Journal of Criminal Law and Criminology

Volume 78
Issue 4 *Winter*

Article 11

Winter 1988

Sixth Amendment--Limiting the Scope of Bruton

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0091-4169/88/7804-984
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 78, No. 4

Printed in U.S.A.

SIXTH AMENDMENT—LIMITING THE SCOPE OF *BRUTON*

Richardson v. Marsh, 107 S. Ct. 1702 (1987).

I. INTRODUCTION

In *Richardson v. Marsh*,[1] the United States Supreme Court refused to expand a defendant's ability to prevent the admission of a confession of a nontestifying co-defendant under the confrontation clause[2] of the sixth amendment as originally prescribed in *Bruton v. United States*.[3] In reversing the decision of the United States Court of Appeals for the Sixth Circuit,[4] the *Richardson* Court held that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existence."[5] The Court refused to extend *Bruton* to include situations in which all references to the defendant are omitted from the confession, but other evidence at trial nonetheless links the defendant to the confession.[6] This refusal exemplifies the Court's recent efforts to narrow the scope of *Bruton*.

This Note examines the *Richardson* opinions and concludes that in its effort to limit the holding in *Bruton*, the Court incorrectly interpreted the underlying principles of *Bruton*. This Note reasons that the *Richardson* Court incorrectly assumed that the referral in *Bruton* to "powerfully incriminating" confessions was limited to "facially incriminating" confessions. Finally, this Note concludes that even under the Court's "facially incriminating" standard, a confession

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1 107 S. Ct. 1702 (1987).

2 The confrontation clause of the sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

3 391 U.S. 123 (1968). The *Richardson* Court interpreted *Bruton* as holding that "a defendant is deprived of his rights under the Confrontation Clause when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant." *Richardson*, 107 S. Ct. at 1704.

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

5 *Richardson*, 107 S. Ct. at 1709.

6 *Id.* at 1704.

that replaces the defendant's name with a symbol or neutral pronoun is still violative of the confrontation clause despite the fact that it does not expressly name the defendant.

II. FACTS

The respondent, Clarissa Marsh, and her co-defendant, Benjamin Williams, were tried jointly[7] for the assault with the intent to commit murder of Cynthia Knighton and the murder of Knighton's son, Koran, and her aunt, Ollie Scott.[8] Marsh's boyfriend, Kareem Martin, was also charged with the same crimes but was a fugitive at the time of the trial.[9]

At trial, Knighton testified to the following sequence of events. On October 29, 1978, Knighton and her son were visiting Scott at her home when Marsh and Martin arrived.[10] As the parties were conversing in the living room, Marsh said that she had come to "pick up something" from Scott.[11] As Marsh rose from the couch, Martin pulled a gun and pointed it at Scott and the Knightons, stating that "someone had gotten killed and [Scott] . . . knew something about it."[12] Marsh then proceeded to walk over to the front door to look out the peep hole.[13] After the doorbell rang, Marsh opened the door, and Williams entered holding a handgun.[14] As Williams walked by Marsh, he asked: "Where's the money?"[15] Martin then took Scott upstairs while Williams searched the lower level of the house, leaving Marsh and the Knightons alone in the living room.[16] The Knightons attempted to escape, but Marsh held them until Williams returned.[17] Williams told Knighton and her son to lie on the floor and went upstairs, again leaving Marsh to watch the Knightons.[18] Martin, Williams, and Scott came back downstairs a few min-

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7 Marsh objected to the joint trial. *Id.*

8 *Id.*

9 *Id.*

10 *Id.* Knighton testified that she was upstairs with her son when she heard voices from downstairs. Knighton came downstairs with her son, and Scott introduced her to Martin and Marsh. *Marsh*, 781 F.2d at 1202.

11 *Richardson*, 107 S. Ct. at 1704.

12 *Id.* Knighton testified that Marsh said something similar to Martin's statement as she rose from the couch. *Marsh*, 781 F.2d at 1202.

13 *Richardson*, 107 S. Ct. at 1704.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.* While guarding the Knightons, Marsh remained at the front door and occasionally looked through the peephole. *Id.*

utes later, and Martin handed a grocery bag to Marsh.[19] Martin and Williams then took Scott and the Knightons into the basement, where Martin fatally shot Knighton's four-year-old son and Scott and critically wounded Knighton.[20]

Supplementing Knighton's testimony, the state also introduced as evidence a confession by co-defendant Williams against the objections of Marsh.[21] The confession was redacted so as to remove all references to Marsh, thus giving the appearance that only Williams and Martin had committed the crime.[22] The court instructed the jury that the confession could only be used against Williams, not against Marsh.[23] Although the confession was admitted, Williams

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19 *Id.*

20 *Id.*

21 *Id.* at 1705. Marsh's attorney stated, "[t]here are certain inferences that are raised by this statement even in its altered form that would tend to incriminate my client." *Marsh*, 781 F.2d at 1202.

22 *Richardson*, 107 S. Ct. at 1705. The confession read:

> On Sunday evening, October 29th, 1978, at about 6:30 p.m., I was over to my girl friend's house at 237 Moss, Highland Park, when I received a phone call from a friend of mine named Kareem Martin. He said he had been looking for me and James Coleman, who I call Tom. He asked me if I wanted to go on a robbery with him. I said okay. Then he said he'd be by and pick me up. About 15 or 20 minutes later Kareem came by in his black Monte Carlo car. I got in the car and Kareem told me he was going to stick up this crib, told me the place was a numbers house. Kareem said there would be over $5,000 or $10,000 in the place. Kareem said he would have to take them out after the robbery. Kareem had a big silver gun. He gave me a long barrelled [sic] .22 revolver. We then drove over to this house and parked the car across the big street near the house. The plan was that I would wait in the car in front of the house and then I would move the car down across the big street because he didn't want anybody to see the car. Okay, Kareem went up to the house and went inside. A couple of minutes later I moved the car and went up to the house. As I entered, Kareem and this older lady were in the dining room, a little boy and another younger woman were sitting on the couch in the front room. I pulled my pistol and told the younger woman and the little boy to lay on the floor. Kareem took the older lady upstairs. He had a pistol, also. I stayed downstairs with the two people on the floor. After Kareem took the lady upstairs I went upstairs and the lady was laying on the bed in the room to the left as you get up the stairs. The lady had already given us two bags full of money before we ever got upstairs. Kareem had thought she had more money and that's why we had went upstairs. Me and Kareem started searching the rooms but I didn't find any money. I came downstairs and then Kareem came down with the lady. I said, "Let's go, let's go." Kareem said no. Kareem then took the two ladies and little boy down the basement and that's when I left to go to the car. I went to the car and got in the back seat. A couple of minutes later Kareem came to the car and said he thinks the girl was still living because she was still moving and he didn't have any more bullets. He asked me how come I didn't go down the basement and I said I wasn't doing no shit like that. He then dropped me back off at my girl's house in Highland Park and I was supposed to get together with him today, get my share of the robbery after he had counted the money. That's all.

Id. at 1705 n.1.

23 *Id.* at 1705. The court stated:

> The statement of co-defendant Williams has been admitted into evidence against him only. I caution you that it may be used in considering only the guilt or inno-

did not testify at trial.[24]

After the prosecution rested, Marsh was called to the stand and testified that on October 29, 1978, she had lost her wallet containing Martin's drug money at a shopping center.[25] Martin became angry and suggested that Marsh borrow money from Scott, a woman Marsh had worked with previously.[26] Martin and Marsh picked up Williams and began driving to Scott's house.[27] Marsh, who was in the back seat of the car, testified that she "knew that [Martin and Williams] were talking," but their words were inaudible because "the radio was on and the speaker was right in [her] ear."[28] Scott admitted Martin and Marsh into her home. During a brief conversation, Marsh asked Scott for a loan.[29] Martin then drew his gun as Marsh went to the door to locate the car.[30] Marsh then stated that she did not know why she stopped the Knightons from escaping and that "she did not feel free to leave and was too scared to flee."[31] Marsh, however, did testify that she took the grocery bag from Martin, but said she left the house without it after Williams and Martin took the victims into the basement.[32] Furthermore, Marsh insisted that she did not know that Williams and Martin had guns and that she never heard Williams or Martin talk about harming or killing Scott or the Knightons.[33]

Although the prosecutor instructed the jury not to use Williams' confession against Marsh,[34] he nonetheless "linked [Marsh] to the portion of Williams' confession describing his conversation

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cence of Defendant Benjamin Williams. Under the rules already given to you, it must not be used or considered in any way against Defendant Clarissa Marsh.

Marsh, 781 F.2d at 1203.

24 *Richardson*, 107 S. Ct. at 1705.

25 *Id.*

26 *Id.* Marsh testified that she often borrowed money so Martin could buy drugs. *Marsh*, 781 F.2d at 1203.

