687 A.2d 660, 667 (Md. 1997).

Gray.[121] Hence, the Court of Appeals of Maryland reversed the judgment of the lower court.[122]

The United States Supreme Court granted certiorari[123] to answer the question expressly left open in *Richardson* and at issue in *Gray*.[124] It sought to determine whether a "redaction that replaces a defendant's name with an obvious indication of the deletion, such as a blank space, the word 'deleted' or a similar symbol, still falls within Bruton's protective rule."[125]

IV. SUMMARY OF THE OPINIONS

A. THE MAJORITY OPINION

Writing for the majority,[126] Justice Breyer addressed whether a redaction that substitutes a defendant's name with an obvious symbol or deletion is admissible under the *Bruton* rule.[127] The Court held that substitutions for a defendant's name, such as a symbol, obvious blank space, or the words "deleted" or "deletion" in a codefendant's incriminating confession, create statements that too similarly resemble the original confession.[128] Justice Breyer concluded that these types of statements possess no significant legal difference from their original counterparts and that the application of the *Bruton* rule renders these specific confessions inadmissible.[129]

The Court first defined the *Bruton* rule.[130] Justice Breyer stated that "certain 'powerfully incriminating extrajudicial statements of a codefendant'—those naming another defendant—considered as a class, are so prejudicial that limiting in-

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[121] *Gray*, 687 A.2d at 669.

[122] *Id.*

[123] Gray v. Maryland, 117 S. Ct. 2452 (1997).

[124] Gray v. Maryland, 118 S. Ct. 1151, 1155 (1998).

[125] *Id.* at 1155.

[126] *Id.* at 1153. Justices Stevens, O'Connor, Souter and Ginsburg joined in Justice Breyer's opinion.

[127] *Id.* at 1155.

[128] *Id.*

[129] *Id.* at 1156.

[130] *Id.* at 1154-55.

structions cannot work."[131] A codefendant's confession must therefore be changed so as to eliminate any prejudice against the nonconfessing defendant.[132] The Court explained that replacing a defendant's name with an obvious symbol or deletion is impermissible because the statement remains directly accusatory, and thus, the jurors will understand that the confession implicates the defendant.[133]

Second, the Court distinguished *Gray* from *Richardson* because the confession in *Richardson* made no reference to the nonconfessing defendant, whereas Bell's confession directly implicated Gray.[134] The Court found that Bell's redacted confession functioned the same way grammatically as the original version.[135] Unlike the confession in *Richardson*, Bell's redacted confession pointed directly to Gray's existence by replacing his name in an obvious manner.[136]

Third, the Court was able to reconcile *Gray* with the basic premise of *Richardson* by distinguishing among the types of inferences in a confession.[137] The confession in *Richardson* was only incriminating once linked with other evidence at trial.[138] In *Gray* however, "[t]he inferences at issue . . . involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial."[139]

Justice Breyer acknowledged that *Richardson* allows into evidence some inferentially incriminating statements, such as codefendants confessions that become incriminating when linked

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[131] *Id.* at 1155.

[132] *Id.*

[133] *Id.* at 1155-56.

[134] *Id.* at 1155. In *Richardson*, "William's confession [did not violate Marsh's Sixth Amendment rights because it] amounted to 'evidence requiring linkage' in that it 'became' incriminating in respect to Marsh 'only when linked with evidence introduced later at trial'." *Id.* at 1154.

[135] *Id.* at 1156.

[136] *Id.*

[137] *Id.* at 1156-57.

[138] *Id.* at 1158.

