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The X Files: Joint Trials, Redacted Confessions and Thirty Years of Sidestepping Bruton

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THE X FILES: JOINT TRIALS, REDACTED CONFESSIONS AND THIRTY YEARS OF SIDESTEPPING *BRUTON*

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> *"X was behind the old man, and X just shot him in the back. The old man fell face forward towards me. And I was so scared I just ran."*[1]

I. INTRODUCTION

THIS excerpt is a portion of one defendant's confession at a joint capital murder trial as it was read to the jury.[2] "Me," of course, refers to the confessor.[3] Seated next to this confessing defendant at the defense table was his co-defendant.[4] If the jurors happened to leap to the conclusion that "X" was the jointly tried defendant, it follows that they heard evidence that one defendant accused the other of murder. The confessing defendant did not take the witness stand and was, therefore, not subject to cross-examination.[5] The landmark Supreme Court case, *Bruton v. United States*,[6] should have prevented this infringement on the nonconfessing defendant's right to confront his accusers.[7] It, however, did not.[8]

This Article exposes the decay of the Supreme Court's *Bruton* rule. In the decades following *Bruton*, both federal and state courts

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1. Notes of Testimony at 190, Commonwealth v. Rainey, 656 A.2d 1326 (Pa. 1995) (No. 9004-1973-1978).

2. *See id.*

3. *See id.*

4. *See* Commonwealth v. Rainey, 656 A.2d 1326, 1331 (Pa. 1995).

5. *See id.*

6. 391 U.S. 123 (1968).

7. *Id.* at 126 (holding that it is unrealistic to assume jury could disregard incriminating confession of co-defendant).

8. *See Rainey*, 656 A.2d at 1332 (affirming conviction based upon same facts despite claim of *Bruton* error). For a discussion of the propriety of substituting "X" for one defendant's name in a co-defendant's confession, see *infra* notes 249-50 and accompanying text.

have gone unchecked in their efforts to ameliorate *Bruton*'s directive.

By way of example, the following scenario depicts a *Bruton* problem: Dick and Jane were accused of robbing a bank together and will be tried jointly for this offense.[9] Jane's confession will be admitted against her at the joint trial. In her confession, Jane stated: "Dick and I robbed the bank." Dick denies participation in the robbery and Jane's implication of him can be impeached through cross-examination.[10] Jane, however, has chosen not to take the witness stand, depriving Dick of the opportunity to cross-examine her regarding the accusations against him.[11] In an effort to protect Dick's constitutional rights, the jury will be instructed not to consider Jane's confession as evidence against Dick.[12] The primary question presented by these facts is whether the jury can be expected to follow the court's instructions.

In the 1968 *Bruton* decision, the Court held that, despite a limiting instruction, it was unrealistic to assume that a jury could be relied upon to disregard the "powerfully incriminating" confession of a co-defendant in assessing the guilt of a defendant.[13] According to the *Bruton* Court, even with a limiting jury instruction, the intro-

9. *See* FED. R. CRIM. P. 8(b) (providing for joinder of defendants in single indictment or information if they are alleged to have participated in same act or transaction constituting offense). In the alternative, the Federal Rules of Criminal Procedure provide for the joint trial of defendants separately indicted. *See* FED. R. CRIM. P. 13. Similar rules exist in most states. *See, e.g.*, ALA. R. CRIM. P. 13.3 (setting forth three instances where offenses and defendants may be joined in indictment, information or complaint); ME. R. CRIM. P. 8(b) (identifying when two or more defendants may be charged in same indictment, information or complaint); PA. R. CRIM. P. 1127 (providing circumstances in which offenses and defendants charged in separate indictments or information may be tried together).

10. *See generally* CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE 44-70 (John W. Strong et al. eds., 4th ed. 1992) (describing rules governing impeachment of witnesses).

11. Because Jane is asserting her Fifth Amendment right, she may not be compelled to testify and be subject to cross-examination. *See* U.S. CONST. amend. V (providing that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself.").

12. *See id.* amend. VI (guaranteeing that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."). The right to cross-examine witnesses is part of the right to confrontation. *See* Pointer v. Texas, 380 U.S. 400, 404 (1965) ("It cannot doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witness against him."). For a further discussion of the right to cross-examine one's accuser, see *infra* notes 60-63 and accompanying text.

13. Bruton v. United States, 391 U.S. 123, 126 (1968) ("[B]ecause of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of [co-defendant's] confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.").

duction of a nontestifying co-defendant's confession incriminating a jointly tried defendant is a violation of that defendant's Sixth Amendment right to confront the witnesses against him or her.[14]

In the wake of *Bruton*, prosecutors were left with three choices. First, they could sever the trials of co-defendants where the confession of one implicated the other.[15] Second, they could forego the use of the confession against the confessor.[16] Third, they could redact portions of the confession by deleting references to jointly tried defendants.[17] For obvious reasons, the first and second options were far less attractive than the third. Severed trials were viewed as wasteful of judicial resources[18] and capable of resulting in

14. *Id.* (noting substantial risk that jury could disregard court's instructions).

15. *See* FED. R. CRIM. P. 14 (authorizing separate trials when joinder of defendants would cause prejudice for government or defendant).

16. *See generally* Alfredo Garcia, *The Winding Path of* Bruton v. United States*: A Case of Doctrinal Inconsistency*, 26 AM. CRIM. L. REV. 401, 413-14 (1988) (discussing problems with government promising not to use co-defendant confessions at joint trials).

17. *See* Comment, *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 YALE L.J. 553, 564 (1965) ("The majority of the federal courts have apparently recognized that the admission of [the confession of one defendant inculpating the co-defendant] is harmful to the co-defendant, and in an attempt to cure the harm have required that the inculpating portions of the statement be deleted.") (citation omitted); *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 990 (1959) (noting that, in some cases, prosecution deleted all references to co-defendant and substituted "X" to avoid problems); *see also* Oliver v. United States, 335 F.2d 724, 728 (D.C. Cir. 1964) (reversing trial court decision that allowed limiting instruction rather than deleting references to three other co-defendants); People v. Aranda, 407 P.2d 265, 272-73 (Cal. 1965) (permitting "a joint trial if all parts of the extrajudicial statements implicating any co-defendants can be and are effectively deleted without prejudice to the declarant"); People v. Hodson, 94 N.E.2d 166, 169 (Ill. 1950) (stating that "if that part of the confession pertaining to the guilt of a co-defendant can be properly left out without in any way weakening the confession as to the one who made it, then the court should not admit in evidence that part of the confession which implicates the co-defendant").

The *Bruton* majority hardly touched upon the alternatives available for the post-*Bruton* prosecution of multiple defendants when one or more had confessed and incriminated another. Justice Brennan, writing for the majority, merely pointed out that there were alternatives available and made reference to the already existing practice of making deletions from the confession. *See Bruton*, 391 U.S. at 133-34 & n.10 (identifying shortcoming of limiting instructions). In his dissenting opinion, Justice White criticized the majority for not spelling out "how the federal courts might conduct their business consistent with today's opinion." *Id.* at 143 (White, J., dissenting). After noting the inefficiencies of separate trials, White lamented 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." *Id.* (White, J., dissenting).

18. For a discussion of judicial views regarding the connection between joint trials and judicial efficiency, see *infra* notes 377-85 and accompanying text.

inconsistent verdicts.[19] Further, in countless prosecutions, a defendant's own confession is the strongest proof available against him.[20] The omission of that proof would rarely be deemed a viable option.[21] Therefore, after *Bruton*, prosecutors naturally turned to the redacted confession as the avenue of choice for preserving their ability to conduct joint trials.[22]

Several methods of redaction emerged. In one type, any reference to the existence of accomplices was deleted.[23] Thus, in the Dick and Jane case, Jane's confession would be redacted to read simply, "I robbed the bank." Nineteen years after its decision in *Bruton*, the Court passed upon the use of this method in *Richardson v. Marsh*.[24] In *Richardson*, a majority of the Court condoned the admission of a nontestifying co-defendant's confession when it was redacted to delete the name of, and all references to, the existence of the co-defendant.[25] Prior and subsequent to *Richardson*, how-

19. For a discussion of the Supreme Court's view of joint trials as expressed in *Bruton*, see *infra* notes 382-83 and accompanying text.

20. *See Bruton*, 391 U.S. at 139 (White, J., dissenting) ("[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him."); Noel Moran, Comment, *Confessions Compelled by Mental Illness: What's an Insane Person to Do?* Colorado v. Connelly, *107 S. Ct. 575 (1986)*, 56 U. CIN. L. REV. 1049, 1069-70 (1988) (arguing that confessions are highly persuasive with jury and are accorded such weight that they can determine trial's outcome); Laura Hoffman Roppe, Comment, *True Blue? Whether Police Should Be Allowed To Use Trickery and Deception To Extract Confessions*, 31 SAN DIEGO L. REV. 729, 730 (1994) (explaining that police "try vigorously to procure" confessions because they are powerfully persuasive to jury).

21. *See* Garcia, *supra* note 16, at 413-14 (concluding that prosecution foregoing use of co-defendant's confession is not efficient means to safeguard defendant's right to confrontation when *Bruton* problem arises before trial).

22. *See generally* James B. Haddad & Richard G. Agin, *A Potential Revolution in* Bruton *Doctrine: Is* Bruton *Applicable Where Domestic Evidence Rules Prohibit Use of a Co-defendant's Confession as Evidence Against a Defendant Although the Confrontation Clause Would Allow Such Use?*, 81 J. CRIM. L. & CRIMINOLOGY 235, 251 n.87 (1990) (listing redaction as one circumstance in which prosecutors argue that *Bruton* is inapplicable); James B. Haddad, *Prosecutorial Approaches to Avoiding Severance After* Bruton v. United States, THE PROSECUTOR J. OF NAT'L DISTRICT ATT'YS ASS'N, Winter 1986, at 40-42 (explaining that redaction is commonly employed, but, may be dangerous) [hereinafter Haddad, *Prosecutorial Approaches*]; Charles J. Williams, *The Honest Consequences of* Bruton *and the Dishonest Consequences of the Redaction Exception*, 28 CRIM. L. BULL. 307, 318-26 (1992) (reviewing and criticizing use of redaction).

23. *See* Richardson v. Marsh, 481 U.S. 200, 211 (1987) (holding that "Confrontation Clause is not violated by the admission of a nontestifying co-defendant's confession with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name but any reference to his or her existence").

24. 481 U.S. 200 (1987).

25. *See id.* at 211 (noting that *Bruton* analysis changes when confession does not name defendant). The redactions combined with an instruction to the jury not to consider the co-defendant's confession against the other defendant were deemed sufficient protection of the defendant's rights. *See id.* Marsh claimed that

ever, it has been commonplace for trial courts to permit the introduction of co-defendant confessions with redactions far less extensive and quite different than the kind sanctioned by the Court in *Richardson*.[26]

Another common type of redaction involves the use of pronouns such as "he," "she," "they" and "others" or other neutral terms such as, "my friend" or "individual" as substitutions for defendants' names when they appear in co-defendants' confessions.[27] According to this method, Jane's confession might read: "Some guy and I robbed the bank." In other cases, a defendant's name is deleted and an "X" or a blank space is inserted in its place.[28] Jane's confession illustrates this method of redaction when it reads: "'X' and I robbed the bank."

The *Richardson* Court expressly left open the question of the propriety of these alternative forms of redaction.[29] Today, ten years after *Richardson*, the Supreme Court has yet to provide an answer. Nevertheless, in the post-*Richardson* period, courts have relied upon

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even though all direct references to her participation were redacted, the admission of her co-defendant's confession, nevertheless, violated her rights under the Confrontation Clause. *See id.* at 205. The Court determined that a curative jury instruction would suffice to prevent any inappropriate jury use of the co-defendant confession against Marsh. *See id.* at 211. Under these circumstances, the Court was satisfied because, on its face, the confession did not implicate Marsh. *See id.* The *Richardson* Court did, however, concede that the redacted confession, linked with evidence later at trial, would have incriminated Marsh if the jury had disobeyed its instructions. *See id.* at 208 n.3 (stating disagreement with dissent). For a further discussion of the redacted confession in *Richardson*, see *infra* notes 147-61 and accompanying text.

26. *See* Paul Marcus, *The Confrontation Clause and Co-defendant Confessions: The Drift From* Bruton *to* Parker v. Randolph, 1979 U. ILL. L.F. 559, 575 (1979) (stating that redaction might not eliminate all problems). For a discussion of the use of partial redaction during the period between *Bruton* and *Richardson*, see *infra* notes 120-33 and accompanying text.

27. *See, e.g.*, United States v. Enriquez-Estrada, 999 F.2d 1355, 1359 (9th Cir. 1993) (substituting "individual" for co-defendants' names); United States v. Benitez, 920 F.2d 1080, 1086 (2d Cir. 1990) (substituting all references to defendant with "friend"); United States v. Greenleaf, 692 F.2d 182, 189 (1st Cir. 1982) (finding that statement in which defendant's name was replaced with "someone" does not satisfy "powerfully incriminating" standard of *Bruton*); State v. Craney, 662 A.2d 899, 902 (Me. 1995) (expunging and replacing defendant's name with neutral pronouns such as "someone").

28. *See, e.g.*, Robinson v. Rose, No. 86-5080, 1987 WL 38091, at *3 (6th Cir. July 22, 1987) (per curiam) (omitting names of accomplices and substituting with word "blank"); Townsend v. State, 533 N.E.2d 1215, 1225 (Ind. 1989) (substituting co-defendants' names with "blank," "other person" or "another person"); Commonwealth v. Lee, 662 A.2d 645, 651 (Pa. 1995) (replacing defendant's name with letter "X"), *cert. denied*, 116 S. Ct. 1831 (1996).

29. *Richardson*, 481 U.S. at 211 n.5 ("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.").

the *Richardson* holding to consistently condone these kinds of redactions.[30] In this Article, this author argues that this reliance is unjustifiable.

This Article calls upon the judiciary to take a hard and honest look at the widespread allowance of the admission of redacted co-defendant confessions at joint trials.[31] Part II traces the development of federal jurisprudence in this area from pre-*Bruton* rulings

30. *See, e.g.*, United States v. Williams, 936 F.2d 698, 701 (2d Cir. 1991) (noting that *Richardson* analysis allows "redacted confessions to refer to accomplices with neutral pronouns"); *Rose*, 1987 WL 38091, at *3 (relying on *Richardson* to find no Sixth Amendment violation because confession was not incriminating on its face). For a further discussion of the use of neutral pronouns, blanks, symbols and "X" as redaction methods, see *infra* notes 211-85 and accompanying text.

31. This Article was submitted for publication in March 1997 and accepted for publication in April 1997. On June 16, 1997 the Supreme Court granted certiorari in *Gray v. Maryland*, 117 S. Ct. 2452 (1997). Gray claims that his confrontation rights were violated by the admission at his joint trial of his co-defendant's confession in which the words "deleted" and "deletion" were substituted for incriminating references to Gray. *See* Brief for Petitioner at 10-20, *Gray* (No. 96-8653). The Maryland Court of Special Appeals, Maryland's intermediate appellate court, agreed with Gray and reversed his conviction. *See* Gray v. State, 667 A.2d 983, 992 (Md. Ct. Spec. App. 1995) (holding that "the statement was ineffectively redacted and its use at the joint trial deprived appellant of his right of confrontation"), *rev'd*, 687 A.2d 660 (Md.), *and cert. granted*, 117 S. Ct. 2452 (1997). That court held that in the context of other evidence at trial, Gray could be linked to his co-defendant's confession creating a "substantial risk" that it was improperly considered against Gray. *Id.* at 990. The Court of Appeals of Maryland reversed the Court of Special Appeals. *See* State v. Gray, 687 A.2d 660, 669 (Md.), *cert. granted*, 117 S. Ct. 2452 (1997). While agreeing 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 codefendant," the Court of Appeals held that the inference that the deleted names belonged to Gray was not compelled. *Id.* at 666, 668 (quoting United States v. Pendegraph, 791 F.2d 1462, 1465 (11th Cir. 1986)). The court reversed the intermediate appellate court and affirmed Gray's conviction. *See id.* at 669. The Supreme Court granted certiorari to decide whether the introduction of the redacted confession deprived Gray of his Sixth Amendment right of confrontation. *See* Brief for Petitioner at i, *Gray* (No. 96-8653). Briefs have been submitted on behalf of three amici curiae, with one on behalf of petitioner Gray. *See* Brief for The National Association of Criminal Defense Lawyers, The Public Defender Service for the District of Columbia, and The National Legal Aid and Defender Association at 3-19, *Gray*, (No. 96-8653) (arguing that redactions that do not result in implication of only the declarant should be prohibited). Two of the briefs have been submitted on behalf of respondent, the State of Maryland. *See* Brief for the States of New York, Connecticut, Delaware, Hawaii, Louisiana, Michigan, Montana, Nevada, Oklahoma, Utah and Vermont, at 3-12, *Gray*, (No. 96-8653) (arguing that procedure of redacting facial implications from confessions, bolstered by limiting instruction was adequate to prevent degree of prejudice anticipated in Bruton); Brief for the Criminal Justice Foundation, at 22-25, *Gray*, (No. 96-8653) (arguing that *Bruton* does not apply because statement would qualify as declaration against penal interest and this hearsay exception is sufficiently firmly rooted to satisfy Confrontation Clause). Argument is scheduled for December 8, 1997.

through *Richardson*.[32] This author explains the debate that arose in the years between *Bruton* and *Richardson* over how courts should determine whether a co-defendant's confession "powerfully incriminates" jointly tried defendants.[33] Part II then focuses particular attention upon the facts and analysis of *Richardson* in order to demonstrate that its holding has been unjustifiably expanded.[34]

Part III exposes the misapplication of *Richardson* in post-*Richardson* jurisprudence and argues that the *Richardson* Court's approval of the admission of a fully redacted co-defendant's statement does not support the wholesale use of less complete methods of redaction.[35] Part III then discusses state and federal court decisions that illustrate the inappropriate expansion of *Richardson* and explains how this expansion poses a serious threat to the confrontation rights of co-defendants in joint trials.[36]

Part IV examines some judicial efforts to determine the appropriate breadth of *Richardson* and subsequent efforts to correctly apply its holding.[37] Part IV also reviews decisions in which courts have acknowledged a distinction between the redaction method approved by the *Richardson* Court and the commonly used method of substituting pronouns or symbols for the names of jointly tried defendants.[38] This author explains that these courts have tried to fashion tests for the propriety of admitting the latter, although these tests fall short of protecting the confrontation rights of the nonconfessing defendant.[39]

Part V recommends that courts adopt a per se rule prohibiting the use of neutral pronoun or symbol redactions because they vio-

32. For a discussion of the development of federal jurisprudence in this area from pre-*Bruton* rulings through *Richardson*, see *infra* notes 42-187 and accompanying text.

33. For a further discussion of the "powerfully incriminates" standard, see *infra* note 222 and accompanying text.

34. For a further discussion of the facts and analysis of the *Richardson* case, see *infra* notes 134-87 and accompanying text.

35. For a further discussion of the misapplication of *Richardson* in post-*Richardson* jurisprudence, see *infra* notes 188-285 and accompanying text.

36. For a further discussion of the inappropriate expansion of *Richardson* and the threat it poses to the confrontation rights of co-defendants in joint trials, see *infra* notes 188-285 and accompanying text.

37. For a further discussion of cases attempting to correctly apply the *Richardson* holding, see *infra* notes 286-341 and accompanying text.

38. For a discussion of the redaction method approved by *Richardson* and other commonly used redaction methods, see *infra* notes 286-320 and accompanying text.

39. For a further discussion of how these tests inadequately protect confrontation rights, see *infra* notes 321-41 and accompanying text.

late the dictates of *Bruton*.[40] Part V also discusses the legal and practical consequences of such a rule and argues that the unacceptable risk to the constitutional right to confrontation posed by partial redactions should not be tolerated in the name of judicial economy or convenience.[41]

II. BACKGROUND

A. *The Road to* Bruton

The Supreme Court's decision in *Bruton* expressly overturned its earlier ruling in *Delli Paoli v. United States*.[42] In *Delli Paoli*, the Court considered the special situation created when the proof against one defendant in a joint trial consists of a confession that also implicates the other jointly tried co-defendant.[43]

In that case, Delli Paoli had been accused of participating in an unlawful conspiracy.[44] Delli Paoli's co-defendant's confession was admitted at their joint trial.[45] In his confession, Delli Paoli's co-defendant implicated Delli Paoli in the unlawful conspiracy.[46] The Court acknowledged that the co-defendant's confession was not admissible evidence against Delli Paoli.[47] According to the Court, the issue was whether the jury could be expected to follow the trial

40. For a further discussion of this Article's recommendation that courts adopt a per se rule prohibiting the use of neutral pronoun or symbol redactions, see *infra* notes 342-86 and accompanying text.

41. For a further discussion of the legal and practical consequences of a per se rule, see *infra* notes 342-86 and accompanying text.

42. 352 U.S. 232 (1957).

43. *See id.* at 242-43.

44. *See id.* at 233. He was specifically charged with conspiring to deal unlawfully in alcohol. *See id.*

45. *See id.* A total of five defendants were tried jointly for the conspiracy. *See id.*

46. *See id.* at 243-46.

47. *See id.* at 239. Eight years before *Delli Paoli* was decided, the Court had ruled that statements made by conspirators after the termination of the alleged conspiracy are only admissible against the declarant. *See* Krulewitch v. United States, 336 U.S. 440, 442-43 (1949) (stating that hearsay declarations attributed to co-conspirator, not made "pursuant to and in furtherance of objectives of the conspiracy," but made "after those objectives either had failed or had been achieved" are inadmissable). Such statements are inadmissible hearsay against alleged co-conspirators. *See id.* (distinguishing statements made in furtherance of criminal undertaking); *cf.* FED. R. EVID. 801(d)(2)(E) (providing that statements made by co-conspirators of party are not hearsay if made during course of, or in furtherance of, conspiracy). The *Krulewitch* Court rejected the Government's contention that after the completion of a conspiracy, there will always be an implicit subsidiary of the conspiracy based upon an implied agreement to conceal. *Krulewitch*, 336 U.S. at 443 (retaining as prerequisite to admissibility that statement be made "in furtherance of the objectives of a going conspiracy").

court's instruction that the co-defendant's confession was only to be considered against the declarant.[48]

The *Delli Paoli* Court concluded that it could "fairly proceed on the basis that the jury followed these instructions."[49] The Court noted a number of considerations to support its conclusion. First, the Court praised the substance of the limiting instruction by characterizing it as "an emphatic warning that [the co-defendant's confession] was to be considered solely in determining the guilt of [the declarant] and not in determining the guilt of any other defendant."[50] Second, Justice Burton, writing for the majority, found it significant that the co-defendant's confession was offered into evidence at the close of the Government's case.[51] Third, the Court believed that the jury's ability to abide by the limiting instruction was enhanced because the alleged conspiracy was relatively simple in character and the jury was not given a multiplicity of limiting evidentiary instructions.[52] Fourth, the Court stated that "[t]he separate interests of each defendant were emphasized throughout the trial."[53] Fifth, the Court noted that the co-defendant's confession "merely corroborated what the Government already had established."[54] Finally, the Court observed that there was nothing in the record to indicate "that the jury was confused or that it failed to follow the court's instructions."[55]

Notably, the Court decided *Delli Paoli* without reference to the

48. *See Delli Paoli*, 352 U.S. at 239 ("The issue here is whether . . . the court's instructions . . . provided petitioners with sufficient protection so that the admission of [co-defendant's] confession . . . constituted reversible error."). Determination of this issue depends on "whether the instructions were sufficiently clear and whether it was reasonably possible for the jury to follow them." *Id.*

49. *Id.* at 241.

50. *Id.* at 234.

51. *See id.* at 241-42 (indicating that timing made it easier for jury to separate confession from other testimony).

52. *See id.* at 241 (noting that simplicity of conspiracy made each defendant's role readily apparent).

53. *Id.* The Court quoted the trial court's instructions that individual proof was required to convict each defendant. *See id.* at 242 n.7 (recognizing lower court's attempt to protect defendant's separate interests). Additionally, the Court noted that none of the defendants requested a separate trial. *See id.* at 241 (emphasizing separate interests of defendants). Delli Paoli did, however, request that all references to himself be deleted from his co-defendant's confession. *See id.* at 233 (noting that trial court refused to eliminate references to Delli Paoli from confession).