27 *Richardson*, 107 S. Ct. at 1705.

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.* at 1705-06.

34 *Id.* The prosecutor stated:

[T]he same law that applies to Mr. Williams applies to Clarissa Marsh as well. The People must prove the same elements that I talked about in my discussion about Mr. Williams. Her guilt, of course, is to be determined separately from the evidence but you may consider the same evidence that you heard from the witness stand. The only thing that the Court will instruct you that you cannot consider is that statement that was made by the Defendant Williams. You cannot consider that statement when you determine her guilt or innocence. To do so would be unfair.

Marsh, 781 F.2d at 1203.

with Martin in the car" during his closing argument.[35] The jury found Marsh guilty of two counts of felony murder and one count of assault with the intent to commit murder.[36] The Michigan Court of Appeals affirmed in an unpublished opinion,[37] and the Michigan Supreme Court denied leave to appeal.[38]

Marsh subsequently filed a petition for a writ of habeas corpus[39] in the United States District Court for the Eastern District of Michigan, claiming that her constitutional rights to confrontation under the sixth amendment were violated when Williams' confession was admitted as evidence.[40] The court denied the petition.[41] The United States Court of Appeals for the Sixth Circuit reversed, holding that "in determining whether *Bruton* bars the admission of a nontestifying codefendant's confession, a court must access the confession's 'inculpatory value' by examining not only the face of the confession, but also all of the evidence introduced at trial."[42] The Sixth Circuit also held that the conversation between Williams and Martin in the car as described in Williams' confession was the only direct evidence that Marsh knew of Martin's intentions to kill Scott

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35 *Richardson*, 107 S. Ct. at 1706. The prosecutor said:

> It's important in light of [respondent's] testimony when she says Kareem drives over to Benjamin Williams' home and picks him up to go over. What's the thing that she says? "Well, I'm sitting in the back seat of the car." "Did you hear any conversation that was going on in the front seat between Kareem and Mr. Williams?" "No, couldn't hear any conversation. The radio was too loud." I asked [sic] you whether that is reasonable. Why did she say she couldn't hear any conversation? She said, "I know they were having conversation but I couldn't hear it because of the radio." Because if she admits that she heard the conversation and she admits to the plan, she's guilty of at least armed robbery. So she can't tell you that.

Id. at 1706 n.2. Marsh's attorney did not object to the prosecutor's closing argument. *Id.* at 1706.

36 *Id.* at 1706.

37 No. 46128 (Dec. 17, 1980). The Michigan Court of Appeals found that malice could be inferred because Marsh guarded the door, prevented the Knightons' escape, and held the grocery bag containing the money. The Michigan Court of Appeals stated:

> A split of opinion still exists on this Court over the issue of whether, in a felony-murder case, malice may be imputed from the underlying felony or merely inferred from the circumstances surrounding the killing, including the underlying felony . . . . We believe *Fountain* presents the better view and hold that malice may not be imputed, as a matter of law, from the underlying felony. Accordingly, the evidence presented at the time of the motion had to sufficiently show that Williams acted with the intent to kill or in reckless disregard of a known and high degree of risk that death or serious bodily harm might occur. . . . [T]he evidence indicated that Marsh knowingly participated in an armed robbery in reckless disregard of circumstances that indicated a high degree of risk that death or serious bodily harm could result.

Id.

38 People v. Marsh, 412 Mich. 927 (1982).

39 28 U.S.C. § 2254.

40 *Richardson*, 107 S. Ct. at 1706.

41 Civ. Action No. 83-CV-2665-DT (E.D. Mich., Oct. 11, 1984).

42 *Richardson*, 107 S. Ct. at 1706 (quoting *Marsh*, 781 F.2d at 1212).

and the Knightons.[43] "In light of the 'paucity' of other evidence of malice and the prosecutor's linkage of respondent and the statement in the car during closing argument, admission of Williams' confession was 'powerfully incriminating to [respondent] with respect to the critical element of intent.' "[44] The United States Supreme Court granted certiorari[45] to address the conflict between the Sixth Circuit's decision and the decisions of other circuits[46] which have declined to adopt the "evidentiary linkage" or "contextual implication" approach to *Bruton* issues.[47]

III. Supreme Court Opinions

A. MAJORITY OPINION

In *Richardson v. Marsh*,[48] the United States Supreme Court reversed the decision of the Court of Appeals for the Sixth Circuit, holding that the Sixth Circuit erred in concluding that Marsh's rights were violated under the confrontation clause.[49] In writing for the majority,[50] Justice Scalia argued that the present case did not fall within the exception created in *Bruton*.[51] The majority noted that in *Bruton* the defendant was expressly named in the co-defendant's confession while in the present case, the confession was not facially incriminating against Marsh and only became so later at trial when other evidence was properly introduced.[52] Justice Scalia concluded that a jury is less likely to disobey instructions to disregard the evidence when it is required to make an inferential linkage between the confession and other evidence introduced at trial than it would if the confession was facially incriminating against the defendant.[53]

Justice Scalia began his opinion for the Court by briefly describing the confrontation clause of the sixth amendment.[54] The majority noted that the "right of confrontation includes the right to cross-examine witnesses,"[55] and, thus, at a joint trial, the pre-trial confes-

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43 *Id.*

44 *Id.* (quoting *Marsh*, 781 F.2d at 1213).

45 106 S. Ct. 2888 (1986).

46 *See, e.g.*, United States v. Belle, 593 F.2d 487 (3rd Cir. 1979)(en banc).

47 *Richardson*, 107 S. Ct. at 1706.

48 107 S. Ct. 1702 (1987).

49 *Id.* at 1709.

50 Justice Scalia delivered the opinion of the Court in which Chief Justice Rehnquist and Justices White, Blackmun, Powell, and O'Connor joined.

51 *Richardson*, 107 S. Ct. at 1707.

52 *Id.*

53 *Id.*

54 *Id.* at 1706. Justice Scalia added that the sixth amendment was extended to the states by the fourteenth amendment. *Id.*

55 *Id.* (citing Pointer v. Texas, 380 U.S. 400, 404, 406-07 (1965)).

sion of a nontestifying co-defendant cannot be admitted as evidence against the defendant.[56] The Court also observed that the general rule in joint trials is that "a witness whose testimony is introduced . . . is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant"[57] because juries are assumed to follow the judge's instructions.[58]

Justice Scalia then noted that the *Bruton* Court had held that the testimony of a nontestifying co-defendant at a joint trial which expressly implicates the defendant is a violation of the defendant's rights under the confrontation clause even if the jury is charged to disregard the confession as to the defendant.[59] The majority argued that this holding was a narrow exception to the general rule that jurors follow their instructions.[60] Justifying the *Bruton* exception, the Court stated:

> "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial."[61]

Justice Scalia added that the co-defendant's confession in *Bruton* was "powerfully incriminating" against the defendant because the confession "expressly implicat[ed]" the defendant as an accomplice.[62]

The majority next distinguished *Bruton* from *Richardson*, assert-

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56 *Id.*

57 *Id.*

58 *Id.* at 1706-07 (citing Francis v. Franklin, 471 U.S. 307, 325 n.9 (1985)). Justice Scalia listed a number of cases supporting the principle that the law assumes jurors are capable of following their instructions. These cases included: Tennessee v. Street, 471 U.S. 409, 414-16 (1985)(instructions were given to the jury to consider accomplice's confession against the defendant only to determine the truthfulness of the defendant's assertion that his own confession was coerced); Marshall v. Lonberger, 459 U.S. 422, 438-39 n.6 (1983); Watkins v. Sowders, 449 U.S. 341 (1981)(instructions were given to the jury to disregard eyewitness identification that was erroneously admitted at trial); Harris v. New York, 401 U.S. 222 (1971)(statements coerced from the defendant which are inadmissable as to the defendant's guilt because of a *Miranda* violation can be used to impeach the defendant's credibility as long as the jury is instructed properly); Spencer v. Texas, 385 U.S. 554 (1967)(evidence of prior convictions can be introduced for sentence enhancement if the jury is instructed that this evidence is not to be used to determine the defendant's guilt); Walder v. United States, 347 U.S. 62 (1954)(instructions were given to the jury to assess unlawfully seized evidence only to determine the defendant's credibility).

59 *Richardson*, 107 S. Ct. at 1707.

60 *Id.*

61 *Id.* (quoting *Bruton*, 391 U.S. at 135-36)(citations omitted).