[139] *Id.*

with other evidence at trial.[140] Justice Breyer also recognized that the jurors in *Gray* needed to make some degree of inference in order to link Gray to the words "deletion" and the blank spaces on the paper.[141] The mere fact that a confession requires the jury to make some type or degree of inference in order to link the codefendant to the confession, however, does not automatically place it beyond the scope of *Bruton's* protective rule by virtue of the holding in *Richardson.*[142] For example, a confession that utilizes a nickname or specific description of an individual in lieu of a codefendant's name, which admittedly requires some sort of an inference to link the codefendant to the confession, still refers directly to the codefendant and is therefore deemed facially incriminatory.[143] The Court stated that this type of change is transparent because it does not fool the jurors, particularly when the defendant is sitting in the courtroom before the jurors' very eyes.[144] If anything, an obvious deletion combined with cautionary jury instructions, may very well call the jury's attention to the "deletions" or blanks.[145] Justice Breyer stated that "the judge's instruction not to consider the confession as evidence against [the codefendant] . . . provide[s] an obvious reason for the blank."[146]

Fourth, the Court suggested that Bell's confession could have been redacted in part so that it made no particular reference to Gray; therefore, it would not have been obvious that the deletions referred to the codefendant in the courtroom, similar to the confession in *Richardson.*[147] For example, the answer read into evidence to the question, "Who was in the group that beat Stacey?" could easily have been read as, "Me and a few other

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[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.* at 1156.

[144] *Id.* at 1155.

[145] *Id.* Justice Breyer explained that "[b]y encouraging the jury to speculate about the reference, the redaction may overemphasize the importance of the confession's accusation—once the jurors work out the reference." *Id.* at 1155-56.

[146] *Id.* at 1155.

[147] *Id.* at 1157.

guys," rather than, "Me, deleted, deleted, and a few other guys."[148]

Finally, the Court acknowledged that a redacted confession containing blank spaces or the words "deleted" or "deletion" in place of the codefendant's name is less incriminating than a confession that uses a codefendant's full name.[149] It also accepted that in some situations, such as where there is more than one codefendant, it may not even be clear as to which codefendant a blank refers.[150] However, the Court still relegated the type of redacted confessions that replace a codefendant's name with a symbol, blank or the word "deleted" to an inadmissible class of confessions covered by the *Bruton* principle because the confession remains directly accusatory against the codefendant.[151] This type of confession thereby has the same effect as if no redaction has occurred at all.[152] For these reasons, the Supreme Court determined that Bell's confession, which replaced Gray's name with the words "deleted" or "deletion" or blank spaces, was impermissible.[153]

B. JUSTICE SCALIA'S DISSENT

Writing for the dissent,[154] Justice Scalia argued that the majority opinion extended the narrow exception of *Bruton*, as set forth in *Richardson*, too far.[155] Justice Scalia first restated the majority's acknowledgement that *Richardson* placed inferentially incriminating statements outside the reach of the *Bruton* principle.[156] He next restated the majority's categorization of confessions that redact a defendant's name with the use of a symbol or blank space as inferentially incriminating.[157] Justice

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[148] *Id.*

[149] *Id.* at 1156.

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.* at 1157.

[154] The Chief Justice and Justices Kennedy and Thomas joined in Justice Scalia's opinion.

[155] *Gray*, 118 S. Ct. at 1159 (Scalia, J., dissenting).

[156] *Id.* at 1159 (Scalia, J., dissenting).

[157] *Id.* (Scalia, J., dissenting).

Scalia used these concessions by the majority to demonstrate what he believed to be an inconsistency in the Court's logic.[158] He contended that the majority unduly extended the boundary drawn in *Richardson* by placing an inferentially incriminating confession under the protection of the *Bruton* principle.[159]

Justice Scalia emphasized the premise that jurors follow limiting instructions.[160] For example, the dissent found the introduction of Bell's redacted confession indistinguishable from the introduction at trial of evidence "of a defendant's prior convictions for the purpose of sentencing enhancement, or statements elicited from a defendant in violation of *Miranda v. Arizona* for the purpose of impeachment . . . ."[161] Justice Scalia believed that the preceding examples demonstrated the legal system's dependence and reliance on jurors to follow limiting instructions.[162] So long as the jury is cautioned that such evidence may not be used to determine a defendant's guilt, Justice Scalia argued, the introduction of a redacted confession or a defendant's prior convictions or statements are permissible and do not violate a defendant's constitutional guarantees.[163]