54. *Id.* at 242.

55. *Id. See generally* Comment, *Post-Conspiracy Admissions in Joint Prosecutions—Effectiveness of Instructions Limiting the Use of Evidence to One Co-defendant*, 24 U. CHI. L. REV. 710, 710-14 (1957) (critiquing *Delli Paoli* and discussing views regarding jury's ability to follow limiting instructions and role of severed trials).

petitioner's Sixth Amendment right to confrontation.[56] Delli Paoli alleged simply that the trial court erred by admitting his co-defendant's statement, when it was not rightfully admissible against Delli Paoli.[57] The Court's analysis centered upon the efficacy of limiting jury instructions in this context.[58] The *Delli Paoli* opinion did not delve into the Confrontation Clause implications presented by the possibility that the jury might fail to follow those instructions.[59]

Eight years after *Delli Paoli*, however, the Confrontation Clause figured predominately in two important Supreme Court decisions.[60] In *Pointer v. Texas*,[61] the Court confirmed that the right to

56. *See* David E. Seidelson, *The Confrontation Clause and the Supreme Court: Some Good News and Some Bad News*, 17 HOFSTRA L. REV. 51, 54 (1988) (noting lack of reference to Confrontation Clause by both majority and dissent in *Delli Paoli*); Mark E. Sharp, *Military Rule of Evidence 804(b)(3)'s Statement Against Penal Interest Exception: Can the Rule Stand on its Own?*, 130 MIL. L. REV. 77, 84 (1990) ("There was no discussion in . . . *Delli Paoli* about the [C]onfrontation [C]lause.").

In fact, the co-defendant's failure to take the witness stand was not an ingredient in the petitioner's appeal. The confessing co-defendant's decision to not take the stand at trial was never discussed in the context of its impact on the petitioner's confrontation rights. *See Delli Paoli*, 352 U.S. at 239-43 (focusing instead on level of protection court's instruction afforded Delli Paoli).

57. *See Delli Paoli*, 352 U.S. at 233 (framing issue before Court).

58. *See id.* at 239 (focusing on clarity of instruction and possibility of jury following it).

59. For a further discussion of the lack of Confrontation Clause analysis in *Delli Paoli*, see *supra* note 56 and accompanying text. It is difficult to account for the lack of Confrontation Clause analysis in *Delli Paoli*. One possibility is that in 1957, when *Delli Paoli* was decided, the Supreme Court had not yet formally pronounced that the Sixth Amendment right of an accused to confront witnesses against him included the right to cross-examine those witnesses. That pronouncement came in 1965. *See* Pointer v. Texas, 380 U.S. 400, 404 (1965) (stating that right of cross-examination is part of right to confrontation). For a further discussion of *Pointer*, see *infra* notes 61-63 and accompanying text. Prior to *Pointer*, the Court had recognized that cross-examination was an essential right. *See* Alford v. United States, 282 U.S. 687, 692 (1931) ("Cross-examination of a witness is a matter of right."); Kirby v. United States, 174 U.S. 47, 55-56 (1899) (stating that defendant is entitled to cross-examine witnesses under Sixth Amendment); The Ottawa, 70 U.S. (3 Wall.) 268, 271 (1865) ("Cross-examination is the right of the party against whom the witness is called, and the right is a valuable one . . . ."). Many of the Court's early discussions of the right to cross-examine, however, tied that right to the Fifth Amendment right to due process of law. *See* Wilner v. Committee on Character and Fitness, 373 U.S. 96, 104 (1963) ("We think the need for confrontation is a necessary conclusion from the requirements of procedural due process . . . ."); Greene v. McElroy, 360 U.S. 474, 496 (1959) (noting ancient roots of confrontation and cross-examination requirements); *In re* Oliver, 333 U.S. 257, 273 (1948) ("A person's right to . . . an opportunity to be heard in his defense—a right to his day in court—[is] basic in our system of jurisprudence; and [this] right[ ] include[s] . . . a right to examine the witnesses against him . . . .").

60. *See* Douglas v. Alabama, 380 U.S. 415, 418 (1965) (finding that right to confrontation was not waived through failure to make sufficient objection to alleged confession); *Pointer*, 380 U.S. at 404 ("The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those

cross-examine witnesses was a crucial component of the Sixth Amendment right to confront one's accusers.[62] *Pointer* also established that this guarantee was applicable to the states by virtue of the Fourteenth Amendment.[63]

On the same day it decided *Pointer*, the Supreme Court decided another landmark Confrontation Clause case, *Douglas v. Alabama*.[64] In *Douglas*, the defendant was tried separately from his alleged accomplice, who had previously been tried and convicted.[65] At Douglas's trial, the prosecutor called Douglas's accomplice to the witness stand.[66] At the time, the accomplice had not yet been sentenced upon his conviction and intended to appeal.[67] Consequently, despite directions to the contrary from the trial judge, the accomplice asserted his privilege against self-incrimination and refused to answer any of the prosecutor's questions.[68]

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liberties and safeguards that confrontation was a fundamental right essential to a fair trial").

61. 380 U.S. 400 (1965).

62. *Id.* at 404. In the Court's view, it was merely confirming a theretofore accepted principle of law. *See id.* The Court stated: "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him." *Id.* Nevertheless, in the eyes of most commentators, *Pointer*'s confirmation of this principle was a significant milestone. *See* Joanne A. Epps, *Passing the Confrontation Clause Stop Sign: Is All Hearsay Constitutionally Admissible?*, 77 KY. L.J. 7, 22-24 (1989) (stating that *Pointer* is best known for holding Confrontation Clause applicable to states and right to cross-examine subsumed under Confrontation Clause); Haddad & Agin, *supra* note 22, at 240 (noting *Pointer* declared "the right of cross-examination is included in the right of an accused in a criminal case to confront the witness against him"). Most significantly, the *Bruton* Court regarded *Pointer* as the point in time at which the Court confirmed that the Sixth Amendment's Confrontation Clause embodied the right to cross-examination. Bruton v. United States, 391 U.S. 123, 126 (1968) (noting that major underlying reason for Confrontation Clause is to give defendant opportunity to cross-examine adverse witnesses).

63. *Pointer*, 380 U.S. at 403 (noting that right to confrontation is "fundamental" right). At Pointer's trial for robbery, the prosecutor offered into evidence the transcript of the alleged victim's testimony from the preliminary hearing. *See id.* at 401. The victim did not testify at trial. *See id.* Pointer claimed that the introduction of the preliminary hearing testimony was a violation of his confrontation rights. *See id.* Having decided that Pointer had a constitutional right to cross-examine the witnesses against him at his state court trial, the Court found that this right was violated by the introduction of the earlier testimony. *See id.* at 407-08 (holding that right to confrontation is determined by same standard in both state and federal proceedings).

64. 380 U.S. 415 (1965).

65. *See id.* at 416. The petitioner, Douglas, and his accomplice were tried separately in Alabama's circuit court on charges of assault with intent to murder. *See id.*

66. *See id.*

67. *See id.* at 416 & n.1.

68. *See id.* According to the facts as recited in the *Douglas* opinion, the accomplice gave only his name and address on the stand and refused to answer any ques-

The trial judge declared the accomplice a hostile witness and permitted the prosecutor to conduct a "cross-examination."[69] During this examination, the prosecutor was permitted to confront the accomplice with his confession.[70] The accomplice continued in his refusal to answer any questions.[71] Nonetheless, during the course of his questioning, the prosecutor read the confession in its entirety.[72] This proved problematic for Douglas because the confession directly incriminated him.[73] The prosecutor's questions were, of course, not evidence in the case.[74] Nonetheless, the Supreme Court found that they violated Douglas's right to confront his accusers because the jury may have inferred from the questions that the accomplice did in fact make the statement.[75] Moreover, the Court found that the assertion of the privilege against self-incrimination "created a situation in which the jury might improperly infer both that the statement had been made and that it was true."[76]

Together, *Pointer* and *Douglas* paved the way for the overruling of *Delli Paoli*. While the *Delli Paoli* Court felt confident in the jury's ability to follow instructions ordering it not to consider one defendant's confession against the other, it did not balance this against the risk of infringing upon the confrontation rights of the nonconfess-

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tions concerning the alleged crime. *See id.* Because of his conviction, the trial judge ruled that the accomplice could not rely on the privilege and ordered him to answer. *See id.* Nonetheless, the accomplice persisted in his refusal to testify. *See id.*

69. *See id.*

70. *See id.*

71. *See id.*

72. *See id.* (noting that prosecutor read confession under "guise of cross-examination to refresh [accomplice's] recollection").

73. *See id.* at 417 (noting that statements read by prosecutor "named the petitioner as the person who fired the shotgun blast which wounded the victim"). The accomplice's confession included the following statements:

> Jesse Douglas was in the back seat with the automatic shotgun that belongs to B.F. Jackson and had it loaded with buckshot. He rolled down the window and when we passed these trucks he shot the lead truck as we passed them heading back north as they were coming south.

Id. at 417-18 n.3. In fact, the accomplice's confession provided the only direct evidence that Douglas fired the shotgun. *See id.* at 419.

74. *See id.* The Court stated that "[a]lthough the Solicitor's reading of [the accomplice's] alleged statement, and [the accomplice's] refusals to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that [the accomplice] in fact made the statement . . . ." *Id.*

75. *See id.* (noting that because solicitor was not witness, he could not be cross-examined).

76. *Id.*

ing defendant.[77]

Pointer and *Douglas* elevated the importance of the right to cross-examination contained within the Sixth Amendment right to confrontation.[78] Moreover, *Douglas* held that a defendant's right to confront his accuser was compromised even when the accomplice's accusations, though read to the jury, were not technically admitted into evidence.[79] In comparison to the *Delli Paoli* Court, the *Douglas* Court seemed far less confident in the jury's ability to follow a limiting instruction to disregard incriminating evidence.[80] With the precious confrontation rights of an accused hanging in the balance, the *Douglas* Court found that the risk of the jury's improper consideration of an accomplice's accusations was intolerable.[81]

During the same time period, but in a different context, the Supreme Court expressed more doubt about the ability of jurors to put incriminating evidence out of their minds.[82] In *Jackson v. Denno*,[83] the Court considered whether it was realistic to expect a jury to both disregard the substance of a defendant's confession while adjudging its voluntariness and to disregard that confession if it determined that it was involuntarily obtained.[84] In striking down a New York Rule of Criminal Procedure, the Court held that a criminal defendant was entitled to a fair hearing and a reliable determination of the voluntariness of his confession.[85]

77. For a discussion of the lack of Confrontation Clause analysis in *Delli Paoli*, see *supra* note 56 and accompanying text.

78. *See* Epps, *supra* note 62, at 19-30 (reviewing historical evolution of Confrontation Clause interpretation); Sharp, *supra* note 56, at 85 (stating that after *Douglas* it appeared clear that incriminating statements "could not be admitted into evidence at a criminal trial against anyone but the declarant").

79. *Douglas*, 380 U.S. at 419 (noting prejudicial impact statement may likely have had on jury).

80. *Id.* (noting possibility that jury could make improper inferences).

81. *Id.* (noting that possible inferences drawn by jury regarding solicitor's reading of confession could not be tested by cross-examination).

82. *See* Jackson v. Denno, 378 U.S. 368 (1964) (identifying as naive "assumption that prejudicial effects can be overcome by instructions to jury").

83. 378 U.S. 368 (1964).

84. *Id.* at 389 ("It is difficult, if not impossible, to prove that a confession which a jury has found to be involuntary has nevertheless influenced the verdict or that its finding of voluntariness . . . was affected by the other evidence showing the confession was true.").

85. *See id.* at 376-77 (reaffirming constitutional right to fair hearing and reliable determination of confession's voluntariness without regard to truth or falsity of confession). New York's Rules of Criminal Procedure required judges to make a preliminary determination regarding the voluntariness of a confession offered by the prosecution and to exclude the confession if "in no circumstances could the confession be deemed voluntary." *See id.* at 377. Where there was a fair question as to voluntariness, however, the judge was required to leave the determination of voluntariness and truthfulness to the jury. *See id.*

Necessary to this holding was the finding that New York's practice of leaving the question of voluntariness to the jury created two unacceptable risks.[86] First, the Court pointed to the danger that matters pertaining to the defendant's guilt could influence the jury's determination of voluntariness.[87] Second, the Court questioned whether the jury could be relied upon to disregard a confession it deemed involuntary.[88] Both risks posed substantial threats to the defendant's due process right against the use of an involuntarily obtained confession at trial.[89] Most significantly, *Jackson* recognized that, under some circumstances, juries may be unable to obey the instructions of a trial court.[90]

The *Delli Paoli* Court believed that a lack of confidence in the jury's ability to follow instructions would render the jury system senseless.[91] Ten years later, the Court appeared ready to go forward and adjudicate constitutional issues through the prism of the reality that a jury may be unable to follow limiting instructions. In the decade following *Delli Paoli*, the Supreme Court elevated the importance of the Sixth Amendment right to confrontation, questioned the premise that juries always carry out the instructions of trial courts and paved the way to *Bruton*.[92]

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86. *See id.* at 383.

87. *See id.* (noting that danger of this occurring "is sufficiently serious to preclude [the jury's] unqualified acceptance . . . regardless of whether there is or is not sufficient other evidence to sustain a finding of guilt"). The Court's chief concern was that, in cases in which the proof against a defendant was strong, the jury would conclude that his or her confession was true and would then be unable to render a decision regarding voluntariness that was divorced from the perceived truthfulness of the confession. *See id* at 384-85 (stating that reliability of confession "has nothing to do with its voluntariness").

88. *See id.* at 388 (noting that under New York procedure, fact of defendant's confession is firmly placed in jury's mind because it heard confession, is in position to judge truthfulness and has been instructed to judge its voluntariness).

89. *See id.* at 376-77 (finding New York procedure allowing jury to determine voluntariness of confession violated Due Process Clause of Fourteenth Amendment).

90. *See id.* at 388-89 (posing rhetorical question concerning effects of jury finding confession involuntary). Perhaps most telling is that the majority in *Jackson* cited the *Delli Paoli* dissent as support for the proposition that, despite limiting instructions, jurors may be unable to put pieces of evidence out of their minds. *See id.* at 388 n.15 ("The 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.") (citing Delli Paoli v. United States, 352 U.S. 232, 248 (1957) (Frankfurter, J., dissenting)).

91. *Delli Paoli*, 352 U.S. at 242 ("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.").

92. *See* Barber v. Page, 390 U.S. 719, 721-23 (1968) (holding that defendant's right to confront witnesses at his trial was violated by admission of transcript of

B. Bruton

Bruton and his co-defendant, Evans, were jointly tried for the federal charge of armed postal robbery.[93] At the trial, a postal inspector testified that Evans orally confessed to the robbery and indicated that Bruton was his accomplice.[94] Evans did not testify at the trial and, consequently, was not subject to cross-examination.[95] The jury convicted both defendants and the United States Court of Appeals for the Eighth Circuit denied Bruton's appeal.[96] Relying upon *Delli Paoli*, the Eighth Circuit held that the admission of Evans's confession at the joint trial was not error because the trial court had instructed the jury to consider the confession exclusively against Evans.[97] The Supreme Court granted certiorari specifically to reconsider *Delli Paoli*.[98]

Upon reconsideration, the *Bruton* Court overruled *Delli Paoli*.[99] Justice Brennan, writing for the *Bruton* majority, commenced his analysis by admitting that the basic premise of *Delli Paoli* had been subsequently repudiated by the Court.[100] According to Justice Brennan, in decisions subsequent to *Delli Paoli*, the Court aban-

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preliminary hearing testimony of witness when prosecution made no effort to secure witness's presence at trial). *Barber* confirmed the Court's commitment to the protections offered by the Confrontation Clause and was decided just one month before *Bruton*. *Id.*

93. *See* Bruton v. United States, 391 U.S. 123, 124 (1968).

94. *See id.*

95. *See id.* at 127-28.

96. *See id.* at 124-25 (denying appeal through reliance on *Delli Paoli*). The Eighth Circuit reversed Evans's conviction on the ground that his oral confession was obtained in violation of his *Miranda* rights. *See id.* at 124 & n.1. In *Miranda v. Arizona*, 384 U.S. 436, 467 (1964), the Court required the issuance of prophylactic warnings to those being subjected to custodial interrogation. *Miranda* was decided one week before the commencement of Evans and Bruton's trial. The Eighth Circuit held that *Miranda* was controlling on the question of the admissability in evidence of the postal inspector's testimony as to Evans' admissions. *See Bruton*, 391 U.S. at 124 n.1.

97. *See Bruton*, 391 U.S. at 124-25 (noting that Evans's confession was inadmissable hearsay against Bruton).

98. *See id.* at 125. After the Court granted certiorari, the Solicitor General, probably fearful of the consequences of an overruling of *Delli Paoli*, requested that Bruton's conviction be reversed and the case remanded for a new trial. *See id.* The Solicitor General argued that because Evans' confession was ultimately suppressed, and upon his retrial, Evans was acquitted, even under *Delli Paoli*, Bruton should receive a new trial. *See id.* at 126-27. Nevertheless, the Court believed a reconsideration of *Delli Paoli* was due. *See id.* at 126.

99. *Id.* at 126.

100. *Id.* ("The basic premise of *Delli Paoli* was that it is 'reasonably possible for the jury to follow' sufficiently clear instructions to disregard the confessor's extrajudicial statement that his codefendant participated with him in committing the crime.").

doned the presumption that jurors are capable of carrying out all clearly delivered judicial instructions.[101]

First, the Court pointed to *Douglas*, which the Court deemed to involve a scenario similar to a *Delli Paoli* and *Bruton* situation. In *Douglas*, the Court reversed the defendant's conviction primarily because of a concern that the jury would not follow the court's instructions that the prosecutor's questions were not evidence.[102] Douglas's confrontation rights were violated because the prosecutor's questions contained the substance of his nontestifying co-defendant's accusations against him and he was unable to cross-examine his co-defendant on the statements.[103] The *Bruton* Court reasoned that the violation of Bruton's confrontation rights was even more compelling because his co-defendant's confession was admissible evidence, albeit only against Evans, and played a legitimate role in the trial.[104] The jury was simply asked to only consider the evidence against one of the two defendants on trial.[105] Given that this evidence bore directly on the guilt of the nonconfessing defendant, the Court found that the jury had been asked to do that which was nearly impossible.[106] Moreover, the prejudice was compounded because an accomplice's accusations are inevitably suspect.[107] The Court held that it is incorrect to assume that a jury will

101. *See id.* (noting repudiation of *Delli Paoli* premise). Justice Brennan referred to the *Douglas* and *Jackson* decisions. *See id.* at 126-29 (discussing rights guaranteed to defendant by Sixth Amendment). In a footnote, Justice Brennan proceeded to list several "cases [that] have refused to consider an instruction as inevitably sufficient to avoid the setting aside of convictions" since *Delli Paoli* was decided. *See id.* at 129 n.4 (including reference to both federal and state decisions).

102. Douglas v. Alabama, 380 U.S. 415, 419 (1965) (expressing concern over fact that Solicitor's reading, which was not subject to cross-examination, "may well have been the equivalent in the jury's mind of testimony that [Douglas's accomplice] in fact made the statement").

103. *See id.* (noting inability to cross-examine solicitor regarding confession). For a further discussion of the Court's concerns over the solicitor reading the confession at trial, see *supra* notes 73-81 and accompanying text.

104. *Bruton*, 391 U.S. at 127 (noting that because testimony regarding Evans's confession was actually in evidence and, therefore, properly before jury to some extent, likelihood that "jury would believe Evans made the statements and that they were true" is enhanced).

105. *See id.*

106. *See id.* at 128 (noting that assumption that "encroachment on the right to confrontation could be avoided by the instruction to the jury to disregard the inadmissable hearsay evidence" has been repudiated). The Court stated that the "limiting instruction is a recommendation to the jury of a mental gymnastic which is beyond . . . their powers." *Id.* at 132 n.8.

107. *See id.* at 136 (noting that credibility of incriminating statements 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").

follow instructions to disregard the "powerfully incriminating extrajudicial statements of a co-defendant who stands accused side-by-side with the defendant."[108]

The *Bruton* Court also relied heavily upon the *Jackson* holding regarding jury determinations of the involuntariness of statements.[109] The Court adopted the reasoning of the California Supreme Court in a case decided after *Jackson* that, if a jury could not be relied upon to disregard an involuntary confession, there was no reason to expect it could disregard the portions of a co-defendant's statement that incriminate a jointly tried defendant.[110]

By the time the Court decided *Bruton*, it apparently had determined that the jury system could survive a holding that there are some contexts in which there is a risk that jurors are unable to follow a court's instructions.[111] Additionally, the *Bruton* Court was will-

108. *Id.* at 135-36 (recognizing that, in some contexts, great risk exists that jury will not follow instructions).

109. *Id.* at 128 (providing example in which assumptions that confrontation rights could be protected by limiting instruction has been repudiated). For a further discussion of *Jackson*, see *supra* notes 82-90 and accompanying text.

110. *See Bruton*, 391 U.S. at 130-31 ("If it is a denial of due process to rely on a jury's presumed ability to disregard an involuntary confession, it may also be a denial of due process to rely on a jury's presumed ability to disregard a codefendant's confession implicating another defendant . . . ."). In a concurring opinion in *Bruton*, Justice Stewart, who dissented in *Jackson*, agreed that *Jackson* compelled the result in *Bruton*. *See id.* at 137 (Stewart, J., concurring) (disagreeing with *Jackson* decision but agreeing that it "compels the overruling of *Delli Paoli*"). Justice Stewart went on to state that because of the serious implications for a defendant's right to confrontation, *Delli Paoli* should be overruled regardless of *Jackson*. *See id.* at 138 (Stewart, J., concurring) (noting that "an out-of-court accusation is universally conceded to be constitutionally inadmissable against the accused, rather than admissible for the little it may be worth").

As additional proof that the Court effectively repudiated the principles of *Delli Paoli*, the *Bruton* majority pointed to its 1966 approval of an amendment to Rule 14 of the Federal Rules of Criminal Procedure. *See id.* at 131-32 (noting that amendment provides for in camera inspection of confessions that government intends to introduce at trial); *see also* FED. R. CRIM. P. 14 (authorizing separate trials when joinder of defendants would cause prejudice for government or defendant). The Advisory Committee Notes acknowledge that limiting instructions may not sufficiently protect against the violation of a defendant's confrontation rights. *See Bruton*, 391 U.S. at 132 (noting that possible prejudice created by co-defendant confession may not be eliminated by limiting instructions).

111. *Bruton*, 391 U.S. at 129 ("'The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.'" (quoting Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring))); *id.* at 132 n.8 ("The limiting instruction . . . is a 'recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else.'" (quoting Nash v. United States, 54 F.2d 1006, 1007 (1932))). The Court did note, however, that many admissions of inadmissable evidence can be cured by limiting instructions. *See id.* at 135.

Justice White, the lone dissenter in *Bruton*, exhibited more faith in jurors stating that "[t]here are good . . . reasons for distinguishing the codefendant's confes-

ing to live with the consequences that fewer joint trials would tax already scarce judicial resources and could result in public inconvenience.[112] According to the Court, this result was simply the price to be paid for "fundamental principles of constitutional liberty."[113]

C. *The Post-*Bruton *Debate Over Contextual Implication Analysis*

Nineteen years elapsed between *Bruton* and the Court's decision in *Richardson.*[114] The *Bruton*-related jurisprudence during this period was dominated by the debate over whether or not to adopt

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sion from that of the defendant himself and for trusting in the jury's ability to disregard the former when instructed to do so." *Id.* at 139 (White, J., dissenting). White reasoned that because a co-defendant's accusations are obviously untrustworthy, a jury would have no trouble disregarding them. *See id.* at 142 (White, J., dissenting) (noting that jury can be told and can understand that co-defendant confessions are unreliable).

112. *Id.* at 134-35 (noting that joint trials conserve funds, diminish inconvenience and avoid delays, but finding defendant's constitutional rights more compelling). For a discussion of the issue of joint trials and judicial economy, see *infra* notes 367-85 and accompanying text.