62 *Id.* (quoting *Bruton*, 391 U.S. at 124 n.1, 135).

ing that "in this case the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony)."[63] Justice Scalia reasoned that a jury is less likely to disregard its instructions when it has to make a linkage of this sort between the confession and other evidence at trial.[64] The majority added that a jury may be unable to disregard the confession if it contained testimony that "the defendant helped me commit the crime" because this type of testimony is "more vivid than inferential incrimination, and hence more difficult to thrust out of mind."[65] On the other hand, although it may be difficult at times for jurors to disregard the co-defendant's testimony as to the defendant, the majority concluded that "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."[66]

The Court added that if the *Bruton* exception is limited to "facially incriminating" confessions, it could still be complied with by redaction, "a possibility suggested in that opinion itself."[67] However, if *Bruton* were extended to include confessions which incriminate the defendant by contextual linkage, the majority warned that the trial judge would be unable to rule on the admissibility of the confession until after the trial ended.[68] This, Justice Scalia claimed, would lead to manipulation by the defense attorney and, at the very least, to numerous mistrials.[69] In response to the suggestion that the trial judge make a *Bruton* analysis at a pre-trial hearing in which both parties introduce their evidence to the judge, the opinion noted that this approach would probably not be possible under the Federal Rules of Criminal Procedure[70] and, even if it

63 *Id.* at 1707. Justice Scalia added that the dissent had misconstrued the decision in saying that the majority "assume[d] that [Williams'] confession did not incriminate the respondent." *Id.* at 1707 n.3. Justice Scalia agreed with the dissent that the confession would have harmed Marsh if the jury had disregarded its instructions. *Id.* However, Justice Scalia stressed that the issue was not whether the confession incriminated Marsh, but rather whether the trial court properly assumed that the jury did not use the confession against her. *Id.*

64 *Id.* at 1707.

65 *Id.*

66 *Id.* at 1708.

67 *Id.* (citing *Bruton*, 391 U.S. at 134 n.10).

68 *Id.*

69 *Id.*

70 The Federal Rules of Criminal Procedure state:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confes-

were, it would be "time consuming and obviously far from foolproof."[71]

Justice Scalia continued by arguing that ordering separate trials for each defendant is also not a feasible solution.[72] The majority noted that joint trials have been utilized in almost one-third of the federal criminal trials in the past five years,[73] and they often prevent inconsistent and inequitable verdicts.[74] Many joint trials have numerous defendants, one or more of whom are likely to confess.[75] Justice Scalia argued that to require separate trials in every case in which an incriminating confession was made would not only be inefficient but also unfair.[76] The majority opinion claimed that the prosecution would have to present the same evidence at each trial, "requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying"[77] and giving "the last-tried defendants . . . the advantage of knowing the prosecution's case beforehand."[78] In response to the suggestion that the prosecution forego the use of a co-defendant's incriminating confession in joint trials, Justice Scalia asserted that this "price is also too high"[79] because confessions " 'are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.' "[80]

The Court disagreed with the dissent's assertion that "*[f]ederal* prosecutors seem to have had little difficulty"[81] implementing the dissent's view of *Bruton*. The dissent reached this conclusion from the fact that the only cases before this Court since *Bruton* were those that originated in a state court.[82] Justice Scalia stated that because the number of cases was so small, "the fact that they happened to be state cases may signify nothing more than that there are many times

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sions made by the defendants which the government intends to introduce in evidence at the trial.

FED. R. CRIM. P. 14. Justice Scalia apparently believes that such a pre-trial hearing would violate this rule because this rule limits the review of evidence introduced before trial to an in camera inspection.

71 *Richardson*, 107 S. Ct. at 1708.

72 *Id.*

73 *Id.* (citing Memorandum from David L. Cook, Administrative Office of the United States Courts, to Supreme Court Library (Feb. 20, 1987)).

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.*

79 *Id.* at 1709.

80 *Id.* (quoting Moran v. Burbine, 106 S. Ct. 1135, 1144 (1986)(quotations omitted)).

81 *Id.* at 1708 n.4 (emphasis in original).

82 *Id.* at 1713 (Stevens, J., dissenting).

more state prosecutions than federal."[83] The majority argued that the brief for the United States as *amicus curiae* urging reversal of the Sixth Circuit's decision in *Richardson* is also evidence that federal prosecutors consider the dissent's interpretation of *Bruton* as harmful to law enforcement efforts.[84]

Justice Scalia concluded by noting that the premise that juries follow their instructions is "rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process."[85] The majority stressed that *Bruton* was an exception to this rule,[86] and it should not be extended to situations in which "the confession is redacted to eliminate not only the defendant's name, but any reference to her existence."[87] However, since the prosecutor during his closing argument attempted to subvert "the limiting instructions by urging the jury to use Williams' confession in evaluating Marsh's case,"[88] Justice Scalia held that the case should be remanded to consider whether a writ of habeas corpus should be granted even though Marsh did not object to the prosecutor's remarks at trial.[89]

B. DISSENTING OPINION

Justice Stevens dissented from the Court's opinion.[90] Justice Stevens concluded that *Bruton* should apply to any inadmissible confession by a co-defendant that is "powerfully incriminating" against the defendant.[91] The dissent argued that the Court drew "a distinction of constitutional magnitude" between confessions that are facially incriminating and confessions that are incriminating by linkage to other evidence.[92] Justice Stevens noted that, according to the majority opinion, the exclusion of a statement would be based on this distinction even though the indirectly incriminating confession may be more damaging to the defendant's case than the facially incriminating confession.[93] The dissent also criticized the Court, as-

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83 *Id.* at 1708 n.4.

84 *Id.*

85 *Id.* at 1709.

86 *Id.*

87 *Id.* Justice Scalia added that "[w]e express no opinion on the admissibility of a confession in which the defendant's name had been replaced with a symbol or neutral pronoun." *Id.* at 1709 n.5.

88 *Id.* at 1709.

89 *Id.*

90 Justice Stevens was joined by Justices Brennan and Marshall in dissent.

91 *Richardson*, 107 S. Ct. at 1709 (Stevens, J., dissenting).

92 *Id.* (Stevens, J., dissenting).

93 *Id.* (Stevens, J., dissenting).

serting that "neither reason nor experience supports the Court's argument that a consistent application of the rationale of the *Bruton* case would impose unacceptable burdens on the administration of justice."[94]

Justice Stevens began his analysis by arguing that certain kinds of hearsay " 'are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge must give.' "[95] The dissenting opinion then reasoned that this principle was applicable to the *Richardson* facts.[96] Justice Stevens agreed with the majority opinion that a jury is less likely to disobey instructions to disregard the confession if the confession only incriminates the defendant by implication, rather than directly.[97] However, the dissent argued that *Bruton* did not mandate the exclusion of all co-defendant confessions lacking the defendant's name.[98] Rather, Justice Stevens argued that confessions that do not expressly name the defendant should be excluded on occasion because some of these confessions may be devastating to the

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94 *Id.* (Stevens, J., dissenting).

95 *Id.* at 1710 (Stevens, J., dissenting)(quoting *Bruton*, 391 U.S. at 138 (Stewart, J., concurring)(emphasis in original)). Justice Stevens added that Judge Learned Hand and Justice Frankfurter have also supported this view. *Id.* at 1710 n.1 (Stevens, J., dissenting). As the *Bruton* Court noted, Judge Hand found that the limiting instruction is a

> " 'recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else,' *Nash v. United States*, 54 F.2d 1006, 1007 [2d Cir. 1932]; 'Nobody can indeed fail to doubt whether the caution is effective, or whether usually the practical result is not to let in hearsay,' *United States v. Gottfried*, 165 F.2d 360, 367 [2d Cir. 1948]; 'it is indeed very hard to believe that a jury will, or for that matter can, in practice observe the admonition,' [*United States v. Delli Paoli*], 229 F.2d 319, 321 [2d Cir. 1956]. Judge Hand referred to the instruction as a 'placebo,' medically defined as a 'medicinal lie.' "

Richardson, 107 S. Ct. at 1710 n.1 (Stevens, J., dissenting)(quoting *Bruton*, 391 U.S. at 132 n.8). Justice Frankfurter observed that " '[t]he Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.' " *Id.* (Stevens, J., dissenting)(quoting Delli Paoli v. United States, 352 U.S. 232, 248 (1957)(Frankfurter, J., dissenting)).

96 *Id.* at 1710 (Stevens, J., dissenting). Justice Stevens noted that the *Bruton* Court framed the issue as " 'whether the conviction of a defendant at a joint trial should be set aside although the jury was instructed that a codefendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence.' " *Id.* (Stevens, J., dissenting)(quoting *Bruton*, 391 U.S. at 123-24). Justice Stevens added that the *Bruton* Court answered that question in the affirmative, noting that a sixth amendment violation occurs " 'where the powerfully incriminating extrajudicial statements of a co-defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.' " *Id.* (Stevens, J., dissenting)(quoting *Bruton*, 391 U.S. at 135-36).

97 *Id.* at 1710 (Stevens, J., dissenting).