Justice Scalia further disagreed with the majority's portrayal of Bell's confession as directly accusatory of Gray.[164] The dissent did not believe that Bell's confession was analogous to a confession which uses a specific description or nickname in lieu of a codefendant's name, as the majority had asserted, because the latter is facially incriminating whereas the former requires speculation on behalf of the jury.[165] For a confession to be facially incriminating, Justice Scalia argued, it must be "incriminating independent of other evidence introduced at trial."[166]

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[158] *Id.* at 1159-60 (Scalia, J., dissenting).
[159] *Id.* at 1160 (Scalia, J., dissenting).
[160] *Id.* at 1159 (Scalia, J., dissenting).
[161] *Id.* (Scalia, J., dissenting).
[162] *Id.* (Scalia, J., dissenting).
[163] *Id.* (Scalia, J., dissenting).
[164] *Id.* (Scalia, J., dissenting).
[165] *Id.* at 1159-60 (Scalia, J., dissenting).
[166] *Id.* at 1159 (Scalia, J., dissenting).

According to Justice Scalia, the statement "Me, deleted and deleted" taken at face value only implicated Bell.[167]

Justice Scalia believed the introduction of Bell's confession did not enable the jury merely to look at Gray and definitively know that the confession specifically incriminated him.[168] Justice Scalia explained that although "the jury may speculate, the statement expressly implicates no one but the speaker." [169] Further evidence was required to link Bell's confession to Gray because the words "deleted" or "deletion" and blank spaces, absent any extrinsic evidence, left uncertain to whom the deletions referred.[170] Theoretically, the confession could have referred to Tank or one of the other six men involved in the beating.[171] If the confession had been read as "Me, Kevin Gray and a few other guys" then it clearly would have incriminated Gray.[172]

Bell's confession, therefore, was properly admitted into evidence, particularly when combined with the limiting instructions because "the issue . . . is not whether the confession incriminated petitioner [inferentially], but whether the incrimination is so 'powerful' that we must depart from the normal presumption that the jury follows its instructions."[173] Justice Scalia argued that courts should only depart from the fundamental notion that jurors follow limiting instructions when a confession is facially incriminating.[174] Justice Scalia explained that limiting instructions sufficiently hinder jurors from going

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[167] *Id.* at 1159-60 (Scalia, J., dissenting).

[168] *Id.* at 1159 (Scalia, J., dissenting).

[169] *Id.* at 1160 (Scalia, J., dissenting).

[170] *Id.* at 1159-60 (Scalia, J., dissenting).

[171] *Id.* at 1160 (Scalia, J., dissenting).

[172] *Id.* at 1161 n.2. (Scalia, J., dissenting). Interestingly, the defense did not object to the question of whether he was able to arrest Gray based upon the confession, which prosecutors posed to the detective after he read Bell's confession into evidence. Gray was therefore deprived of the right to "complain of some incremental indentifiability added to the redacted statement by the question and answer." *Id.* at 1161 n.2. (Scalia, J., dissenting). The question posed to the detective and the detective's answer could possibly have been grounds for reversal if found to have inexorably linked Gray to the confession. *Id.* (Scalia, J., dissenting).

[173] *Id.* at 1160 (Scalia, J., dissenting).