113. *Bruton*, 391 U.S. at 135 ("'We secure greater speed, economy and convenience . . . at the price of fundamental principles of constitutional liberty. That price is too high.'" (quoting People v. Fisher, 164 N.E. 336, 341 (N.Y. 1928))). The Court noted that some jurisdictions have required the deletion of references to co-defendants "where practicable." *Id.* at 134 n.10. It also noted that there were limits to the redaction alternative, especially where oral confessions are offered into evidence. *See id.* (stating that redaction is impractical when confession is introduced as oral testimony). In his dissenting opinion, Justice White also discussed the feasibility of the redaction method. *See id.* at 143 (White, J., dissenting) (providing possible requirements of effective deletion of extrajudicial confessions). White criticized the majority for not providing post-*Bruton* guidelines and options for the federal courts. *See id.* (White, J., dissenting) (stressing "practical difficulties of separate trials and their potential unfairness"). He suggested that effective deletions of incriminating references would be an acceptable tactic and characterized effective deletion as "not only omission of all direct and indirect inculpations of co-defendants but also of any statement that could be employed against those defendants once their identity is otherwise established." *Id.* (White, J., dissenting). Justice White cautioned, however, that a redaction effort would be unacceptable if it resulted in the distortion of the statements to the detriment of the confessor or the Government. *See id.* (White, J., dissenting).

The *Bruton* Court's references to redacted confessions has been cited to support both their use and limitations on their use. *Compare* United States v. Gaines, 563 F.2d 1352, 1356 (9th Cir. 1977) ("*Bruton* . . . fully supports the view that the writing itself would have been admissible where the prejudicial portions have been excised."), *and* United States v. Fleming, 504 F.2d 1045, 1050 (7th Cir. 1974) (finding that *Bruton* Court suggested redaction as option to protect Sixth Amendment rights of co-defendants), *with* Clark v. Maggio, 737 F.2d 471, 476 (5th Cir. 1984) ("The *Bruton* opinion itself implied that redaction might be inadequate to allay the [S]ixth [A]mendment concerns that prompted the decision.").

114. *Compare Bruton*, 391 U.S. at 135, *with* Richardson v. Marsh, 481 U.S. 200, 211 (1987).

"contextual implication analysis."[115] To truly understand the evolution of the *Bruton* doctrine, it is necessary to understand contextual implication.[116]

Contextual implication analysis is a process for determining whether the admission of a co-defendant's confession at a joint trial is consistent with *Bruton*.[117] Advocates of contextual implication analysis examine the confession in the context of all of the evidence admitted at trial.[118] They then determine whether, in this context, the confession incriminates any jointly tried defendant or defendants.[119]

As an illustration, let us revisit our hypothetical co-defendants, Dick and Jane.[120] If Jane's confession states that she robbed the bank along with Dick, on its face, her confession incriminates Dick. Assuming Jane does not take the stand, *Bruton* precludes the admission of her confession at their joint trial.[121] A more difficult ques-

115. *Compare* United States v. Belle, 593 F.2d 487, 495 (3d Cir. 1979) (finding that evidentiary linkage or contextual implication may not be utilized to convert inadmissible statement into *Bruton* admissible statement), *with* Hodges v. Rose, 570 F.2d 643, 647 & n.9 (6th Cir. 1978) (stating that judge must "Brutonize" statement early in trial and "[s]uch an assessment may require consideration of other evidence."). *See generally* James B. Haddad, *Post-*Bruton *Developments: A Reconsideration of the Confrontation Rationale, and a Proposal for a Due Process Evaluation of Limiting Instructions*, 18 AM. CRIM. L. REV. 1, 21 n.101 (1980) (providing examples of and discussing competing views of contextual implication analysis debate).

116. *See Richardson*, 481 U.S. at 206 (noting that not all courts of appeals have adopted "evidentiary linkage" or "contextual implication" approach). Contextual implication analysis is also frequently referred to as "evidentiary linkage" analysis. Because the terms are synonymous, they are used interchangeably in this Article.

117. *See id.*

118. *See id.*

119. *See id.*

120. For the complete facts of the hypothetical scenario, see *supra* notes 9-12 and accompanying text.

121. A few years after it decided *Bruton*, the Supreme Court confirmed that if the declarant testifies and is subject to cross-examination at trial, admission of the out-of-court statements does not violate the Confrontation Clause. *See* Nelson v. O'Neil, 402 U.S. 622, 626 (1971) ("'[T]here is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination.'" (quoting California v. Green, 399 U.S. 149, 158 (1970))). In *O'Neil*, the co-defendant's confession contained incriminating references to the other co-defendant and was admitted at their joint trial. *See id.* at 624. The declarant testified at trial and denied making the alleged out-of-court statement implicating the other co-defendant. *See id.* This denial, combined with the fact that the co-defendant testified favorably to the nonconfessing co-defendant concerning the underlying facts, the Court found no *Bruton* error despite the fact that on the witness stand the co-defendant denied making the alleged confession. *See id.* at 629-30 (noting futility of cross-examination). The Court rejected the defendant's claim that one could not effectively cross-examine a witness about a statement that he denies making. *See id.* at 627-29. *But see* United States v. Brown, 699 F.2d 585, 592-93 (2d Cir. 1983) (distinguishing *O'Neil* and finding *Bruton* error

tion is presented when Jane's confession is redacted by the deletion of Dick's name, so that it no longer incriminates Dick. Depending upon the type of redaction used, it may now implicate "X," Jane's "friend" or "another." Under contextual implication analysis, the court would examine whether or not other evidence admitted at trial might have revealed the identity of "X," "friend" or "another." For example, suppose Jane confessed that "my friend and I had pizza at noon and then went next door and robbed the bank." Evidence that Dick ate pizza with Jane at noon on the day in question would suggest that the friend was Dick. Under contextual implication analysis, admission of the redacted confession under these circumstances would be deemed a violation of *Bruton*. In other words, even when reference to the name of another defendant is deleted from the face of the confession, courts adopting contextual implication analysis will find a *Bruton* error if the confession incriminates that defendant when considered in the context of other evidence.[122]

Some courts have rejected contextual implication analysis claiming that as long as the face or four corners of the confession

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even though confessing co-defendant testified at trial when co-defendant denied making confession and where defendants did not share common defense). *See generally* Slawek v. United States, 413 F.2d 957, 964 (8th Cir. 1969) (listing cases in which there was no *Bruton* error because confessing co-defendant took stand and was subject to cross-examination); Haddad, *supra* note 115, at 9-16 (discussing inapplicability of *Bruton* when co-defendant testifies).

One commentator has noted that the fact that the confessing co-defendant testifies at trial does not always cure the error of admitting his or her confession at a joint trial. *See id.* at 10 (stating that most jurisdictions find reversible error when no limiting instruction is given, even if confessing co-defendant testifies). Even if there is no Confrontation Clause violation, the confession is still not admissible against the non-confessing co-defendant pursuant to the hearsay rules, and the jury is no more likely to obey an instruction to limit its use. *See id.* (noting hearsay nature of confession). For this and other reasons, one commentator has argued that *Bruton* should have been decided on procedural due process, rather than confrontation grounds. *See id.* at 15 (stating that future *Bruton* problems could have been avoided if Court had used procedural due process approach). A different twist on this issue was presented in *United States v. Hill*, 901 F.2d 880 (10th Cir. 1990). In *Hill*, the confessing co-defendant indicated that she would testify and then changed her mind after the introduction of her unredacted confession. *See id.* at 881-82. Because the confession clearly implicated Hill, the court found *Bruton* error despite the prosecutor's argument that such a ruling might invite collusion amongst co-defendants. *See id.* at 883-84 (noting that premise of *Bruton* is that "collusive behavior cannot be assumed to exist between defendants and co-defendants").

122. *See, e.g.*, Hodges v. Rose, 570 F.2d 643, 647 (6th Cir. 1978) (providing that assessment of admissibility may include consideration of other evidence to determine effectiveness of redaction); Serio v. United States, 401 F.2d 989, 990 (D.C. Cir. 1968) (noting inevitable association between defendant and "other man" segment of co-defendant's confession).

do not incriminate a jointly tried defendant, the court need look no further.[123] According to this viewpoint, *Bruton* is not violated even when other evidence links a defendant to the redacted confession of his co-defendant.[124]

A different dilemma is presented if Jane's confession is redacted to delete all references to anyone other than Jane. In this form, the confession makes it appear as though there was only a single perpetrator.[125] Contextual implication analysis potentially plays a role here as well. On its face, the redacted confession may incriminate no one but the confessor. Nonetheless, when placed in the context of other evidence, the confession may tend to incriminate the nonconfessing defendant as well.[126] The incrimination could take the form of corroboration of some of the prosecution's proof[127] or of discrediting the defense.[128] In either event, the co-defendant's confession, while not including any facial reference to accomplices, may nonetheless enhance the prosecution's case against jointly tried defendants.

On the one hand, courts adopting contextual implication analysis would have disallowed the admission of Jane's fully redacted confession if, when combined with other evidence, it incriminated Dick.[129] On the other hand, rejection of contextual implication analysis would have resulted in the admission of the redacted confession even though, in the context of other evidence, it incriminated Dick.[130]

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123. *See, e.g.*, United States v. Satterfield, 743 F.2d 827, 849 (11th Cir. 1984) (finding that admission of statement violates *Bruton* only if statement is clearly inculpatory when viewed alone).

124. *See id.*

125. This form of redaction, while offering greater protection of the confrontation rights of the nonconfessing defendant, is not always feasible.

126. For a discussion of *Richardson* as an example of contextual implication through corroborative evidence, see *infra* notes 134-87 and accompanying text.

127. Suppose for example, a bank teller testifies that he or she was confronted with a sawed-off shotgun. If Jane's confession states that the robbery was performed with a sawed-off shotgun, her confession corroborates the witness' testimony. The corroboration adds credibility to the entire testimony of that witness.

128. Suppose Dick testifies that they used a toy gun. Jane's confession stating that she used an operable shotgun would discredit his defense. *Cf.* United States v. Jimenez, 77 F.3d 95, 98-99 (5th Cir. 1996) (stating that nontestifying co-defendant's statement rebutted defendant's trial testimony).

129. *See, e.g.*, Marsh v. Richardson, 781 F.2d 1201, 1210-13 (6th Cir. 1986) (discussing contextual implication analysis and impact and role of other evidence upon analysis), *rev'd*, 481 U.S. 200 (1987).

130. *See, e.g.*, United States v. Belle, 593 F.2d 487, 493 (3d Cir. 1979) (holding that *Bruton* is implicated only when nontestifying co-defendant's confession directly implicates defendant on its face); United States v. Cleveland, 590 F.2d 24, 28-

In the years between *Bruton* and *Richardson*, the United States Courts of Appeals were divided over the propriety of contextual implication analysis. A number of circuits chose to reject it.[131] Others believed that *Bruton* required them to adopt it.[132] The Supreme Court granted certiorari in *Richardson* to resolve the conflict among the circuits on the issue of contextual implication analysis.[133]

D. Richardson v. Marsh

In *Richardson*, three individuals, Marsh, Williams and Martin, were accused of murdering two people and assaulting a third.[134] On the night in question, Martin shot the assault victim, Knighton,

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29 (1st Cir. 1978) (holding that *Bruton* is satisfied as long as co-defendant's confession contains no direct or indirect references to other defendants).

131. *See* United States v. Satterfield, 743 F.2d 827, 849 (11th Cir. 1984) (stating test is whether out-of-court statement is directly implicating); United States v. Wright, 742 F.2d 1215, 1223 (9th Cir. 1984) (finding no *Bruton* violation); *Cleveland*, 590 F.2d at 28 (rejecting *Bruton* analysis in part).

The Third Circuit rejected contextual implication analysis when all references to the existence of others was deleted from the confession. *See Belle*, 593 F.2d at 495. In an earlier Third Circuit decision, the Third Circuit had used linkage analysis when the phrase "other fellows" was substituted for the names of co-defendants. *See* United States v. Lipowitz, 407 F.2d 597, 602-03 (3d Cir. 1969) (stating *Bruton* principle not applicable).

Prior to *Richardson*, the Second Circuit's position on contextual implication analysis was somewhat inconsistent. *Compare* United States v. Wilkinson, 754 F.2d 1427, 1435 (2d Cir. 1985) (finding no *Bruton* error because co-defendant's statement did not inculpate defendant without introduction of further independent evidence), *and* United States *ex rel.* Nelson v. Folette, 430 F.2d 1055, 1057-58 (2d Cir. 1970) (holding that co-defendant's confession did not, alone, connect defendant to crime), *with* United States v. Gonzalez, 555 F.2d 308, 315-17 (2d Cir. 1977) (looking at other evidence to find "well-nigh inevitable association" between defendant and accusations in co-defendant's confession).

132. *See* English v. United States, 620 F.2d 150, 152 (7th Cir. 1980) ("The introduction of a confession from which the names of co-defendants have been excised may violate the *Bruton* rule if in context the statement is clearly inculpatory of a co-defendant."); Hodges v. Rose, 570 F.2d 643, 647 (6th Cir. 1978) (explaining that statements by nontestifying co-defendants are inadmissible if there is "substantial risk" that jury would use statement in conjunction with other evidence to determine defendant's guilt); Serio v. United States, 401 F.2d at 990 (D.C. Cir. 1968) (finding well-nigh inevitable association of Serio as "other man" referred to in confession).

There was yet a third view on this issue. Under this view, a *Bruton* problem is created whenever testimony reveals to the jury that the police, Federal Bureau of Investigation (FBI) or other law enforcement officials have knowledge of the true identities of any parties whose names had been deleted from a co-defendant's confession. *See, e.g.*, Clark v. Maggio, 737 F.2d 471, 477 (5th Cir. 1984) (holding that jury might "readily infer that deleted name was that of co-defendant"); United States v. Danzey, 594 F.2d 905, 917-19 (2d Cir. 1979) (same).

133. Richardson v. Marsh, 481 U.S. 200, 201-02 (1987) (discussing split among circuits).

134. *Id.* at 202.

and killed Knighton's son and aunt.[135] Marsh and Williams were accused as accomplices and tried jointly for these crimes.[136]

At trial, Knighton testified that she and her four-year-old son were at her aunt's house when they were visited there by Marsh and Marsh's boyfriend, Martin.[137] According to Knighton, shortly after their arrival, Martin pulled out a gun, pointed it at her, her son and her aunt and began making accusations against the aunt.[138] Marsh allegedly then opened the door and admitted Williams, who entered carrying a gun.[139] Upon Williams's arrival, Martin forced the aunt upstairs and Williams went into the kitchen, leaving Marsh alone in the living room with Knighton and her son.[140] Knighton testified that, while alone with Marsh in the living room, she and her son attempted to flee, but were physically prevented from doing so by Marsh.[141] Shortly thereafter, Martin came back to the living room with Williams and the aunt.[142] Martin handed a paper bag to Marsh, and then Martin and Williams forced all three victims into the basement, where Martin shot them.[143] Upon his arrest, Williams confessed.[144]

Marsh's defense theory was that she was unaware of Martin and Williams's plans for the evening.[145] She claimed that even though she was with them, she did not share their intent.[146] The introduction of Williams's confession at their joint trial posed serious problems for Marsh's defense. In its original form, the confession related that, on the evening of the crimes, Martin and Marsh picked up Williams in Martin's car.[147] Williams confessed that he and Martin had a conversation in the car in which Martin disclosed his intention to rob the victims of substantial sums of money and to then "take them out."[148] Without doubt, Marsh's claim that she knew nothing of the others' intentions would be undermined by Williams placing Marsh in the car during the conversation about

135. *See id.*
136. *See id.* At the time of trial, Martin was a fugitive. *See id.*
137. *See id.*
138. *See id.*
139. *See id.*
140. *See id.*
141. *See id.*
142. *See id.*
143. *See id.*
144. *See id.* at 203.
145. *See id.* at 204.
146. *See id.*
147. *See id.* at 203.
148. *See id.* at 215.

the impending robbery and murder.[149]

Marsh objected to being tried jointly with Williams.[150] She argued that because Williams would not testify at the trial and could, therefore, not be cross-examined by her, a joint trial would violate her Sixth Amendment right to confrontation under *Bruton*.[151]

Marsh's objection to the joinder was overruled.[152] Instead, all references to Marsh were deleted from the confession thereby removing all references to the existence of a third perpetrator.[153] The redacted confession referred solely to the conduct of Martin and Williams.[154] The trial court resolved the alleged *Bruton* problem by redacting Williams's confession and delivering a limiting instruction to the jury not to consider Williams's confession when determining Marsh's guilt.[155]

Marsh, however, was not satisfied with the redactions. She pointed to the fact that, while Williams's confession no longer made reference to Marsh, Knighton testified that Martin and Marsh arrived together.[156] Wouldn't the jury infer that Marsh rode there with Martin and was, therefore, in a position to hear their conversation?[157] Clearly, Williams's confession detailing the conversation in the car still incriminated her. Furthermore, Marsh herself took the stand and, among other things, testified that she and Martin picked up Williams and drove to the victim's home.[158] She maintained, however, that she sat in the back seat and even though she knew Martin and Williams were talking in the front seat, she could not hear the content of their conversation because the radio was playing and she was situated right next to the speaker.[159] She went on to testify that she heard no conversation about killing and did not herself intend to rob or kill anyone.[160] Thus, through her own tes-

149. *See id.* ("The jury was therefore certain to infer from the confession that respondent had been in the car and had overheard the statement by Martin.").

150. *See id.* at 202.

151. *See* Marsh v. Richardson, 781 F.2d 1201, 1205 (6th Cir. 1986), *rev'd*, 481 U.S. 200 (1987).

152. *See Richardson*, 481 U.S. at 202.

153. *See id.* at 202-03.

154. *See id.* Martin's name was not redacted because, due to his status as a fugitive, he was not on trial. *See id.*

155. *See id.* at 205.

156. *See id.* at 202.

157. *See id.* at 215 ("The jury was therefore certain to infer from the confession that the respondent had been in the car and had overheard the statement by Martin.").

158. *See id.* at 204.

159. *See id.*

160. *See id.*

timony, Marsh placed herself in the car during Martin and Williams's conversation.[161]

Marsh was convicted on two counts of felony murder and one count of assault with the intent to commit murder.[162] The Michigan appellate courts denied her appeals.[163] The United States District Court for the Eastern District of Michigan denied her petition for a writ of habeas corpus;[164] however, the United States Court of Appeals for the Sixth Circuit reversed that denial.[165] The Sixth Circuit found that the admission of Williams's confession at the joint trial violated the Confrontation Clause under *Bruton* because, even after the redactions, Williams's confession remained "powerfully incriminating" of Marsh.[166] The Sixth Circuit reasoned that the content of Martin and Williams's conversation as related in the confession incriminated Marsh when the jury learned and inferred through other evidence that she was in the car.[167] Acknowledging a conflict among the circuits on this point, 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

161. *See id.* One can only speculate why Marsh chose to take the stand. It is entirely plausible, however, that she felt compelled to negate the inference that could be drawn from Williams' confession, despite the fact that the jury was told it was not evidence against her. *See* Garcia, *supra* note 16, at 418-19 (arguing that threat to Marsh's right to confrontation may have forced her to surrender her right against self-incrimination); *see also* Alfred O. Garcia, *Toward an Integrated Vision of Criminal Procedural Rights: A Counter to Judicial and Academic Nihilism*, 77 MARQ. L. REV. 1, 33-34 (1993) (same); *cf.* United States v. Lugpong, No. 89-50528, 1991 WL 88175, at *2 (9th Cir. May 17, 1991) (stating that defendant took stand and undid effect of redaction by explaining to jury his role in events). Even though she placed herself in the car, Marsh could at least tell the jury that she couldn't hear the conversation in the front seat. It was tantamount to an acceptance on her part that the jury was not likely to follow the court's instructions. The prosecutor clearly recognized this as her motivation. He improperly urged the jury to conclude that Marsh testified that she couldn't hear Martin and Williams's conversation because an admission that she heard what they said would constitute an admission of knowledge. *See Richardson*, 481 U.S. at 205 n.2. This was most definitely an invitation to the jury to use Williams's confession against Marsh. The Court recognized it as such, but because there was no objection, the Court remanded the case for a determination by the district court as to whether the lack of objection resulted in a defaulted claim. *See id.* at 211.

162. *See Richardson*, 481 U.S. at 205 (discussing procedural history of case).

163. *See id.*

164. *See id.*

165. *See* Marsh v. Richardson, 781 F.2d 1201, 1201 (6th Cir. 1986), *rev'd*, 481 U.S. 200 (1987).

166. *See id.* at 1213 (discussing effect of admission of statements).

167. *See id.*

trial.[168] According to the court, if by virtue of other evidence, the co-defendant's statement tends to incriminate the defendant, then there remains a substantial risk that the statement will be improperly used against the defendant despite a cautionary limiting instruction to the jury.[169] The Sixth Circuit reversed Marsh's conviction because it found a *Bruton* error and determined that such error was not harmless.[170]

The Supreme Court granted certiorari and reversed.[171] The Court noted that, for purposes of trial, Martin's confession was redacted to not only delete Marsh's name, but also to delete any reference to the existence of a third participant.[172] Thus, standing alone, Williams's confession did not incriminate Marsh. According to the Court, the fact that the confession's account of the conversation in the car on the way to the murder scene harmed Marsh when viewed together with other evidence did not violate *Bruton*.[173] The Court characterized the *Bruton* exception as a "narrow" one and determined that its protection need not be extended as far as Marsh argued.[174] In other words, the Court declined to utilize contextual implication analysis for cases in which the nontestifying co-defendant's confession is redacted to remove all reference to the existence of accomplices.[175]

The Court's reasoning was twofold. First, the Court stressed that *Bruton* was a narrow exception to the assumption that jurors

168. *See id.* at 1208-12 (discussing views of various circuits). For a further discussion of the views of the various circuits on contextual implication, see *supra* notes 123-33 and accompanying text.

169. *See Richardson*, 781 F.2d at 1209.

170. *See id.* ("[U]nder the facts of this case, we are unable to conclude beyond a reasonable doubt that the probable impact of Williams' statement and its use by the prosecution on the minds of an average jury can be deemed harmless.").

Shortly after it decided *Bruton*, the Supreme Court ruled that *Bruton* error was not immune from harmless error analysis. *See* Harrington v. California, 395 U.S. 250, 254 (1969) (holding that *Bruton* violation "was harmless beyond a reasonable doubt"). *See generally* Garcia, *supra* note 16, at 422-25 (criticizing *Harrington*); Williams, *supra* note 22, at 326-28 (examining harmless error review in *Bruton* context).

171. *See* Richardson v. Marsh, 481 U.S. 200, 211 (1987) (reversing judgment of lower court).

172. *See id.* at 203, 211 (holding Confrontation Clause not violated by admission of confession because of proper redaction and limiting instructions to jury).

173. *See id.* at 208 ("[I]n this case the confession was not incriminating on its face [in contrast to *Bruton*], and became so only when linked with evidence introduced later at trial . . . . [This] distinction between this case and *Bruton* . . . causes it to fall outside the narrow exception [of *Bruton*].").

174. *See id.* at 211 ("While we continue to apply *Bruton* where we have found that its rationale validly applies, . . . we decline to extend it further.").

175. *See id.* at 208-11.

follow the instructions of the trial court.[176] Justice Scalia, writing for the majority, posited that where a co-defendant's statement only incriminated the defendant when linked with other evidence in the case, it was "a less valid generalization that the jury will not likely obey the instruction to disregard the evidence."[177] Justice Scalia speculated that the trial court's limiting instruction would dissuade the jury from making the evidentiary linkage.[178] Accordingly, the jury would not even recognize that the co-defendant's confession inculpated the defendant.[179]

The second and, according to Justice Scalia, more significant reason for not finding *Bruton* error was a concern for the practical impact of applying *Bruton* to Marsh's case.[180] Justice Scalia praised redaction as a means of complying with *Bruton* and feared that looking beyond the face of the confession to measure its incriminating value would signify the end of the redaction option.[181] Further, the majority expressed concern that evidentiary linkage analysis would compel the trial judge to preview all of the evidence before ruling on a severance request in order to avoid a retrial.[182] Finally the Court went on at some length extolling the virtues of joint trials.[183] The Court concluded by acknowledging that:

> [T]he rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certi-

176. *See id.* at 207.

177. *Id.* at 208.

