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Avoiding a Confrontation?: How Courts Have Erred in Finding That Nontestimonial Hearsay is Beyond the Scope of the Bruton Doctrine

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I. INTRODUCTION

Quite obviously, what the “interlocking” nature of the codefendant’s confession pertains to is not its *harmfulness* but rather its *reliability*: If it confirms essentially the same facts as the defendant’s own confession it is more likely to be true. Its reliability…may be relevant to whether the confession should…be *admitted as evidence* against the defendant…but cannot conceivably be relevant to whether, assuming it cannot be admitted, the jury is likely to obey the instruction to disregard it, or the jury's failure to obey is likely to be inconsequential. The law cannot command respect if such an inexplicable exception to a supposed constitutional imperative is adopted. Having decided *Bruton*, we must face the honest consequences of what it holds.¹

In *Bruton v. United States*, George Bruton and William Evans were jointly tried before a jury on a bank robbery charge.² After he was arrested, Evans gave a confession to a postal inspector in which he admitted that Bruton and he committed the armed robbery at issue.³ At trial, Evans did not testify, and the prosecution introduced his confession.⁴ The confession was inadmissible against Bruton under the rules of evidence, so the court instructed the jury only to use it as evidence of Evans’ guilt.⁵ In concluding that the admission of Evans’ confession violated the Confrontation Clause, the United States Supreme Court found that it could not trust the jury to use the confession solely as evidence of Evans’ guilt and that the admission of the

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³ *Id.*
⁴ *Id.* at 125.
⁵ *Id.* at 125.
confession had a devastating practical effect on Bruton’s defense.\(^6\) Courts now use this “Bruton doctrine” to conclude that the admission at a joint jury trial of a nontestifying co-defendant’s confession that facially incriminates other defendants but is inadmissible against them under the rules of evidence violates the Confrontation Clause.\(^7\)

But what if Evans did not make his statement to a person he knew to be a governmental agent? What if he made the same statement to his mother, his brother, or his lover? Or what if he made the same statement to his cellmate, who turned out to be a confidential informant? Before 2004, the vast majority of courts would have found that the admission of such a “noncustodial” statement violated the Bruton doctrine.\(^8\) For example, in State v. Swafford, the Supreme Court of Kansas found that the admission at a joint jury trial of a nontestifying co-defendant’s unwitting confession to a confidential informant violated the Confrontation Clause because “Bruton applies to a statement made in a noncustodial setting…”\(^9\)

Furthermore, before 2004, it would have been irrelevant whether Evans’ confession was Constitutionally reliable as long as it was inadmissible against Bruton under the rules of evidence. In Ohio v. Roberts, the Supreme Court held that the admission of hearsay did not violate the Confrontation Clause if the hearsay declarant was “unavailable” and the statement had “adequate indicia of reliability,” i.e., if it was Constitutionally reliable.\(^10\) As the introductory excerpt from the Supreme Court’s opinion in Cruz v. New York makes clear, however, the Bruton doctrine is a test of Constitutional harmfulness and not a test of Constitutional reliability.\(^11\)

\(^6\) Id. at 128-36.
\(^7\) See e.g., State v. Ellis, 748 P.2d 188, 190 (Utah 1987) (“To invoke the Bruton doctrine, a statement must be powerfully and facially incriminating with respect to the other defendant and must directly, rather than indirectly, implicate the complaining defendant in the commission of the crime.”).
\(^8\) See infra notes 273-83 and accompanying text.
\(^9\) 913 P.2d 196, 201 (Kan. 1996).
\(^10\) 448 U.S. 56, 66 (1980).
\(^11\) See supra note 1 and accompanying text.
Therefore, the doctrine depends on the inadmissibility of co-defendant confessions combined with their harmfulness, not their Constitutional unreliability. Consequently, co-defendant confessions that were inadmissible but reliable under Roberts still violated the Bruton doctrine.

In its 2004 opinion in Crawford v. Washington, the Supreme Court overruled Roberts and held that “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” And, while the Supreme Court is still sorting out exactly which statements are “testimonial” and which statements are “nontestimonial,” three things are clear: First, statements like Evans’ confession to the postal inspector are testimonial while statements like the co-defendant’s confession to the confidential informant in Swafford are not. Second, with limited exceptions, only the admission of testimonial hearsay violates the Confrontation Clause. Third, courts presented with the issue have consistently concluded with few exceptions that nontestimonial hearsay now falls outside the scope of the Bruton doctrine, with many of these opinions coming in the last year. Thus, in its 2010 opinion in United States v. Dale, the Tenth Circuit could easily conclude that the admission at a joint jury trial of a co-defendant’s unwitting confession to a confidential informant did not violate the Bruton doctrine because it was nontestimonial.

These courts, however, are missing something apparently less clear about Crawford: Like its predecessor, Ohio v. Roberts, it should have had no effect on the Bruton doctrine.

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12 See id.
13 See id.
15 See id. at 51 (“An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”).
16 See Davis v. Washington, 547 U.S. 813, 821 (2006) (“It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.”).
17 See infra notes 288-301 and accompanying text.
18 See infra notes 302-03 and accompanying text.
19 614 F.3d 942, 856 (8th Cir. 2010).
Because *Crawford*, like *Roberts*, sets forth a test for Constitutional *reliability*, it has no bearing on the *Bruton* doctrine, which sets forth a test for Constitutional *harmfulness*. It is thus easy to see why the *Crawford* Court concluded that in *Cruz* it answered an “entirely different question” than the one before it: The *Bruton* doctrine “make[s] no claim to be a surrogate means of assessing reliability.”

This article thus argues that courts have erred in concluding that nontestimonial statements are beyond the scope of the *Bruton* doctrine in the wake of *Crawford* and its progeny. Therefore, a co-defendant’s confession to a mother, brother, or lover should violate the *Bruton* doctrine to the same extent as a formal co-defendant confession to a governmental agent. Moreover, this article asserts that even if *Crawford* did deconstitutionalize the *Bruton* doctrine with regard to nontestimonial statements, courts should still find that the admission of nontestimonial statements by co-defendants that used to violate the Confrontation Clause now, as they always did, violate the rules of evidence.

Section II tracks the Supreme Court’s treatment of the Confrontation Clause before *Crawford*, including its creation and refinement of the *Bruton* doctrine. Section III discusses *Crawford*, its progeny, and the testimonial/nontestimonial dichotomy created by the Court. Section IV addresses the ways in which lower courts have interpreted and applied the *Bruton* doctrine both before *Crawford* and in its wake. Finally, Section V concludes that courts should find that *Crawford* had no effect on the *Bruton* doctrine, meaning that the admission of nontestimonial co-defendant statements can still violate the *Bruton* doctrine. Alternatively, it argues that the admission of nontestimonial statements by co-defendants that used to violate the Confrontation Clause still clearly violate the rules of evidence.

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20 *Crawford*, 541 U.S. at 59 & 62.
II. THE SUPREME COURT’S PRE-CRAWFORD CONFRONTATION CLAUSE CASES

A. The Pre-Pointer Confrontation Clause

The Confrontation Clause of the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him…”\(^{21}\) Before its 1965 opinion in *Pointer v. Texas*,\(^{22}\) the United States Supreme Court had never explicitly held that the Confrontation Clause encompassed “the right of an accused criminal defendant to cross-examine any witness who testifies against him.”\(^{23}\) Therefore, in 1957, when first presented with the question of whether the prosecution could admit the confession of a nontestifying co-defendant at a joint jury trial, the Supreme Court had no reason to decide whether the admission of such a confession in effect made the co-defendant a witness against the other defendants and violated the Confrontation Clause.

B. The Road to the Bruton Doctrine

1. In Jury We Trust: *Delli Paoli* and the Efficacy of Jury Instructions

That 1957 case was *Delli Paoli v. United States*,\(^{24}\) which dealt with the validity of the basic premise of the American jury system that jurors will follow a court’s clear instructions.\(^{25}\) As the Court’s opinion in *Delli Paoli* makes clear, courts used to apply this premise in cases in which judges instructed jurors in joint trials only to use nontestifying co-defendants’ confessions as evidence of their guilt and not as evidence against other defendants. In *Delli Paoli*, Orlando

\(^{21}\) U.S. CONST. amend. VI.
\(^{22}\) 380 U.S. 400 (1965).
\(^{24}\) 352 U.S. 232 (1957).
\(^{25}\) *See infra* note 39 and accompanying text.
Delli Paoli was jointly tried with four co-defendants on charges of conspiracy to deal unlawfully in alcohol.\(^{26}\) One of those co-defendants, James Whitley, signed a written confession after the conspiracy was over that also implicated Delli Paoli.\(^{27}\) The district court allowed the prosecution at the close of its case to admit Whitley’s confession and added an emphatic instruction to the jury only to use the confession in determining Whitley’s guilt and not to use the confession to determine the guilt of any of the other defendants.\(^{28}\) This instruction informed jurors, *inter alia,* that

An admission by defendant after his arrest of participation in alleged crime may be considered as evidence by the jury against him, together with other evidence, because it is, as the law describes it, an admission against interest which a person ordinarily would not make. However, if such defendant after his arrest implicates other defendants in such an admission it is not evidence against those defendants because as to them it is nothing more than hearsay evidence.\(^{29}\)

After Delli Paoli was convicted, he appealed, with the case eventually reaching the United States Supreme Court.\(^{30}\) Neither Delli Paoli’s appeal, nor the Court’s opinion, referenced the Sixth Amendment Confrontation Clause.\(^{31}\) Instead, the primary issue before the Court was whether the district court committed reversible evidentiary error by allowing the prosecution to introduce Whitley’s confession, which was admissible against him but not against his co-defendants.\(^{32}\) In addressing this issue, the Court first noted that if the facts were somewhat different, it would have been clear that there was no such evidentiary error.\(^{33}\) First, if Whitley’s confession did not implicate Delli Paoli in the conspiracy, its admission would not have been

\(^{26}\) 352 U.S. at 233.  
\(^{27}\) *Id.* at 233.  
\(^{28}\) *Id.*  
\(^{29}\) *Id.* at 240.  
\(^{30}\) *Id.* at 234.  
\(^{32}\) *Id.* at 233.  
\(^{33}\) *Id.* at 237.
objectionable.\textsuperscript{34} Second, if the district court admitted the confession but deleted all reference to Delli Paoli, it clearly would have been admissible.\textsuperscript{35} Third, if Whitley’s statement were made in furtherance of the subject conspiracy, it would have constituted a co-conspirator admission and been admissible against all co-defendants.\textsuperscript{36} As noted, though, Whitley made his confession after the conspiracy was over, meaning that his confession was “nothing more than hearsay evidence” and thus inadmissible against his co-defendants.\textsuperscript{37}

The Court’s decision about whether to affirm Delli Paoli’s conviction thus hinged on whether the jury followed the district court’s limiting instruction and only used Whitley’s confession as evidence of his guilt.\textsuperscript{38} The Court concluded that it did, based not so much upon an actual belief that the jurors did as told as upon the fear that a contrary conclusion would mean that the very concept of trial by jury would need to be abandoned. According to the Court,

\begin{quote}
It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. 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. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice.\textsuperscript{39}
\end{quote}

While the Court acknowledged that in some cases such blind faith should not be placed in the jury’s ability to respect limiting instructions, it found that the case before it was not one of them and affirmed Delli Paoli’s conviction.\textsuperscript{40} In a dissenting opinion joined by three other Justices, Justice Frankfurter disagreed, concluding that “[t]he Government should not have the

\begin{footnotes}
\item[34] \textit{Id.}
\item[35] \textit{Id.} According to the Court, “the impracticality of such deletion was, however, agreed to by both the trial court and the entire court below and cannot well be controverted.” \textit{Id.}
\item[36] \textit{Id.}
\item[37] \textit{Id.} at 240.
\item[38] \textit{Id.} at 241–43.
\item[39] \textit{Id.} at 242.
\item[40] \textit{Id.} at 243.
\end{footnotes}
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.”