[174] *Id.* (Scalia, J., dissenting).

down the path of speculation in contextually incriminating situations.[175]

Second, the dissent disagreed with the majority's proposed redaction.[176] If the confession had originally been "Me and Kevin decided to beat Stacey," the majority proposed that the statement should have been redacted to "I decided to beat Stacey" which "would no longer be a confession to the conspiracy charge, but rather the foundation for an insanity defense."[177] The dissent argued that the proper redaction was still "Me and deleted" or "Me and another person."[178] Justice Scalia contended that "we have never before endorsed—and . . . we ought not to endorse—the redaction of a statement by some means other than the deletion of certain words, with the fact of the deletion shown."[179] If this form of redaction would unduly prejudice a codefendant, such as in the case of only two codefendants where "Me and deleted" is more obvious, then the nonconfessor may appeal to federal and state rules of criminal procedure which provide for severance or the exclusion of the confession.[180]

Justice Scalia rejected a bright-line rule which would render inadmissible all redacted confessions that employ the words "deleted" or "deletion," blank spaces or a symbol in lieu of the codefendant's name.[181] The dissent believed a confession should only be barred when it is facially incriminating, meaning that the jury is compelled to link the codefendant to the incriminating statements independent of other evidence admitted at trial.[182] That a jury may infer that the statement refers to the codefendant is inconsequential because the trial judge's limiting instructions adequately safeguard against the jurors linking the confession to the codefendant.[183]

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[175] *Id.* (Scalia, J., dissenting).
[176] *Id.* (Scalia, J., dissenting).
[177] *Id.* (Scalia, J., dissenting).
[178] *Id.* (Scalia, J., dissenting).
[179] *Id.* (Scalia, J., dissenting).
[180] *Id.* at 1160-61 (Scalia, J., dissenting).
[181] *Id.* at 1159-61 (Scalia, J., dissenting).
[182] *Id.* (Scalia, J., dissenting).
[183] *Id.* (Scalia, J., dissenting).

V. ANALYSIS

This Note argues that the majority's decision to create a bright-line or *per se* rule which prohibits redacted confessions that substitute a defendant's name with the word "deleted" or an obvious symbol is the most appropriate solution.[184] A bright-line rule protects a defendant's Sixth Amendment guarantees of confrontation and cross-examination by making out-of-court confessions that directly accuse co-defendants inadmissible at trial.

The majority in *Gray* believed that Bell's confession, albeit redacted, still directly implicated Gray.[185] The majority thereby used the facially incriminating approach in determining that even with the words "deleted" or "deletion" and blank spaces, Bell's confession outwardly incriminated Gray.[186] By creating a bright-line rule, the majority built an additional safeguard for the defendant's Sixth Amendment rights into the facially incriminating test.[187] The majority's rule ensures that the specific type of redaction at issue in *Gray* will automatically be rendered inadmissible under the facially incriminating approach.[188] Much like the emperor's new clothes, the words "deleted" and "deletion" or blank spaces did not cloak Gray's name. The majority recognized that, despite the use of the words "deleted" or "deletion," the jury could understand that the confession referred specifically to Gray.[189] The effect of Bell's redacted confession was simply transparent.[190]

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[184] *Id.* *See* Ritter, *supra* note 60, at 916-17 (arguing "[f]or cases in which anonymous references to others remain after redaction, however, the fairest and most practical solution is a *per se* rule prohibiting the introduction of the confession in that form").

[185] *Gray*, 118 S. Ct. at 1155.

[186] *Id.* at 1155-57.

[187] *But see* Garcia, *supra* note 7, at 437-38 (arguing instead that "severance is the most effective means of affording a defendant a fair trial" because even the mere introduction of a redacted confession undermines the basis of the Confrontation Clause. A codefendant is forced to take the stand, thereby losing her "privilege against self-incrimination in order to compensate for the denial of another constitutional safeguard: her right to confront her accusers as stipulated in the Sixth Amendment.").

[188] *Gray*, 118 S. Ct. at 1157.

[189] *Id.* at 1155-57.