178. *See id.*

179. *See id.* Justice Scalia offered no support for this conclusion and given the nature of his premise, it is difficult to imagine how such support could be generated. He used the following language: "[T]he judge's instruction may well be successful in dissuading the jury from entering onto the path of inference [as to incrimination] in the first place so that there is no incrimination to forget." *Id.*; *see* Garcia, *supra* note 16, at 419 (describing this premise as faulty, illogical and contrary to jury decision-making research).

180. *See Richardson*, 481 U.S. at 208-10 ("[I]f limited to facially incriminating confessions, *Bruton* can be complied with by redaction.").

181. *See id.* at 209 ("If extended to confessions incriminating by connection, not only is [redaction] not possible, but it is not even possible to predict the admissibility of a confession in advance of trial."). Naturally, this would only be true in cases in which the confession was indeed rendered incriminating when linked with other evidence. There will, no doubt, still be cases in which a confession redacted to delete all reference to others will, even when linked with all the remaining evidence, fail to incriminate the nonconfessing defendant.

182. *See id.* (discussing whether preview would be feasible under Federal Rules of Criminal Procedure and stating that preview "would be time consuming and obviously far from foolproof").

183. *See id.* at 209-10 ("Joint trials play a vital role in the criminal justice system accounting for almost one-third of Federal criminal trials in the past five years.").

> tude 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.[184]

According to the Court's interpretation of the *Richardson* holding, "the Confrontation Clause is not violated by the admission of a nontestifying co-defendant'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 his or her existence."[185] In a footnote, the majority acknowledged that it expressed "no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun."[186] That is to say, the Court made no ruling on the propriety of redactions that deleted reference to a co-defendant's name, but not his or her existence as a coparticipant.[187]

III. THE MISAPPLICATION OF *RICHARDSON*

A. *The Overly Broad Reliance on* Richardson*'s Rejection of Contextual Implication Analysis*

In the ten years since *Richardson* was decided, both state and federal courts have commonly sanctioned the practice of redaction as a means of avoiding severance when confronted with a *Bruton* problem.[188] These courts have gone beyond the limited holding of *Richardson*, which approved redactions that eliminate all reference to the existence of the defendant, to answer the question reserved by the Court.[189] These courts have permitted the use of symbols such as "X,"[190] "____,"[191] "blank,"[192] and more commonly, pro-

184. *Id.* at 211.

185. *Id.*

186. *Id.* at 211 n.5.

187. *See id.*

188. *See generally* Williams, *supra* note 22, at 318-22 (detailing practice of redaction in cases before and after *Richardson*).

189. *Richardson*, 481 U.S. at 211 & n.5 (stating that Court was expressing "no opinion on the admissibility of confessions in which the defendant's name has been replaced with a symbol or neutral pronoun").

190. *See, e.g.*, Commonwealth v. Lee, 662 A.2d 645, 651 (Pa. 1995) (substituting "X" as symbol), *cert. denied*, 116 S. Ct. 1831 (1996).

191. *See, e.g.*, Aziz v. Warden of Clinton Correctional Facility, No. 92 Civ. 0104, 1992 WL 249888, at *4 (S.D.N.Y. Sept. 23, 1992) (substituting with blank line).

192. *See, e.g.*, Robinson v. Rose, No. 86-5080, 1987 WL 38091, at *3 (6th Cir. July 22, 1987) (substituting with "blank").

nouns such as "another,"[193] "friend,"[194] "they,"[195] or "someone"[196] as a method of cleansing a co-defendant's confession so that it can be admitted in a joint trial.[197] Many of these courts discount the possibility, probability or even virtual certainty that the true identity of the anonymous accomplice is easily determinable.[198]

The willingness of many courts to ignore the risk that a jury will, in essence, unravel the redaction, is caused by misplaced reliance on the *Richardson* Court's rejection of contextual implication analysis. *Richardson* rejected the doctrine of contextual implication, but solely in instances in which the redaction was complete (i.e., references to even the existence of other offenders had been deleted). The rationale behind *Richardson*'s rejection of contextual implication analysis cannot support the same rejection for neutral pronoun- or symbol-type redactions. The significant difference is that the use of a symbol or pronoun in place of the name of a defendant, brings before the jury the statement of the co-defendant that, despite redaction, continues to accuse another, albeit anonymously.

When a co-defendant's confession points an accusing finger at one or two others, referred to after redaction as "X" or "another" and there are one or two other defendants seated at the defense table, the risk that the jury will conclude that the omitted names are the names of the co-defendants is undeniable.[199] But, the risk is

193. *See, e.g.*, United States v. Williams, 936 F.2d 698, 700 (2d Cir. 1991) (substituting with "another guy").

194. *See, e.g.*, United States v. Paries, No. 95-50246, 1996 U.S. App. LEXIS 14884, at *6 (9th Cir. June 5, 1996) (substituting with "friend").

195. *See, e.g.*, United States v. Banks, 78 F.3d 1190, 1200 (7th Cir.) (substituting with "they"), *vacated and remanded sub nom.*, Mills v. United States, 117 S. Ct. 478 (1996).

196. *See, e.g.*, United States v. Garcia, 836 F.2d 385, 389 (8th Cir. 1987) (substituting with "someone").

197. *See* David Rudolph and Gordon Widenhouse, *Co-defendant Confessions: When Redacting Simply Will Not Do*, THE CHAMPION, Sept.-Oct. 1996, at 41-42; *see also* Williams, *supra* note 22, at 322-24 (discussing various analyses courts apply based upon *Richardson*). For a discussion of the question reserved by the Richardson Court, see *supra* notes 186-87 and accompanying text.

198. *See Williams*, 936 F.2d at 701 (stating that linkage of confession with other evidence "all but insured that a jury could identify the person referred to in [the] confession as [the defendant])" but nevertheless concluding that "[a]dmission of testimony was . . . not error"); Robinson v. Rose, No. 86-5080, 1987 WL 38091, at *3 (6th Cir. July 22, 1987) (holding no Sixth Amendment violation).

199. *See* Harrington v. California, 395 U.S. 250, 253 (1969) (agreeing with defendant's assertion that reference to "'the white guy,' made it as clear as pointing and shouting that the person referred to was the white man in the dock with the three Negroes"); *see also* Gutierrez v. State, 388 N.E.2d 520, 527 (Ind. 1979) ("[I]n context it was reasonable to infer that one or more of the blanks referred to one or more of the co-defendants.").

often more substantial. Frequently, a piece or pieces of other evidence in the case will prove the true identity of "X." Suppose, for example, a co-defendant confesses, stating that "*another guy* and I drove from New York to New Jersey, and when we got there, I was the look-out while the *other guy* shot the store clerk." Any proof in the case that shows that the defendant accompanied the co-defendant from New York to New Jersey on the date in question, transforms the co-defendant's statement into an accusation of guilt not subject to cross-examination. Courts have used *Richardson's* rejection of contextual analysis as a license to sanction joint trials even under those circumstances.[200]

These courts have reasoned that a pronoun substitution, on its face, cannot be deemed "powerfully incriminating" as required by *Bruton*.[201] Because the *Richardson* Court appeared to rely exclusively upon a facial examination in measuring the inculpatory value of the confession, numerous federal and state post-*Richardson* courts have determined that they need not be concerned when other evidence suggests the deleted names of other defendants.[202] These courts have missed an important distinction between the redaction method specifically approved in *Richardson* and other less protective methods.[203]

Sometimes a confession details an incident or conspiracy involving multiple participants in numbers larger than the number of defendants on trial. *See e.g.*, United States v. Chrismon, 965 F.2d 1465, 1472 (7th Cir. 1992) ("[T]he group of conspirators involved in a drug scheme included more than just the co-defendants."); Catlett v. United States, 545 A.2d 1202, 1211 (D.C. 1988) (stating that "a large group of people participate[d] in the crime" and that "numerous by-standers watched the violent act being committed"). In these cases, the risk that a jury will automatically fill in the blanks with the names of specific co-defendants is diminished.

200. *See, e.g., Williams*, 936 F.2d at 701 (allowing joint trial); *Rose*, 1987 WL 38091, at *3 (same).

201. Bruton v. United States, 391 U.S. 123, 135 (1968) (using phrase "powerfully incriminating"). Justice Brennan spoke of contexts in which the risk that a jury will not follow instructions is great and the consequences of that failure are vital to the defendant. *See id.* According to Brennan, such a context is presented "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.* at 135-36; *see also Williams*, 936 F.2d at 701 (using term "incriminating"); *Rose*, 1987 WL 388091, at *3 (same).

202. For a further discussion of cases in which evidence corroborates the identity of other defendants whose names have been deleted, see *infra* notes 188-285 and accompanying text.

203. Reliance on *Richardson* as authority for the approval of the use of pronouns and symbols, even when the concealed identity is revealed through other testimony, is clearly an overly broad reading of the opinion. If *Richardson* stood for such a premise, the Court would not have specifically stated that it expressed no opinion on the use of pronouns and symbols. *See* Richardson v. Marsh, 481 U.S. 200, 211 n.5 (1987). The *Richardson* Court was not called upon to rule on such a

To explore the distinction, let us return to the facts of *Richardson.* Recall that Williams's confession was redacted for trial to delete all reference to the existence of a third participant.[204] As admitted, the confession spoke of Williams and Martin (who was a fugitive and not jointly tried), driving together to the scene of the crime.[205] It did not say: "Martin, I and another person." Williams's confession incriminated Marsh, not because an anonymous reference to her was revealed through other evidence, but because the details of the planning of the crimes as contained within Williams's confession proved otherwise harmful to Marsh's defense. The substance of Williams's conversation with Martin hurt Marsh's defense when other evidence placed her in a position to have heard that conversation. The substance of Williams's confession was problematic for Marsh's defense even though the confession pointed an accusatorial finger at no one but the confessor and the fugitive, Martin.

The difference is exceedingly important. In *Richardson,* Justice Scalia theorized that if a co-defendant's confession only inculpated another defendant when linked with other evidence, a prophylactic instruction to the jury not to consider the confession against other defendants could be relied upon to steer the jury away from making such a link.[206] Such a premise may display undue optimism about a jury's capacity to follow instructions.[207] But, such concerns are undoubtedly magnified when an evidentiary linkage reveals to the jury the name of another, theretofore anonymous, perpetrator.[208] Sup-

practice. *See id.* Significantly, however, the Court recognized that it required separate analysis. *See id.*

204. *See id.* at 203.

205. *See id.*

206. *Id.* at 208 ("[T]he judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget.").

207. As noted, Justice Scalia himself used somewhat tentative language when proffering this theory. This explains, in part, why the opinion concludes with a reminder that, for practical reasons, we must live with less than absolute certainty that a court's instructions will be obeyed. *See id.* at 211 ("The 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."); *see also* Garcia, *supra* note 16, at 419 (discussing small likelihood of jury following limiting instruction and ignoring relevant information); Note, Richardson v. Marsh*: Co-defendant Confessions and the Demise of Confrontation,* 101 HARV. L. REV. 1876, 1880-82 (1988) (criticizing premises underlying Justice Scalia's opinion).

208. Once a co-defendant's statement is admitted with references to the criminal conduct of others, it seems natural that jurors would speculate about the identity of the others.

pose that, as introduced to the jury, Williams's confession stated that he, Martin, and "another" drove to the house and he, Martin and "another" robbed and shot the victims. Because other evidence linked Marsh to the car ride, Marsh becomes "another." The confession accuses "another" of participating in the crimes. The court will instruct the jury that Williams's confession may not be considered against Marsh, but can it be said that the court's instructions will prevent the jury from simply deducing the identity of "another" and then from considering that, according to Williams, Marsh was a knowing participant?[209]

It might be different if the jury were instructed to entirely disregard the confession. In that case, the jury might not be tempted to go to the trouble of piecing together bits of evidence. The jury is asked, however, to consider the confession against its maker—in this example—Williams. The jury's natural inclination to figure out the identity of "another" could not be deterred by the limiting instruction because it would not be until after making the link to Marsh that the jury would even realize that the confession described the actions of the defendant against whom it was not to be considered. At that point, the co-defendant's confession becomes identical to the one in *Bruton* and the instruction not to consider it against Marsh would be as ineffectual as the instruction in Bruton's trial.[210]

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209. *See* Parker v. Randolph, 442 U.S. 62, 90 n.15 (1979) ("Indeed the judge's command to ignore the confession may well assure that any juror who happened to miss the connection to the defendant at first will nonetheless have made it by the time he enters the jury room."). There is some evidence to suggest that the instructions actually increase the likelihood that the jury will make this deduction. In 1955, the Jury Project of the University of Chicago Law School conducted a study on the function of the jury. *See* Harry Kalyen, Jr., Report on the Jury Project of the University of Chicago Law School (November 5, 1955) (transcript available in the University of Michigan law library). As part of the study, it devised an experimental moot negligence case. *See id.* at 22. The experimental design allowed for the study of the affect of a limiting jury instruction. *See id.* The experimenters found that when the defendant disclosed that he had no insurance, the mean award for all verdicts was $33,000; when the defendant disclosed that he had insurance, the mean award was $37,000; and when the defendant disclosed that he had insurance and the jury was then instructed to disregard that fact, the mean award was $46,000. *See id.* at 24. For a description of the final findings of the Jury Project, see Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959).

210. Another difference between fully and partially redacted co-defendant confessions is that the portion of the confession that goes beyond self-incrimination and points an accusatory finger at another defendant is, by its nature, unreliable. *See* Williamson v. United States, 512 U.S. 594, 607 (1994) (Ginsburg, J., concurring) ("[T]he Court recognizes the untrustworthiness of statements implicating another person."); Lee v. Illinois, 476 U.S. 530, 541 (1986) (recognizing that

B. *Illustrations of the Misuses of Redacted Confessions*

1. *Neutral Pronouns*

The United States Court of Appeals for Second Circuit's decision in *United States v. Williams*[211] lucidly illustrates the inappropriate broadening of *Richardson*. Williams's co-defendant, McKenzie, had confessed to the police.[212] McKenzie's confession stated that the criminal plan was the brainchild of Williams.[213] At trial, Williams's name was deleted from all parts of McKenzie's confession and the words "this guy" were put in its place.[214] The jury was instructed that McKenzie's statement was not to be considered against Williams.[215] In considering Williams's claim that the admission of McKenzie's confession was error, the court found that in light of other evidence, "one would quickly conclude that the neutral pronoun in McKenzie's statement referred to Williams" and that the other evidence "all but insured" that the jury could identify "this guy" as Williams.[216] Nevertheless, relying upon *Richardson*, the

"over the years . . . the Court has spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants").

There are a host of reasons that an accused might falsely accuse others of being coparticipants. For example, there could be a desire to shift blame or focus away from himself or herself, or an accused might endeavor to garner favor with law enforcement personnel by helping to make cases against others. *See id.* at 544-45 (finding that it is "a reality of the criminal process . . . that once partners in crime recognize that the 'jig is up,' they tend to lose any identity of interest and immediately become antagonists, rather than accomplices"). Lenient treatment is often offered in exchange for information about the criminal behavior of others. *See Williamson*, 512 U.S. at 607-08 (Ginsburg, J., concurring) ("[A] person arrested in incriminating circumstances has a strong incentive to shift blame or downplay his own role in comparison with that of others."). *See generally* Welsh S. White, *Accomplices' Confessions and the Confrontation Clause*, 4 WM. & MARY BILL OF RTS. J. 753, 758 (1996) (explaining and analyzing significance of reasons why accomplices' accusations against coparticipant tend to be unreliable). The *Bruton* Court recognized that the credibility of a co-defendant's accusations are "inevitably suspect" noting that "when accomplices do take the stand . . . the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others." Bruton v. United States, 391 U.S. 123, 136 (1968). For these reasons the Supreme Court of Michigan held that redacted confessions with blanks or neutral pronouns substituted for the names of other defendants should be "clothed with a presumption of unreliability." People v. Banks, 475 N.W.2d 769, 774 (Mich. 1991); *accord* People v. Frazier, 521 N.W.2d 291, 304 (Mich. 1994) (Cavanagh, J., dissenting) (agreeing with decision in *Banks*).

211. 936 F.2d 698 (2d Cir. 1991).

212. *See id.* at 701.

213. *See id.*

214. *See id.*

215. *See id.*

216. *Id.* The other evidence was Williams's own confession. *See id.* Both defendants' confessions described the same plan and the same victim. *See id.* The fact that the jointly tried defendants gave factually interlocking confessions does not, by itself, make *Bruton* inapplicable. *See* Cruz v. New York, 481 U.S. 186, 193

court of appeals concluded that there was no *Bruton* error.[217] Because McKenzie's admitted confession simply incriminated another "guy," citing *Richardson*'s rejection of contextual implication analysis, the court was not troubled by the virtual certainty that the jury knew that the "guy" was Williams.[218] Thus, in the name of *Richardson*, the prosecutor was permitted to introduce an out-of-court statement by a nontestifying accomplice that accused the defendant of masterminding the crimes.[219] Moreover, the court recognized that the jury easily could know that Williams was the one accused by his co-defendant, but relying upon *Richardson*, it rationalized that the limiting instruction would prevent the jury from making that identification.[220]

This rationale fails. It is true that, ordinarily, juries may be depended upon to follow much of a trial judge's instructions.[221]

(1987). In *Cruz*, the Supreme Court applied the *Bruton* and *Richardson* tests to such a situation and held that:

> [W]here a nontestifying codefendant's confession incriminating the defendant is not directly admissable against the defendant . . . the Confrontation Clause bars its admission at their joint trial, [regardless of whether] the jury is instructed not to consider it against the defendant [or] even if the defendant's own confession is admitted against him.

Id.

217. *See Williams*, 936 F.2d at 698, 701.

218. *See id.* at 701 (stating that admission of testimony was not in error because, as in *Richardson*, "the likelihood that a jury will disregard such a limiting instruction is less than in a case such as *Bruton*"). The court acknowledged that the allowance of neutral pronouns was an "extension of Richardson" and made reference to several other post-*Richardson* cases in the Second Circuit in which the court sanctioned the use of neutral pronoun redactions. *See id.* at 700-01. Neither the *Williams* opinion nor any of the opinions cited therein, however, contain any examination of whether it is a supportable extension. *See id.*; United States v. Benitez, 920 F.2d 1080, 1087 (2d Cir. 1990) (containing no examination as to whether expansion supportable); United States v. Smith, 918 F.2d 1032, 1038 (2d Cir. 1990) (same); United States v. Tutino, 883 F.2d 1125, 1135 (2d Cir. 1989) (same); United States v. Alvarado, 882 F.2d 645, 652-53 (2d Cir. 1989) (same). *Compare Williams* 936 F.2d at 701 (rejecting contextual implication analysis of neutral pronoun redaction), *with* Foster v. United States, 548 A.2d 1370, 1380-82 (D.C. 1988) (holding that rejection of contextual implication analysis in neutral pronoun redaction cases was overly broad reading of *Richardson*).

219. *See Williams*, 936 F.2d at 701.

220. *See id.* (finding that other evidence "all but insured that a jury *could* identify the person referred to in McKenzie's confession as Williams" but reasoning that jury "*would* identify Williams as the other 'guy' . . . only if it disregarded the limiting instructions given by the district court").

221. *See* Parker v. Randolph, 442 U.S. 62, 73 (1979). The *Parker* Court held that

> [a] crucial assumption underlying [the jury] system is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed.

Bruton, however, stands for the proposition that when considering the guilt of a particular defendant, jurors will be unable to follow instructions telling them to disregard a co-defendant's statement that "powerfully incriminates" that defendant.[222] It is no more realistic to expect the jury to follow those instructions when the co-defendant's statement "powerfully incriminates" another "guy" because the jury can easily deduce that the "guy" is the other defendant. *Richardson* does not hold otherwise. In a case like *Williams*, the jury's potential inability to follow the limiting instruction would result in a serious violation of the Confrontation Clause. The jury would be considering as evidence against a defendant the uncross-examined statement of his accomplice, that the defendant was guilty and even more culpable than the accomplice.

The Second Circuit is not alone in its expansion of *Richardson*. In *United States v. Vogt*,[223] the United States Court of Appeals for the Fourth Circuit upheld the admission of a co-defendant's confession because the jointly tried defendant's name was removed and the word "client" substituted.[224] The confessing co-defendant was an attorney, and according to the court, the "incriminating import [of the redacted confession] was certainly inferable from other evidence."[225] Nonetheless, the court, relying on *Richardson*, found that the admission of the statement did not offend the *Bruton* rule.[226]

Similarly, in *United States v. Kreiser*,[227] the United States Court

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Id.; *see also* Norman E. Fontes et al., *Deletion of Inadmissible Materials from Courtroom Trials: Merit or Myth?*, 1977 DET. C.L. REV. 67, 70 (questioning assumption that jurors cannot follow limiting instructions); Lisa Eichhorn, Note, *Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence*, 52 LAW & CONTEMP. PROBS. 341, 349 (1989) (examining circumstances under which jurors are more or less likely to follow instructions).

222. Bruton v. United States, 391 U.S. 123, 135-36 (1968) ("There 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.").

223. 910 F.2d 1184 (4th Cir. 1990).

224. *See id.* at 1191.

225. *Id.* at 1192.

226. *See id.* (holding that "[b]ased on the reasoning in *Richardson*, we think *Bruton* did not bar admission of the redacted statements here"). Two years after *United States v. Vogt* in *United States v. Brooks*, 957 F.2d 1138, 1146 (4th Cir. 1992), the Fourth Circuit conceded that there is an argument that some redacted co-defendant confessions are more incriminating of jointly tried defendants than the confession in *Richardson*. Resolution of the question was avoided in *Brooks*, when the court found that the statement was admissible against the defendant as a statement "'by a coconspirator of a party during the course and in the furtherance of the conspiracy.'" *Id.* (quoting FED. R. EVID. 801(d)(2)(E)).

227. 15 F.3d 635 (7th Cir. 1994).

of Appeals for the the Seventh Circuit approved of the admission of a redacted confession in a narcotics sale case in which the defendant's name was replaced with the words "the source."[228] Acknowledging that other evidence suggested that Kreiser was "the source," the court found no confrontation violation because it interpreted *Richardson* as rejecting the evidentiary linkage approach and, in its view, this case was indistinguishable.[229] Examples of this kind of broadening of *Richardson* are also seen in opinions from the United States Courts of Appeals for the Third,[230] Fifth,[231] Sixth,[232]

228. *See id.* at 638-39 (affirming convictions and admission of certain redacted statements).

229. *See id.* at 639 (holding that "such evidentiary linkage does not rise to the level of a Confrontation Clause problem when, as here, the jury is properly instructed to consider the statements only against the confessing co-defendant."); *see also* United States v. Hubbard, 22 F.3d 1410, 1421 (7th Cir. 1994) (rejecting contextual implication argument); United States v. Gio, 7 F.3d 1279, 1287 (7th Cir. 1993) (rejecting evidentiary linkage approach); United States v. Strickland, 935 F.2d 822, 825-26 (7th Cir. 1991) (same); United States v. Myers, 892 F.2d 642, 648 (7th Cir. 1990) (holding that *Myers* case was indistinguishable from *Richardson*). In one case, the Seventh Circuit suggested that it would not condone the use of a neutral pronoun when the pronoun could be viewed as a "direct reference" to the defendant. *See* United States v. Briscoe, 896 F.2d 1476, 1501-02 (7th Cir. 1990). The court seemed to measure the directness of the reference by whether the pronoun used could just as likely refer to someone other than the jointly tried defendant. *See id.* at 1502 (distinguishing facts from *Bruton*, because there were only two defendants in *Bruton*, but three defendants in case at bar). Interestingly, the *Briscoe* majority concluded that the pronoun in that case was not a direct reference to the defendant, while the concurring judge found that it was. *See id.* at 1523-24 (stating that statement implicated defendant "on its face") (Cudahy, J., concurring). In another opinion, the Seventh Circuit suggested it would not allow the use of a neutral pronoun when the connection with the defendant was "inevitable." *See* United States v. Chrismon, 965 F.2d 1465, 1472 (7th Cir. 1992) (holding that "the connection to the defendant is not at all inevitable"). In any event, by the time it decided *Kreiser* in 1994, the Seventh Circuit apparently rejected both the "direct reference" and "inevitable association" tests and resolved that the use of a neutral pronoun was acceptable as long as, on its face, the confession did not reveal the identity of the coparticipant. *See Kreiser*, 15 F.3d at 639 ("[T]here is no *Bruton* problem when the substitution . . . does not identify the non-confessing co-defendant by race, age, size, or any other means except . . . gender."). For further discussion of the "direct reference" or "direct implication" test, see *infra* notes 292-326 and accompanying text.