Eleven years later, in 1968, the Court would agree with Justice Frankfurter in *Bruton v. United States*.

2. **In Jury We Doubt: The Court’s Loss in Faith in the Jury**

In between the Supreme Court’s opinion in *Delli Paoli* and its opinion in *Bruton*, the Supreme Court took four important actions that laid the groundwork for what has since become known as the *Bruton* doctrine. First, in its 1964 opinion in *Jackson v. Denno*, the Court considered the constitutionality of a New York rule under which a defendant’s confession was given to jurors rather than the judge to determine its voluntariness, with the judge instructing jurors to disregard the confession entirely if they determined that it was involuntary. In resolving this issue, the Court posed the following questions:

Under the New York procedure, the fact of a defendant’s confession is solidly implanted in the jury’s mind, for it has not only heard the confession, but it has been instructed to consider and judge its voluntariness and is in position to assess whether it is true or false. If it finds the confession involuntary, does the jury—indeed, can it—then disregard the confession in accordance with its instructions? If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest by resort to the confession? Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows the defendant has given a truthful confession?

The Court then admitted the folly of this venture, noting that “[i]t 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, if this is the course it took, was affected

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41 *Id.* at 248 (Frankfurter, J., dissenting).
44 *Id.* at 388.
by the very evidence showing the confession was true."\(^{45}\) For the Court, though, this uncertainty was enough for it to conclude that New York’s rule contravened the defendant’s rights under the Due Process Clause of the Fourteenth Amendment because the rule “pose[d] substantial threats to a defendant’s constitutional rights to have an involuntary confession entirely disregarded….\(^{46}\) One of the authorities upon which the Court relied in reaching this conclusion was the aforementioned language from Justice Frankfurter’s dissenting opinion in *Delli Paoli*\(^ {47}\).

Second, in its 1965 opinion in *Pointer v. Texas*, the Court reaffirmed “that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him.”\(^ {48}\) Third, later that year, the Court applied this right in *Douglas v. Alabama*, a case in which a defendant was not able to cross-examine his alleged co-participant in a crime regarding his confession even though the confession technically was not admitted against him or even admitted into evidence.\(^ {49}\)

In *Douglas*, Jesse Douglas and Olen Loyd were charged with assault with intent to murder and given separate trials.\(^ {50}\) Loyd’s trial was held first, and he was convicted.\(^ {51}\) Before Loyd was sentenced, the prosecutor called him to testify at Douglas’ trial, and Loyd attempted to invoke his Fifth Amendment privilege against self-incrimination.\(^ {52}\) The trial judge precluded Loyd from invoking this privilege because he had been convicted, but Loyd persisted in refusing to testify, leading to him being declared a hostile witness.\(^ {53}\) Then, under the guise of attempting to refresh Loyd’s recollection, the prosecutor read the entirety of a confession allegedly made by

\(^{45}\) *Id.* at 389.
\(^{46}\) *Id.*
\(^{47}\) *Id.* at 388 n.15.
\(^{48}\) 380 U.S. 400, 404 (1965).
\(^{49}\) 380 U.S. 415 (1965).
\(^{50}\) *Id.* at 416.
\(^{51}\) *Id.*
\(^{52}\) *Id.*
\(^{53}\) *Id.*
Loyd, stopping after every few sentences to ask Loyd, “Did you make that statement?” In part of the alleged confession read by the prosecutor, Loyd named Douglas as the person who fired the shot that struck the victim. Three law enforcement officers thereafter identified the confession as one made and signed by Loyd, but the confession was not officially offered into evidence.

After Douglas was convicted, he appealed, with his appeal eventually reaching the United States Supreme Court, which found that Douglas’ inability to cross-examine Loyd regarding this “alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause.” According to the Court, while the prosecutor’s “reading of Loyd’s alleged statement, and Loyd’s refusal to answer, were not technically testimony, the [prosecutor’s] reading may well have been the equivalent in the jury’s mind of testimony that Loyd in fact made the statement….” Therefore, “Loyd’s reliance on privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true.”

The Court held that “effective confrontation of Loyd was only possible if Loyd affirmed the statement as his” and that Loyd instead invoked his Fifth Amendment privilege and did not expose himself to cross-examination. It thus reversed Douglas’ conviction, concluding that Loyd’s confession “clearly bore on a fundamental part of the State’s case against [Douglas].”

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54 Id.
55 Id. at 416-17.
56 Id. at 417.
57 Id. at 419.
58 Id.
59 Id.
60 Id.
61 Id.
Fourth, the Supreme Court in 1966 amended Federal Rule of Criminal Procedure 14, which authorized courts to sever defendants’ trials if consolidation appeared to prejudice the government or the defendants. The amendment added a clause to Rule 14 which provided that “[i]n ruling on a motion by a defendant for severance the court may order the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at trial.” The accompanying Advisory Committee’s Note indicated that the reason for this amendment was that “[a] defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice.”

C. *Bruton v. United States* and the Creation of the *Bruton* Doctrine

Two years later, in 1968, the Court would rely upon these four occurrences in *Bruton v. United States* to overrule *Delli Paoli*. In *Bruton*, George William Bruton and William James Evans were jointly tried on the federal charge of bank robbery, and Evans did not testify at trial. After he was arrested, Evans had given one confession to a postal inspector in which he refused to name his accomplice, but he also gave another confession in which he admitted that Bruton and he committed the armed robbery at issue. As in *Delli Paoli*, the district court allowed the prosecution to introduce this latter confession and issued a limiting instruction

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64 Fed.R.Crim.P. 14 advisory committee’s note to the 1966 amendment.
66 Id. at 124.
67 Id.
informing the jury, inter alia, that Evans’ confession was “hearsay insofar as the defendant George William Bruton is concerned, and you are not to consider it in any respect to the defendant Bruton, because insofar as he is concerned it is hearsay.”68

Both Bruton and Evans were convicted, but their trial was actually held one week after the United States Supreme Court decided Miranda v. Arizona.69 Therefore, on appeal, the Second Circuit reversed Evans’ conviction upon finding that his confessions were inadmissible because the interrogations that led to those confessions were not accompanied by any kind of preliminary warnings.70 But, because the district judge instructed jurors not to use Evans’ confessions as evidence of Bruton’s guilt, the Second Circuit affirmed Bruton’s conviction.71

Bruton subsequently successfully filed a petition for writ of certiorari with the United States Supreme Court, which began by restating Delli Paoli’s basic premise “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.”72 The Court then reiterated that “[i]f it were true that the jury disregarded the reference to the codefendant, no question would arise under the Confrontation Clause, because by hypothesis the case is treated as if the confessor made no statement inculpating the nonconfessor.”73 Ultimately, however, the Court found that it had effectively repudiated this basic premise through the four previously mentioned actions.74

First, the Court stated that in Douglas, it relied upon Pointer in finding a Confrontation Clause violation when Loyd’s confession was read to the jury even though it was not technically

68 Id. at 126.
69 Id. at 126 n.1.
70 Id.
71 Id. at 125.
72 Id. at 126 (quoting Delli Paoli v. United States, 352 U.S. 232, 239 (1957)).
73 Id.
74 Id.
admitted into evidence.\textsuperscript{75} The Court then noted that Evans’ confession implicating Bruton actually was introduced into evidence, which increased the likelihood that the jury would improperly use the confession as evidence of Bruton’s guilt.\textsuperscript{76} The Court thus found that Bruton’s inability to cross-examine Evans, like Douglas’ inability to cross-examine Loyd, denied him his rights under the Confrontation Clause.\textsuperscript{77}

The Court next noted that while \textit{Jackson} did not involve a co-defendant’s confession, the Court relied in part upon Justice Frankfurter’s dissent in \textit{Delli Paoli} to reject the proposition that a court can rely upon a jury to ignore a defendant’s confession after being asked to determine whether that confession was voluntary.\textsuperscript{78} The Court therefore had no problem in agreeing with the opinion of the Supreme Court of California in \textit{People v. Aranda}, which had used \textit{Jackson} to reject \textit{Delli Paoli}’s premise that a court can rely upon a jury to honor a jury instruction and not use a co-defendant’s confession as evidence of the other defendant’s guilt.\textsuperscript{79} Indeed, the Court quoted \textit{Aranda} for the proposition that “‘[i]f 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 when it is determining that defendant's guilt or innocence.’”\textsuperscript{80}

Then, after describing the import of the aforementioned amendment to Rule 14,\textsuperscript{81} the Court set forth and struck down several defenses to the procedure approved in \textit{Delli Paoli}. First, the Court noted that Judge Learned Hand argued that while a limiting instruction might not prevent a jury from using a co-defendant’s confession as evidence of the other defendant’s guilt,
the admission of such a confession along with a limiting instruction “‘probably furthers, rather than impedes, the search for truth.’” The Court found that this argument overlooked alternative ways of getting such a confession before the jury without violating the nonconfessor’s right of confrontation such as admitting the confession after removing all references to the nonconfessing co-defendant.

Second, the Court cited the argument that it should maintain the rule of *Delli Paoli* because its abolishment would lead prosecutors to pursue separate trials and sacrifice the numerous benefits of joint trials. The Court again turned this argument aside, relying upon the opinion of the New York Court of Appeals in *People v. Fisher*, which concluded that it could not sacrifice a defendant’s constitutional rights at the altar of greater convenience, economy, and speed in the administration of justice.