98 *Id.* (Stevens, J., dissenting).

defendant's case.[99] On the other hand, some confessions expressly naming the defendant need not be excluded because they do not prejudice the defendant at all.[100] The dissent argued that despite proper limiting instructions, "the very act of listening and seeing will sometimes lead them [the jury] down the 'path of inference.' "[101] Justice Stevens pointed out that the Court is only speculating that the limiting instructions will dissuade the jury from considering the confession against the defendant.[102] The dissent argued that, according to *Bruton*, the determination of whether a confession is deemed "powerfully incriminating" should be made on a case-by-case basis and should not be dependent on whether or not the defendant was named in the confession.[103]

Justice Stevens next argued that Marsh's rights under the confrontation clause were violated because at the time Williams' confession was introduced at trial, the prosecutor clearly indicated that the confession would incriminate both Williams and Marsh.[104] The dissent noted that the evidence had already shown that Marsh was at Scott's home when the crimes occurred.[105] However, the evidence was not as clear on the issue of "whether respondent herself intended to commit a robbery in which murder was a foreseeable result, or knew that the two men planned to do so."[106]

Justice Stevens reiterated that Williams' confession included Martin's statement to Williams in the car that "he would have to

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99 *Id.* (Stevens, J., dissenting).

100 *Id.* at 1710 n.2 (Stevens, J., dissenting).

101 *Id.* at 1710 (Stevens, J., dissenting).

102 *Id.* (Stevens, J., dissenting).

103 *Id.* (Stevens, J., dissenting).

104 *Id.* at 1710-11 (Stevens, J., dissenting).

105 *Id.* at 1711 (Stevens, J., dissenting).

106 *Id.* (Stevens, J., dissenting). Justice Stevens observed that the "quantum of evidence admissible against respondent was just sufficient to establish this intent and hence support her conviction." *Id.* (Stevens, J., dissenting). As the Sixth Circuit explained:

> "[T]he issue is whether the evidence was sufficient to show that Marsh aided and abetted the assault with the specific intent to murder Knighton or with the knowledge that Martin had this specific intent . . . . Marsh's case presents a much closer question on this issue than does Williams'. There was no testimony indicating she harbored an intent to murder Knighton, nor was there any showing that she heard Martin's statements regarding the need to 'hurt' or 'take out' the victims. There was, in addition, no testimony placing her in the basement, the scene of the shootings. The evidence does indicate, viewed in the light most favorable to the prosecution, that she was aware that Williams and Martin were armed, that she served as a guard or 'lookout' at the door, that she prevented an attempted escape by Knighton, and that she was given the paper bag thought to contain the proceeds of a robbery. The evidence also indicates that Marsh knew Scott, supporting the inference that it was Marsh who allowed Martin to gain entrance. While it is a close question, we believe the evidence presented at the time of the motion was sufficient to survive a motion for directed verdict."

Id. (Stevens, J., dissenting)(quoting *Marsh*, 781 F.2d at 1204).

take them out after the robbery."[107] In addition, the dissent noted that Knighton testified that Marsh and Martin arrived at Scott's house together.[108] Thus, Justice Stevens reasoned that the jury could not avoid the inference that Marsh was in the car and had heard the conversation.[109] The dissent next argued that the 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."[110] Justice Stevens criticized the majority opinion for assuming that Williams' confession did not incriminate Marsh, stating that "[i]t is unrealistic to believe that the jury would assume that respondent did not accompany the two men in the car but had just magically appeared at the front door of the apartment at the same time that Martin did."[111]

Since Williams did not take the stand, Justice Stevens noted that Marsh's lawyer did not have a chance to cross-examine Williams to establish that the radio may have been too loud for Marsh to hear the conversation with Martin.[112] Thus, the dissent argued that Marsh had to try "to rebut the obvious inference that she had overheard Martin," giving the prosecutor yet one more chance "to point to this most damaging evidence on the close question of her specific intent."[113] Justice Stevens asserted that the fact that the confession was not facially incriminating against Marsh but rather incriminating only when considered in light of the other evidence "does not eliminate their common, substantial, and constitutionally unacceptable risk that the jury, when resolving a critical issue against respondent, may have relied on impermissible evidence."[114]

Justice Stevens added that Justice White's dissenting opinion in *Bruton* did not interpret the *Bruton* majority opinion to include only facially incriminating confessions:[115]

> "I would suppose that it will be necessary to exclude all extrajudicial confessions unless all portions of them which implicate defendants other than the declarant are effectively deleted. *Effective deletion will probably require not only omission of all direct and indirect inculpations of codefendants but also of any statement that could be employed against those defendants*

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107 *Id.* at 1711 (Stevens, J., dissenting).

108 *Id.* (Stevens, J., dissenting).

109 *Id.* (Stevens, J., dissenting).

110 *Id.* (Stevens, J., dissenting).

111 *Id.* at 1711 n.3. (Stevens, J., dissenting).

112 *Id.* at 1711-12 (Stevens, J., dissenting).

113 *Id* at 1712 (Stevens, J., dissenting).

114 *Id.* (Stevens, J., dissenting).

115 *Id.* at 1712 n.4 (Stevens, J., dissenting).

once their identity is otherwise established."[116]

Justice Stevens added that Justice White still adheres to this interpretation of *Bruton* today.[117]

The dissent continued by analyzing the role of joint trials in the administration of criminal trials.[118] Justice Stevens admitted that "joint trials conserve prosecutorial resources, diminish inconvenience to witnesses, and avoid delays in the administration of criminal justice."[119] However, the dissent added that if a joint trial creates "special risks of prejudice to one of the defendants," a severance must be granted.[120] Justice Stevens criticized the government's assertion that the costs to the state of using a severence instead of a co-defendant's confession outweigh the benefits to the defendant[121] by noting that "on the scales of justice . . . considerations of fairness normally outweigh administrative concerns."[122]

The dissent noted that the United States made a similar argument in *Bruton*.[123] Quoting Judge Lehman of the New York Court of Appeals, the *Bruton* Court responded to these administrative concerns by saying:

> "We still adhere to the rule that an accused is entitled to confrontation of the witnesses against him and the right to cross-examine them. . . . We destroy the age-old rule which in the past has been regarded as a fundamental principle of our jurisprudence by a legalistic formula, required of the judge, that the jury may not consider any admissions against any party who did not join in them. We secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high."[124]

Justice Stevens further criticized the Court's use of "irrelevant statistics" to support its decision.[125] In response to the Court's as-

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116 *Id.* (Stevens, J., dissenting)(quoting *Bruton*, 391 U.S. at 143 (White, J., dissenting)(emphasis added)).

117 *Id.* at 1712 n.4 (Stevens, J., dissenting). *See* Cruz v. New York, 107 S. Ct. 1714, 1720 (White, J., dissenting)("[A] codefendant's out-of-court statements implicating the defendant are not only hearsay but also have traditionally been viewed with special suspicion. . . . *Bruton* held that where the defendant has not himself confessed, there is too great a chance that the jury would rely on the codefendant's confession.").

118 *Richardson*, 107 S. Ct. at 1712 (Stevens, J., dissenting).

119 *Id.* (Stevens, J., dissenting)(citing United States v. Lane, 106 S. Ct. 725, 732 (1986)(quoting *Bruton*, 391 U.S. at 134)).

120 *Id.* (Stevens, J., dissenting)(citing *Bruton*, 391 U.S. at 131; FED. R. CRIM. P. 14).

121 *Id.* (Stevens, J., dissenting)(citing Brief Amicus Curiae (Solicitor General) for Petitioner at 22, Richardson v. Marsh, 107 S. Ct. 1702 (1987)(No. 85-1433)).

122 *Id.* (Stevens, J., dissenting).

123 *Id.* (Stevens, J., dissenting). *See Bruton*, 391 U.S at 134.

124 *Richardson*, 107 S. Ct. at 1712-13 (Stevens, J., dissenting)(quoting People v. Fisher, 249 N.Y. 419, 432 (1928)(Lehman, J., dissenting)).

125 *Id.* at 1713 (Stevens, J., dissenting).

sertion that joint trials account for "almost one-third of federal criminal trials in the past five years," the dissent highlighted the Court's lack of precision by noting that "the Court might have stated that there were 10,904 federal criminal trials involving more than one defendant during that 5 year period."[126] Justice Stevens added that the data did not specify how many of the joint trials contained confessions by one of the defendants.[127]

Justice Stevens continued his criticism of the majority by stating that all cases before the Court in which the *Bruton* rule was at issue originated in a state court.[128] The dissent, therefore, reasoned that federal prosecutors, presumably through "the options of granting immunity, making plea bargains, or simply waiting until after a confessing defendant has been tried separately before trying to use his admissions against an accomplice," have been able to avoid "the great harm to the criminal justice system"[129] that the Court asserts will occur if the *Bruton* rule is extended to the facts of this case.