230. *See* McCloskey v. Ryan, No. 90-1478, 1991 WL 165076, at *7 (E.D. Pa. Aug. 23, 1991) (expanding *Richardson*). In *McCloskey*, the co-defendant's statement was introduced into evidence. *See id.* at *14. In the redacted version, he stated that he and "another person" participated in the robbery of a bar. *See id.* The co-defendant claimed that the robbery was the "other person's" idea, that the "other person" did all the talking, and was responsible for the shooting. *See id.* In the statement read to the jury, the co-defendant told the police that the "other person" could be located by talking to the bartender at the bar or at "Cosmos." *See id.* at *18. The jury could readily infer that the other person was McCloskey because other evidence at trial proved that McCloskey lived in the Cosmos apartments and the police arrested him as a result of conversations with the barmaid. *See id.* Nevertheless, the court, citing *Richardson*, discounted the links. *See id.* at *20-21 (re-

Eighth,[233] Ninth[234] and Tenth Circuits.[235]

Many state courts have decided *Bruton* claims after *Richardson*

jecting defendant's *Bruton* violation contention); *cf.* United States v. DiGiglio, 538 F.2d 972, 983 (3d Cir. 1976) (using pre-*Richardson* analysis to disallow redaction when jury might well have drawn inference that defendant was "blank" referred to in co-defendant's statement); United States v. Lipowitz, 407 F.2d 597, 602-03 (3d Cir. 1969) (using pre-*Richardson* contextual implication analysis to resolve *Bruton* claim).

231. *See* United States v. Payan, 992 F.2d 1387, 1393 (5th Cir. 1993) (holding that, in view of *Richardson* holding, *Bruton* was not violated despite possibility that defendant could be contextually linked to neutral references in his co-defendant's confession); *see also* United States v. Jimenez, 77 F.3d 95, 98-99 (5th Cir. 1996) (holding that even though co-defendant's confession directly impeached defendant's testimony, there was no *Bruton* violation because "the statement, standing alone, does not directly implicate [defendant]"); United States v. Espinoza-Seanez, 862 F.2d 526, 534-35 (5th Cir. 1988) (holding that *Bruton* is not violated when co-defendants' statements, standing alone, did not identify or implicate defendants).

232. *See* United States v. Fontao, Nos. 95-1084, 95-1086, 1996 WL 189306, at *1 (6th Cir. Apr. 18, 1996) (finding no *Bruton* error in neutral pronoun redaction because "[t]his circuit interpreted [the *Richardson*] rule as allowing the introduction of a redacted confession 'even if the co-defendant's confession becomes incriminating when linked with other evidence adduced at trial.'" (quoting United States v. DiCarlantonio, 870 F.2d 1058, 1062 (6th Cir. 1989))), *cert denied*, 117 S. Ct. 165 (1996).

233. *See* United States v. Donahue, 948 F.2d 438, 443-44 (8th Cir. 1991) (relying upon *Richardson* and finding no *Bruton* error because references to "everyone" and "they" only incriminated defendant when linked with independent evidence). The Eighth Circuit has criticized the neutral pronoun redaction method for cases in which attention is drawn to the fact that the prosecution had the name available to it and purposely omitted it from the statement. *See, e.g.*, United States v. Long, 900 F.2d 1270, 1279-80 (8th Cir. 1990) (holding that statement invited speculation); United States v. Garcia, 836 F.2d 385, 391 (8th Cir. 1987) (permitting redaction under above analysis). For a further discussion of the "invitation to speculate" test, see *infra* notes 327-41 and accompanying text.

234. *See* United States v. Enriquez-Estrada, 999 F.2d 1355, 1359 (9th Cir. 1993) (finding no *Bruton* violation under *Richardson* because neutral term incriminated defendant only when linked with specific evidence introduced later); *see also* United States v. Paries, Nos. 95-50246, 95-50313, 1996 WL 297620, at *2 (9th Cir. June 5, 1996); United States v. White, Nos. 92-30290, 92-30291, 92-30292, 1993 WL 509006, at *2 (9th Cir. Dec. 9, 1993); United States v. Kasparoff, Nos. 89-50333, 89-50342, 1990 WL 191698, at *1 (9th Cir. Nov. 30, 1990); *cf.* United States v. Olano, 62 F.3d 1180, 1195-96 (9th Cir. 1995) (finding no *Bruton* error because references to defendant contained within unredacted confession of his co-defendant did not even incriminate that defendant on its face), *cert. denied*, 117 S. Ct. 303 (1996). *But see* United States v. Reynolds, No. 91-50466, 1992 WL 337659, at *2 (9th Cir. Nov. 17, 1992) (finding reversible *Bruton* error because "in all likelihood the jury would construe the pronoun as including [the defendant]").

235. *See* United States v. Markopoulos, 848 F.2d 1036, 1038-39 (10th Cir. 1988) (holding that references to "Greek man" were only inferentially incriminating and therefore satisfied requirements set forth in *Richardson*); *cf.* United States v. Nelson, Nos. 90-3081, 90-3108, 90-3109, 90-3110, 90-3111, 90-3113, 90-3114, 90-3119, 1991 WL 163061, at *5 (10th Cir. Aug. 23, 1991) (holding no *Bruton* error despite fact that jury could connect defendant with reference to "he" in co-defendant's confession, because reference was too equivocal to implicate defendant in crimes).

in a similar manner. The state court decisions in *State v. Craney*[236] and *State v. Evans*[237] illustrate the misapplication of *Richardson* by state courts.

Craney involved an appeal by two defendants of their murder convictions.[238] One defendant, Craney, gave a statement to the police, in which he claimed that he did not commit, but only knew about, the murder.[239] He told police that his co-defendant, Eastman, told him all about it and asked him to dispose of the murder weapon.[240] At trial, Craney's references to Eastman by name were redacted and the word "someone" was put in their place.[241] The Supreme Judicial Court of Maine upheld the admission of Craney's redacted statements, maintaining that *Richardson* should be read as requiring courts to look only to the four corners of the statement in order to determine if there has been a *Bruton* violation.[242] The court did not examine the likelihood of the jury knowing that "someone" referred to the only other defendant on trial. The re-

236. 662 A.2d 899 (Me. 1995). For a discussion of *State v. Craney*, see *infra* notes 238-45 and accompanying text.

237. 450 S.E.2d 47 (S.C. 1994). For a further discussion of *Evans*, see *infra* notes 246-48 and accompanying text.

238. *Craney*, 662 A.2d at 900.

239. *See id.* at 902.

240. *See id.*

241. *See id.*

242. *See id.* at 903. In reaching its decision, the court indicated that it favored the approach taken by the Second Circuit in *Williams*. *See id.* (finding that Craney's statements standing alone did not connect Eastman to crime and thereby adopting *Williams* holding that redacted confession is admissible provided that "the statement standing alone does not otherwise connect co-defendants to the crimes"); *see also* United States v. Williams, 936 F.2d 698, 700 (2d Cir. 1991). For a discussion of *Williams*, see *supra* notes 211-22 and accompanying text.

In *Craney*, the co-defendant's redacted statement was admitted pursuant to a state evidentiary rule providing that "'[i]n a criminal case tried to a jury evidence inadmissible as to one defendant shall not be admitted as to other defendants unless all references to the defendant as to whom it is inadmissible have been effectively deleted.'" *See Craney*, 626 A.2d at 902 n.1 (quoting ME. R. EVID. 105). This rule was apparently interpreted not to require the deletion of all references to the existence of other defendants. *See id.* at 902. A number of other states have rules containing similar language. *See, e.g.*, N.C. GEN. STAT. § 15A-927(c)(1) (1995) (stating that, when defendant objects to joinder of charges against two or more defendants for trial because out-of-court statement of co-defendant makes reference to him or her but is not admissible, court must require require prosecutor to select either separate trial, joint trial in which statement is not admitted or joint trial in which statement is admitted but in which all references to moving defendant have been deleted); FLA. R. CRIM. P. 3.152(b)(2)(A)-(C) (stating that, if state intends to offer out-of-court statement of co-defendant that is not admissible against objecting defendant, court must require state to choose either joint trial in which statement is not admitted, joint trial in which statement is admitted but in which all references to defendant are deleted, or severance of moving defendant); TENN. R. CRIM. P. 14(c)(1)(i)-(iii) (same).

sult in *Craney* was that the jury was permitted to hear that one defendant claimed that it was "someone" else who committed the murder and he, the declarant, was merely an accessory after the fact.[243] Had the jury deduced or speculated that "someone" was the other defendant accused of the crime, the statement became a powerful piece of uncross-examinable evidence against that other defendant. The only ostensible protection for the defendant was a limiting instruction that told the jury that the statements were only evidence admissible against the confessing co-defendant.[244] Long ago, however, *Bruton* spoke to the inefficacy of those instructions.[245]

In *Evans*, the Supreme Court of South Carolina approved the admission of the redacted statement of Evans' co-defendant.[246] The court brushed aside its belief that, with respect to Evans, the statement's "incriminating import was certainly inferable from other evidence."[247] The court reasoned that pursuant to *Richardson, Bruton* was satisfied if, on its face, the statement did not incriminate Evans.[248]

2. *Blanks, Symbols and "X"*

Generally, when a co-defendant's confession is to be admitted at a joint trial, the use of a blank or an "X" in lieu of the names of jointly tried defendants is frowned upon by the federal courts.[249]

243. Although Craney's statement did not specifically make that claim, it was the only logical inference to be drawn from his words. *See Craney*, 662 A.2d at 903.

244. *See id.*

245. Bruton v. United States, 391 U.S. 123, 135-36 (1968) (stating that admission of powerfully incriminating out-of-court statements of co-defendant in joint trial is one context in which "the risk that the jury will not, or cannot, follow instructions is so great" that limiting instruction will be ineffective).

246. State v. Evans, 450 S.E.2d 47, 48 (S.C. 1994).

247. *Id.* at 50; *see* Nancy Hobbs, *Co-defendant's Confession That Implicates Defendant by Inference and Post-Hypnotic Testimony Held Admissible*, 47 S.C. L. REV. 96, 96-98 (1995) (discussing South Carolina Supreme Court's decision in *Evans* to admit nontestifying co-defendant's confession because it alone did not connect defendant to crime).

248. *See Evans*, 450 S.E.2d at 50. In *Evans*, the jury was not even given a limiting instruction not to consider the co-defendant's statement against Evans. *Id.* at 50 n.1. Because Evans's counsel failed to request the instruction and, on appeal, failed to argue that the lack of a limiting instruction was error, the court found the issue waived. *See id.*; *see also* United States v. Vasquez, 874 F.2d 1515, 1517 n.3 (11th Cir. 1989) (finding no *Bruton* error despite absence of limiting instruction when defendant made no request for instruction).

249. *See* United States v. Alvarado, 882 F.2d 645, 653 (2d Cir. 1989) (stating permissibility of having "'simply referred to the other individual . . . without referring to him as 'blank' and thus preventing . . . the jury from knowing that the name of a particular individual had been redacted.'" (quoting United States v. Danzey, 594 F.2d 905, 919 (2d Cir. 1979))); United States v. DiGilio, 538 F.2d 972, 983 (3d Cir. 1976) (disapproving of limited redaction when, despite district court's

The use of these redaction tools is distinguishable from the use of neutral pronouns because blanks or "X" say to the jury that a name once contained in the confession has been removed and is being kept secret from them. The use of words like "another" or "someone" leaves open the possibility that the unidentified accomplice was never actually named by the co-defendant. The presence of a blank or "X" becomes a red flag inviting the jury to play detective and attempt to figure out or speculate concerning the identity of the mystery accomplice.[250]

Nevertheless, "X"s and blanks have been sanctioned by at least one federal court of appeals and by two state courts.[251] The Sixth Circuit's opinion in *Robinson v. Rose*[252] approved of this practice and lucidly illustrated the misinterpretation and improper broadening of the *Richardson* holding.[253] In *Rose*, a pre-*Richardson* habeas corpus petitioner had been tried jointly with two co-defendants in a Tennessee state court.[254] One of his co-defendants confessed and placed the primary responsibility for the crime on the petitioner.[255] The co-defendant's confession was admitted into evidence with the petitioner's name deleted from the confession and the word "blank" was put in its place.[256] Both the Tennessee Court of Criminal Appeals and the United States District Court for the Middle District of Tennessee agreed with petitioner that, pursuant to *Bruton*, the admission of his co-defendant's statement, even in redacted

limiting instruction, jury might have drawn inference that defendant was "blank" referred to in co-defendant's statement); Aziz v. Warden of Clinton Correctional Facility, No. 92 Civ. 0104, WL 249888, at *5, (S.D.N.Y. Sept. 23, 1992) (finding use of "blank" in co-defendant's redacted statement to be *Bruton* violation notwithstanding limiting instruction); Bradford v. Walker, No. 91 CV. 0907, 1992 U.S. Dist. LEXIS 5037, at *6 (E.D.N.Y. Apr. 2, 1992) (finding use of "blank," rather than neutral pronoun to be *Bruton* violation, but concluding it was harmless error).

250. For a discussion of when a blank or "X" invites a jury to speculate about the indentity of an unspecified accomplice, see *supra* notes 120-22 and accompanying text.

251. For a discussion of a Sixth Circuit decision approving the use of blanks in lieu of the name of a jointly tried defendant, see *infra* notes 252-68 and accompanying text. For an analysis of the sanctioning of "X"s and blanks by the Pennsylvania and Indiana Supreme Courts, see *infra* notes 269-85 and accompanying text.

252. No. 86-5080, 1987 WL 38091 (6th Cir. July 22, 1987) (per curiam).

253. *Id.* at *6.

254. *Id.*

255. *See id.* That co-defendant did not testify at trial and, thus, was unavailable for cross-examination by the other defendants. *See id.* The other co-defendant, however, did testify. *See id.* Therefore, the admission of her confession did not present a *Bruton* problem. *See* State v. Robinson, 622 S.W.2d 62, 69 (Tenn. Crim. App. 1981) (holding that because co-defendant testified, there was no problem concerning admission of her redacted confession).

256. *See Rose*, 1987 WL 38091, at *3.

form, violated petitioner's Sixth Amendment rights.[257] According to the Tennessee appellate court, the other evidence at the trial "pointed so unerringly to the defendants that it was an impossibility for any juror to mistake the fact that the blanks in the redacted confessions referred only to them and no one else."[258] Nevertheless, the petitioner's conviction was affirmed because the court determined that the *Bruton* error was harmless.[259]

The U.S. Supreme Court decided *Richardson* just before the Sixth Circuit considered petitioner's appeal from the district court's denial of his habeas corpus petition.[260] The Sixth Circuit concluded that *Richardson* authorized the use of the redacted confession in petitioner's trial because, when the word "blank" was substituted for the petitioner's name, his co-defendant's confession, on its face, no longer incriminated petitioner.[261] The court interpreted the *Richardson* Court's rejection of contextual implication analysis as authority for its decision to ignore the undisputed fact that it was all but certain that the jury would identify the petitioner as the "blanked" out accomplice.[262]

Consider the full implication of such a holding. Robinson's co-defendant, upon his arrest, gave a statement to the police saying that he was involved in the robbery, but it was Robinson who actually killed the victim.[263] The redacted version, admitted at trial, read something like, "I did the robbery, but blank killed him."[264] All reviewing courts agreed that the jury was sure to deduce that "blank" was Robinson. While the co-defendant's implication of Robinson as the killer may have been easily attacked on cross-examination, Robinson had no such opportunity because the co-defendant did not take the stand.[265] Once again, the only thing that ostensibly protected Robinson from this seeming unfairness was the judge's limiting instruction to the jury that the co-defendant's con-

257. *See id.* at *6-7 (analyzing petitioner's argument of Sixth Amendment violation).

258. *Id.*

259. *See id.* at *7 (stating that *Bruton* error was rendered harmless by overwhelming evidence of petitioner's guilt).

260. Richardson v. Marsh, 481 U.S. 200, 211 (1987).

261. *See Rose*, 1987 WL 38091, at *3 (holding that Confrontation Clause is not violated by admission of redacted confession that is not incriminating on its face).

262. *See id.*

263. *See id.* at *6.

264. *See id.* (explaining that when read at trial, names of all other accomplices were omitted from nontestifying co-defendant's redacted confession and substituted with "blank").

265. *See id.*

fession was evidence against the confessing co-defendant alone.[266]

Contrary to the Sixth Circuit's reasoning, *Richardson* did not give the Supreme Court's stamp of approval to such a result. The *Richardson* Court refused to find *Bruton* error by contextual implication, but only for cases in which co-defendant confessions facially implicate no one other than the confessing co-defendant.[267] In a case like *Robinson* the redacted confession, on its face, incriminated another: "blank." Can it be said that when instructed by the court to consider the statement against the co-defendant alone, there was a chance that the jury would resist trying to fill in the "blank?" To overlook the certainty that the jury would fill in the "blank" with "Robinson" flies in the face of the guarantees of the Sixth Amendment and is not what the *Richardson* Court intended to authorize.[268]

A survey of state court decisions reveals similar examples of the use of symbol redactions.[269] The Supreme Court of Pennsylvania, on several occasions, has upheld the admission of a co-defendant's statement in which the other defendant's name was replaced with an "X."[270] In *Commonwealth v. Rainey*,[271] the court sustained the introduction at Rainey's trial of his co-defendant's confession in which the co-defendant identified "X" as an accomplice who killed

266. *See id.*

267. Richardson v. Marsh, 481 U.S. 200, 211 n.5 (1987) ("We express no opinion on the admissibility of confession in which the defendant's name has been replaced with a symbol or neutral pronoun.").

268. Interestingly, *Richardson* came out of the Sixth Circuit. *See* Marsh v. Richardson, 781 F.2d 1201, 1212 (6th Cir. 1986), *rev'd*, 481 U.S. 200 (1987). The Supreme Court reversed the Sixth Circuit's ruling that had employed contextual implication analysis. *See Richardson*, 481 U.S. at 211. Thus, the Sixth Circuit obviously favored contextual implication analysis prior to *Richardson*. Nonetheless, it failed to distinguish *Rose* from *Richardson*. *Cf.* United States v. Hayhow, No. 91-3990, 1992 WL 115993, at *3 (6th Cir. May 29, 1992) (per curiam) (finding no *Bruton* error, but leaving room for consideration of contextual implication).

269. Like most federal courts, some states specifically prohibit redaction with blanks. *See, e.g.*, McDonald v. State, 436 S.E.2d 811, 813 (Ga. Ct. App. 1993) (holding that "simply removing the name of the co-defendants and inserting in lieu thereof a 'blank' was not sufficient to avoid a *Bruton* violation"); State v. Butler, 916 P.2d 1, 7 (Kan. 1996) (finding *Bruton* violation when defendant's name was simply removed and replaced with "blank" in co-defendant's confession).

270. *See* Commonwealth v. Miles, 681 A.2d 1295, 1300 (Pa. 1996) (stating that substitution of letter "X" for defendant's name did not violate defendant's *Bruton* rights because proper limiting instruction was given); Commonwealth v. Lee, 662 A.2d 645, 652 (Pa. 1995) (holding that any prejudice suffered by use of "X" for defendant's name in co-defendant's redacted statement was cured by limiting instructions); Commonwealth v. Rainey, 656 A.2d 1326, 1332 n.5 (Pa. 1995) (same).

271. 656 A.2d 1326 (Pa. 1995).

the victim by shooting him in the back.[272] In his confession, the co-defendant proceeded to say that he urged "X" to turn himself in, but "X" refused.[273] Relying upon *Richardson*, the Pennsylvania Supreme Court ignored other evidence introduced at the trial that created the inference that "X" was Rainey.[274]

Similarly, in *Commonwealth v. Miles*,[275] the Pennsylvania Supreme Court sanctioned the use of "X" as a method for redacting a co-defendant's confession's references to a jointly tried defendant.[276] *Miles* involved a murder following an armed robbery.[277] One of Miles' co-defendants confessed to being involved in the robbery, but claimed that Miles shot the deceased.[278] When the co-defendant's confession was introduced at trial it accused "X" of possessing the murder weapon and firing it at the deceased.[279] "X" was easily identifiable as Miles. There were three defendants on trial and, according to the confession, there were three participants.[280] Two of the participants were named in the confession, while Miles' role was denoted with an "X."[281] Miles could be linked to "X" by virtue of his own confession and the testimony of the third defendant.[282] Despite this, the court held that "X" was a proper redaction

272. *Id.* at 1332 n.5. As recited to the jury, the co-defendant's confession read: "'X' was behind the old man, and 'X' just shot him in the back." *See id.*

273. *See id.* at 1331.

274. *See id.* (stating that any inferential incrimination suffered by Rainey from redacted statement was cured by trial court's limiting instruction). The co-defendant's statement described his own conduct and that of two accomplices. *See id.* One accomplice, Rainey, was jointly tried as a co-defendant. *See id.* at 1329. The other accomplice had previously plead guilty and testified at trial against the other two. *See id.* When the co-defendant's statement accused "X" of being the murderer, by process of elimination, the only conclusion that could be drawn was that "X" was Rainey. Beyond that, however, the trial testimony of the third participant linked Rainey to "X." *See id.* at 1332 n.5; *cf.* Commonwealth v. Wharton, 607 A.2d 710, 716-17 (Pa. 1992) (rejecting, in neutral pronoun redaction case, "'contextual implication theory' as 'a blanket rule,'" but holding that when there is danger of contextual implication, court should balance possible prejudice against probative value of evidence, possibility of minimizing prejudice and benefits to criminal justice system of conducting joint trials).

275. 681 A.2d 1295 (Pa. 1996).

276. *Id.* at 1300.

277. *Id.* at 1297-98. Miles and his two co-defendants forcibly attempted to rob the deceased and his friend, both fifteen years old, of newly purchased sneakers. *See id.* Miles fired his .38 caliber pistol, hitting the deceased in the heart, and then fled the scene with his co-defendants carrying the deceased's sneakers. *See id.* at 1298. The deceased died at the scene. *See id.*

278. *See* Notes of Testimony, at 4, *Miles* (No. 9007-2228-2260).

279. *See id.* at 38-39.

280. *See id.* at 36-44.

281. *See id.*

282. *See id.* at 23-29.

and did not violate *Bruton*.[283]

The use of blank spaces in lieu of a defendant's name was sanctioned by the Indiana Supreme Court in *Taggart v. State*.[284] In that case, the court cited *Richardson*'s rejection of evidentiary linkage analysis as support for its approval of this redaction method.[285]

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283. *See Miles*, 681 A.2d at 13000.

In *Commonwealth v. Lee*, 662 A.2d 645, 652 (Pa. 1995), the Pennsylvania Supreme Court found no *Bruton* error in the admission of a co-defendant's statements that placed primary responsibility for two murders on the shoulders of "X." There, the risk of unfair prejudice was compounded by testimony revealing that the co-defendant provided the identity of "X," but it was deleted for the jury. *See id.* This testimony removed the small possibility that the jury might think that "X" could be an unknown perpetrator, still at large. Despite this, the court believed that *Bruton*'s requirements were satisfied because these statements incriminated Lee through "contextual implication" alone. *See id.*

Interestingly, during the trials of the defendants in *Rainey*, *Miles* and *Lee*, the prosecuting attorneys misspoke and uttered the true names of "X" some time during their questioning and/or closing remarks. *See Miles*, 681 A.2d at 1301 (dismissing as harmless error prosecutor's reading of defendant's nickname in co-defendant's redacted statement in closing arguments, despite jury's awareness that name read was defendant's nickname); *Lee*, 662 A.2d at 651-52 n.6 (dismissing defendant's allegation that prosecutor either intentionally or accidentally read defendant's name instead of "X" in one of co-defendant's redacted statements); Commonwealth v. Rainey, 656 A.2d 1326, 1332 (Pa. 1995) (dismissing as harmless error prosecutor's reference to detective's statement in attorney's closing argument that implicated defendant because of existence of overwhelming evidence identifying defendant as victim's killer). While in all likelihood this was unintentional, it highlights another pitfall in the use of the redaction method that uses substitute words for the names of defendants on trial. The *Bruton* Court anticipated this and predicted: "To expect a witness to relate X's confession without including any of its references to Y is to ignore human frailty. Again, it is unlikely that an intentional or accidental slip by the witness could be remedied by instructions to disregard." Bruton v. United States, 391 U.S. 123, 134 n.10 (1968) (quoting Note, *Codefendants' Confessions*, 3 COLUM. J.L. & SOC. PROB. 80, 88 (1967)); *see also* State v. Robinson, 622 S.W.2d 62, 71 (Tenn. Crim. App. 1980) (pointing out that inadvertent slips can make redaction ineffective). *See generally* Haddad, *Prosecutorial Approaches*, *supra* note 22, at 41, 44 n.27 (describing "split of authority" over whether slip can be remedied by limiting jury instruction).