Third, the Court referenced its prior conclusion in *Delli Paoli* that a contrary result would have required abolishing the very idea of trial by jury. The Court now regarded this pronouncement as hyperbolic, finding “that in many….cases the jury can and will follow the trial judge's instructions to disregard” inadmissible evidence brought to their attention. In other cases, however, “as was recognized in *Jackson v. Denno*…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.” And, according to the Court, “[s]uch a context is presented here, where the powerfully incriminating

82 Id. at 133 (quoting Nash v. United States, 54 F.2d 1006, 1007)).
83 Id. at 133-34 & n.10.
84 Id. at 134.
85 Id. (quoting People v. Fisher, 164 N.E.336, 341).
86 Id. at 135.
87 Id.
88 Id.
extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial."\(^{89}\)

The Court deemed such co-defendant confessions devastating to other defendants.\(^{90}\) Accordingly, it held that “[d]espite the concededly clear instructions to the jury to disregard Evans’ inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner’s constitutional right of cross-examination.”\(^{91}\) The Court emphasized that it was the inadmissibility of Evans’ confession combined with this likelihood of harmfulness that led to the Confrontation Clause violation.\(^{92}\) It specifically noted that there was not before it “any recognized exception to the hearsay rule insofar as [Bruton] is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause.”\(^{93}\)

Courts later interpreted the Court’s opinion as creating the “Bruton doctrine,” under which the admission at a joint jury trial of a nontestifying co-defendant’s confession that is inadmissible against other defendants under the rules of evidence violates the Confrontation Clause.\(^{94}\) Later in 1968, the Supreme Court found in Roberts v. Russell that this new Bruton doctrine was applicable to state court prosecutions.\(^{95}\)

**D. Harrington v. California and Harmless Error**

The next year, in 1969, in Harrington v. California, the Court was presented with the question of whether violations of the Bruton doctrine automatically require reversal or whether

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\(^{89}\) Id. at 135-36.  
\(^{90}\) Id. at 136.  
\(^{91}\) Id. at 137.  
\(^{92}\) Id. at 128 n.3.  
\(^{93}\) Id.  
\(^{95}\) 392 U.S. 293, 294 (1968).
they are subject to traditional harmless error analysis. In Harrington, three African-American men and one Caucasian man, Glen Harrington, were jointly tried before a jury on charges of attempted robbery and first-degree murder. Two of the African-American men gave confessions which also implicated “the white guy” or “the white boy.” These two co-defendants did not testify at trial, but the prosecution did introduce their confessions, which were inadmissible against Harrington under the rules of evidence. The third African-American defendant did testify and implicated Harrington, and Harrington also testified and implicated himself. Moreover, other witnesses testified that Harrington had a gun and was an active participant in the attempted robbery.

Harrington was convicted, and the United States Supreme Court ultimately granted his petition for writ of certiorari and held that admission of the nontestifying co-defendants’ confessions violated the Bruton doctrine. That said, the Court found that this Confrontation Clause violation was subject to harmless error review and determined that the trial court’s error was harmless in light of the overwhelming other evidence of Harrington’s guilt.

E. Parker v. Randolph: The Court’s First Stab at Interlocking Confessions

As noted, in Bruton, the Court found a Confrontation Clause violation in part because Evans’ confession had a “devastating” practical effect on Bruton’s defense. In its 1979 opinion in Parker v. Randolph, the Court unsuccessfully attempted to answer the question of

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97 Id. at 252.
98 Id. at 253.
99 Id. at 252.
100 Id. at 253-54.
101 Id.
102 Id.
103 Id.
104 See supra note 90 and accompanying text.
whether a co-defendant’s confession could survive Confrontation Clause scrutiny if the prosecution could prove that its admission would not devastate the defenses of other defendants in a given case. In *Parker v. Randolph*, several defendants were jointly tried before a jury in connection with a murder committed during a robbery, and none of the defendants testified.\textsuperscript{105} Each of the defendants made a confession to police officers that interlocked with the other defendants’ confessions, *i.e.*, corroborated the other confessions.\textsuperscript{106} The trial court allowed the State to introduce each of these confessions and instructed jurors to use each defendant’s confession solely as evidence of his guilt because each confession was only admissible against the confessor under the rules of evidence.\textsuperscript{107}

In finding that the Sixth Circuit improperly granted *habeas* relief to one of the defendants convicted after this joint trial, the United States Supreme Court later concluded in a four Justice plurality opinion “that admission of interlocking confessions with proper limiting instructions conforms to the Sixth and Fourteenth Amendments to the United States Constitution.”\textsuperscript{108} According to the plurality, the admission of a co-defendant’s interlocking confession does not violate the *Bruton* doctrine because the other defendant has himself confessed, “‘probably the most probative and damaging evidence that can be admitted against him.’”\textsuperscript{109} Therefore, admitting the co-defendant’s interlocking confession would not have the “devastating” practical effect forecast by the *Bruton* Court, and the *Bruton* remedy of “cross-examination would likely

\begin{footnotesize}
\textsuperscript{105} 442 U.S. 62, 64 (1979).
\textsuperscript{106} *Id.* at 66-67.
\textsuperscript{107} *Id.* at 67.
\textsuperscript{108} *Id.* at 75.
\textsuperscript{109} *Id.* at 72.
\end{footnotesize}
yield small advantage to the defendant whose own admission of guilt stands before the jury unchallenged."\textsuperscript{110}

Justice Powell took no part in the consideration of the case while three dissenting Justices would have found a \textit{Bruton} doctrine violation and reversed.\textsuperscript{111} Meanwhile, Justice Blackmun concurred with the plurality, deeming the admission of the interlocking confessions harmless error based upon the facts of the case before him.\textsuperscript{112} Justice Blackmun, however, specifically refused to join the plurality’s new interlocking confession exception to \textit{Bruton}, concluding that “it abandon[ed] the harmless-error analysis” the Court announced in \textit{Harrington}.\textsuperscript{113} Blackmun concluded that when the prosecution admits a non-testifying co-defendant’s confession that also implicates other defendants, there is a violation of the \textit{Bruton} doctrine, and the question then becomes whether that violation constituted harmless error.\textsuperscript{114} According to Justice Blackmun, the fact that the co-defendant’s confession interlocks with other defendants’ confessions is only relevant to this harmless error analysis, not the baseline question of whether there was a \textit{Bruton} doctrine/Confrontation Clause violation.\textsuperscript{115} Eight years later, a majority of the Court would agree with him.\textsuperscript{116}

\textbf{F. \textit{Ohio v. Roberts} and Adequate Indicia of Reliability}

In the interim, in 1980, the Supreme Court in \textit{Ohio v. Roberts} finally articulated a test that addressed the issue of whether the admission of hearsay violates the Confrontation Clause

\begin{itemize}
  \item \textsuperscript{110} \textit{Id.} at 73.
  \item \textsuperscript{111} \textit{Id.} at 77.
  \item \textsuperscript{112} \textit{Id.} at 77 (Blackmun, J. concurring in part and concurring in the judgment).
  \item \textsuperscript{113} \textit{Id.}
  \item \textsuperscript{114} \textit{Id.}
  \item \textsuperscript{115} \textit{Id.}
  \item \textsuperscript{116} See infra notes 157-72 and accompanying text.
\end{itemize}
because it is Constitutionally unreliable.\textsuperscript{117} In \textit{Roberts}, Herschel Roberts was charged with forgery of a check and possession of stolen credit cards belonging to Bernard and Amy Isaacs.\textsuperscript{118} At a preliminary hearing, defense counsel called the Isaacs’ daughter, Anita, to testify and got her to admit that she knew Roberts and that she allowed him to use her apartment while she was away.\textsuperscript{119} Anita, however, denied defense counsel’s suggestion that she gave Roberts her parents’ checks and credit cards without informing him that she did not have permission to use them.\textsuperscript{120} Anita did not appear at Roberts’ trial, so the prosecution admitted a transcript of her preliminary hearing testimony under Section 2945.49 of the Ohio Code, which allowed for the admission of such testimony as an exception to the rule against hearsay when the witness “‘cannot for any reason be produced at the trial…’”\textsuperscript{121}

After Roberts was convicted, he appealed, claiming that the trial court improperly admitted the transcript.\textsuperscript{122} The Court of Appeals of Ohio reversed, and the Supreme Court of Ohio affirmed that ruling by a 4-3 vote, prompting the State to file a petition for writ of certiorari with the United States Supreme Court.\textsuperscript{123} According to the Court, its task in \textit{Roberts} was to determine “the relationship between the Confrontation Clause and the hearsay rule with its many exceptions.”\textsuperscript{124} And, according to the Court, even if a declarant’s hearsay statements are admissible against a defendant under an exception to the rule against hearsay, they run afoul of the Confrontation Clause if the declarant is not present for cross-examination at trial unless the

\textsuperscript{117} 448 U.S. 56 (1980).
\textsuperscript{118} Id. at 58.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id. at 59.
\textsuperscript{122} Id. at 60.
\textsuperscript{123} Id. at 60-61.
\textsuperscript{124} Id. at 62.
State establishes two elements: First, the State must establish that the declarant is “unavailable.” Second, it must prove that the statement “bears adequate indicia of reliability.” The Court concluded that “[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.” If a statement does not fall within such an exception, “the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.”

The Court found that Anita was unavailable at trial but did not resolve the issue of whether Section 2945.49 was a firmly rooted hearsay exception. Instead, it found that Anita’s testimony had sufficient particularized guarantees of trustworthiness to overcome Confrontation Clause concerns. Specifically, the Court concluded that when defense counsel tests preliminary hearing testimony with cross-examination or the equivalent of cross-examination, that testimony bears sufficient indicia of reliability and affords the trier of fact a basis for evaluating the truth of the testimony sufficient to satisfy the Confrontation Clause.

**G. Lee v. Illinois and Actual Harm**

Six years later, in 1986, the Supreme Court decided *Lee v. Illinois*, a case that resembled *Bruton* in all regards save one: the trier of fact. In *Lee*, Millie Lee and Edwin Thomas were charged with committing a double murder after both signed written confessions. As in *Parker v. Randolph*, these confessions interlocked, at least to a certain degree, with Thomas’

\[\text{\textsuperscript{125}}\text{Id. at 62-66.}\]
\[\text{\textsuperscript{126}}\text{Id. at 66.}\]
\[\text{\textsuperscript{127}}\text{Id.}\]
\[\text{\textsuperscript{128}}\text{Id.}\]
\[\text{\textsuperscript{129}}\text{Id.}\]
\[\text{\textsuperscript{130}}\text{Id. at 70-71.}\]
\[\text{\textsuperscript{131}}\text{Id.}\]
\[\text{\textsuperscript{132}}476 U.S. 530 (1986).\]
\[\text{\textsuperscript{133}}\text{Id. at 531-35.}\]
confession implicating Lee in the murders. But, unlike in Randolph, Lee and Thomas were jointly tried before a judge rather than a jury. Thomas did not testify, the prosecutor introduced his confession, and the trial judge expressly explained that he relied upon Thomas’ confession in finding Lee guilty of both murders.

Lee thereafter appealed, claiming that the trial court improperly used Thomas’ confession as evidence of her guilt, but the Appellate Court of Illinois disagreed, finding no Bruton doctrine problem because Thomas’ confession interlocked with Lee’s confession. The Supreme Court of Illinois denied leave to appeal, but the United States Supreme Court granted cert.