[190] *Id.*

The dissent expressly embraced a pure facially incriminating approach just like the approach used in *Richardson.*[191] According to Justice Scalia, a redacted confession should be admissible unless the jury is forced to link the confession to the nonconfessing codefendant.[192] Further, a juror's ability to infer that a confession refers to a codefendant is inconsequential because the trial judge's limiting instructions adequately safeguard against this type of speculation.[193]

On the surface, the majority and dissenting opinions appear diametrically opposed.[194] In essence, however, the majority and dissent agreed that the facially incriminating approach is the appropriate standard by which to judge the admissibility of a codefendant's incriminating confession.[195] The dissent explicitly announced its use of the facially incriminating approach,[196] while the majority implicitly used the facially incriminating analysis in the sense that the majority found that Bell's redacted confession directly accused Gray despite the deletions.[197] Admittedly, the majority's analysis had an inferentially or contextually incriminating component.[198] The majority's minor use of an inferentially incriminating analysis is insignificant, however, because a pure division between the facially incriminating

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[191] *Id.* at 1161 (Scalia, J., dissenting).

[192] *Id.* at 1160-61 (Scalia, J., dissenting).

[193] *Id.* at 1160 (Scalia, J., dissenting).

[194] *Gray,* 118 S. Ct. 1151.

[195] *Id.*

[196] *Id.* at 1159 (Scalia, J., dissenting).

[197] *Id.* at 1155. *See* United States v. Stockheimer, 157 F.3d 1082, 1086-87 (7th. Cir. 1998) (holding that codefendant's confession was admissible under *Gray* because the statements only incriminated the other codefendants once linked with other evidence at trial); Herrera v. United States, No. 97 Civ. 2570 (TPG), 93 Cr. 203 (TPG), 1998 WL 770559, at *2 (S.D.N.Y Nov. 3, 1998) (explaining that *Gray* only places facially incriminating statements under *Bruton*'s protective rule); People v. Bryden, 73 Cal. Rptr. 2d 554, 565 (Cal. Ct. App. 1998) (finding that the *Gray* court "concluded that no Sixth Amendment right is invoked when other evidence must be associated with the extrajudicial statement to implicate the defendant.").

[198] *Gray,* 118 S. Ct. at 1155. The Court explained, however, that inference pure and simple cannot make the critical difference, for if it did, then *Richardson* would also place outside *Bruton*'s scope confessions that use shortened first names, nicknames, descriptions as unique as the "red-haired, bearded, one-eyed man-with-a-limp," and perhaps even full names of defendants who are always known by a nickname. *Id.* at 1156.

approach and the inferentially incriminating approach is impossible.[199] Even in cases where there is an obvious link between a confession and a nonconfessing codefendant, the jury must still make some degree of inference no matter how minute.[200]

The difference in opinion between the majority and dissent, therefore, was not over the appropriateness of the facially incriminating analysis, but whether Bell's confession failed under the facially incriminating analysis.[201] The question thus became whether Bell's confession compelled the jury to link his confession to Gray.[202] The majority believed that the use of the word "deleted" or "deletion" or an obvious symbol was directly accusatory, and therefore facially incriminating because the jurors were compelled to link the confession to Gray.[203] The dissent, on the other hand, did not believe that the confession forced the jurors to link the confession to Gray.[204]

While the dissent is technically correct in that Bell's confession could have referred to Gray, Tank or one of the other six men involved in the beating,[205] the majority reached a more sensible conclusion. Despite the particular circumstances of *Gray*, the majority's bright-line rule, which bars the use of the words "deleted" or "deletion," is still favorable because it neither unduly prejudices Bell nor presents an untrue fiction to the jury.[206] A redacted confession is only unduly prejudicial against the confessor if the redaction makes it appear as if he alone committed the crime.[207] The majority's proposed redaction in *Gray* did not create the type of statement that would unduly prejudice Bell.[208] The majority suggested that the answer read into evidence to the question "Who was in the group that beat Sta-

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[199] *Id.* at 1157. More importantly, it is "the *kind* of, not the simple *fact* of, inference" that is significant. *Id.* at 1157 (emphasis in original).

[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] *Id.* at 1155.