Justice Stevens labeled the Court's assertion, that the number of cases containing a co-defendant's confession which does not facially incriminate the defendant is too great to evaluate on a case-by-case basis, a declaration that "floats unattached to any anchor of reality."[130] Because the number of cases in which more than one co-defendant confesses is small, the dissent reasoned that the Court's concern of "presenting the same evidence again and again" is "nothing but a rhetorical flourish"[131] because most cases would require at most two trials, one for the confessing defendant and one for the other defendant or defendants.[132] Furthermore, Justice Stevens commented that a joint trial can often be avoided because "most confessing defendants are likely candidates for plea bargaining."[133]

In response to the Court's belief that trial judges will be unable to determine if a co-defendant's non-facially incriminating confession unfairly prejudices the defendant, Justice Stevens argued that the judge will have no problem making this evaluation after the

126 *Id.* (Stevens, J., dissenting)(citing Memorandum from David L. Cook, Administrative Office of the United States Courts, to Supreme Court Library (Feb 20, 1987)).

127 *Id.* (Stevens, J., dissenting)(citing Memorandum from David L. Cook, Administrative Office of the United States Courts, to Supreme Court Library (March 25, 1987)).

128 *Id.* (Stevens, J., dissenting).

129 *Id.* (Stevens, J., dissenting).

130 *Id.* at 1713 n.7 (Stevens, J., dissenting).

131 *Id.* (Stevens, J., dissenting).

132 *Id.* (Stevens, J., dissenting).

133 *Id.* (Stevens, J., dissenting).

prosecution rests.[134] Furthermore, the dissent criticized the Court's assertion that if *Bruton* is extended to encompass the facts of this case, the result will lead to "manipulation by the defense."[135] Justice Stevens explained that the Court presumably meant that a defense attorney might "tailor [the] evidence to make sure that a confession which does not directly mention the defendant is deemed powerfully incriminating when viewed in light of the prosecution's entire case."[136] Justice Stevens expressed doubt that defense attorneys would "pursue this high-risk strategy of 'manipulating' [the] . . . evidence" to increase the inculpatory value of the confession against their clients.[137] The dissent added that trial judges are very capable of controlling "problems that seem insurmountable to appellate judges who are sometimes distracted by illogical distinctions and irrelevant statistics."[138] Justice Stevens closed by stating that other than Williams' confession and the prosecutor's remarks at closing argument, which will be treated separately on remand, "there was a paucity of other evidence" connecting Marsh to Martin's statement in the car indicating his intent to kill the victims.[139] Thus, Justice Stevens concluded that the Sixth Circuit was correct in deciding that this specific violation of the confrontation clause was not a harmless error.[140]

IV. Discussion and Analysis

A. The Confrontation Clause

Included in the confrontation clause of the sixth amendment is the right of an accused criminal defendant to cross-examine any witness who testifies against him.[141] The Supreme Court first articulated this point in *Pointer v. Texas*,[142] stating that "a major reason underlying the constitutional confrontation rule is to give a defendant charged with [a] crime an opportunity to cross-examine the witness against him."[143] Prior to *Pointer*, the Supreme Court in *Delli Paoli v. United States*[144] held that no constitutional violation occurs if

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134 *Id.* at 1713 (Stevens, J., dissenting).
135 *Id.* (Stevens, J., dissenting).
136 *Id.* at 1713-14 (Stevens, J., dissenting).
137 *Id.* at 1714 (Stevens, J., dissenting).
138 *Id.* (Stevens, J., dissenting).
139 *Id.* at 1714 n.8 (Stevens, J., dissenting).
140 *Id.* (Stevens, J., dissenting).
141 *Bruton*, 391 U.S. at 126 (citing Pointer v. Texas, 380 U.S. 400, 404 (1965)).
142 380 U.S. 400 (1965).
143 *Id.* at 406-07.
144 352 U.S. 232 (1956). The facts of *Delli Paoli* resembled the facts of *Bruton*, 391 U.S. 123 (1968), discussed *supra* notes 148-57.

a non-testifying co-defendant's confession is admitted into evidence, even if the confession makes reference to the defendant, as long as the jury is instructed to disregard the confession in determining the defendant's guilt.[145] The Court in *Delli Paoli* based its holding on the long-standing premise that it is reasonably possible for juries to follow sufficiently clear instructions.[146]

In *Bruton v. United States*, the Supreme Court rejected this argument and expressly overruled *Delli Paoli*, using principles underlying the confrontation clause.[147] In *Bruton*, the co-defendant gave a post-arrest confession which expressly implicated the defendant.[148] Because the co-defendant did not testify at the joint trial, a postal inspector testified regarding the confession.[149] The trial judge instructed the jury to disregard the co-defendant's confession in determining the defendant's guilt or innocence because the confession was inadmissible hearsay against the defendant.[150] The *Bruton* Court noted that if the jury did disregard the co-defendant's confession as to the defendant, no confrontation clause question would arise because the situation would be as if the co-defendant made no statement at all inculpating the defendant.[151] However, the Court held that the admission of the co-defendant's confession violated the defendant's rights under the confrontation clause because there was a substantial risk that the jury would use the co-defendant's confession in determining the guilt of the defendant despite the limiting instruction.[152]

In overruling *Delli Paoli*, the *Bruton* Court relied on Justice

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145 *Delli Paoli*, 352 U.S. at 237.

146 *Id.* at 242.

147 *Bruton*, 391 U.S. at 126.

148 *Id.* at 124.

149 *Id.*

150 *Id.* at 125. The *Bruton* Court stressed that the co-defendant's confession was clearly inadmissible evidence against the defendant under traditional rules of evidence. *Id.* at 128 n.3 (citing Krulewitch v. United States, 336 U.S. 440, 442-43, 443-44 (1948)(holding that the co-conspirator's hearsay declaration was not admissible because it was made in furtherance of the conspiracy to transport a woman for the purposes of prostitution and because it was made in furtherance of a continuing subsidiary phase of the conspiracy); Fiswick v. United States, 329 U.S. 211, 217 (1946)(holding that the confession of a co-conspirator after he was apprehended ended the conspiracy and rendered his confession inadmissible against his co-conspirator)). The *Bruton* Court cited several authorities to support this proposition, including C. MCCORMICK, EVIDENCE § 239 (1954); 4 J. WIGMORE, EVIDENCE §§ 1048-49 (3d ed. 1940); Levie, *Hearsay and Conspiracy*, 52 MICH. L. REV. 1159 (1954); Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 355 (1921); Note, *Criminal Conspiracy*, 72 HARV. L. REV. 920, 984-90 (1959); Comment, *Post-Conspiracy Admissions in Joint Prosecutions*, 24 U. CHI. L. REV. 710 (1957).

151 *Bruton*, 391 U.S. at 126.

152 *Id.*

Frankfurter's dissent in *Delli Paoli*.[153] Justice Frankfurter in *Delli Paoli* directly attacked the majority's premise that juries are able to follow their instructions, noting that "[t]he fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors."[154] The *Bruton* Court conceded that there are many circumstances in which a jury can be relied upon to follow its limiting instructions.[155] Nevertheless, the Court agreed with Justice Frankfurter, concluding that "where the powerfully incriminating extrajudicial statements of a codefendant" are introduced at a joint trial,[156] a jury will be unable to disregard the confession as to the defendant even if properly instructed to do so.[157]

B. *BRUTON*'S "POWERFULLY INCRIMINATING" STANDARD

In *Richardson v. Marsh*, Justice Scalia concluded that no *Bruton* violation existed because Williams' confession was redacted and all references to Marsh were omitted.[158] The majority concluded that Williams' confession was not "facially incriminating" against Marsh, as was the case in *Bruton*.[159] Even though Williams' confession inculpated Marsh when combined with other evidence properly introduced at trial, Justice Scalia held that Marsh's rights were not violated under the confrontation clause because Marsh was not implicated by the confession alone.[160] A careful analysis of *Bruton* reveals, however, that the majority's interpretation of *Bruton* is erroneous, as *Bruton* was not based on this "facially incriminating" distinction.

Although the co-defendant's confession in *Bruton* did "facially incriminate" the defendant, the *Bruton* Court did not use this rationale to determine the standard for confrontation clause violations.[161] Rather, Justice Brennan, writing for the Court in *Bruton*, articulated the standard in more general terms:

> [T]here are some contexts in which the risk that the jury will not, or cannot follow instructions is so great, and the consequences of failure

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153 *Id.* at 129.
154 *Delli Paoli*, 352 U.S. at 247 (Frankfurter, J., dissenting).
155 *Bruton*, 391 U.S. at 135.
156 *Id.* at 135-36.
157 *Id.* at 129 (citing *Delli Paoli*, 352 U.S. at 247 (Frankfurter, J., dissenting)).
158 *Richardson*, 107 S. Ct. at 1709.
159 *Id.* at 1707.
160 *Id.* at 1709.
161 Brief for Respondent at 16, Richardson v. Marsh, 107 S. Ct. 1702 (1987)(No. 85-1433). *See generally* Bruton v. United States, 391 U.S. 123 (1968).