According to the Court, Lee did not involve two issues. First, the Court proclaimed that Lee was “not strictly speaking a Bruton case because [the Court was] not…concerned with the effectiveness of limiting instructions in preventing the spill-over prejudice to a defendant when his codefendant’s confession is admitted against the codefendant at a joint trial.” Instead, Lee involved a bench trial in which the judge acknowledged that he used Thomas’ confession as evidence of Lee’s guilt, meaning that “[t]he danger against which the Confrontation Clause was erected…actually occurred.” Second, the case did not involve the issue of whether the trial court violated Illinois evidence law in using Thomas’ confession as evidence of Lee’s guilt because that was a matter of state law.

Instead, the sole issue before the Court was whether Thomas’ confession had adequate indicia of reliability under Ohio v. Roberts such that it could be admitted directly against Lee

\[134\] Id. at 545.
\[135\] Id. at 542.
\[136\] Id.
\[137\] Id. at 538-39.
\[138\] Id. at 539.
\[139\] Id. at 542.
\[140\] Id. at 543.
\[141\] Id. at 539.
without violating the Confrontation Clause.\textsuperscript{142} While the Court found that Thomas’ confession interlocked with Lee’s confession to a certain extent, it ultimately concluded that there were discrepancies between the two confessions that were neither irrelevant nor trivial.\textsuperscript{143} Accordingly, the Court found that there was a Confrontation Clause violation because “when the discrepancies between the statements are not insignificant, the co-defendant’s confession may not be admitted.”\textsuperscript{144}

H. \textit{Richardson v. Marsh: The Redaction Solution}

The next year, the Court again addressed a case resembling \textit{Bruton} in every regard but one. In \textit{Richardson v. Marsh}, Clarissa Marsh, Benjamin Williams, and Kareem Martin were charged with assault and murder.\textsuperscript{145} Marsh and Williams were later given a joint jury trial, and Williams did not testify at trial.\textsuperscript{146} The prosecution, however, introduced a confession given by Williams in which he implicated Marsh, Martin, and himself in the subject crimes.\textsuperscript{147} The confession was carefully redacted to remove all references to Marsh; these redactions “omit[ted] all indication that \textit{anyone} other than Martin and Williams participated in the crime.”\textsuperscript{148} After allowing for the admission of the redacted confession, the court admonished the jury “not to use it in any way against [Marsh]” because the confession was inadmissible against Marsh under the rules of evidence.\textsuperscript{149}

\begin{flushleft}
\footnotesize
\textsuperscript{142}\textit{Id.} at 543.
\textsuperscript{143}\textit{Id.} at 546.
\textsuperscript{144}\textit{Id.} at 545.
\textsuperscript{145}481 U.S. 200, 202 (1987).
\textsuperscript{146}\textit{Id.}
\textsuperscript{147}\textit{Id.} at 203.
\textsuperscript{148}\textit{Id.}
\textsuperscript{149}\textit{Id.} at 204.
\end{flushleft}
After Marsh was convicted, she appealed, with her case eventually reaching the United States Supreme Court. The Court found that, unlike the confession in Bruton, based upon the redaction, “in this case the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial….” This fact was significant to the Court, which concluded that “[w]here the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence.” According to the Court, while it may not be simple for jurors to respect an instruction to use a co-defendant’s confession that does not facially incriminate other defendants only as evidence of the co-defendant’s guilt, “there does not exist the overwhelming probability of their inability to do so that is the foundation of Bruton’s exception to the general rule.”

Finally, the Court noted that its decision was at least part based upon practicality. According to the Court, if the Bruton doctrine only applies “to facially incriminating confessions, Bruton can be complied with by redaction—a possibility suggested in that opinion itself.” Conversely, if the doctrine were extended to include “confessions incriminating by connection, not only is that not possible, but it is not even possible to predict the admissibility of a confession in advance of trial.” Instead, trial judges could not determine whether such confessions became sufficiently incriminatory until the close of the evidence, which, “even without manipulation w[ould] result in numerous mistrials and appeals.”

I. **Cruz v. New York: Interlocking Confessions, Take 2**

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150 Id. at 206.
151 Id. at 208.
152 Id.
153 Id.
154 Id. at 208-09.
155 Id. at 209.
156 Id.
In 1987, the Supreme Court finally answered the question it had left unresolved eight years earlier in *Randolph*:\(^{157}\) Does the admission of interlocking confessions violate the *Bruton* doctrine? In *Cruz v. New York*, Eulogio and Benjamin Cruz were indicted for felony murder and jointly tried before a jury.\(^{158}\) Before trial, Benjamin gave a videotaped confession in which he admitted that Eulogio, he, and two other men committed the crime charged.\(^{159}\) Benjamin did not testify at trial, but the trial court, over Eulogio’s objection, allowed the prosecution to introduce Benjamin’s confession into evidence. The court then instructed the jury only to use Benjamin’s confession as evidence of his guilt because it was inadmissible against Eulogio under the rules of evidence.\(^{160}\) After Eulogio was convicted, he appealed, and the New York Court of Appeals ultimately affirmed, finding that Eulogio gave a confession that “interlocked” with Benjamin’s confession, rendering the *Bruton* doctrine inapplicable.\(^{161}\)

A majority of the United States Supreme Court disagreed, rejecting the plurality opinion in *Parker v. Randolph*.\(^{162}\) As noted, the *Randolph* plurality would have removed interlocking confessions from the purview of the *Bruton* doctrine on the theory that a co-defendant’s confession cannot be devastating to the case of a defendant who has himself confessed and devastated his own case.\(^{163}\) The *Cruz* Court rejected this reasoning, finding “[a] co-defendant’s confession will be relatively harmless if the incriminatory story it tells is different from that which the defendant himself is alleged to have told, but enormously damaging if it confirms, in all essential respects, the defendant’s alleged confession.”\(^{164}\)

\(^{157}\) See supra notes 104-16 and accompanying text.


\(^{159}\) Id. at 188-89.

\(^{160}\) Id. at 189.

\(^{161}\) Id.

\(^{162}\) Id. at 191.

\(^{163}\) See supra note 109 and accompanying text.

\(^{164}\) Id.
This finding led the *Cruz* Court to conclude, contrary to the position of the *Parker* plurality, that “[q]uite obviously, what the ‘interlocking’ nature of the codefendant’s confession pertains to is not its *harmfulness* but rather its *reliability*: If it confirms essentially the same facts as the defendant’s own confession it is more likely to be true.”\(^{165}\) It also led the Court to conclude that interlocking confessions are covered by the *Bruton* doctrine, which is merely concerned with the *harmfulness* of co-defendant confessions, not their (un)reliability.\(^{166}\) According to the Court,

Quite obviously, what the “interlocking” nature of the codefendant’s confession pertains to is not its *harmfulness* but rather its *reliability*: If it confirms essentially the same facts as the defendant’s own confession it is more likely to be true. Reliability…may be relevant to whether the confession should (despite the lack of opportunity for cross-examination) be admitted as evidence against the defendant, see *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.E.2d 514 (1986), but cannot conceivably be relevant to whether, assuming it cannot be admitted, the jury is likely to obey the instruction to disregard it, or the jury’s failure to obey is likely to be inconsequential. The law cannot command respect if such an inexplicable exception to a supposed constitutional imperative is adopted. Having decided *Bruton*, we must face the honest consequences of what it holds.\(^{167}\)

And, for the Court, the honest consequence was that the case before it was “indistinguishable from *Bruton* with respect to those factors the Court has deemed relevant in this area: the likelihood that the instruction will be disregarded,…the probability that such disregard will have a devastating effect,…and the determinability of these factors in advance of trial.”\(^{168}\)

In other words, the *Cruz* Court “adopt[ed] the approach espoused by Justice Blackmun” in his concurrence in *Parker v. Randolph*.\(^{169}\) Under this approach, even interlocking confessions are covered by the *Bruton* doctrine, and the only question is whether the improper admission of

\(^{165}\) *Id.*  
\(^{166}\) *Id.* at 192-93.  
\(^{167}\) *Id.*  
\(^{168}\) *Id.* at 193.  
\(^{169}\) *Id.* at 191.
such a confession is harmless error.\textsuperscript{170} According to the Court, lower courts could use the fact that the defendant made a confession that interlocked with his co-defendant’s confession in this harmless error analysis.\textsuperscript{171} But, the fact that the defendant gave an interlocking confession had no bearing on the issue of whether there was a \textit{Bruton} doctrine violation.\textsuperscript{172}

\textbf{J. \textit{Gray v. Maryland: Obvious Omissions}}

The Supreme Court resolved its last major \textit{Bruton} doctrine case eleven years later, in 1998. In \textit{Gray v. Maryland}, Anthony Bell and Kevin Gray were jointly tried for the murder of Stacey Williams.\textsuperscript{173} After Bell was arrested, a police detective asked him, “Who was in the group that beat Stacey?” and he responded, “Me, Kevin Gray, Jacquin “Tank” Vanlandingham, and a few other guys.”\textsuperscript{174} Bell did not testify at trial, but the trial court allowed the detective to restate his question to the jury about who beat Stacey and repeat Bell’s confession as “Me, deleted, deleted, and a few other guys.”\textsuperscript{175} Immediately thereafter, the prosecutor asked the detective whether it was true that Bell’s confession led the police to be able to arrest Gray, and the officer responded, “That’s correct.”\textsuperscript{176} Finally, the trial court allowed the prosecution to introduce a written copy of Bell’s confession with the names of Gray and Vanlandingham “omitted, leaving in their place blank white spaces separated by commas.”\textsuperscript{177} Later, the court instructed the jury that Bell’s “confession was evidence only against Bell; the instructions said

\textsuperscript{170} \textit{Id.} at 194.
\textsuperscript{171} \textit{Id.}
\textsuperscript{172} \textit{Id.}
\textsuperscript{173} 523 U.S. 185, 188 (1998).
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} \textit{Id.} at 196.
\textsuperscript{176} \textit{Id.} at 188-89.
\textsuperscript{177} \textit{Id.} at 189.
that the jury should not use the confession as evidence against Gray” because the confession was inadmissible against Gray under the rules of evidence.\textsuperscript{178}

After Gray was convicted, he appealed in the Maryland state courts and ultimately filed a successful petition for writ of certiorari with the United States Supreme Court. The Court acknowledged that in \textit{Richardson v. Marsh}, it had held that the admission of co-defendant confessions redacted to remove any reference to the existence of other defendants do not violate the \textit{Bruton} doctrine because they do not facially incriminate other defendants.\textsuperscript{179} The Court, however, distinguished the redacted confession before it to the redacted confession in \textit{Marsh}, finding that

Redactions that simply replace a name with an obvious blank space or a word such as “deleted” or a symbol or other similarly obvious indications of alteration…leave statements that, considered as a class, so closely resemble \textit{Bruton}’s unredacted statements that, in our view, the law must require the same result.\textsuperscript{180}

The Court dismissed the argument that its ruling left prosecutors with no alternative but to abandon the use of co-defendant confessions or joint trials, instead finding that “[a]dditional redaction of a confession that uses a blank space, the word ‘delete,’ or a symbol…is normally possible.”\textsuperscript{181} As an example, the Court wondered why Bell’s confession to the question of who was in the group that beat Stacey could not have been altered to read, “Me and a few other guys.”\textsuperscript{182}

Justice Scalia wrote a dissenting opinion joined by three other Justices.\textsuperscript{183} He took particular exception to the majority’s suggestion that the detective could have testified that Bell

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{178} \textit{Id.} at 189.
\item \textsuperscript{179} \textit{Id.} at 190-91.
\item \textsuperscript{180} \textit{Id.} at 192.
\item \textsuperscript{181} \textit{Id.} at 196.
\item \textsuperscript{182} \textit{Id.} at 192.
\item \textsuperscript{183} \textit{Id.} at 200 (Scalia, J., dissenting).
\end{itemize}
\end{footnotesize}
admitted that “Me and a few other guys” were in the group that beat Stacey. Scalia was aware of no prior case in which the Court had endorsed the redaction of a statement by some means other than the deletion of certain words, with the fact of the deletion shown.” According to Scalia, “[t]he risk to the integrity of our system (not to mention the increase in its complexity) posed by the approval of such freelance editing seems to me infinitely greater than the risk posed by the entirely honest reproduction that the Court disapproves.”