284. 595 N.E.2d 256 (Ind. 1992). In *Taggart*, the Indiana Supreme Court held that a redacted confession was admissible only when the trial court provided limiting instructions advising the jury that the confession was limited in applicability to the confessor. *See id.*; *see also* Townsend v. State, 533 N.E.2d 1215, 1225 (Ind. 1989) (holding that "blank," "other person" or "another person" are proper redactions).

285. *See Taggart*, 595 N.E.2d at 258 (holding that use of redacted confession made incriminatory through linkage by other evidence is barred in absence of limiting jury instructions). Despite its satisfaction with the use of blanks in the co-defendant's confession, the court reversed Taggart's conviction because the trial court failed to instruct the jury to consider the confession against the confessor alone. *See id.* In essence, the court reasoned that *Richardson* authorized the use of blanks in place of jointly tried defendants' names, even if other evidence linked those defendants to the blanks in the confession, but, only when the jury is told not to consider the confession against those other defendants. *See id.*

IV. THE SURVIVAL OF CONTEXTUAL IMPLICATION ANALYSIS

The decisions critiqued in Part III exemplify the unjustifiable broadening of *Richardson* and contain little or no recognition that a jurisprudential leap has been taken. In another body of case law, some courts have recognized the significant distinction between a *Richardson*-type redaction and the use of pronouns or blanks. In these decisions, courts have wrestled with the distinction and launched their analysis from the premise that the rejection of contextual implication analysis when co-defendant confessions have been redacted using "someone," "another" or "X" is not necessarily in line with the principles enunciated in *Bruton* and *Richardson*.[286] To these courts, the question left open by the *Richardson* Court—whether neutral pronoun or symbol redactions are acceptable—is not easily answered.

The solutions reached by these courts can be assigned to one of two categories. The first advocates what could be generally termed the "degree of inference test." While the labels vary, these decisions conclude that, despite the *Richardson* Court's reasoning, when a co-defendant's confession is redacted by substituting a pronoun or symbol for a jointly tried defendant's name, a reviewing court must evaluate the likelihood that the disguised reference will be unmasked by the jury. In simpler terms, these courts believe in calculating whether the jury was likely to infer who that "someone" was.[287] In all of the decisions in this category, the courts found that the calculation must be performed by reference to all of the admitted evidence (i.e., contextual implication must be examined).[288] This Article terms this category "degree of inference test" because the recommended inquiry is the degree or amount of inference needed for the jury to link the defendant to the redacted reference.

The second category of cases utilize the "invitation to speculate test." In these opinions, the courts prohibit redaction efforts when the form of the redaction invites the jury to speculate about the

286. *See, e.g.*, United States v. Bennett, 848 F.2d 1134, 1142 n.8 (11th Cir. 1988) (holding co-defendant's confession inadmissible because government's attempted redaction contained pronoun "they," thus referring to defendant, rather than eliminating all references to defendant's existence); Foster v. United States, 548 A.2d 1370, 1374 (D.C. 1988) (adopting decisions of other courts performing contextual analysis).

287. For a critical analysis of courts applying the "degree of inference test" to determine whether a jury was likely to determine who a pronoun or symbol in a redacted statement referred to, see *infra* notes 292-326 and accompanying text.

288. For a discussion of courts examining the contextual implication of a redacted statement, see *supra* notes 188-285 and accompanying text.

identity of anonymously mentioned accomplices.[289] Typically, an "invitation to speculate" exists when the jury's attention is called to the fact that names, known to the prosecution, have been deleted.[290]

Opinions in both categories may reflect well-intentioned efforts to fairly resolve the post-*Richardson* redaction dilemma.[291] Nevertheless, as discussed below, the efforts in the first category produce a vague and inadequate test. Furthermore, efforts in the second category do not go far enough.

A. *Degree of Inference Test*

Not long after *Richardson* was decided, the United States Court of Appeals for the District of Columbia Circuit grappled with the post-*Richardson* viability of contextual implication analysis.[292] In *Foster v. United States*,[293] the court began by acknowledging that *Rich-*

289. For an examination of cases prohibiting redaction when it invites the jury to speculate about anonymously mentioned accomplices, see *infra* notes 327-41 and accompanying text. This view actually predates *Richardson*. *See* Clark v. Maggio, 737 F.2d 471, 476-77 (5th Cir. 1984) (prohibiting admission of redacted statement that nontestifying co-defendant gave names of accomplices to police because it implicated his co-defendants); United States v. Danzey, 594 F.2d 905, 918-19 (2d Cir. 1979) (prohibiting admission of co-defendant's redacted statement containing word "blank" when prosecutor told jury that co-defendant had named his accomplices because jury could have easily filled in blank with name of defendant). After *Richardson*, some courts clung to the invitation to speculate test wherever it was applicable. *See, e.g.*, United States v. Tutino, 883 F.2d 1125, 1135 (2d Cir. 1989) (holding that redacted statement in which names of co-defendants were replaced by neutral pronouns, without indication that statement contained actual names, was admissible because jury could conclude that co-defendant did not reveal actual name of defendant).

290. Often, but not always, cases in this category involve the use of blanks or "X"s in lieu of names of jointly tried co-defendants. *See, e.g.*, Aziz v. Warden of Clinton Correctional Facility, No. 92 Civ. 0104, 1992 WL 249888, at *5 (S.D.N.Y. Sept. 23, 1992) (assuming use of blanks for defendant's name in nontestifying co-defendant's redacted confession is *Bruton* violation because it allows jury to speculate about identity of unnamed accomplice). Even when neutral pronouns are used, however, if the jury is informed that actual names were deleted, the same invitation to speculate is present. *See, e.g.*, United States v. Long, 900 F.2d 1270, 1280 (8th Cir. 1990) (holding that use of term "someone" was unacceptable redaction inviting jury speculation).

291. A dilemma exists because the Supreme Court left the propriety of neutral pronoun and symbol redactions unaddressed. In the view of the judiciary, it is a dilemma not easily solved. The rejection of the popular neutral pronoun redaction option could mean a decrease in the number of joint criminal trials. *See* Richardson v. Marsh, 481 U.S. 200, 209-10 (1987) (stating that reducing practice of joint trials "would impair both the efficiency and the fairness of the criminal justice system"). Thus, it is seen as opening the door to much duplication of judicial resources. For a discussion of the alleged efficiencies of joinder, see *infra* notes 367-85 and accompanying text.

292. *See* Foster v. United States, 548 A.2d 1370 (D.C. 1988).

293. 548 A.2d 1370 (D.C. 1988).

ardson did not speak to all cases involving redacted confessions.[294] Central to the court's analysis was the notion that there will be occasions when, despite redaction, a cautionary instruction will not suffice to prevent the jury from improper consideration of a co-defendant's confession.[295] The court came up with the following test: if accompanied by limiting instructions, a redacted statement, substituting neutral references for names, may be introduced at a joint trial unless "a substantial risk exists that the jury will consider that statement in deciding the guilt of the defendant."[296] To measure the substantiality of the risk, the court called upon trial courts to "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."[297] These calculations were to be made on a case-by-case basis taking into account other evidence to determine whether the redaction is truly effective in the context of such other evidence.[298] In other words, the *Foster* court adopted contextual implication analysis for confes-

294. *Id.* at 1374 (stating that issue is determining degree of certainty that instruction will prevent jury from making wrongful inference of incrimination).

295. *See id.* The court spoke of a continuum with *Bruton* at one end and *Richardson* at the other. *See id.* The *Bruton* end, of course, represents trials in which a co-defendant's confession that incriminates a jointly tried defendant by name is admitted along with a cautionary instruction. *See id.* At the *Richardson* end, there are trials in which all references to the existence of others are redacted, thereby assuring, at least in the *Richardson* Court's view, that cautionary instructions will be obeyed. *See id.*; *see also* People v. Cruz 521 N.E.2d 18, 22 (Ill. 1988) (describing co-defendant confessions in *Bruton* and *Richardson* as being at opposite ends of spectrum). According to the *Foster* court, the difficult issue is where along this continuum does the risk that the cautionary instructions will not be followed outweigh the benefits of joint trials. *See Foster*, 548 A.2d at 1374.

296. *Foster*, 548 A.2d at 1378. The concept of identifying a "substantial risk" that the jury would be unable to follow the court's instructions was borrowed from the *Bruton* decision. *See id.* (citing Bruton v. United States, 391 U.S. 123, 126 (1968)). The *Bruton* Court spoke of the "substantial risk" that, despite instructions to the contrary, the jury would consider against one defendant incriminating references to him contained in his co-defendant's statement. *See Bruton* 391 U.S. at 126. Because of this "substantial risk," it was a constitutional violation to admit the statement at the joint trial. *See id.* Similarly, the *Foster* court reasoned that if the substantial risk remained even after an effort at redaction, the statement should be precluded. *See Foster*, 548 A.2d at 1378 (holding that redacted statement may be admitted at joint trial "unless a 'substantial risk' exists that jury will consider that statement in deciding the guilt of the defendant").

297. *Foster*, 548 A.2d at 1379; *see* Smith v. United States, 561 A.2d 468, 473-74 (D.C. 1989) (citing *Foster* test, court found substantial risk in use of blank rectangular squares in lieu of jointly tried defendant's name); Morriss v. United States, 554 A.2d 784, 786-87 (D.C. 1989) (applying *Foster* test to use of pronouns in lieu of alleged accomplices' names).

298. *See Foster*, 548 A.2d at 1379 ("Such an assessment will require consideration of other evidence to determine whether the redaction is effective, when taken in context, to avoid linkage with the defendant.").

sions redacted with pronouns or symbols.[299]

Consistent with *Foster*, several other states subscribe to the notion that, even after *Richardson*, contextual implication analysis should be part of the consideration of a claim of *Bruton* error.[300] Though these courts do not always use the term "degree of inference," they all essentially hold that when a co-defendant's redacted confession is offered as evidence in a joint trial, there must be some measure of the likelihood that, despite a limiting instruction, the jury will link the other defendant to neutral references in the confession and improperly consider the confession against that defendant.

For example, in *State v. Gray*,[301] the Maryland Court of Appeals held that a redacted confession violates *Bruton* "'if the statement compels a directly inculpating inference' between the redacted confession and the nonconfessing defendant."[302] Similarly, in *People v. Banks*,[303] the Supreme Court of Michigan ruled that when a substantial risk remains that the jury will improperly consider a co-defendant's confession, the redacted confession will not be allowed.[304] Additionally, the Supreme Court of Illinois has deter-

299. *Id.* at 1378 (holding that redacted statement substituting "neutral references for names . . . may be admitted into evidence at a joint trial"). Before pronouncing its holding, the court discussed the pre-*Richardson* conflict over contextual implication analysis. *See id.* at 1374-77 (discussing varying results in U.S. courts of appeals when considering question of contextual analysis). The post-*Richardson Foster* court chose to opt for contextual analysis for certain cases lying along the continuum between *Bruton* and *Richardson*. *See id.* at 1377-78 (stating that contextual analysis may be inappropriate for cases lying along continuum between *Bruton* and *Richardson* when "the requisite degree of assurance that the jury will not improperly consider the evidence . . . despite a proper limiting instruction" does not exist).

300. For a discussion of state cases which hold that contextual implication analysis should be considered when addressing error under *Bruton*, see *infra* notes 301-07 and accompanying text.

301. 687 A.2d 660 (Md.), *cert. granted*, 117 S. Ct. 2452 (1997). For a further discussion of the Supreme Court's grant of certiorari in *Gray*, see *supra* note 31.

302. *Gray*, 687 A.2d at 666 (quoting United States v. Pendegraph, 791 F.2d 1462, 1465 (11th Cir. 1986)). The *Gray* court stressed that the "compulsion to make the impermissible inference must be compelling, inevitable, and subject to little or no debate." *Id.* at 667.

303. 475 N.W.2d 769 (Mich. 1991).

304. *Id.* at 774 ("If a 'substantial risk' exists that the jury . . . will consider a codefendant's out-of-court statement in deciding the defendant's guilt, the statement—even though redacted to delete the defendant's name—will be rendered inadmissable at a joint trial."); *see also* State v. Tucker, 861 P.2d 24, 34-35 (Haw. App. 1993) (relying upon reasoning in both *Banks* and *Foster*); People v. Frazier, 521 N.W.2d 291, 301-02 (Mich. 1994) (finding no substantial risk that jury would improperly consider co-defendant's confession in which "friend" was substituted for defendant's name); People v. Etheridge, 492 N.W.2d 490, 493 (Mich. Ct. App. 1992) (using substantial risk inquiry). *See generally* Eric D. Scheible, Note, *The Intro-*

mined that a redaction effort using neutral language will be unacceptable if the inference required to unmask the redaction is less than substantial.[305] A post-*Richardson* New York court adopted contextual analysis and ruled that neutral pronoun redactions will not be permitted if the masked reference would be interpreted by the jury as incriminating the nonconfessing defendant.[306] Similarly, the Supreme Court of California has ruled that neutral pronoun redactions are insufficient if "despite the editing, reasonable jurors could not avoid drawing the inference that the defendant was the coparticipant designated in the confession by symbol or neutral pronoun."[307]

On the federal side, the United States Court of Appeals for the Eleventh Circuit appears to be the leader among the circuits in the post-*Richardson* era determining that not all redaction efforts will satisfy the Confrontation Clause.[308] The most frequently cited case from the Eleventh Circuit on this issue is *United States v. Vasquez*.[309] The *Vasquez* court determined that when neutral terms are substi-

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duction of Codefendants' Out-of-Court Statements Preceded by a Limited Use Instruction Does Not Violate the Constitutional Right to Confront One's Accuser, 73 U. DET. MERCY L. REV. 131, 139-43 (1995) (examining Michigan Supreme Court's decision in *Frazier*).

305. *See* People v. Cruz, 521 N.E. 18, 23 (Ill. 1988) (finding use of redacted statement impermissible when prosecution encouraged jurors to consider each co-defendant's admission against other defendants by implying that defendants' friendship allowed them to do so, even if no "substantial inference" was required of jury to identify defendants as "friends" in co-defendant's statement).

306. *See* People v. Khan, 613 N.Y.S.2d 198, 203 (App. Div. 1994) (finding use of neutral pronouns insufficient to protect nonconfessing defendants when all defendants were identified by eyewitness because jury would have simply filled in blanks with eyewitness' testimony); People v. Hussain, 568 N.Y.S.2d 966, 968-69 (App. Div. 1991) (reversing defendant's conviction because co-defendant's statements implicating his "cousin" allowed jury to interpret "cousin" as incriminating nonconfessing defendant).

Hussain and *Khan* were not decided by New York's highest court, the New York Court of Appeals. That court has not addressed the question subsequent to *Richardson*. In one case, however, the New York Court of Appeals considered whether *Cruz*, which invalidated the interlocking confession exception to *Bruton*, should be applied retroactively. *See* People v. Eastman, 648 N.E.2d 459, 461 (N.Y. 1995). Without analysis, the court affirmed the finding of *Bruton* error based upon the introduction of an ineffectively redacted co-defendant confession. *See id.*

Prior to *Richardson*, New York's highest court adopted contextual implication analysis and called for a measure of the risk that a redacted confession would be linked to and considered against a jointly-tried defendant. *See* People v. Wheeler 466 N.E.2d 846, 847 (N.Y. 1984). The *Hussain* court found that *Richardson* had no impact on the *Wheeler* holding and that it was still controlling law. *Hussain*, 568 N.Y.S.2d at 969.

307. People v. Fletcher, 917 P.2d 187, 189 (Cal. 1996).

308. *See generally* United States v. Washington, 952 F.2d 1402, 1405-07 (D.C. Cir. 1991) (reviewing Eleventh Circuit and other federal appellate decisions on question left open by *Richardson*).

309. 874 F.2d 1515 (11th Cir. 1989).

tuted for other defendants' names, the redacted confession will not be admitted if it compels a direct implication of the redacted parties.[310] Further, whether a direct implication was compelled should be viewed in light of the other evidence admitted at trial.[311]

After considering *Vasquez*, the District of Columbia Circuit created its own post-*Richardson* test for the admissibility of co-defendant confessions redacted through the use of neutral pronouns.[312] The circuit adopted contextual implication analysis and held that the admission of the redacted statement will not violate the Confrontation Clause if, "when viewed together with other evidence, the statement does not create an inevitable association" with jointly tried defendants.[313]

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310. *Id.* at 1518 ("The standard in this circuit, which is consistent with [*Richardson*], is that a redacted confession only violates *Bruton* if it compels a direct, rather than indirect, implication of the complaining defendant.").

311. *See id.* Prior to *Richardson*, the Eleventh Circuit had used contextual implication analysis to determine whether substituted terms should be deemed direct references to jointly tried defendants. For example, in *United States v. Pendegraph*, 791 F.2d 1462, 1465 (11th Cir. 1986), the Eleventh Circuit held that the redacted statement of a co-defendant implicated the defendant because the jury could easily infer that the defendant was the "individual referred to in co-defendant's confession." *Id.* The *Vasquez* court found that *Pendegraph* was consistent with *Richardson*. *See Vasquez*, 874 F.2d at 1518. This has consistently been the view of the Eleventh Circuit. *See, e.g.*, United States v. Foree, 43 F.3d 1572, 1578 (11th Cir. 1995) (using contextual implication analysis to evaluate alleged *Bruton* error); United States v. Van Hemelryck, 945 F.2d 1493, 1501-02 (11th Cir. 1991) (following *Vasquez*); United States v. Beale, 921 F.2d 1412, 1425 (11th Cir. 1991) (using direct implication test).

312. *See Washington*, 952 F.2d at 1406-07 (stating that facts before court did not require application of post-*Richardson* standard used by other courts of appeals).

313. *Id.* The circuit's "inevitable association" language originated in a pre-*Richardson* case. *See* Serio v. United States, 401 F.2d 989, 990 (D.C. Cir. 1968) (per curiam) (finding error in admission of co-defendant's confession because of "well-nigh inevitable association" of defendant as "other man" referred to in confession). In *Washington*, the court found it unnecessary to decide whether the reasoning of *Serio* survived *Richardson*. *Washington*, 952 F.2d at 1406 (stating that determining whether use of indefinite pronoun or other general term that creates inevitable association with defendant violates Sixth Amendment is unnecessary to decide). The *Washington* court found that the redacted statement did not create an inevitable association with the defendant. *See id.* Therefore, the court specifically noted that it was not necessarily ruling that, if there was an inevitable association, there would be a *Bruton* violation. *See id.* Instead, it held simply that in the absence of such an "inevitable association," pursuant to both *Bruton* and *Richardson*, there was certainly no Confrontation Clause violation. *See id.* Citing the same reason, the District of Columbia Circuit avoided the question again in a later case. *See* United States v. Applewhite, 72 F.3d 140, 145-46 (D.C. Cir. 1995) (finding co-defendant's redacted statement did not create inevitible association with defendant).

The Eleventh and District of Columbia Circuits are the only federal courts of appeals that have truly embraced the direct versus indirect implication test. It has been suggested that the Seventh Circuit employs the test as well. *See Washington*,

The cases discussed in this Part reflect efforts to solve the dilemma, unresolved in *Richardson*, concerning the admission of co-defendant confessions that have been redacted, but retain references to the existence of accomplices. Each identifies the court's task to be an assessment of the chances that the redaction will be unveiled inferentially. The language used to describe the recommended assessment varies. One court, for example, seeks to determine whether there is an "unavoidable inference" that the neutral pronoun refers to another defendant.[314] Another court asks whether the reference "compels a direct implication."[315] Yet another looks for an "inevitable association" with jointly accused defendants.[316]

Nevertheless, in several significant ways these cases share common ground. First, they display a keen recognition that the Supreme Court's opinion in *Richardson* is not controlling in cases in which, even after redaction, references to the existence of other

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952 F.2d at 1405 ("Sixth Amendment is not violated when the defendant 'is not *directly implicated* in the nontestifying codefendant's confession by being specifically identified or by being the only other participant in the charged crime.'" (quoting United States v. Briscoe, 896 F.2d 1476, 1502 (7th Cir. 1990))). A more recent Seventh Circuit opinion, however, suggests it does not. *See* United States v. Kreiser, 15 F.3d 635, 639 (7th Cir. 1994) (holding that evidentiary linkage does not cause Confrontation Clause problem when jury is properly instructed).

The Ninth Circuit claimed to follow the reasoning of the Eleventh Circuit. *See* United States v. Enriquez Estrada, 999 F.2d 1355, 1359 (9th Cir. 1993). This claim, however, displays a stark misreading of Eleventh Circuit cases. In *Enriquez-Estrada*, the Ninth Circuit refused to look beyond the face of the redacted confession in its determination of whether the confession incriminated jointly tried defendants. *See id.* The fact that the neutral references in the redacted confession could be linked to these defendants by other evidence was discounted. *See id.* (finding no *Bruton* violation existed because redacted statement was not facially incriminating but error arose when statement was linked to other evidence). This is inconsistent with all of the Eleventh Circuit cases on this issue. Two federal district courts within the Third Circuit reached differing conclusions on this question. *Compare* United States v. Kruckel, No. 92-611, 1993 WL 765648 at *9 (D.N.J. Aug. 13, 1993) (disapproving redaction because of serious danger that jury would make incriminating inference), *aff'd*, 52 F.3d 318 (1995), *with* United States v. Evangelista, 813 F. Supp. 294, 300 (D.N.J. 1993) (adopting Second Circuit's view and "bright line rule" permitting admission of redacted confessions that are not facially incriminating to jointly tried defendants).

314. People v. Fletcher, 917 P.2d 187, 196 (Cal. 1996) ("[R]edaction that replaces the nondeclarant's name with a pronoun or similar neutral . . . term will adequately safeguard the nondeclarant's confrontation rights unless the average juror . . . could not avoid drawing the inference that the nondeclarant is the person so designated in the confession . . . .").

315. *Vasquez*, 874 F.2d at 1518 (discussing Eleventh Circuit's position).

316. *Washington*, 952 F.2d at 1406 (finding that co-defendant's statement did not meet inevitable association standard).

perpetrators remain in a co-defendant's confession.[317] Second, they advocate a case-by-case assessment of the propriety of admitting redacted confessions that contain pronouns or blanks in lieu of names.[318] Third, they all hold that if the redaction can be easily deciphered, a limiting instruction will be no more effective than if there were no redaction in the first place.[319] Finally, these courts resolve that, in making the determination of how easy it will be for the jury to decipher the redaction, consideration must be given to all of the evidence at trial. Despite *Richardson*'s rejection of contextual implication analysis for fully redacted confessions, these courts conclude that it should be utilized for partially redacted confessions. This conclusion stands in contrast with other courts' opinions that *Richardson* precludes contextual implication analysis in all *Bruton*-related matters.[320]

Unfortunately, the solutions offered by these opinions are unworkable. Most of the opinions discussed in this Part lack a prescription for measuring the chance that the jury will infer the actual identity of redacted parties. Although courts speak of making a determination of how likely it is that the jury could unveil the disguised references, they offer no reliable way of making that prediction. Of the opinions in this category, only *Foster* proposes a standard for this assessment.[321] *Foster* calls for the consideration of

317. *See, e.g.*, People v. Banks, 475 N.W.2d 769, 773 (Mich. 1991) ("The *Richardson* facially incriminating analysis does not easily lend itself to the present circumstances. Indeed, the line between inferential incrimination and direct implication is a thin one when the fact of a defendant's existence is not totally eliminated from a co-defendant's statement.").

318. In contrast, the *Richardson* rule for co-defendant confessions that have been redacted to omit all reference to the existence of jointly tried defendants deems all such confessions per se admissible under the Sixth Amendment when accompanied by a limiting instruction. *See* Richardson v. Marsh, 481 U.S. 200, 211 (1987).