> so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed.[162]

Thus, the *Bruton* Court held that the confrontation clause requires a per se rule excluding the confession of a co-defendant if the defendant has no opportunity to cross-examine the co-defendant *and* if the confession is so "powerfully incriminating" against the defendant that any limiting instruction given to the jury would be ineffective.[163]

In *Richardson*, the first criterion set forth in *Bruton* was clearly satisfied because Williams' confession was inadmissible hearsay against Marsh under the Federal Rules of Evidence[164] and because Williams did not take the stand. However, the majority incorrectly interpreted the second criterion of "powerfully incriminating" to mean "facially incriminating."[165] Justice Scalia remarked that "[o]n the precise facts of *Bruton*, involving a *facially incriminating* confession, we found [the rule that juries are presumed to follow their instructions] inadequate. . . . [T]he calculus changes when confessions that do not name the defendant are at issue."[166] Thus, the majority would exclude all evidence from sixth amendment protection other than facially inculpatory co-defendant confessions, regardless of the incriminating effect on the defendant.[167] Clearly, Justice Scalia's conclusion that a confession can only be "powerfully incriminating" if it facially incriminates the defendant blatantly ignores the express language of the *Bruton* opinion and its precedents.

Justice Brennan laid the foundation for the "powerfully incriminating" standard of *Bruton* for co-defendant confessions in *Douglas v.*

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162 *Bruton*, 391 U.S. at 135-36 (citations omitted).

163 Marcus, *The Confrontation Clause and Co-Defendant Confessions: The Drift from* Bruton *to* Parker v. Randolph, 1979 U. ILL. L.F. 559, 566 (1979).

164 *See* FED. R. EVID. 801-06; *see also* sources cited *supra* note 150; *see generally* Marcus, *supra* note 163, at 562 n.21.

165 *See Richardson*, 107 S. Ct. at 1709 (Stevens, J., dissenting).

166 *Id.* (emphasis added).

167 *Id.* (Stevens, J., dissenting). *See also* Brief for Respondent at 19, Richardson v. Marsh, 107 S. Ct. 1702 (1987)(No. 85-1433).

Alabama.[168] In *Douglas*, the defendant and an alleged accomplice were tried separately for assault with the intent to murder.[169] The alleged accomplice was tried first and found guilty.[170] The state called the accomplice to testify at the defendant's trial.[171] However, the accomplice refused to answer any questions on grounds of self-incrimination because an appeal on his conviction was pending.[172] The trial judge thus allowed the prosecution to treat the accomplice as a hostile witness.[173] The prosecutor subsequently read the accomplice's purported confession which implicated the defendant and asked the accomplice to affirm or deny the statements.[174] Once again, the accomplice refused to respond.[175] The Court noted:

> The alleged statements clearly bore on a fundamental part of the State's case against the petitioner. The circumstances are therefore such that "inferences from a witness' refusal to answer added *critical weight* to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant."[176]

The Court thus held that the defendant's inability to cross-examine the accomplice about the confession violated his confrontation right under the sixth amendment.[177]

Relying on *Douglas*, Justice Brennan noted in *Bruton* that the risk of prejudice to the defendant was even more serious than it was in *Douglas*.[178] Justice Brennan argued that the co-defendant's confession "added *substantial*, perhaps even *critical*, weight to the Government's case in a form not subject to cross-examination, since [the co-defendant] . . . did not take the stand. [The defendant] . . . thus was denied his constitutional right of confrontation."[179] Although *Douglas* and *Bruton* involved confessions which facially incriminated the defendants, Justice Brennan did not limit confrontation clause violations to only those statements.[180] Rather, any confession which added substantial weight to the prosecution's case in a form not subject to cross-examination would be deemed "powerfully incrimi-

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168 380 U.S. 415 (1965).
169 *Id.* at 416.
170 *Id.*
171 *Id.*
172 *Id.*
173 *Id.*
174 *Id.* at 416-17.
175 *Id.*
176 *Id.* at 420 (quoting Namet v. United States, 373 U.S. 179, 187 (1962))(emphasis added).
177 *Id.* at 419.
178 *Bruton*, 391 U.S. at 127.
179 *Id.* at 128 (emphasis added).
180 *See* Note, *The Admission of a Codefendant's Confession After* Bruton v. United States*: The Questions and a Proposal for Their Resolution*, 1970 DUKE L. REV. 329, 341.

nating." In *Richardson*, Justice Stevens correctly argued that a co-defendant's confession which implicates the defendant when combined with other evidence at trial certainly may add substantial weight to the government's case just as easily as a confession which directly implicates the defendant.[181] This is especially true if the government's case is based primarily on circumstantial evidence. To hold that such linkage testimony does not violate the confrontation clause "ignores the true incriminating effect of the statement."[182]

Moreover, Justice Stewart's concurring opinion in *Bruton* also adhered to the proposition that "powerfully incriminating" is not limited to facially incriminating confessions. Justice Stewart noted that "the underlying rationale of the Sixth Amendment's Confrontation Clause precludes reliance upon cautionary instructions when the *highly damaging* out-of-court statements of a codefendant, who is not subject to cross-examination, is deliberately placed before the jury at a joint trial."[183] Although Justice Stewart's choice of words was slightly different from that of Justice Brennan, the meaning is the same: a co-defendant's confession is "powerfully incriminating" if it is highly damaging or adds substantial weight to the government's case.

Indeed, even Justice White, in his dissent in *Bruton*, agreed that Justice Brennan did not intend to limit "powerfully incriminating" confessions to "facially incriminating" confessions.[184] Justice White noted:

> I would suppose that it will be necessary to exclude all extrajudicial confessions unless all portions of them which implicate defendants other than the declarant are effectively deleted. Effective deletion will probably require not only omission of all direct and indirect inculpations of codefendants but also of any statement that could be employed against those defendants once their identity is otherwise established.[185]

Justice White's dissenting opinion is highly significant because neither the majority opinion nor the concurring opinion in *Bruton* discussed the effects the decision would have on the redaction process. Because Justice White was dissenting, his views may represent the minimum standard that the prosecution will have to satisfy in order to comply with *Bruton*.[186] Justice White nonetheless correctly

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181 *Richardson*, 107 S. Ct. at 1710 (Stevens, J., dissenting).
182 *Marsh*, 781 F.2d at 1212.
183 *Bruton*, 391 U.S. at 137-38 (Stewart, J., concurring)(emphasis added).
184 *Id.* at 143 (White, J., dissenting).
185 *Id.* (White, J., dissenting).
186 Marcus, *supra* note 163, at 575.

asserted that under the majority opinion, a confession would still be powerfully incriminating unless all statements which incriminated the defendant, direct or otherwise, were deleted from the confession.

Justice Scalia disagreed that redaction was discussed only in Justice White's dissent, asserting that the majority opinion in *Bruton* suggested that the principles of *Bruton* could be complied with by redaction.[187] Such a statement is misleading. The Court's exact words in *Bruton* were: "Some courts have required deletions of reference to codefendants where practicable."[188] Such a statement hardly implies that a redaction which omits all express reference to the defendant will always protect the defendant's rights guaranteed by the confrontation clause. In fact, the Court specifically cited authorities criticizing redactions.[189] In *Richardson*, even though Williams' confession made no reference to Marsh, the redaction was still ineffective because the confession inculpated Marsh when it was combined with other evidence introduced at trial. Since Williams' confession was the only evidence that indicated that Marsh may have known of Martin's intent to kill the victims, the confession added substantial weight to the state's case. Thus, in light of the rest of the opinion, the majority in *Bruton* would not consider a redaction that omitted all reference to the defendant to be practicable if the confession was still "powerfully incriminating" against the defendant.

C. THE "FACIALLY INCRIMINATING" STANDARD

In addition to disregarding the express language in *Bruton*, the majority opinion in *Richardson* creates illogical results and ignores the values of the confrontation clause that *Bruton* sought to protect. As Justice Stevens noted in *Richardson*, the result of using Justice Scalia's "facially incriminating" standard is that even if a jury's indirect inference from a co-defendant's confession is much more devastating than an inference from a direct reference in the confession, only the latter statement would be excluded.[190] The *Bruton* Court clearly could not have intended such an illogical result. As the Court concluded in *Pointer v. Texas*,[191] the purpose of the confrontation clause is to protect a criminal defendant from being unfairly

187 *Richardson*, 107 S. Ct. at 1708.