III. THE CONFRONTATION CLAUSE AND THE CRAWFORD REVOLUTION

A. Crawford v. Washington and “Testimonial” Hearsay

In 2004, the Supreme Court was asked to reconsider the adequate indicia of reliability test from Ohio v. Roberts and was not satisfied with what it found. In Crawford v. Washington, during a fight, Michael Crawford stabbed Kenneth Lee, who allegedly had tried to rape Michael’s wife, Sylvia. Officers thereafter arrived and Mirandized Michael and Sylvia, who each gave tape-recorded statements. And while Sylvia’s account of the events leading up to the fight generally corroborated her husband’s account, “her account of the fight was arguably different-particularly with respect to whether Lee had drawn a weapon before [Michael] assaulted him…."

At Michael’s trial for assault and attempted murder, Sylvia did not testify pursuant to Washington’s spousal testimonial privilege. Therefore, the State introduced Sylvia’s tape-recorded statement over Michael’s objection as a statement against penal interest, an exception to

184 Id. at 203.
185 Id.
186 Id. at 203-04.
188 Id.
189 Id. at 39.
190 Id. at 40.
the rule against hearsay. After he was convicted, Michael appealed, claiming that the admission of Sylvia’s statement violated the Confrontation Clause, and the Washington Court of Appeals agreed with him. But the Supreme Court of Washington found no Confrontation Clause violation because it concluded that Sylvia’s statement bore guarantees of trustworthiness sufficient to satisfy *Ohio v. Roberts*. Michael thereafter filed a successful petition for writ of certiorari with the United States Supreme Court, asserting that the *Ohio v. Roberts* test strayed from the original meaning of the Confrontation Clause.

In turn, the Court considered the historical background of the Clause to ascertain the validity of this claim and concluded that this history supported two inferences: First, the Court found that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused, i.e., examinations of accusers conducted before trial and without the defendant’s presence. Therefore, the Court concluded that the Confrontation Clause covers both live testimony in court as well as *ex parte* testimony or “testimonial” statements.

The Court set forth various formulations of the phrase ‘testimonial statements,’ defining them at one point as “‘statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.’” The Court, however, neither chose one of these formulations nor concluded that the Confrontation Clause was only concerned with testimonial hearsay. Instead, it was enough for

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191 *Id.*
192 *Id.* at 41.
193 *Id.*
194 *Id.* at 42.
195 *Id.* at 43
196 *Id.* at 50.
197 *Id.* at 51-52.
198 *Id.* at 52.
the Court to conclude that “even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.” 199 And, according to the Court, “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” 200

The second inference was “that the Framers would not have allowed the admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” 201 The Court then explained that its case law had largely been consistent with both of these principles. 202 According to the Court, with one arguable exception, its cases remained faithful to the Framers’ understanding of the Confrontation Clause: “[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” 203 In reaching this conclusion, however, the Court noted that its prior opinions in Parker v. Randolph and Cruz v. New York did not address the question of whether testimonial hearsay by an unconfronted declarant violated the Confrontation Clause but instead “addressed the entirely different question whether a limiting instruction cured prejudice to codefendants from admitting a defendant’s own confession against him in a joint trial.” 204

Conversely, the Court concluded that the Ohio v. Roberts test departed from the Framers’ understanding in ways that both helped and hurt criminal defendants. First, the test was too

199 Id. at 53.
200 Id. at 51.
201 Id. at 53-54.
202 Id. at 57.
203 Id. at 58.
204 Id. at 59.
broad because it required the exclusion of even non-testimonial hearsay if a prosecutor could not prove that the hearsay had adequate indicia of reliability.\textsuperscript{205} Second, the test was too narrow because it allowed for the admission of even testimonial hearsay as long as a prosecutor could prove that it was sufficiently reliable.\textsuperscript{206} In these ways, the \textit{Roberts} test “replace[d] the constitutionally prescribed method of assessing reliability with a wholly foreign one.”\textsuperscript{207} This rendered the \textit{Roberts} test “very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability.”\textsuperscript{208} As a counterpoint, the Court referenced and accepted the doctrine of forfeiture by wrongdoing, which “extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.”\textsuperscript{209}

Moreover, the Court deemed the adequate indicia of reliability test to be “so unpredictable that it fail[ed] to provide meaningful protection from even core confrontation violations.”\textsuperscript{210} The Court, though, deemed this unpredictability a forgivable sin compared to “[t]he unpardonable vice of the \textit{Roberts} test”: “its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.”\textsuperscript{211}

The Court thus replaced the adequate indicia of reliability test with the following test: “Where testimonial evidence is at issue,…the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”\textsuperscript{212} Or, as the Court later

\begin{thebibliography}{212}
\bibitem{60} \textit{Id}. at 60.
\bibitem{61} \textit{Id}.
\bibitem{62} \textit{Id}. at 62.
\bibitem{63} \textit{Id}.
\bibitem{64} \textit{Id}.
\bibitem{65} \textit{Id}. at 63.
\bibitem{66} \textit{Id}.
\bibitem{67} \textit{Id}. at 68.
\end{thebibliography}
put it at the conclusion of its opinion, “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” Finding that Sylvia’s statement to the police officers was testimonial and that Michael had no opportunity to cross-examine her, the Supreme Court thus concluded that there was a Confrontation Clause violation.

But does the Confrontation Clause only cover testimonial hearsay? The Court would answer that question a few years later.

B. **Davis, Bockting and the Testimonial/Nontestimonial Dichotomy**

In 2006, the Court resolved the companion cases of *Davis v. Washington* and *Hammon v. Indiana*. In *Davis*, Michelle McCottry made statements to a 911 operator identifying Adrian Davis as her assailant, just after he had assaulted her and while she was “in an environment that was not tranquil, or even…safe.” In *Hammon*, police responded to the site of a reported domestic disturbance at the house of Amy and Hershel Hammon. Amy initially told officers that “nothing was the matter,” but while an officer was with Hershel in the kitchen, Amy filled out and signed a battery affidavit in the living room while with the other officer.

McCottry did not testify at Davis’ trial, and Amy Hammon did not testify at her husband’s trial, but their statements were each admitted under exceptions to the rule against hearsay. In deciding whether the admission of either of these statements violated the Confrontation Clause, the *Davis* Court had to answer two questions left unresolved by *Crawford*:

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213 *Id.* at 68-69.
214 *Id.* at 68-69.
215 *Id*.
217 *Id.* at 819.
218 *Id.* at 819-20.
219 *Id.* at 818-21.
(1) Does the Confrontation Clause only apply to testimonial hearsay; and (2) Which police interrogations produce testimonial hearsay? 220

The Court answered the first question in the affirmative, concluding that “[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.” 221 In response to the second question, the Court created a dichotomy to resolve the cases before it:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. 222

Using this test, the Court deemed Michelle McCottry’s statements nontestimonial and properly admitted, but it concluded that Amy Hammon’s statements were testimonial. 223 The Court acknowledged that Amy Hammon’s statements, despite being testimonial, could still be admitted against her husband if he procured or coerced silence from her because “one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.” 224 According to the Court, this rule of forfeiture by wrongdoing still survived because “Crawford, in overruling Roberts, did not destroy the ability of courts to protect the integrity of their proceedings.” 225 But in the absence of such forfeiture, the admission of her statements violated the Confrontation Clause. 226

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220 Id. at 823.
221 Id. at 821.
222 Id. at 822.
223 Id. at 828-30.
224 Id. at 833.
225 Id. at 834.
226 Id. at 833-34.
Later, in its opinion in *Whorton v. Bockting*, the Supreme Court reiterated that “[u]nder *Crawford*,… the Confrontation Clause has no application to [nontestimonial] statements and therefore permits their admission even if they lack indicia of reliability.”

In its 2011 opinion in *Michigan v. Bryant*, however, a majority of the Court noted that in conducting the primary purpose analysis of *Davis*, “standard rules of hearsay, designed to identify some statements as reliable, will be relevant.” This led some, including Justice Scalia in his dissenting opinion, to conclude that the majority was resurrecting the *Roberts* adequate indicia of reliability test without explicitly overruling *Crawford*.

**IV. LOWER COURT INTERPRETATIONS OF BRUTON**

**A. The Inapplicability of the Bruton Doctrine at Bench Trials**

1. **Pre-Crawford Precedent**

In the wake of the Court’s opinion in *Lee v. Illinois*, several courts grappled with the question of whether the *Bruton* doctrine applies to bench trials or whether it applies only to jury trials. Every federal appellate court that addressed the issue before *Crawford* concluded the doctrine was inapplicable in cases heard by judges rather than juries.

For example, in *Rogers v. McMackin*, Darrick Rogers, Mimi Cash, Ricardo Forney, and Andre Robinson were allegedly co-participants in the robbery of a restaurant and the fatal...
shooting of its proprietor. Rogers confessed to the crime, and Robinson also gave a confession that largely interlocked with Rogers’ confession. The two were given a joint bench trial, and the prosecution introduced Robinson’s confession despite the fact that he did not testify at trial. After Rogers was convicted and exhausted his state court remedies, he brought a habeas corpus proceeding in the United States District Court for the Northern District of Ohio, claiming that the admission of Robinson’s confession violated the Bruton doctrine.

The district court agreed with Rogers, finding that Lee made the Bruton doctrine applicable to bench trials. With this “understanding of Lee, the district court looked for the ‘particularized guarantees of trustworthiness’ required by Ohio v. Roberts…; finding none, the court concluded that the admission of Robinson's confession constituted prejudicial error of constitutional dimension.”