319. *See, e.g.*, Foster v. United States, 548 A.2d 1370, 1378 (D.C. 1988) (finding that ineffective redaction case represents point between *Bruton* and *Richardson* "where one cannot have the requisite degree of assurance that the jury will not improperly consider the evidence in deciding the guilt of the defendant against whom the evidence is not admissible despite a proper limiting instruction"); State v. Gray, 687 A.2d 660, 666 (Md. 1997) (holding that in some instances, where inferential step required to make link is so small as to be no step at all, act of redaction "becomes a mere formalistic exercise devoid of the Constitutional protections undergirding *Bruton*").

320. For a critical discussion of cases concluding that contextual implication analysis is precluded in all *Bruton*-related matters, see *supra* notes 188-285 and accompanying text.

321. *Foster*, 548 A.2d at 1379 (stating that "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 the linkage despite a limiting instruction.").

"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."[322] It is difficult, however, to imagine the application of this standard. How is the degree of inference to be measured? Is it the number of cognitive steps the jury must take to solve the mystery? If so, then how many steps suggest the inference will not be made? And should the length of the trial and complexity of the evidence not be considered as well? When should the trial court make the assessment? Should the assessment be made before the trial begins or as the evidence unfolds? Furthermore, frequently the only thing linking a defendant to a redacted reference in his or her co-defendant's confession, is his or her presence at counsel table. It is not inferable from other testimony, but because the confessing co-defendant stated that he or she and "another" did the deed and the nonconfessing defendant is the only other one accused.[323] How would that kind of inference drawing fit into the equation? The second prong of the test, the degree of risk that the jury, despite limiting instructions, will engage in evidence linking is directly related to the results of the first inquiry regarding degree of inference.

In any event, a case-by-case assessment is an unacceptable means for protecting the confrontation rights of defendants in joint trials. When a co-defendant who is not subject to cross-examination accuses another defendant of criminal conduct, *any* reasonable possibility that the jury will infer the identity of the one so accused requires that such evidence be excluded.[324] That possibility always exists at a multiple-defendant trial, any time a co-defendant's state-

322. *Id.*

323. The Indiana Supreme Court put it best when it astutely observed that "if the persons [whose names were redacted] identified as participants by the out-of-court declaration were not co-defendants, there would be no need to attempt concealment of their identities in the first instance." Gutierrez v. State, 388 N.E.2d 520, 527 (Ind. 1979).

324. The tests prescribed for gauging risk by the courts of California, New York and the United States Court of Appeals for the District of Columbia Circuit suggest that *Bruton* is only offended if it is a virtual certainty that the jury will link the defendant to the disguised references in his or her co-defendant's confession. Under that test, even an overwhelming probability that the jury would make such an inference could be disregarded. In somewhat different contexts, the Supreme Court has been intolerant of the mere possibility that jurors drew incorrect conclusions based upon improper instructions. *See, e.g.*, Mills v. Maryland, 486 U.S. 367, 384 (1988) (regarding potential misunderstanding of jury instructions in capital penalty phase, "the possibility that petitioner's jury conducted its task improperly certainly is great enough to require re-sentencing"); Francis v. Franklin, 471 U.S. 307, 315-16 (1985) (regarding language about presumption, "the question . . . is . . . what a reasonable juror could have understood the charge as meaning").

ment containing anonymous references to accomplices is admitted.[325] Once the true identity of the accused is inferred, the dictates of *Bruton* establish that there is a significant and unacceptable risk that the jury will be unable to follow the court's limiting instruction.[326] If *Bruton*'s protection is triggered when a co-defendant's confession incriminates another defendant by name, then its protection should likewise be triggered when there is a reasonable possibility that the jury will determine that name.

B. *Invitation to Speculate Test*

There are circumstances under which the admission of a redacted confession will signal that a name, known to the prosecution, has been removed from the text. This message can be delivered using either neutral pronouns or symbols. The message to the jury is that the court and/or prosecutor and/or police know the identities of the deleted parties, but for reasons they will not explain, they are being kept secret. There are a number of jurisdictions that answer *Richardson*'s open question regarding symbols and pronouns by forbidding their use when such a message is likely to be inferred.[327]

The "invitation to speculate" test calls for an assessment of whether the method of redaction is likely to convey to the jury that the names of known accomplices have been intentionally covered up. This inquiry is deemed crucial because of the perceived risk that if the jury knows or suspects that a known party's name has been deleted, it will be unable to resist speculating about the true identity. Just how the invitation to speculate is extended varies. In some trials the jury is literally told that known parties' names have been removed. Sometimes it is the police detective who testifies that he or she was told an actual name.[328] Sometimes, the trial

325. *See* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO JOINDER AND SEVERANCE, § 2.3(a) (1967) (questioning vitality of *Delli Paoli* prior to *Bruton* and, in considering redaction, warning that "if the statement indicates that another unnamed party is involved in the crime, the jury is nearly certain to draw the inference that the co-defendant is this party").

326. Bruton v. United States, 391 U.S. 123, 131 (1968) (stating that it cannot accept limiting instructions as adequate protection for right to cross-examine).

327. For a discussion of cases in which redaction depended upon the risk that the altered confession would inculpate the nonconfessing defendant, see *supra* notes 301-16 and accompanying text.

328. *See, e.g.*, United States v. Long, 900 F.2d 1273, 1279 (8th Cir. 1990) (pertaining to FBI agent informing jury that defendant's name is known). Consider the following excerpt from the testimony of the agent who interrogated the co-defendant in *Long*:

court[329] or the prosecutor[330] reveals that a redaction has been made. In other instances, it is easily inferable.[331] Moreover, the nature of the redaction itself often gives it away. That is to say, the use of the word "blank," a blank space or an "X" in and of itself strongly suggests that a particular name has been omitted.[332] In contrast, when words like "another," "friend" or "some guy" are used in lieu of defendants' names, it remains possible for the jury to interpret that language to mean that the identities of those other

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Q: So if I understand it right, Miss Long [the co-defendant] told you that someone instructed her to be out there?

A: That's correct.

Q: She actually told you a name of the person that told her to be out there and you know that name now?

A: Yes, sir, I do.

Id. Similar testimony was given in *Commonwealth v. Lee*:

Q: Prosecutor (interjecting): Excuse me, after X are there any additional phrases?

A: A name was given at this point. Hereafter referred to as X.

Notes of Testimony at 666, Commonwealth v. Lee, 662 A.2d 546, (No. 8605-1163) (Pa. 1995); *see* McCloskey v. Ryan, No. C.A. 90-1478, 1991 WL 165076, at *8 (E.D. Pa. Aug. 23, 1991) (illustrating prosecutor reading co-defendant's statements in front of jury). Beyond the prejudice to a defendant's confrontation rights, such testimony ought to be inadmissible because it is irrelevant. *See* FED. R. EVID. 401 (defining relevant evidence); MCCORMICK, *supra* note 10, at 338-41 (examining meaning of relevance). When the names of jointly tried defendants are redacted, proof that they were supplied to the police by the co-defendant tends to show nothing more than that secrets are being kept from the jury.

329. *See* People v. Frazier, 521 N.W.2d 291, 296-97 (Mich. 1994) (criticizing trial court for "telling the jury of the fact of redaction").

330. *See* People v. Cruz, 521 N.E.2d 18, 24 (Ill. 1988) (concerning prosecutor introducing questioning of witness by instructing him not to "mention the name of any other person to whom he referred").

In one case, the prosecutor commenced his examination of the agent who took the co-defendant's confession by stating, "[n]ow I want to tell you something right now. Pursuant to an objection by counsel concerning names of individuals, I don't want you to name any individual by name." United States v. Fontao, No. 95-1084-86, 1996 WL 189306, at *1 (6th Cir. Apr. 18, 1996). In closing argument, the prosecutor summarized the co-defendant's confession by stating that "[h]e gives detailed information identifying people by name who are involved in this transaction with him." *Id.*

331. *See* Commonwealth v. Miles, 681 A.2d 1295, 1331 (Pa. 1996). In *Miles*, the fact that the actual name of the accomplice was provided to the police was revealed in the following way: "Question and Answer Read by Officer: I'm showing another photo for identification purposes. Do you recognize this male? Answer (By Co-defendant): Yes. I know him as X, the X I have been talking about." Notes of Testimony, at 43, *Miles* (No. 9007-2228-2260).

332. *See* United States v. Danzey, 594 F.2d 905, 918-19 (2d Cir. 1979) (holding that use of "blank" suggests that name of particular individual has been redacted); State v. Swafford, 913 P.2d 196, 201-02 (Kan. 1996) (holding that method of redaction—leaving blank space—makes it obvious to jury that statement was redacted and that nontestifying defendant knows true identity of persons referenced).

participants are still unknown to the prosecution and that they remain unapprehended.[333]

Courts adopting this test generally favor redaction. Unlike the courts following the "degree of inference" test, many are not concerned that other evidence may link defendants to substituted neutral pronouns.[334] They extract from *Richardson* the notion that limiting jury instructions will suffice to prevent jurors from building inferences about the identity of anonymously denoted coparticipants.[335] They carve out an exception, however, for redacted confessions that, more or less, entice the jury to "try to solve the mystery."

The Eighth Circuit staunchly advocates the "invitation to speculate test."[336] The United States Court of Appeals for the Second Circuit has also embraced it,[337] and the Ninth Circuit has suggested

333. *See Frazier*, 521 N.W.2d at 297 ("While the word 'friend' may have signaled a redaction, it may also have been the word actually used in the statement, leaving the person referred to unnamed.").

Of course, while possible, this interpretation is rather unlikely in a joint trial. It would be illogical for jurors to conclude that accomplices remain unapprehended when co-defendants accused by the prosecution of committing the same acts were obviously apprehended and are being tried jointly with the confessor.

334. *See, e.g.*, United States v. Jones, 101 F.3d 1263, 1270 (8th Cir. 1996) (holding that issue is not whether it would be easy for jury to conclude that redacted name was defendant's, but whether confession itself implicates defendant); United States v. Tutino, 883 F.2d 1125, 1135 (2d Cir. 1989) (holding that, as long as defendant's statement itself does not connect co-defendant to crime, it is admissible).

335. *See, e.g.*, *Jones*, 101 F.3d at 1270 ("[C]ourt's instruction to apply a confession only to the declarant is adequate to constrain the jury to do so."); United States v. Garcia, 836 F.2d 385, 390-91 (8th Cir. 1987) (citing *Richardson*'s reasoning that jury will follow limiting instruction).

336. *See* United States v. Payne, 923 F.2d 595, 597 (8th Cir. 1991) (holding that redacted testimony should have been excluded because jury was invited to speculate as to identity of "someone"); United States v. Long, 900 F.2d 1270, 1280 (8th Cir. 1990) (same); *Garcia*, 836 F.2d at 391 (permitting redaction that did not draw attention to fact that names were purposely omitted).

The Eighth Circuit's opinions rely on the reasoning of *Clark v. Maggio*, 737 F.2d 471 (5th Cir. 1984), a pre-*Richardson* case from the Fifth Circuit. The *Maggio* court reasoned that the jury might "fill[ ] in the blanks," thereby violating the defendant's right to confrontation. *Id.* at 476-77. The Fifth Circuit has not indicated whether the *Maggio* test remains applicable in the wake of *Richardson*. For a discussion of Fifth Circuit decisions, see *supra* note 231 and accompanying text.

337. *See Tutino*, 883 F.2d at 1135 (holding that redacted statement in which names of co-defendants were replaced by neutral pronouns was admissible if there was no indication to jury that original statement contained actual names); United States v. Alvarado, 882 F.2d 645, 653 (2d Cir. 1989) (holding that using "blank" in confession without telling jury that names were used originally is constitutional).

Tutino and *Alvarado* are not inconsistent with *Williams*, which was also decided by the Second Circuit. *See* United States v. Williams, 936 F.2d 698, 701 (2d Cir. 1991). Under *Williams*, the use of neutral pronouns is an acceptable redaction

that it employs it as well.[338]

Application of the "invitation to speculate" test raises an interesting issue concerning whether there is a role to be played by contextual implication analysis. As stated, most of the courts adopting this test believe that *Richardson* directed them to reject a contextual implication approach. Yet, when courts find an invitation to speculate based upon a police detective's testimony that actual names have been redacted from a confession, this, in essence, is contextual implication analysis. Evidence apart from the text of the confession (e.g., the detective's testimony that names were deleted) is what links the jointly tried defendant to his or her co-defendant's confession. Courts fully rejecting contextual implication analysis might be expected to disregard this other evidence and argue that a limiting instruction would be adequate to prevent the jury from linking the defendant to the co-defendant's confession through the knowledge that the names of known parties have been deleted.

Even if the "invitation to speculate" analysis could technically be labeled "contextual implication," it stands to reason that some courts purporting to reject contextual implication actually adopt it nonetheless.[339] In these cases, the so-called "linking evidence" is

format despite the fact that other evidence in the case reveals the true identity of the parties. *See id.* *Tutino* and *Alvarado* subscribe to the same principle but call for the disallowance of neutral pronoun redactions whenever the jury is alerted that names have been redacted. *See Tutino*, 883 F.2d at 1135 (permitting redacted statement of co-defendant in heroin distribution conspiracy case); *Alvarado*, 882 F.2d at 653 (permitting redaction of nontestifying co-defendant's confession relating to various drug-related crimes).

338. *See* United States v. Hoac, 990 F.2d 1099, 1107 (9th Cir. 1993) (holding that substitution of "individuals" for names was permitted because there was no indication that co-defendant gave actual names or even stated number of individuals). The same test was also employed by a district court in the Third Circuit. *See* United State v. Giampa, 904 F. Supp. 235, 268 (D.N.J. 1995) (allowing admission of redacted statement and distinguishing cases in which speculation was invited). Unlike most of the other courts adopting this test, the *Giampa* court applied both the invitation to speculate and the degree of inference tests. *See id.* at 268-69. There are other opinions in which both tests are applied. *See* State v. Hoeck, 547 N.W.2d 852, 857-58 (Iowa Ct. App. 1996) (holding that method of redaction invited jury to speculate and context indicated that defendant's name was one omitted); People v. Cruz, 521 N.E.2d 18, 23-24 (S.C. 1988) (holding that acknowledgment of redaction and its nature required no substantial inference to identify defendants' names as names redacted).

339. The Court of Appeals for the Second Circuit provides an excellent example of a line of decisions rejecting contextual implication, yet embracing the invitation to speculate test. *Compare Williams*, 936 F.2d at 701 (holding that, although jury could identify defendant's name as one redacted, confession is permissible), *with Alvarado*, 882 F.2d at 653 (stating that reference to other individual in confession is permissible because jury does not know name is redacted). Decisions from the Eighth Circuit exemplify this as well. *Compare Jones*, 101 F.3d at 1270 (holding that use of "we" and "they" could refer to anyone and not just co-defendant), *with*

admitted almost simultaneously with the co-defendant's confession.[340] Given the juxtaposition of the two pieces of evidence, it is unlikely that anything would prevent the jury from speculating about the undisclosed perpetrators based upon the testimony that they were disclosed to the government.

The invitation to speculate test is workable. It creates a per se rule regarding the use of neutral terms as substitutes for the names of other defendants. If the jury is informed, directly or indirectly, that actual names have been redacted, the admission of a nontestifying co-defendant's confession will be barred. The problem is that it is limited in scope. It offers no protection for defendants in trials in which the jury is not told of the redaction.[341] Defendants who are otherwise linked to the anonymous references in their co-defendants' confessions are denied the right to confront their accusers when these redacted confessions are admitted at joint trials. The invitation to speculate test offers no protection to these defendants.

V. THE RIGHT THING TO DO AND THE CONSEQUENCES

The comment accompanying the 1968 American Bar Association (ABA) *Standards Relating to Joinder and Severance* warned that "courts must exercise great caution in permitting the prosecution to elect the deletion alternative."[342] To an alarming extent courts

Long, 900 F.2d at 1280 (using "someone" in place of redacted name led jury to defendant).

340. *See, e.g.*, Notes of Testimony at 666, 673, Commonwealth v. Lee, 662 A.2d 645 (Pa. 1996) (No. 8605-1163) (noting that police detective's recitation of co-defendant's redacted statement was interrupted by prosecutor, and detective was asked to state that actual name had been given in lieu of "X"s that were read).

341. *See, e.g., Garcia*, 836 F.2d at 390-91 (finding that despite grounds for jury to infer link between neutral references and defendant, redacted confession was not improperly admitted because attention was not drawn to fact that names were purposely redacted).

342. *See* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 325, § 2.3(a). The tentative draft for these standards was prepared in 1967, shortly before *Bruton* was decided. *See id.* (criticizing *Delli Paoli* reasoning). The draft standards themselves prescribed that

> (a) [w]hen a defendant moves for a severance because an out-of-court statement of a co-defendant makes reference to him but is not admissible against him, the court should determine whether the prosecution intends to offer the statement in evidence at the trial. If so, the court should require the prosecuting attorney to elect one of the following courses:
>
> (i) a joint trial at which the statement is not admitted into evidence;
>
> (ii) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted; or
>
> (iii) severance of the moving defendant.

Id.

have failed to heed this warning. Instead, courts appear to have bent over backwards to permit joint trials, and they freely admit co-defendant confessions containing thinly veiled and highly incriminating references to other defendants.[343]

A decade has passed since the Supreme Court decided *Richardson*. The *Richardson* Court gave its stamp of approval to only one form of redaction—one in which all references to the existence of other defendants have been deleted.[344] This holding has been of limited practical use because it is far more common for the prosecution to offer a redacted statement that retains references to jointly tried defendants, but substitutes symbols or pronouns for their names.[345] The *Richardson* Court expressly stated that its ruling

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After *Bruton* was decided, but before the standards were finalized, they were amended. The following phrase was added to section 2.3(a)(ii) of the ABA's *Standards Relating to Joinder and Severance*: "provided that, as deleted, the confession will not prejudice the moving defendant." *Id.* § 2.3(a)(ii). The commentary accompanying the supplemental amendments explained that section 2.3(a) was especially important because *Bruton* overruled *Delli Paoli* and because the *Bruton* Court "did not attempt to prescribe any particular procedure to be followed so as to avoid the consequences of that case." *See id.*; *see also* Bruton v. United States, 391 U.S. 123, 143 (1968) (White, J., dissenting) (warning that deletion must not cause substantial prejudice to declarant or government). It was anticipated that editing the confession would be the preferred method. *See* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 325, § 2.3(a) (stating that "[e]diting of the confession is clearly the alternative which will usually be preferred . . . [because] the confession can be used . . . without the expense of a separate trial."). The standards were supplemented in 1968 "to give greater emphasis to the fact that courts must exercise great caution in permitting the prosecution to elect the deletion alternative." *Id.* § 2.3(a) (warning against materially changing substance of statement).

343. *See generally* Richardson v. Marsh, 481 U.S. 200, 209-10 (1987) (discussing perceived benefits of joint trials).

344. *Id.* at 211 (holding that Confrontation Clause is not violated when all references to defendant, not just name, are deleted). Commentators have criticized *Richardson* especially for its rejection of contextual implication analysis. *See* William J. Dickett, *Supreme Court Review, Sixth Amendment—Limiting the Scope of* Bruton, 78 J. CRIM. L. & CRIMINOLOGY 984, 999-1013 (1988) (claiming that interpretation of *Bruton* was incorrect); Garcia, *supra* note 16, at 418-21 (criticizing *Richardson* because it did not follow *Bruton*, prejudiced defendant, violated Confrontation Clause, was based in part on faulty premise that jury could follow limiting instructions and cited advantages of joint trials as reason not to expand *Bruton* to this situation); Seidelson, *supra* note 56, at 65-69 (arguing that majority's belief that jury will obey limiting instructions and that joint trials are necessary for efficient administration of justice are not persuasive arguments). This author agrees that even if all references to the existence of other defendants is removed, if the confession still incriminates those other defendents when linked with other evidence, then the confrontation rights of those defendants and *Bruton* are violated. This Article, however, limits its critique to the admission of co-defendant confessions that are redacted through the use of pronouns and symbols.

345. There are at least a couple of reasons that the use of neutral pronouns or symbols is the redaction method of choice. One is that often the deletion of all reference to the existence of accomplices will distort the meaning of the confession. This could seriously undermine its probative value. *See* ABA PROJECT ON

did not address the question of the propriety of this form of redaction.[346] Ten years later, the Court's answer is long overdue.[347]

Since its decision in *Richardson*, the Court has not elected to hear any case presenting this open question.[348] The Supreme

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STANDARDS FOR CRIMINAL JUSTICE, *supra* note 325, § 13-3.2; Robert O. Dawson, *Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices*, 77 MICH. L. REV. 1379, 1414 (1979) (noting that trial courts will allow references to other individuals to prevent false suggestion that declarant admitted sole culpability for offense); Garcia, *supra* note 16, at 415. This might occur, for example, if the confessing co-defendant played a relatively minor role in the offense. If all references to the existence of the primary actor were deleted, the confession might no longer describe criminal activity. According to one court:

> [A] trial court will not always have the luxury of a simple choice between a confession with no references to co-defendants or one which employs pronouns. Confessions raising *Bruton* questions will often contain so many references to the participation of others that it may be difficult to redact them to omit any reference to co-defendants' existence and still have a coherent statement. As a practical matter, the choice will often be between a redacted confession with neutral references or no usable confession at all for joint trial.

United States v. Evangelista, 813 F. Supp. 294, 299 (D.N.J. 1993). In addition, full redaction potentially gives rise to a claim by the confessing co-defendant that the introduction of an incomplete version of his statement violates his rights. *See* United States v. Range, 94 F.3d 614, 621 (11th Cir. 1996) (holding that "rule of completeness" is violated when redacted statement distorts its meaning); State v. Robinson, 622 S.W.2d 62, 71 (Tenn. Crim. App. 1981) (co-defendant claimed he had the right to have the entire contents of his confession admitted). *See also* FED. R. EVID. 106 ("When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part . . . which ought in fairness to be considered . . . ."). Another, perhaps more cynical, view is that prosecutors prefer to leave in anonymous references to other defendants with the expectation that jurors will inevitably fill in the blanks. Prosecutors know that jurors may link jointly tried defendants to incriminating references in a co-defendant's confession and may be unable to follow the court's limiting instruction. When this happens, the prosecutor gets the windfall of uncross-examined incriminating evidence without running afoul of *Bruton*.

346. *See Richardson*, 481 U.S. at 211 & n.5 (opting not to rule on admissibility).

347. As noted above, the Supreme Court has granted certiorari to address the issue. For a discussion of the Supreme Court's grant of certiorari in *Gray v. Maryland*, see *supra* note 31 and accompanying text.

348. For a further discussion of possible explanations for the Court's denial of certiorari in any given matter, see Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 TEX. L. REV. 1251, 1253-56 (1989). During the past decade there has been a documented reduction in the overall size of the Supreme Court's docket. *See* Erwin Chemerinsky, *Supreme Court Review: The Shrinking Docket*, TRIAL, May 1996, at 71. Nevertheless, it is somewhat curious that the Court has, thus far, not addressed the question left open in *Richardson*. It is especially curious given what could be described as a conflict among the circuits on this issue. *See* Arthur D. Hellman, *The Supreme Court, The National Law, and the Selection of Cases for the Plenary Docket*, 44 U. PITT. L. REV. 521, 624 (1983) (concluding that resolution of conflict among lower courts played significant role in granting of certiorari); *cf.* Sturley, *supra*, at 1258-59, 1275 (arguing that intercircuit conflict, by itself, should not warrant Supreme Court review, rather, Court should determine importance of resolving conflict). It is conceivable that the Court has shied away from the *Richardson* question because it fears that an

Court should grant certiorari in a neutral pronoun redaction case because their use poses a significant threat to the confrontation rights of criminal defendants in joint trials. The Supreme Court needs to confront this threat and decide that it cannot be tolerated by a fair system of criminal justice.[349]

The Court should rule that the introduction of a nontestifying co-defendant's confession that incriminates a jointly tried defendant is a per se violation of *Bruton*, even when the name of the defendant has been replaced with a neutral pronoun or symbol. A per se rule prohibiting neutral pronoun or symbol redactions is necessary to protect adequately the confrontation rights of the implicated defendant. Any time a redacted confession that points an accusatory finger at an anonymous accomplice is admitted, there is a reasonable possibility that the jury will infer that the accomplice is the other defendant on trial. 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.[350] Although in some cases the inference will be stronger than in others, a reasonable possibility always exists that

honest answer could have disadvantageous consequences. In *Richardson*'s majority opinion, Justice Scalia extolled the virtues of joint trials. *See Richardson*, 481 U.S. at 209-10 (claiming that separate trials would impair efficiency and fairness). The Court may perceive that if it calls for the discontinuance of the neutral pronoun redaction method, there will be a dramatic increase in the number of severed trials.