[204] *Id.* at 1160 (Scalia, J., dissenting).

[205] *Id.* at 1161 (Scalia, J., dissenting).

[206] *Id.* at 1157.

[207] *Id.*

[208] *Id.*

cey?" should have been read as "Me and a few other guys" rather than "Me, deleted, deleted, and a few other guys."[209] This statement maintains the distribution of blame as detailed by the confessor.[210] If the statement were to simply read "Me" in response to "Who was in the group that beat Stacey?," then the statement would be unduly prejudicial to Bell.[211]

Furthermore, the bright-line rule renders inadmissible redacted confessions which replace a codefendant's name with a symbol or the word "deleted." This is true even in cases where the confession would not harm the codefendants, such as in a case with multiple codefendants.[212] Despite the fact that a *per se* rule may be overly encompassing at times, the prosecution's case is not harmed.[213] The prosecution is still able to introduce the pertinent part of the confession against the confessing defendant once an appropriate redaction is used.[214] The majority, in creating the bright-line rule, successfully ensured that the prosecution could introduce the confession against the appropriate defendant, and that the confessor would not be unduly prejudiced by the redaction, while at the same time protecting the nonconfessing codefendant's constitutional guarantees.[215]

A major weakness of the dissent's logic is that evidence is not introduced in a vacuum. What the jurors see in the courtroom may be as important and influential as what they hear at trial.[216] In fact, the key premise of the majority opinion is that what the jurors perceive in the courtroom may even override the trial judge's limiting instructions.[217] Take, for instance, a situation in which the confession reads "I committed the crime with X." Despite the fact that the names of several other code-

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[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.* at 1155.
[217] *Id.* at 1155-56. *See also* Ritter, *supra* note 60, at 915 ("It is unrealistic to assume that an instruction to jurors will prevent them from thinking about the identity of a perpetrator whose actions are elaborately described in the confession.").

fendants may be floating around the courtroom, if there is only one other defendant *in* the courtroom, the natural inclination is to assume that the X replaced that person's name.[218] A juror surely may wonder that if it weren't the codefendant's name that was replaced with the X, then why would the name need to be crossed out in the first place?[219] Admittedly, it is not as apparent which codefendant is expressly implicated by the confession if there are two or more codefendants in the courtroom.[220] However, the prosecution's case against the appropriate defendant is equally as strong, and the confessing defendant is not unduly prejudiced, if the confession is read as "I committed the crime with another person" or "someone else" instead of the proverbial "X."[221]

Ultimately, the bright-line rule is very narrow, as it only applies in instances where a codefendant's name is replaced with an obvious symbol or the words "deleted" or "deletion."[222] The test set forth by the *Richardson* Court is still the appropriate test for all other types of redacted confessions.[223] The threshold for all redacted confessions remains higher than that the jury *could* have made an inference linking the confession to the codefendant, but rather that the jury was *compelled* to make this infer-

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[218] *Gray*, 118 S. Ct. at 1155. *But see Leading Cases, Confrontation Clause—Use of Codefendant's Confession in a Joint Trial:* Gray v. Maryland, 112 HARV. L. REV. 142, 149 (1998) (asserting that "if an individual's very status as a criminal defendant were a cognizable source of prejudice—literally every conviction would be suspect . . . . [T]his route of inference . . . would require a presumption that jurors will *not* obey the presumption of innocence that is central to any criminal trial.") [hereinafter *Leading Cases*].

[219] *Gray*, 118 S. Ct. at 1155-56. *See* Commonwealth v. McGlone, 716 A.2d 1280, 1286 (Pa. Super. Ct. 1998) (stating that the "use of the term 'deleted' or 'X' immediately signals jurors that a specific person was named by the declarant and they, the jurors, are not permitted to know that name.").

[220] *Gray*, 118 S. Ct. at 1156-57.

[221] *Id.* at 1157.