The Sixth Circuit disagreed, noting that the Court explicitly found in Lee that Lee was “‘not strictly speaking a Bruton case’” because it did not concern the effectiveness of limiting instructions to the jury.” Indeed, “[t]he Lee Court did not even consider whether the co-defendant's confession was so ‘devastating’ as to prevent its proper use.” Moreover, the Sixth Circuit pointed out that “although Lee, like Parker v. Randolph,…was a case of interlocking confessions, the Lee Court focused not on whether their interlocking nature made them ‘devastating,’ but on whether their interlocking nature made them reliable.” Finally, the court then refused to make this extension itself, finding that there was no reason to conclude that

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232 884 F.2d 252, 253 (6th Cir. 1989).
233 Id.
234 Id. at 254.
235 Id.
236 Id. at 257.
237 Id.
238 Id.
239 Id. at 257.
240 Id.
judges, like jurors, are “incapable of separating evidence properly admitted against one defendant from evidence admitted against another.”

2. Post-Crawford Precedent

In the wake of the Court’s opinion in Crawford and its progeny, courts categorically continue to conclude that the Bruton doctrine does not apply to joint bench trials, even if the co-defendant’s confession is testimonial. For instance, in West v. Jones, Anthony West and Herman Coleman were jointly tried before a judge on charges of felony murder and arson of a dwelling house. Coleman did not testify, and the prosecution introduced “two statements made by Coleman to police officers which tended to place responsibility on [West] and minimize Coleman’s culpability.” The trial court overruled the objection of West to the admission of these statements, concluding that these statements would only be admissible against Coleman, not West.

After unsuccessfully appealing his conviction in Michigan state court, West filed a petition for writ of certiorari with the United States District Court for the Eastern District of Michigan. The court found in 2006 that Bruton doctrine is inapplicable to bench trials because “[t]rial courts are presumed to consider only properly admitted and relevant evidence in rendering its decision and to give no weight to improper testimonial evidence, which is taken under objection.”

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241 Id.
243 Id.
244 Id.
245 Id. at *2.
246 Id. at *3. As in Lee, however, the court found that there was evidence that the trial judge relied on Coleman’s confession in finding West guilty. Id. at *4. Because this meant that the trial judge in effect allowed for the admission of Coleman’s testimonial confession as evidence against West, the Court found a Confrontation Clause
In later finding in 2008 that the Bruton doctrine was inapplicable to bench trials, the Third Circuit noted that it was “agree[ing] with every United States Court of Appeals that has considered the question.”

B. The Bruton Doctrine and the Neutral Pronoun Solution

1. Pre-Crawford Precedent

As noted, in Richardson v. Marsh, the Court found that the redaction of a co-defendant’s confession to remove all references to co-defendants satisfied the Bruton doctrine and the Confrontation Clause. Later, in Gray v. Maryland, the Court found that redactions of co-defendant confessions that simply replace names with obvious blank spaces or words such as “deleted” or symbols or other similarly obvious indications of alteration do violate the Bruton doctrine and the Confrontation Clause. In Marsh, the Court had left open the question of whether co-defendant confessions can be redacted to replace the names of other co-defendants with neutral pronouns consistent with the Confrontation Clause. In Gray, the Court did not explicitly approve of this practice, but it did strongly imply that it found this practice permissible. As noted, in Gray, the Court found that a co-defendant’s confession that “Me, Kevin Gray, Jacquin ‘Tank’ Vanlandingham, and a few other guys” were in the group that beat up the victim could not be redacted to read, “Me, deleted, deleted, and a few other guys.”

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247 Johnson v. Tennis, 549 F.3d 296, 298 (3rd Cir. 2008).
248 See supra notes 145-56 and accompanying text.
249 See supra notes 173-82 and accompanying text.
250 See Richardson v. Marsh, 481 U.S. 200, 211, n.5 (1987) (“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.”).
251 See supra note 180 and accompanying text.
Later, however, the majority wondered why the co-defendant’s confession could not have been altered to read, “Me and a few other guys.”

Before Crawford, courts consistently concluded that the Bruton doctrine does not apply when co-defendant confessions are redacted to replace other defendants’ names with neutral pronouns. For instance, in United States v. Logan, after a joint jury trial, Benjamin Logan was convicted of several crimes, including robbery. Logan’s co-defendant, Zachary Roan, confessed to a detective that he planned and committed the subject robbery with Logan. At their joint trial, Roan did not testify, so the prosecution called the detective, and the district court allowed him to testify that Roan confessed to him that he planned and committed the subject robbery with “‘another individual.’

In finding that the admission of Roan’s redacted confession complied with the Bruton doctrine and the Confrontation Clause, the Eighth Circuit noted in 2000 that the Marsh Court left open the question of whether courts could replace the names of other defendant with neutral pronouns. That said, the court found that “the principles on which Marsh was decided provide[d] clear guidance on how to resolve the instant difficulty.” According to the Eighth Circuit, Marsh held that the Bruton doctrine only precludes the admission of co-defendant confessions that facially incriminate other defendants, and confessions redacted to replace other defendants’ names with neutral pronouns do not facially incriminate other defendants. In

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252 See supra note 182 and accompanying text.
253 See, e.g., United States v. Winston, 2003 WL 173046, No. 01-1611 at **4 (6th Cir., Jan. 23, 2003) (noting that “several of our sister circuits have noted that a Bruton violation can be avoided by replacing the co-defendant's name with a neutral pronoun or other generalized phrase”).
254 210 F.3d 820, 821 (8th Cir. 2000).
255 Id.
256 Id.
257 Id. at 822.
258 Id.
259 Id.
reaching this conclusion, the court found that it was “simply adher[ing] to a view that several of our cases have long since adopted.” 260

2. Post-Crawford Precedent

After Crawford and its progeny, courts categorically continue to conclude that the admission of a co-defendant confession redacted to replace the names of other defendants with neutral pronouns does not violate the Bruton doctrine. For instance, in United States v. Akefe, Aderemi J. Akefe and Na-Heem Tokumbo Alade were charged with conspiracy to import heroin into the United States and conspiracy to distribute heroin. 261 The two were given a joint jury trial, and Alade did not testify. 262 At trial, the prosecution called Special Agent Michael Galu to testify. Galu conducted Alade’s post-arrest interview, and the prosecutor engaged him in the following colloquy during trial:

Q. Other than this post-arrest interview, did Mr. Alade make any other statements to you?
A. He did.

Q. When did he make those statements?
A. When, later that evening, I had transported Mr. Alade to the Wayne County jail and as I was escorting Mr. Alade from my vehicle to the jail processing center, he stated that, he said, oh man, I didn't know you guys got him too, man, I can help you out, I can help you out.

Q. Who was he referring to?
A. Another person arrested in this case. 263

Alade in fact had referred to Akefe, and the trial court permitted Galu to answer this last

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260 Id.
262 Id.
263 Id. at *25.
question with the neutral pronoun “another person” rather than with Akefe’s name to prevent a
Bruton doctrine violation. After this testimony by Galu, the court instructed jurors only to use
Alade’s statement as evidence of his guilt and not as evidence of Akefe’s guilt.

After he was convicted, Akefe appealed, claiming that Alade’s statements to Galu were
“testimonial” and thus inadmissible under Crawford. The court disagreed, finding that
Alade’s reliance on Crawford “in attacking the Government’s use of Alade’s Brutonized
statement [was] misplaced because Crawford held that testimonial hearsay offered against a
criminal defendant is unconstitutional under the confrontation clause and therefore
inadmissible.” According to the court, Crawford was irrelevant because “the challenged
testimony was offered only against Alade and the jury was instructed accordingly.” The court
thus concluded that “Crawford is inapplicable and Alade’s Brutonized post-arrest statement
admitted solely against Alade is only violative of Akefe’s confrontation rights if it violates the
rules set out in Bruton v. United States,…Richardson v. Marsh,…and their progeny.”

The court then failed to find such a violation, initially noting that “[t]he Second Circuit
has been clear that statements made by defendants are admissible against the speaker where the
statement is redacted to replace the names of co-defendants with neutral pronouns and the
statement on its face does not connect co-defendants to the crimes.” The court then asserted
that Alade’s statement fell “squarely within Second Circuit precedent because Akefe's name was

264 Id.
265 Id.
266 Id.
267 Id.
268 Id.
269 Id.
270 Id.
replaced with a neutral pronoun, and the statement, standing alone, did not implicate Akefe.”271

The Second Circuit is not alone in this regard. Instead, as the United States District Court for the District of Columbia noted in its 2011 opinion in United States v. Clarke, “[t]he use of neutral pronouns or other general identifiers, such as “other guys,” has been recognized by several circuits as a type of redaction that satisfies Bruton.”272

C. The Bruton Doctrine and Noncustodial/Nontestimonial Hearsay

1. Pre-Crawford Precedent

Before the Supreme Court’s opinion in Crawford, the vast majority of courts held that co-defendants’ statements that were noncustodial (and would now be considered nontestimonial) were covered by the Bruton doctrine. For instance, in State v. Swafford, Artis Swafford, Jan Anthony, and Joel Butler were jointly tried before a jury on charges of felony murder and aggravated robbery.273 Previously, Anthony unwittingly made statements to confidential informant Lamar Williams that also implicated Swafford and Butler.274 At trial, Anthony did not testify, and the prosecution introduced a typed transcript of these statements, with the names of Swafford and Butler deleted, “but blank spaces with underlining were left.”275 After he was convicted, Swafford appealed, claiming that the admission of the transcript violated the Bruton doctrine.276 The Supreme Court of Kansas agreed, concluding that “[w]hile the conversation between Lamar Williams and Anthony is not a typical post-arrest confession, Bruton applies to

271 Id. According to the court, “[t]here was no evidence that the two defendants on trial were the only individuals arrested in the investigation.” Id.
274 Id. at 200.
275 Id.
276 Id. at 199.
any extrajudicial statement by a nontestifying codefendant.” Moreover, the court found that “Bruton applies to a statement made in a noncustodial setting as well to a statement made to other coconspirators if, as in this case, such statement is not made during the life of, and in furtherance of, the conspiracy.” Courts also consistently found that the Bruton doctrine was violated by the admission of similar noncustodial statements made to mothers, brothers, lovers, and other friends and family members.