349. In the meantime, the lower federal courts and state courts should reexamine their allowance of neutral pronoun redactions and forbid them. At a minimum, the use of symbol redactions like "X" or "blank" should be abandoned by the few courts that allow them. Unfortunately, change in the lower courts is unlikely because many of these courts ignore the likelihood that the neutral pronoun or symbol redaction will be unmasked. *See, e.g.*, United States v. Williams, 936 F.2d 698, 700-01 (2d Cir. 1991) (ignoring risk based upon mistaken belief that *Richardson* requires them to do so). Thus, it is especially important for the Supreme Court to speak to the proper application of *Richardson*.

350. For a discussion of evidence that a cautionary jury instruction may increase the likelihood that evidence will be improperly considered, see *supra* note 209 and accompanying text. In cases in which there is no suggestion to the jury that names have been redacted (this would not apply to the use of symbols or blanks because their very use suggests redaction), it could be argued that the jury could as likely assume that the references are to unapprehended perpetrators. The limiting instruction, however, probably destroys that possibility because, in all likelihood, the jury would conclude that the trial court would not go to the trouble of asking them not to consider evidence against a particular defendant if it had no logical bearing on his case. Of course, the elimination of the limiting instruction is an unacceptable solution. This may, however, explain why, on occasion, trial counsel fail to request the limiting instruction. *See, e.g.*, United States v. Vasquez, 874 F.2d 1515, 1517 n.3 (11th Cir. 1988) (illustrating situation in which no request was made for limiting instruction); State v. Evans, 450 S.E.2d 47, 50 n.1 (S.C. 1994) (illustrating situation in which no request was made for limiting instruction nor was argument made that it was error); Tageant v. State, 737 P.2d 764, 767 (Wyo.

the inference will be made.[351] To deny *Bruton*'s protection to those accused by a nontestifying co-defendant through inference, though not by name, is unjustifiable.

The degree of inference test involves a case-by-case assessment of the likelihood that the redaction will be unmasked during the course of the trial.[352] A per se rule, however, avoids the difficulties inherent in a case-by-case approach. In *Richardson*, Justice Scalia raised the concern that, at the beginning of a trial, it would often be difficult, if not impossible, to predict whether the evidence would tend to link a defendant to his or her co-defendant's confession.[353] This concern is valid.[354] Before the evidence has been presented, it would indeed be quite difficult to know whether and how much evidence in the trial will reveal the true identity of the "X" or "another" mentioned in a co-defendant's confession. In cases like *Richardson*, in which a co-defendant's confession is redacted to remove any reference to others, Justice Scalia's solution is for courts to be unconcerned with the links created by other evidence. For cases in which anonymous references to others remain

1987) (stating that limiting instruction must be given only upon request and no request made in case).

351. *Compare Williams*, 936 F.2d at 701 (finding that other evidence "all but insured" that jury could identify redacted party), *and* Robinson v. Rose, No. 86-5080, 1987 WL 38091, at *3 (6th Cir. July 23, 1987) (finding that other evidence pointed unerringly to defendants), *with* United States v. Bennett, 848 F.2d 1134, 1142 (11th Cir. 1988) (finding use of pronoun could "most logically" be understood to refer to defendants), *and* United States v. Petit, 841 F.2d 1546, 1556 (11th Cir. 1988) (finding that use of pronoun "sufficiently inculpated" defendant).

352. For a further discussion of the degree of inference test, see *supra* notes 292-326 and accompanying text.

353. *Richardson*, 481 U.S. at 209 (claiming that if *Bruton* is extended "to confessions incriminating by connection . . . it is not even possible to predict the admissibility of a confession in advance of trial.").

354. *See id.* at 220 (Stevens, J., dissenting). Justice Stevens, in his dissenting opinion in *Richardson*, made light of this concern, arguing that the decision on whether to admit the confession could be postponed until after the prosecution rests. *See id.* (Stevens, J., dissenting). This solution, however, is unfair to both sides. *See id.* (Stevens, J., dissenting). If, mid-trial the confession is excluded, the prosecutor has lost the enormous advantage of introducing the confession against its declarant. Had the prosecutor known this would develop, he or she could have agreed to separate trials. *See id.* (Stevens, J., dissenting). If the court rules mid-trial that the confession may be admitted, the prosecutor has missed out on the opportunity of presenting it at a chosen juncture and the advantage of mentioning it in his or her opening statement. *See id.* (Stevens, J., dissenting). Moreover, both confessing and nonconfessing defendants are prejudiced by this method as well. *See id.* (Stevens, J., dissenting). The defense strategy of the confessing defendant would likely be altered depending upon whether his or her own confession was to be revealed to the jury. *See id.* (Stevens, J., dissenting). Likewise, the strategy of the nonconfessing defendant would be affected if he or she were aware that the jury would hear the redacted confession of his co-defendant. *See id.* (Stevens, J., dissenting).

after redaction, however, the fairest and most practical solution is a per se rule prohibiting the introduction of the confession in that form.

Absent a ruling on neutral pronoun redactions from the Supreme Court, an amendment to the Federal Rules of Criminal Procedure could address the problem, at least in the federal courts.[355] Rule 14 of the Federal Rules of Criminal Procedure, entitled "Relief from Prejudicial Joinder," currently authorizes a court to order separate trials if it appears that a defendant or the government would be prejudiced by joinder.[356] The rule specifically mentions that in deciding a motion for severance, the court may review any statements or confessions made by the defendants.[357] In light of the misapplication of *Richardson*, the rule should further provide that if incriminating references to one defendant contained within the statement of another cannot be redacted to delete all reference to the existence of the nonconfessing defendant, either the trials must be severed or the confession excluded. In other words, the

355. *See* 28 U.S.C. § 2072 (1994) (describing Supreme Court's power to prescribe rules for federal courts). By law, the Supreme Court is endowed with the power to prescribe rules of procedure for the federal courts. *See id.* The Judicial Conference, which submits proposed changes to the Court for approval, has an Advisory Committee on Criminal Rules charged with making a continuing study of the rules and recommending desirable changes. *See id.* § 2073. *See generally* 2 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE (describing amendment process). Rule changes recommended by the Advisory Committee and approved by the Judicial Conference are transmitted to the Supreme Court for its approval. *See* 28 U.S.C. § 2073. Changes approved by the Court are promulgated by it, and take effect unless Congress objects within a prescribed period. *See id.* Thus, ironically, an amendment of the Rules to prohibit neutral pronoun redactions would have to be approved by the very Court that, on numerous occasions, has passed up the opportunity to rule on the issue. Nevertheless, this author's suggestion that an amendment to the Rules be proposed is not unrealistic. Prior to its deciding *Bruton*, the Court approved an amendment to Rule 14 of the Federal Rules of Criminal Procedure that allowed a court considering a severance motion to inspect any statements made by any defendants. *See* Bruton v. United States, 391 U.S. 123, 131-32 (1967). This amendment was recommended by the Advisory Committee for the same reasons that the Court ultimately relied upon in establishing the *Bruton* rule. *See id.* at 132. In other words, before overruling *Delli Paoli*, the Court approved an amendment to Rule 14 that was inconsistent with the *Delli Paoli* holding. *See id.* at 131. The Court cited its own approval of the rule amendment in support of its ruling in *Bruton*. *See id.* at 132. Historically speaking, therefore, there is no reason to believe that the Court would be disinclined to adopt a rule of criminal procedure through its rule making powers even if thus far, it has not reached out to accomplish the change through judicial pronouncement.

356. *See* FED. R. CRIM. P. 14 (describing options for court if party is prejudiced by joinder of defendants).

357. *See id.* (stating that court may require attorney to produce statements for in camera review). This language was included in a 1966 amendment, two years before *Bruton* was decided. *See Bruton*, 391 U.S. at 131-32 (allowing court to order government to deliver confessions for in camera review).

rules should specifically prohibit the use of neutral pronoun or symbol redactions.

The misuse of redaction has also been addressed by the ABA in the *Standards Relating to Joinder and Severance.*[358] Standard 13-3.2 prescribes guidelines for "severance of defendants."[359] In the face of a *Bruton* problem, the standard suggests redaction as an alternative to severance, "provided that, as deleted, the confession will not prejudice the moving defendant."[360] This language has been part of the ABA's *Standards Relating to Joinder and Severance* since just after *Bruton* was decided.[361] The standard should be revised to rule out the use of neutral pronoun- and symbol-type deletions.

It is surprising that, thus far, the standard has not been amended in this fashion. The language warning against potential prejudice was inserted specifically to emphasize the need for caution when utilizing redaction.[362] The commentary to the 1968 amendments reveals that the drafters envisioned full, rather than partial, redaction.[363] In fact, the original drafters considered an "effective" deletion to be one in which more than just the name of the nonconfessing defendant is deleted.[364] According to the original commentary, "if the statement indicates that another unnamed party is involved in the crime, the jury is nearly certain to draw the inference that the co-defendant is this party."[365] In view of these particularized concerns about the election of redaction as an alternative to *Bruton*, the ABA should examine the widespread use of neutral pronoun redactions and modify the standards to advise against the practice.[366]

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358. *See* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 325, § 13-3.2 (providing guidelines for severance of defendants).

359. *See id.* (suggesting that trial court should determine whether prosecution intends to offer statement as evidence in case-in-chief and, if trial court so determines, requiring prosecutor either to prohibit use of statement, to redact statement or to sever defendant).

360. *See id.* at 13-3.2 (a)(ii).

361. For a further discussion of the revision of the standards, see *supra* note 342.

362. *See* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 325, § 2.3(a) ("[C]ourts must exercise great caution in permitting the prosecution to elect the deletion alternative.").

363. *See id.* ("In a great many cases the deletion alternative simply will not be available, as it will be impossible to remove all references to participation of another person in the crime without changing materially the substance of the statement.").

364. *See id.* § 13-3.2.

365. *Id.*

366. The ABA itself has recognized that its standards can influence judicial decisions. *See id.*

A per se rule that restricts the use of redaction as a means of complying with *Bruton* will likely result in an increase in the number of severance orders in co-defendant cases.[367] Although the *Bruton* majority chose to elevate fairness over concerns for judicial economy, the latter carried the day in *Richardson*.[368] The *Richardson* majority's unwillingness to apply *Bruton*'s protection to fully redacted confessions was based, in large part, upon concerns about sacrificing the efficiencies of joint trials.[369] Justice Scalia expressed the opinion that "joint trials play a vital role in the criminal justice system."[370] He feared that severing the trials of co-defendants could result in waste,[371] inconvenience[372] and injustice.[373]

A rule prohibiting neutral pronoun and symbol redactions, however, need not result in severance of co-defendants' trials. To avoid severance the court, when possible, can admit a co-defendant's confession after the redaction of all references to the exist-

367. For a further discussion of alternative solutions to severance, see *infra* notes 374-85 and accompanying text. This Article refers to severance "orders" to emphasize that an order severing cases may not always result in multiple trials.

368. *See* Richardson v. Marsh, 481 U.S. 200, 209-10 (1987) (holding that requiring prosecutors to bring separate trials for each defendant impairs both efficiency and fairness of criminal justice system); Bruton v. United States, 391 U.S. 123, 134-35 (1968) (reasoning that violating constitutional liberties is too high a price to pay for economic efficiency).

369. *See Richardson*, 481 U.S. at 209-10 (noting that joint trials generally prevent inconsistent verdicts and other injustices); *see also* United States v. LaFrance, No. 91-5767, 1992 WL 130179, at *5 (4th Cir. June 9, 1992) (Luttig, C.J., dissenting) (supporting rationale of *Richardson*); United States v. Roberts, 881 F.2d 95, 102 (4th Cir. 1989) (holding that just because defendant would have better chance of acquittal in separate trial does not warrant severance).

370. *Richardson*, 481 U.S. at 209; *cf. id.* at 218 (Stevens, J., dissenting) ("The concern about the cost of joint trials, even if valid, does not prevail over the interests of justice.").

371. *See id.* at 209-10 (describing potential effects of severance). Justice Scalia asserted that joint trials accounted for almost one-third of federal criminal trials in the preceding five years. *See id.* at 209. Because many of these joint trials involved numerous defendants and because it was common for some of these defendants to have confessed, Scalia warned that broadening *Bruton* in the way advocated by Marsh would require prosecutors to present "the same evidence again and again." *Id.* at 210.

372. *See id.* (expressing concern that witnesses would be forced to "repeat the inconvenience (and sometimes trauma) of testifying").

373. *See id.* (noting potentially unfair advantage for co-defendant in last of severed cases to be tried). According to Justice Scalia, the last defendant tried would have had the benefit of previewing the prosecutor's evidence in the earlier trials. *See id.* Justice Scalia also praised joint trials for their role in preventing what he termed the "scandal and inequity of inconsistent verdicts." *Id.*; *see also Bruton*, 391 U.S. at 143 (White, J., dissenting) (arguing that separate trials of co-defendants are apt to have varying results).

ence of additional perpetrators.[374] In addition, the prosecutor always has the option of foregoing the use of the confession altogether. Another option is to choose one of two creative alternatives to severance. The first is trial bifurcation. Here, defendants are tried jointly; however, the co-defendant's confession is not introduced against him until the jury has reached a verdict with regard to the other defendant.[375] The other is to use multiple juries. Under this scheme, two (or more) juries sit at a joint trial and each is only permitted to hear the evidence properly admissible against one defendant. Thus, the co-defendant's confession that incriminates another defendant would not be read in front of that defendant's jury.[376]

Despite the availability of alternative solutions, in many instances they will not be viable.[377] In those instances, a *Bruton* problem can only be solved through severance. Nevertheless, fears that

374. *See, e.g., Richardson*, 481 U.S. at 211; Ortega v. United States, 897 F. Supp. 771, 779 (S.D.N.Y. 1995); Skinner v. State, 575 A.2d 1108, 1119 (Del. 1990); State v. Umphrey, 786 P.2d 1279, 1281-82 (Or. Ct. App. 1990).

To the *Richardson* Court, deleting all reference to the existence of other defendants meant that, in redacted form, the confession would contain no references to the conduct of accused accomplices. Sometimes a court, however, will misapply this language and the substitution of a neutral pronoun will be considered the deletion of all references to that person's existence. *See, e.g.*, United States v. White, Nos. 93-30290 to 93-30292, 1993 WL 509006, at *2 (9th Cir. Dec. 9, 1993) ("White's confrontation rights were not violated because the redacted testimony contained no reference to her existence. [Defendant]'s name was replaced with the neutral term 'that person.'").

375. *See, e.g.*, United States v. Crane, 499 F.2d 1385, 1387-88 (6th Cir. 1974) (holding that bifurcated trial did not prejudice the defendant). *But cf.* Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*, 26 U. TOL. L. REV. 505, 505 (1995) (advocating elimination of bifurcation in both civil and criminal trials).

376. *See* People v. Fletcher, 917 P.2d 187, 196 n.5 (Cal. 1996) (pointing out multiple jury and bifurcation alternatives); Robert R. Calo, *Joint Trials, Spillover Prejudice, and the Ineffectiveness of a Bare Limiting Instruction*, 9 AM. J. TRIAL ADVOC. 21, 37 (1985) (exploring multiple jury alternative to severance); Alex A. Gaynes, *Two Juries/One Trial Panacea of Judicial Economy or Personification of Murphy's Law*, 5 AM. J. TRIAL ADVOC. 286, 288-92 (1981) (exploring pitfalls of multiple jury approach); Haddad, *supra* note 115, at 5 n.11 (detailing examples of use of multiple jury procedure).

In a highly publicized New York case, a *Bruton* problem caused a court to impanel two juries to hear the joint trial of two co-defendants. *See* Patricia Hurtado & Wendy Lin, *Juries Hear Different Evidence in Trial*, NEWSDAY, Apr. 17, 1990, at 27 (illustrating use and benefits of multiple juries). Members of one jury wore gold badges and the other blue and the admitted exhibits were also color coded. *See id.*

377. *See* People v. Williams, 444 N.E.2d 136, 143 (Ill. 1982) (ruling that use of multiple juries should be cautioned against because of possibility of spillover of information from one jury to another); *see also* Dawson, *supra* note 345, at 1416-18 (describing these "imaginative solutions" and how courts have found them to be flawed); Garcia, *supra* note 16, at 414-15 (describing risks inherent in multiple jury and bifurcation alternatives).

a reduction in the number of joint trials will negatively impact on judicial efficiency may be exaggerated. A series of separate trials may, on occasion, be more efficient than a single, lengthy, multi-defendant and multi-defense-counsel trial.[378] Moreover, it is often not true that severed defendants all undergo separate jury trials.[379] Depending upon the outcome of the first trial, prosecutors may have incentive to settle remaining cases and/or defendants seeing a negative outcome may be motivated to plead guilty and avoid the risks of a trial.[380] In addition, severing the trials of co-defendants may enhance the ability of a prosecutor to present a complete case. After severance and the conviction of one defendant, that defend-

378. In his often-cited article on joint trials, Professor Robert O. Dawson makes a strong case for re-examining the validity of assumptions about the efficiencies and other benefits of joinder. *See* Dawson, *supra* note 345, at 1381-1409; *see also* United States v. McVeigh, No. 96-CR-68-M, 1996 WL 630979, at *9 (D. Co. Oct. 25, 1996) ("[I]t is far from certain that the time required for two separate trials would, in total, be substantially greater than the time required for a joint trial."); John L. Costello, Jr., *Closing the Floodgates Causes Spillover: Virginia's New Rule for Joint Criminal Trials,* 4 CIV. RTS L.J. 67, 69-71 (1993) (questioning whether perceived benefits of joint trials can be meaningfully measured); Garcia, *supra* note 16, at 412-13 (echoing Dawson's arguments regarding exaggeration of advantages of joinder). Professor Dawson questions what he calls, the "supposed efficiencies," and argues that joint trials are not the efficiency or time-saving devices many believe them to be. *See* Dawson, *supra* note 345, at 1381-91. This is true, claims Dawson, from the perspectives of the prosecutor, witnesses and the court. *See id.* Dawson points out that severing the trials of co-defendants far from doubles the time requirement of the prosecutor. *See id.* at 1383-84. He suggests that severance would have no impact on the time required for investigation, plea bargaining or pre-trial hearings. *See id.* at 1383. With regard to the trials, while Dawson admits there would be additional time commitments, he asserts that two trials stemming from the same incident would not require twice the preparation time of one joint trial. *See id.* at 1383-84. As to witness convenience, Dawson points out that the majority of trial witnesses are noncivilians. These witnesses routinely give testimony in court as part of their jobs. *See id.* at 1384-85. Lastly, Dawson stresses that joinder may not even conserve judicial resources. *See id.* He asserts that because they involve many players, joint trials are difficult to schedule and are often delayed. *See id.* at 1385-86. According to Dawson, joint trials are complicated and, therefore, take longer to conduct than single-defendant trials. *See id.* at 1386-87. He states that jury selection in joint trials has unique issues. *See id.* at 1386. He also claims that the court is likely to encounter far more evidentiary objections in a joint trial. *See id.* at 1387. Dawson also suggests that the cost of appeals is not necessarily reduced for joint trials. *See id.* at 1387-88. He makes the point that appeals from verdicts in joint trials frequently involve issues relating to alleged prejudice from the joinder. *See id.* at 1388.

379. *See* Dawson, *supra* note 345, at 1389-91 (suggesting that questions about strength of proof, credibility of witnesses and other issues will be answered in first trial and may cause parties to re-evaluate their chances at trial).

380. *See id.* Dawson refers to a 1973 survey of Vermont trial judges. At the time, Vermont provided certain felony defendants with an absolute right of severance. *See id.* Trial judges reported that after the first trial the cases of the awaiting co-defendants were usually disposed of without trial. *See id.* at 1390-91.

ant could be called as a witness against his co-defendant.[381] This strategy would be impossible at the joint trial of both defendants.

In the final analysis, some duplication of judicial resources may be a necessary consequence of providing the constitutional protection due defendants in multidefendant cases. The increased judicial cost gives these defendants no less of a right to confrontation. In deciding *Bruton*, the Court considered the argument that its decision might result in the sacrifice of the financial and other advantages of joint trials.[382] The argument was fully rejected and the premise that constitutional liberties outweigh the need for judicial economy was fully embraced by the *Bruton* Court.[383]

In this Article, this author argues that when a co-defendant's incriminating reference to a jointly tried defendant is deleted and a pronoun or symbol is substituted for that defendant's name, the redacted confession is not sufficiently distinguishable from the confession considered in *Bruton*.[384] That being the case, any tension

381. *See* Barker v. Wingo, 407 U.S. 514 (1972) (arguing that defendant's right to speedy trial was violated by prosecutor's continued requests to continue his trial until after trial of co-defendant). In *Barker*, the prosecutor requested continuances in order to be able to call the co-defendant as a witness against the defendant. *See id.* at 516-17. The convicted co-defendant eventually gave testimony against the defendant and he was convicted. *See id.* at 518. Of course, it could turn out that a convicted or acquitted co-defendant would choose to testify on behalf of a defendant. He or she might testify that he committed the crime alone or that neither defendant was guilty of the offense. In any event, the accuracy of the truth-finding process at a defendant's trial would likely be enhanced by the cross-examinable testimony of an alleged coparticipant.

382. Bruton v. United States, 391 U.S. at 123, 134 (1968) (holding that, although "[j]oint trials do conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial," these reasons do not justify sacrificing constitutional liberties).

383. *Id.* at 134-35 ("'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.'" (quoting People v. Fisher, 164 N.E. 336, 341 (1928) (Lehman, J., dissenting))). Timothy McVeigh, one of the defendants in the Oklahoma City bombing case, recently moved to sever his case from that of his co-defendant Terry Nichols. *See* United States v. McVeigh, No. 96-CR-68-M, 1996 WL 630979, at *1 (D. Colo. Oct. 25, 1996). He argued that he was entitled to severance pursuant to *Bruton*. *See id.* Given the nature of the charges and the fact that the trial's venue was moved far from the homes of most of the victims' families, separate trials would likely present significant duplication of resources and result in inconvenience. *See id.* at *9. Nevertheless, the federal district court granted severance holding that the value of resource conservation "may be outweighed by the compelling interest in the fairness and finality of the verdict." *See id.*

384. The *Richardson* majority found that if a co-defendant's confession is redacted to delete all references to the name and existence of other defendants, it is sufficiently different than the confession considered in *Bruton* so that concerns for efficiency and resource conservation weigh against severance. *See* Richardson v. Marsh, 481 U.S. 200, 209-10 (1987). In his dissenting opinion, Justice Stevens dis-

between economy and the protection of the constitutional right to confrontation must be resolved—as it was in *Bruton*—in favor of fairness.[385]

VI. CONCLUSION

Many years ago Professor Wigmore described the right to cross-examination as "the greatest legal engine ever invented for the discovery of truth."[386] Thirty years after *Bruton*, however, for most defendants accused by the extra-judicial statements of their co-defendants, that engine is stalled in its tracks. These defendants are "protected" by neutral pronouns, symbols or, as this author argues, transparent and worthless disguises. In truth, however, the identity of "X," "someone" or "a friend" is no mystery. They are criminal defendants for whom we pretend to offer the protections of the Sixth Amendment.

agreed arguing, "[o]n the scales of justice . . . considerations of fairness normally outweigh administrative concerns." *Id.* at 217 (Stevens, J., dissenting).

385. Shortly after *Bruton* was decided, the Court determined that the ruling was important enough to justify the administrative costs of having it apply retroactively. *See* Roberts v. Russell, 392 U.S. 293, 294 (1968). In doing so, the Court stated that "[t]he retroactivity of the holding in *Bruton* is therefore required; the error 'went to the basis of fair hearing and trial because the procedural apparatus never assured the [petitioner] a fair determination' of his guilt or innocence." *See id.* (quoting Linkletter v. Walker, 381 U.S. 618, 639 n.20 (1965)).

386. 5 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1367 (5th ed. 1974).