188 *Bruton*, 391 U.S. at 134 n.10.

189 *Id.* (citing Note, *Criminal Conspiracy*, *supra* note 150, at 990; Comment, *Post-Conspiracy Admissions in Joint Prosecutions*, *supra* note 150, at 713; Note, *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 YALE L.J. 553, 564 (1965)).

190 *Richardson*, 107 S. Ct. at 1709 (Stevens, J., dissenting).

191 380 U.S. 400 (1965).

prejudiced by evidence which is inadmissible against him.[192] A nonfacially incriminating confession may certainly unfairly prejudice the defendant as much as a facially incriminating confession. Justice Stevens was, therefore, correct when he stated that the determination of whether a co-defendant's confession violates the confrontation clause should not be dependent upon whether the defendant is named in the confession, but rather should be made on a case-by-case basis dependent upon whether the confession is "powerfully incriminating."[193]

Furthermore, Justice Scalia's "facially incriminating" standard is flawed because it ignores the elements of the jury's decision-making process. Juries are instructed not to form conclusions until all the evidence is introduced, thus giving the jury the opportunity to view each piece of evidence in the context of the entire case.[194] Consequently, a piece of inadmissible evidence which inculpates the defendant when linked with other evidence at trial may still have a devastating effect against the defendant even though it is not facially incriminating. Justice Stevens correctly noted that "the very acts of listening and seeing will sometimes lead them [the jury] down 'the path of inference.' "[195] As the *Bruton* Court noted, if the testimony adds substantial weight to the state's case in a form not subject to cross-examination, "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."[196]

Indeed, the facts of *Richardson* are a perfect example of the problems created by the majority's "facially incriminating" distinction. Because Williams' confession was not facially incriminating as to Marsh, Justice Scalia reasoned that it did not violate Marsh's rights under the confrontation clause.[197] However, at the time Williams' confession was introduced, Knighton's testimony had already established that Marsh, Williams, and Martin had committed an armed robbery at Scott's house and that Martin and Marsh had arrived together.[198] Justice Stevens correctly reasoned that the jury could not help but infer that Marsh was in the car and had heard Martin's statement indicating his intent to kill Scott and the Knight-

192 *Id.* at 403.
193 *Richardson*, 107 S. Ct. at 1710 (Stevens, J., dissenting).
194 Brief for Respondent at 21, Richardson v. Marsh, 107 S. Ct. 1702 (1987)(No. 85-1433).
195 *Richardson*, 107 S. Ct. at 1710 (Stevens, J., dissenting).
196 *Bruton*, 391 U.S. at 135.
197 *Richardson*, 107 S. Ct. at 1709.
198 *Id.* at 1711 (Stevens, J., dissenting).

ons.[199] Williams' confession certainly added substantial weight to the state's case and thus made it powerfully incriminating against Marsh because it was the only evidence at trial that indicated that Marsh may have known of Martin's intent to kill the victims.[200] In addition, because Williams did not testify at trial, Marsh's attorney had no opportunity to cross-examine him to establish that the radio may have been too loud for Marsh to hear Martin's statement.[201] Thus, Justice Stevens was correct in concluding that the introduction of Williams' confession was a violation of the confrontation clause even though the confession did not facially incriminate Marsh.

D. THE ADMINISTRATIVE ARGUMENTS IN *RICHARDSON*

Justice Scalia further tried to justify his "facially incriminating" distiction by noting that "[w]here the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence."[202] However, the majority cites no authority to support this conclusion. As noted above, this conclusion was specifically incorrect in *Richardson* because Williams' confession added substantial weight to the state's case in a form not subject to cross-examination. Furthermore, Justice Scalia's choice of words indicated the clear lack of certainty he has for this proposition. By using phrases such as "the judge's instruction *may well* be successful in dissuading the jury from entering onto the path of inference in the first place . . ." and "there does not exist the *overwhelming probability* [that the jury will obey their limiting instructions]," Justice Scalia showed that he was far from certain about his conclusion.[203]

In addition, Justice Scalia actually admitted to the logical weakness of his proposition and tried to rationalize his conclusion by using administrative arguments. The majority stated that

> [t]he rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.[204]

Justice Scalia thus attempted to justify his conclusion by arguing

199 *Id.* (Stevens, J., dissenting).
200 *Id.* (Stevens, J., dissenting).
201 *Id.* at 1711-12 (Stevens, J., dissenting).
202 *Id.* at 1707.
203 *Id.* at 1708 (emphasis added).
204 *Id.* at 1709.

that the costs of requiring the prosecution to use separate trials or foregoing the use of the co-defendant's confession outweigh the benefits to the defendant.[205] It is true that joint trials "conserve prosecutorial resources, diminish inconvenience to witnesses, and avoid delays in the administration of criminal justice."[206] However, to allow administrative concerns to prevail at the expense of fairness and justice protected by the confrontation clause would be a dangerous practice. Justice Stevens correctly argued that the criminal justice system pays too high a price when it protects " 'greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty.' "[207] Although Justice Scalia and the state would prefer smoother administration in the criminal justice system at the expense of a fair trial for the defendant, the Constitution does not tolerate such a result.[208]

Moreover, even if administrative issues are given more weight than constitutional rights, Justice Scalia's concerns about administrative burdens on the criminal justice system are without merit. The majority fears that a "contextual implication" reading of *Bruton* will lead to mid-trial manipulation by defense attorneys.[209] Justice Scalia presumably meant that a defense attorney may try to alter the evidence at trial in order to create a powerfully incriminating inference against his or her client.[210] This argument, however, ignores the realities of a criminal trial. As Justice Stevens argued, there are few defense attorneys who would pursue this high risk strategy of manipulating their evidence to create a powerfully incriminating inference if their client has any chance of acquittal.[211] Even if a defense attorney did try to manipulate the evidence, Justice Stevens correctly noted that trial judges are fully capable of "supervising counsel in order to avoid problems that seem insurmountable to appellate judges."[212] Furthermore, if the state had an exceptionally

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205 *Id.* at 1708-09. *See also* Brief Amicus Curiae (Solicitor General) for Petitioner at 22, Richardson v. Marsh, 107 S. Ct. 1702 (1987)(No. 85-1433).

206 *Richardson*, 107 S. Ct. at 1712 (Stevens, J., dissenting)(citing United States v. Lane, 106 S. Ct. 725, 732 (1986)).

207 *Id.* at 1713 (Stevens, J., dissenting)(quoting People v. Fisher, 249 N.Y. 419, 432 (1928)(Lehman, J., dissenting)).

208 *See* Brief for Respondent at 40, Richardson v. Marsh, 107 S. Ct. 1702 (1987)(No. 85-1433). *See also* Marcus, *supra* note 163, at 579 ("if the two values at issue are maintenance of joint trials and violation of Confrontation Clause principles, surely the fundamental considerations of the sixth amendment must prevail").

209 *Richardson*, 107 S. Ct. at 1708.

210 *Id.* at 1713-14 (Stevens, J., dissenting).

211 *Id.* at 1714 (Stevens, J., dissenting).

212 *Id.* (Stevens, J., dissenting).

strong case against the defendant, the defense would not benefit by manipulating the evidence to create a powerfully incriminating inference because any *Bruton* violation would be deemed a harmless error.[213]

Justice Scalia further argued that reading *Bruton* to encompass "contextual linkage" confessions would be needlessly time-consuming and would lead to a trial before trial.[214] Other critics have stressed that such a reading of *Bruton* would all but eliminate the use of joint trials by forcing the state to expose its entire case on a motion for severence.[215] These assertions are without merit. At most, trial courts would have to survey the co-defendant's statements and order production of only those statements which could provide contextual linkage evidence.[216] Trial judges are well-equipped and thoroughly familiar with complex discovery procedures. There is no reason to believe they will have any more difficulty deciding this issue than they would have with any other evidentiary matter.[217] In any event, even if the "contextual implication" reading of *Bruton* does result in fewer joint trials and less efficiency in the criminal justice system, this price is small compared to the consequences arising from the jeopardizing of an individual's constitutional rights of confrontation under the sixth amendment.

Indeed, the prosecutor has a duty to request a severance in any *Bruton* situation in which the defendant's confrontation rights are threatened. Justice Scalia's argument conveniently ignores this duty to provide the defendant with a fair trial.[218] In *Berger v. United States*,[219] the Supreme Court stated:

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213 *See* Brown v. United States, 411 U.S. 223, 231 (1973)(holding that the *Bruton* error was harmless where "[t]he testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury"); Schneble v. Florida, 405 U.S. 427, 432 (1972)(holding that "unless there is a reasonable probability that the improperly admitted evidence contributed to the conviction, reversal is not required"); Harrington v. California, 395 U.S. 250, 254 (1969)(holding that *Bruton* violations are subject to the harmless error test set forth in Chapman v. California, 386 U.S. 18 (1967), and that the case against the defendant was so overwhelming that the *Bruton* violation was harmless beyond a reasonable doubt). In *Richardson*, Justice Stevens correctly concluded that the admission of Williams' confession was clearly not a harmless error because it was the only evidence linking Marsh to Martin's intent to kill the victims. *Richardson*, 107 S. Ct. at 1714 n.8 (Stevens, J., dissenting).