There were a few opinions before Crawford which held that noncustodial statements were beyond the scope of the Bruton doctrine, but these were the exception to the rule and often based upon mistaken reasoning more than anything else. For instance, in Brown v. State, the Supreme Court of Georgia found that the admission of a co-defendant’s non-custodial statements that qualified as co-conspirator admissions did not violate the Bruton doctrine. This was not a controversial conclusion as the Bruton Court itself acknowledged that if Evans’ confession qualified as a co-conspirator admission it would have been directly admissible against Bruton and would have presented no Confrontation Clause problem. Later, however, Georgia courts began citing Brown and its progeny as supporting the proposition that noncustodial statements made after the completion of conspiracies were beyond the scope of the Bruton doctrine. These

277 Id. at 201.
278 Id.
279 See, e.g., People v. Jimenez, 2002 WL 1486571, No. C038273 at *1-3 (finding a violation of the Bruton doctrine – but harmless error – based upon the admission of a nontestifying co-defendant’s incriminatory statement to his mother).
280 See, e.g., United States v. Ruff, 717 F.2d 855, 857-58 (3rd Cir. 1983) (finding a violation of the Bruton doctrine – but harmless error – based upon the admission of a nontestifying co-defendant’s incriminatory statements to several family members, including statements to his brother and brother-in-law).
281 See, e.g., Holland v. Attorney General of New Jersey, 777 F.2d 150, 152 (3rd Cir.1985) (finding a violation of the Bruton doctrine based upon the admission of a nontestifying co-defendant’s incriminatory statement to his wife).
282 See, e.g., Vincent v. Parke, 942 F.2d 989, 991-92 (6th Cir. 1991) (finding a violation of the Bruton doctrine based upon the admission of a nontestifying co-defendant’s incriminatory statement to his sister); Monachelli v. Warden, SCI Graterford, 884 F.2d 749, 753 (3rd Cir. 1989) (noting “that the Bruton rule is applicable where the statements of the non-testifying co-defendant were made in a non-custodial setting to family and friends”);
284 See supra note ## and accompanying text.
opinions read more as mistaken interpretations of prior precedent rather than the courts consciously limiting the scope of the Bruton doctrine.285

2. Post-Crawford Precedent

After Crawford, the tables largely have turned, with the vast majority of courts finding that co-defendants statements that are nontestimonial (and would have been considered noncustodial) are beyond the scope of the Bruton doctrine. And, while the Supreme Court is still in the process of deciding which statements are testimonial and which statements are nontestimonial,286 for purposes of this article, all that matters is that courts generally have found that statements to acquaintances such as mothers, brother, lovers, and cellmates are nontestimonial.287 Many of these opinions concluding that nontestimonial hearsay is beyond the scope of the Bruton doctrine have come in the last year, such as the Eighth Circuit’s opinion in United States v. Dale,288 which was issued on July 30, 2010. In Dale, police found the bodies of Anthony Rios and Olivia Raya as well as several bricks of marijuana and cocaine at the couple’s Kansas City home.289 During their investigation of these murders, law enforcement officials convinced inmate Anthony Smith to wear a wire and talk with Michael Dale, a suspect in the

285 For instance, in Johnson v. State, the Supreme Court of Georgia found that a co-defendant’s non-custodial statement made after the completion of the charged conspiracy was beyond the scope of the Bruton doctrine. 571 S.E.2d 782, 784 (Ga. 2002). In reaching this conclusion, the court simply cited its prior opinion in Reid v. State, 437 S.E.2d 646 (Ga. 1993) for the proposition that “Bruton is not applicable to a statement which ‘is not the custodial confession of a non-testifying accomplice which details the criminal participation of’ a co-defendant.” Id. In Reid, however, the court had found that a co-defendant confession did not violate the Bruton doctrine not simply because it was non-custodial but because it “was admissible against all defendants as the statement of a co-conspirator made prior to the termination of the conspiracy.” Reid, 437 S.E.2d at 650.
286 See supra notes 228-30 and accompanying text.
287 See, e.g., Kennedy v. Warren, 2009 WL 1313327, No. 04-CV-71116-DT *14 (E.D.Mich, May 11, 2009) (“Co-defendant Parham's statements to acquaintance Michael Dixon were non-testimonial in nature. Crawford is thus inapplicable. Similarly, Bruton does not apply as Parham's remarks were made to an acquaintance, not the police or prosecuting authorities in a custodial setting.”).
288 614 F.3d 942 (8th Cir. 2010).
289 Id. at 948.
murders and an inmate at the same facility as Smith. Smith eventually recorded a conversation with Dale in which Dale incriminated Dyshawn Johnson and himself in the murders. Dale and Johnson were later jointly tried before a jury on charges of first-degree murder and conspiracy to distribute cocaine, and Dale did not testify at trial. At trial, the prosecution played the recording of Dale’s confession to jurors and instructed them that the tape-recorded conversation was not admissible against Johnson.

After he was convicted, Johnson appealed, claiming that the admission of Dale’s statements violated the *Bruton* doctrine. The Eight Circuit disagreed, finding that Dale’s statements were nontestimonial and that after *Davis v. Washington* and *Whorton v. Bockting*, “[i]t is now clear that the Confrontation Clause does not apply to non-testimonial statements by an out-of-court declarant.” Therefore, the court concluded that under its “present understanding of the confrontation right, governed by *Crawford*, the introduction of Dale's out of court statements did not violate Johnson's confrontation right.”

Nine days before Dale, on July 21, 2010, the Sixth Circuit found that a co-defendant’s statement to a confidential informant that implicated another defendant could not violate the *Bruton* doctrine because it was nontestimonial. Two weeks before Dale, the First Circuit found that a co-defendant’s similar statement to his mother also was beyond the scope of the *Bruton* doctrine because it was nontestimonial. And, two months before Dale, the Tenth Circuit concluded in *United States v. Smalls* that a co-defendant’s statements to a confidential

290 *Id.* at 949.
291 *Id.*
292 *Id.* at 948.
293 *Id.* at 952.
294 *Id.* at 955.
295 *Id.*
296 *Id.* at 956.
298 *United States v. Figueroa-Cartagena*, 612 F.3d 69, 85 (1st Cir. 2010).
informant were properly admitted at a joint jury trial because “the Bruton rule, like the Confrontation Clause upon which it is premised, does not apply to nontestimonial hearsay statements.” 299 Finally, in 2008, the Second Circuit applied the same reasoning to a co-defendant’s confession to a fellow inmate. 300

To this point, the only federal circuit court to find that nontestimonial co-defendant statements can violate the Bruton doctrine after Crawford is the Third Circuit. 301 Similarly, most federal district courts have found after Crawford that nontestimonial hearsay is beyond the scope of the Bruton doctrine, but a couple of federal district courts have reached contrary conclusions in the last year. 302

V. THE BRUTON DOCTRINE SHOULD STILL COVER NONTESTIMONIAL HEARSAY

A. First Interpretation: Crawford’s Testimonial/Nontestimonial Dichotomy Should Have Had No Effect on the Bruton Doctrine

The first possible interpretation of Crawford v. Washington and its progeny is that they should have had no effect on Bruton doctrine cases. If this interpretation is correct, the question of whether hearsay is “testimonial” or “nontestimonial” is irrelevant to the Bruton doctrine, and the vast majority of courts have erred in finding nontestimonial hearsay beyond Bruton’s scope.

299 605 F.3d 765, 768 n.2 (10th Cir. 2010).
300 See United States v. Pike, 2008 WL 4163242, No.07-0338-cr (L) (2nd Cir., Sept. 5, 2008) (holding that a co-defendant’s incriminatory statement to a fellow inmate could not violate the Bruton doctrine because it was nontestimonial).
301 See, e.g., United States v. Jones, 2010 WL 2017673 at **2 (3rd Cir., May 21, 2010) (“We have interpreted Bruton’s rule broadly, applying it not only to custodial confessions but also to informal statements such as Gwen’s.”).
There are several reasons to believe that *Crawford* is as irrelevant as its predecessor – *Ohio v. Roberts* – to the Bruton doctrine. 303

The first reason is the Bruton opinion itself. When the Supreme Court decided Bruton in 1968, the Supreme Court had not yet addressed the question of when the prosecution’s introduction of hearsay violates the Confrontation Clause because it is Constitutionally unreliable. The Court did not address this question until its 1970 opinion in *California v. Green*, 304 and it did not clearly resolve it until its 1980 opinion in *Ohio v. Roberts*. 305 The question for the Bruton Court thus was not whether Evans’ confession was Constitutionally unreliable but rather whether the confession was inadmissible against Bruton under the rules of evidence, with the Court finding that the confession “was clearly inadmissible against him under traditional rules of evidence.” 306 Because Evans’ confession was inadmissible against Bruton, the prosecution’s introduction of the confession violated the Confrontation Clause because Evans did not testify and the confession was sufficiently harmful to Evans. 307 The Bruton Court simply could not trust the jury to use Evans’ confession solely as evidence of his guilt and felt that its admission had a devastating practical effect on Bruton’s defense. 308

Indeed, the Court later pointed out that because Evans’ confession was inadmissible against Bruton, it did not need to resolve the issue of whether the confession was Constitutionally unreliable. According to the Court, “[t]here is not before us…any recognized exception to the hearsay rule insofar as [Bruton] is concerned and we intimate no view whatever

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303 See supra notes 162-72 and accompanying text.
304 399 U.S. 90 (1970); see Anthony Bocchino & David Sonenshein, Rule 804(b)(6) – The Illegitimate Child of the Failed Liaison Between the Hearsay Rule and Confrontation Clause, 73 Mo. L. Rev. 41, 56 (2008) (noting that *Green* was the Court’s “first opinion explicitly addressing the interplay of the Confrontation Clause and the law of hearsay”).
305 448 U.S. 56 (1980).
307 Id.
308 Id.
that such exceptions necessarily raise questions under the Confrontation Clause.”

This question of whether hearsay violates the Confrontation Clause because it is Constitutionally unreliable was the question later resolved by the Court in Roberts and Crawford, and, as the Bruton Court made clear, it is a question unrelated to the doctrine it was creating. The second reason is the Court’s opinion in Cruz, which makes clear that the Roberts test of Constitutional (un)reliability had no effect on the Bruton doctrine. As noted, in Cruz, it was clear that Benjamin Cruz’s confession was inadmissible against Eulogio Cruz at their joint jury trial under the rules of evidence.

But, according to the State, because Eulogio gave an interlocking confession, Benjamin’s confession had adequate indicia of reliability to satisfy the Ohio v. Roberts test, meaning that there was no Confrontation Clause problem. The Court forcefully rejected this argument, finding that Roberts declared that certain hearsay that is admissible under an exception to the rule against hearsay nonetheless violates the Confrontation Clause because it is Constitutionally unreliable. Conversely, the Bruton doctrine declares that certain hearsay that is inadmissible under the rules of evidence violates the Confrontation Clause at joint jury trials because it is harmful.