[222] *Id. But see Leading Cases, supra* note 218, at 150-51 (arguing that the majority's bright-line rule is fundamentally over-reaching in that it ignores the "presumption of juror fidelity"; rather, the appropriate solution would be to "aggressively police the use of redacted confessions to ensure that prosecutors do not undermine the limiting instruction required by *Richardson*.").

[223] *Gray*, 118 S. Ct. at 1157.

ence.[224] Redacted confessions that replace a defendant's name with "deleted" or an obvious symbol are automatically assumed to force the jury to link the confession to the codefendant.[225] This is proper in order to preserve a defendant's Constitutional guarantees as well as ensure administrative ease.

IV. CONCLUSION

In *Gray v. Maryland*, the Court held that substitutions for a defendant's name, such as a symbol, obvious blank space, or the words "deleted" or "deletion," in a codefendant's incriminating confession, create statements that too similarly resemble the original confession.[226] Hence, these redacted confessions have virtually the same legal consequence as the unredacted versions and are rendered inadmissible hearsay under *Bruton*'s protective rule.[227]

The majority created a bright-line or *per se* rule which bars the admission of these types of confessions, regardless of the particular facts of the case.[228] The *per se* rule set forth by the majority has many advantages and virtually no apparent disadvantages. First, a bright-line rule is easy to apply and eliminates confusion among the lower courts.[229] Second, the benefits of a

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[224] *Id.* at 1155-56. *See* Commonwealth v. Blake, 696 N.E.2d 929, 932 (Mass. 1998) (stating that a codefendant's confession which only becomes directly accusatory once linked with other evidence at trial "generally does not offend the Sixth Amendment, so long as an adequate limiting instruction is given").

[225] *Gray*, 118 S. Ct. at 1155.

[226] *Id.* at 1157.

[227] *Id.* at 1156-57.

[228] *Id.*

[229] Courts are able to apply the *Gray* bright-line rule fairly easily. *See, e.g.*, United States v. Peterson, 140 F.3d 819, 822 (9th Cir. 1998) (holding that the substitution of a codefendant's name with "person X" was impermissible under *Gray*); United States v. Hickman, 151 F.3d 446, 457 (5th Cir. 1998) (finding that confession which redacted codefendants' names "with a marker, are exactly the type of evidence found unconstitutional in *Gray*."); People v. Bryden, 73 Cal. Rptr. 2d 554, 564 (Cal. Ct. App. 1998) ("Simply excising the name of the defendant from the extrajudicial statements is insufficient when it remains obvious that the substituted words refer to the defendant."); United States v. Cambrelen, 18 F. Supp. 2d 226, 229-30 (E.D.N.Y. 1998) (holding that confession which redacted codefendants' names with "guy" or "guys" and was retyped with no blank spaces was admissible under *Gray*); Commonwealth v. McGlone, 716 A.2d 1280, 1285 (Pa. Super. Ct. 1998) (redacted confession admissible under *Gray* because "[n]owhere in the redacted statement are there overt indications

joint trial are still realized despite the prohibition on the words "deleted" or "deletion" and obvious symbols in lieu of a codefendant's name. Administrative conveniences resulting from a joint trial include saving money, time, and resources.[230] Third, although the prosecution's creative license is somewhat restricted, it is still able to present the pertinent part of the confession against the appropriate defendant. Most importantly, this *per se* rule protects, if not enforces, a defendant's Sixth Amendment guarantees of confrontation and cross-examination, which ensures the reliability or credibility of evidence against her.

Gabrielle Benadi

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of revision," where there were no blank spaces and codefendant's name was replaced with "other people").

[230] *See generally* Kevin P. Hein, *Joinder and Severance*, 30 AM. CRIM. L. REV. 1139, 1154-1163 (1993) (discussing the advantages and disadvantages of joint trials for the state and codefendants). *But see, e.g.*, Ritter, *supra* note 60, at 921 (arguing that the commonly stated advantages of joint trials may be exaggerated).