214 *Id.* at 1708.

215 Brief Amicus Curiae (Solicitor General) for Petitioner at 21, Richardson v. Marsh, 107 S. Ct. 1702 (1987)(No. 85-1433).

216 Marcus, *supra* note 163, at 580.

217 *Id.*

218 *See generally* Brief for Respondent at 42, Richardson v. Marsh, 107 S. Ct. 1702 (1987)(No. 85-1433).

219 295 U.S. 78 (1935).

> The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[220]

Thus, when a redacted confession implicates the defendant even though the confession is not facially incriminating, the prosecutor is under a duty either to request a severence or to seek alternative measures.

Two such viable alternatives to traditional joint trials that Justice Scalia failed to recognize are bifurcation and multiple juries. In a bifurcated trial, the jury is permitted to hear all of the evidence against the defendant except for the co-defendant's confession. After the jury hears closing arguments and reaches a verdict as to the defendant, the trial judge then informs the jury about the co-defendant's confession. The jury is then allowed to hear the complete confession and any other evidence pertinent to the co-defendant's case.[221] Bifurcation thus grants the prosecution the value of the co-defendant's confession against the co-defendant and, at the same time, protects the confrontation rights of the defendant. In a single trial, multiple jury procedure, a jury is chosen for each co-defendant. The jury for the defendant is excused when the co-defendant's confession or any evidence relating to the confession is introduced at trial. The juries hear separate closing arguments and subsequently render separate verdicts.[222] Similar to bifurcation, a multiple jury procedure enables the prosecution to use the confession against the co-defendant, yet sufficiently protects the defendant from unfair prejudice. These two methods, therefore, successfully achieve a balance between the interests of the state and the defendant. The state obtains the same "speed, economy, and convenience" that it would normally obtain in a traditional joint trial, while

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220 *Id.* at 88.

221 *See* Haddad, *Post-*Bruton *Developments: A Reconsideration of the Confrontation Rationale, and a Proposal for a Due Process Evaluation of Limiting Instructions*, 18 AMER. CRIM. L. REV. 1, 4 n.10 (1980); Note, *Co-Defendant Confessions*, 3 COLUM. J.L. & SOC. PROB. 80, 93 (1967). *See, e.g.*, United States v. Crane, 499 F.2d 1385, 1387 (6th Cir. 1974)(upholding the defendant's conviction for armed robbery and noting that no prejudice occurred as a result of using a bifurcated trial).

222 *See* Haddad, *supra* note 221, at 5 n.11. *See generally*, Morris & Savitt, Bruton *Revisited: One Trial/Two Juries*, 12 PROSECUTOR 92 (1976). *See, e.g.*, State v. Hernandez, 163 N.J. Super. 283, 286 (N.J. Super. Ct. App. Div. 1979)(holding that the employment of three juries at the robbery trial of the defendant and his two co-defendants did not unfairly prejudice the defendant).

the defendant receives adequate protection of his or her rights under the confrontation clause.

E. THE EFFECTS OF *RICHARDSON* ON CONFESSIONS WHICH REPLACE THE DEFENDANT'S NAME WITH AN "X" OR A "BLANK"

Finally, a confession in which the defendant's name has been replaced by a symbol or neutral pronoun should be a violation of the confrontation clause even under Justice Scalia's "facially incriminating" standard. The Supreme Court expressly avoided deciding this issue in *Richardson*.[223] Should the issue arise in the future, it seems apparent that even under the "facially incriminating" standard, a confession which replaces the defendant's name with a symbol or neutral pronoun is a violation of the confrontation clause. In *Richardson*, the Court stressed that Williams' confession did not facially incriminate Marsh because all references to Marsh had been omitted from the confession.[224] When a defendant's name is replaced by a symbol or neutral pronoun, however, the confession still clearly refers to the defendant even though the confession does not use the defendant's name. A jury cannot avoid filling in the blanks and discovering that the defendant is the "blank" or "symbol" in the confession.[225] Judge Friendly agreed with this proposition, stating that "[i]t is impossible realistically to suppose that when the twelve good men and women had [the co-defendant's] . . . confession in the privacy of the jury room, not one yielded to the nigh irresistible temptation to fill in the blanks. . . ."[226] In fact, some authorities have suggested that a confession with a blank or symbol in place of the defendant's name is actually more devastating to the

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223 *Richardson*, 107 S. Ct. at 1709 n.5. Justice Scalia stated: "We express no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun."

224 *Id.* at 1709.

225 *See* Dawson, *Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices*, 77 MICH. L. REV. 1379, 1414 (1979)(the edited confession makes it "as clear as pointing and shouting" that the defendant is the "X" or the "another person" named in the confession); Haddad, *Prosecutorial Approaches to Avoiding Severence After* Bruton v. United States, 19, No. 3 PROSECUTOR 37, 40 (1986)(noting that simplistic methods of editing out the defendant's name is ineffective in protecting the defendant); Note, *The Admission of a Codefendant's Confession After* Bruton v. United States*: The Questions and a Proposal for Their Resolution*, *supra* note 180, at 347 (arguing that under New Jersey law, references to the defendant as "X, Y, or Z" or to "another Negro male" or to "Blank" are ineffective deletions); Note, *Criminal Conspiracy*, *supra* note 150, at 990 (noting that the desirability of placing an "X" for the defendant's name as a substitute for severence is doubtful); Note, *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, *supra* note 189, at 564 n.55 (arguing that the substitution of "Mr. Blank" for the name of the inculpated defendant usually is not enough to cure the harm).

226 United States v. Bozza, 365 F.2d 206, 215 (2d Cir. 1966).

defendant than a confession which expressly names the defendant because the former draws the special attention of the jurors, and their tendency to fill in the blank makes it even harder for them to disregard the confession.[227] Thus, a confession that replaces the defendant's name with a symbol or pronoun is still "facially incriminating" even though it does not expressly refer to the defendant's name.

V. CONCLUSION

In *Richardson v. Marsh*, the Supreme Court significantly limited the scope of *Bruton v. United States*. The Court held that the confrontation clause of the sixth amendment is not violated by the admission of a nontestifying co-defendant's confession with proper limiting instructions when all references to the defendant are removed from the confession, even if the confession inculpates the defendant when linked with other evidence introduced at trial.

According to the Court, such a confession need not be excluded under *Bruton* because *Bruton* was only intended to apply to co-defendant confessions which "facially incriminate" the defendant. The Court rationalized this interpretation by asserting that a jury will be able to follow its limiting instructions when the confession incriminates the defendant only by "contextual implication." The Court further argued that a reading of *Bruton* which encompasses "contextual implication" confessions would harm the efficiency of the criminal justice system more than it would benefit the defendant.

However, the *Richardson* Court's interpretation of *Bruton* is erroneous because *Bruton* was intended to apply to all confessions which were "powerfully incriminating" against the defendant. The *Richardson* Court failed to recognize that the "powerfully incriminating" standard in *Bruton* was not limited to "facially incriminating" confessions but rather included all confessions which added substantial weight to the state's case in a form not subject to cross-examination. Furthermore, the *Richardson* Court's interpretation of *Bruton* creates the illogical result of admitting a confession which implicates the defendant by "contextual implication" even if it is more devastating

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227 Comment, *Post-Conspiracy Admissions in Joint Prosecutions*, *supra* note 150, at 713. This conclusion is based on an experiment by the Jury Project at the University of Chicago Law School which used a moot case and thirty moot juries. *Id.* at 713 n.21. This experiment is reported in Kalvan, Report on the Jury Project of the University of Chicago Law School (speech given on Nov. 5, 1955, to a Conference on Legal Research at the University of Michigan Law School, on file at the University of Chicago Law School Library).

than a confession which "facially incriminates" the defendant. Finally, even if the exclusion of confessions which inculpate the defendant by "contextual implication" causes a reduction in the efficiency of the criminal justice system, this price is small compared to the cost of violating an individual's confrontation rights under the sixth amendment.

The effects of the Supreme Court's holding in *Richardson v. Marsh* are disturbing. The Court's overly narrow interpretation of *Bruton* will have the unfortunate effect of increasing the chance that a nonconfessing defendant at a joint trial will be prejudiced by evidence which is inadmissible against him. Such an effect is neither dictated by *Bruton* nor acceptable in our criminal justice system.

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