Thus, it was irrelevant to the Cruz Court that Eulogio gave an interlocking confession because

Quite obviously, what the “interlocking” nature of the codefendant's confession pertains to is not its harmfulness but rather its reliability: If it confirms essentially the same facts as the defendant's own confession it is more likely to be true. Its reliability…may be relevant to whether the confession should (despite the lack of opportunity for cross-examination) be admitted as evidence against the

309 Id.
310 See supra note 93 and accompanying text.
311 See supra note 160 and accompanying text.
312 See supra notes 162-63 and accompanying text.
313 See supra notes 164-72 and accompanying text.
314 See id.
defendant…but cannot conceivably be relevant to whether, assuming it cannot be admitted, the jury is likely to obey the instruction to disregard it, or the jury's failure to obey is likely to be inconsequential.\(^{315}\)

The Cruz’s Court’s holding is unmistakable: The admission at a joint jury trial of a nontestifying co-defendant’s confession that facially incriminates other defendants, but is inadmissible against them under the rules of evidence, violates the Bruton doctrine and the Confrontation Clause.\(^{316}\) The fact that such a confession was potentially “reliable” under Roberts was irrelevant to the Bruton doctrine if the confession was inadmissible against other defendants under the rules of evidence.\(^{317}\) Indeed, the Cruz Court noted that reliable confessions are often more harmful than unreliable confessions, implying that Constitutionally reliable confessions under Roberts can be more violative of the Bruton doctrine than Constitutionally unreliable confessions.\(^{318}\)

In fact, the Cruz Court came close to chastising the State for arguing that inadmissible but Constitutionally reliable hearsay satisfied the Bruton doctrine, concluding that “[t]he law cannot command respect if such an inexplicable exception to a supposed constitutional imperative is adopted. Having decided Bruton, we must face the honest consequences of what it holds.”\(^{319}\) And, as noted, for the Cruz Court, the honest consequence was that the case before it was “indistinguishable from Bruton with respect to those factors the Court has deemed relevant in this area: the likelihood that the instruction will be disregarded,…the probability that such


\(^{316}\) See supra note 164-72 and accompanying text.

\(^{317}\) See id. In its later opinion in Idaho v. Wright, 497 U.S. 805, 822 (1990), the Supreme Court concluded that “To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.” If the Court had applied this analysis in Cruz, it would not have found Benjamin Cruz’s confession reliable based upon the mere fact that Eulogio Cruz gave an interlocking confession. The whole point of Cruz, though, is that the Court did not need to resolve the issue of whether Benjamin’s confession was reliable because reliability was irrelevant to its decision.

\(^{318}\) See supra note 164 and accompanying text.

\(^{319}\) Cruz, 481 U.S. at 193.
disregard will have a devastating effect,…and the determinability of these factors in advance of trial.”

The third reason why Crawford can be read as having no effect on Bruton doctrine cases is the Crawford opinion itself, which establishes that the Court did not intend for its testimonial/nontestimonial dichotomy to have any effect on the Bruton doctrine. Crawford claimed that the Roberts “test stray[ed] from the original meaning of the Confrontation Clause and urge[d the Court] to reconsider it.” And reconsider it the Court did, finding that “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” As Justice Rehnquist noted in his opinion concurring in the judgment, the Court “overrule[d] Ohio v. Roberts….” The Court then later confirmed in both Davis and Bockting that Crawford overruled Roberts.

If all the Court did in Crawford was overrule Roberts, it is clear that the Court’s opinion had no effect on the Bruton doctrine. According to the Cruz Court, the Roberts test for Constitutional reliability had no effect on the Bruton doctrine, which is solely concerned with Constitutional harmfulness, so there is no reason to believe that Crawford’s replacement test for Constitutional reliability should be any different. Indeed, the Crawford Court acknowledged that it was not affirmatively reaching the conclusion that the Sixth Amendment is only concerned

320 Id.
322 Id. at 69.
323 Id. at 69 (Rehnquist, J., concurring).
324 See supra note 227 and accompanying text.
325 See supra note 164-72 and accompanying text.
with testimonial hearsay,\textsuperscript{326} so it would be difficult to argue that \textit{Crawford} itself found nontestimonial hearsay beyond the scope of the \textit{Bruton} doctrine.

That said, the \textit{Crawford} Court did conduct a historical analysis of the Confrontation Clause, finding that it supported two inferences: that the Clause (1) covers both live testimony in court and “testimonial” statements; and (2) does not allow for the admission of “testimonial” statements unless the declarant is “unavailable” at trial and the defendant previously had the chance to cross-examine him.\textsuperscript{327} In Section V of its opinion, the Court then found that its “case law ha[d] been largely consistent with these two principles.”\textsuperscript{328} The Court in \textit{Davis} later used this historical analysis to conclude that the Confrontation Clause is only concerned with testimonial hearsay.\textsuperscript{329} The argument could be made, then, that regardless of the actual grounds of its prior Confrontation Clause precedent, going forward, only testimonial hearsay can violate the Confrontation Clause.

There are, however, two separate portions of \textit{Crawford} that contradict the reading that the testimonial/nontestimonial dichotomy applies to, and limits, the \textit{Bruton} doctrine. First, in the same Section V in which the \textit{Crawford} Court conducted its historical analysis, it addressed an important argument by the State. In finding that all of its prior cases were consistent with the aforementioned two principles, the Court noted that “[o]ne case arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial is

\textsuperscript{326} See supra note 199 and accompanying text.
\textsuperscript{327} See supra notes 195-204 and accompanying text.
\textsuperscript{328} \textit{Crawford}, 541 U.S. at 57.
\textsuperscript{329} See supra note 221 and accompanying text.
The Court ultimately distinguished *White* and then addressed an argument by the State.\(^{331}\) In its Respondent’s Brief, the State had argued that the admission of Sylvia Crawford’s statement to the police did not violate the Confrontation Clause despite the fact that she refused to testify because her statement interlocked with Michael Crawford’s own statement.\(^{332}\) The State began by noting that “[i]n *Parker v. Randolph*, a plurality of this Court determined that the ‘interlocking confessions’ of jointly tried co-defendants were sufficiently reliable to satisfy the Confrontation Clause.”\(^{333}\) The State did acknowledge that this opinion was later “[a]brogated by *Cruz v. New York*….”\(^{334}\)

This, however, still left the State with the Court’s opinion in *Lee v. Illinois*. As noted, in *Lee*, a trial judge presiding over a joint trial expressly relied upon a nontestifying co-defendant’s confession in finding another defendant guilty of murder.\(^{335}\) And, as noted, the *Lee* Court found that the case before it was not a *Bruton* case because it did not involve the effectiveness of a limiting instruction to the jury to use the confession only as evidence of the co-defendant’s guilt; instead, *Lee* was a bench trial, and the judge acknowledged that he used the co-defendant’s confession as evidence of the other defendant’s guilt.\(^{336}\) Therefore, the Court had to decide whether the confession had indicia of reliability sufficient to satisfy *Roberts*.\(^{337}\)

The *Lee* Court noted that the other defendant gave a confession that partially interlocked with the co-defendant’s confession but ultimately found that the co-defendant’s confession

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\(^{330}\) *Crawford*, 541 U.S. at 58 n.5.

\(^{331}\) Id.

\(^{332}\) 2003 WL 22228001 at *5.

\(^{333}\) Id.

\(^{334}\) Id. at *5* n.1.

\(^{335}\) *See supra* note 136 and accompanying text.

\(^{336}\) *See supra* note 139 and accompanying text.

\(^{337}\) *See supra* notes 142-44 and accompanying text.
lacked such indicia because there were discrepancies between the two confessions that were neither irrelevant nor trivial.\textsuperscript{338} Accordingly, the Court found that there was a Confrontation Clause violation under \textit{Roberts} because “when the discrepancies between the statements are not insignificant, the co-defendant’s confession may not be admitted.”\textsuperscript{339}

According to the State in \textit{Crawford}, “[t]he logical inference of this statement is that when the discrepancies between the statements are insignificant, then the codefendant’s statement may be admitted” consistent with \textit{Roberts}.\textsuperscript{340} Under this reading of \textit{Lee}, if the co-defendant’s confession in \textit{Lee} completely interlocked with the other defendant’s confession, the admission of the co-defendant’s confession would not have violated the Confrontation Clause at the joint bench trial because the confession would have had adequate indicia of reliability to satisfy \textit{Roberts}.\textsuperscript{341}

The \textit{Crawford} Court acknowledged that this was a “possible inference” from the \textit{Lee} opinion but found that it was not an “inevitable one” and declined to draw it.\textsuperscript{342} Rather, the \textit{Crawford} Court concluded that “[i]f \textit{Lee} had meant authoritatively to announce an exception-previously unknown to this Court's jurisprudence-for interlocking confessions, it would not have done so in such an oblique manner.”\textsuperscript{343} The Court then immediately followed this conclusion with the following disclaimer: “Our only precedent on interlocking confessions had addressed the entirely different question whether a limiting instruction cured prejudice to codefendants from admitting a defendant’s own confession against him in a joint trial. \textit{See Parker v.}

\textsuperscript{338} \textit{See supra} note 143 and accompanying text.


\textsuperscript{340} \textit{Brief for Respondent, Crawford, 541 U.S. 36 (No. 02-9410), 2003 WL 22228001 at *5.}

\textsuperscript{341} \textit{Id.}


\textsuperscript{343} \textit{Id.}
Randolph...(plurality opinion), abrogated by Cruz v. New York....” Having rejected this argument, the Court was then able to conclude in the next sentence of its opinion that its “cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”

According to the Court, then, Lee, which was not a Bruton doctrine case, was relevant to the question of whether its cases had remained faithful to the principle that testimonial hearsay can only be admitted if the declarant is unavailable and the defendant previously had the opportunity to cross-examine him. Conversely, Randolph and Cruz, which were Bruton doctrine cases, were not relevant to this question but instead were relevant to “the entirely different question whether a limiting instruction cured prejudice to codefendants from admitting a defendant’s own confession against him in a joint trial.” This makes sense because the Lee Court itself distinguished the case before it from Bruton because in Lee, it was “not... concerned with the effectiveness of limiting instructions in preventing spill-over prejudice to a defendant when his codefendant's confession is admitted against the codefendant at a joint trial.”

Indeed, the Court had to reach the conclusion or else it would have needed to cite Randolph as a case that was inconsistent with the Framers’ understanding, even if it was only plurality opinion. As noted, in Randolph, several defendants were jointly tried before a jury,

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344 Id.
345 Id.
346 Id.
347 Id.
349 In the pre-Crawford Confrontation Clause case, Lilly v. Virginia, 527 U.S. 116 (1999), the Supreme Court categorized three separate categories of declarations against penal interest. The Court placed in one category voluntary admissions offered against the defendant himself such as confessions covered by the Bruton doctrine. Id, at 127-28. In another category, the Court considered confessions made by a declarant by offered against a separate criminal defendant at trial. With regard to confessions falling into this category, the Court concluded that it had
and none of the defendants testified at trial. Nonetheless, the Supreme Court found no problem with the admission of each defendant’s confession to police officers, despite the fact that there was no prior opportunity for Confrontation. Clearly, each of these confessions were “testimonial,” meaning that Randolph was inconsistent with the Framer’s understanding if the Court presented the Bruton doctrine as an alternative means of determining Constitutional reliability. But the reason why the Randolph Court found the confessions admissible was not because they were reliable; it was because they were insufficiently harmful as each defendant had himself confessed and devastated his own case. Randolph and the Court’s later opinion in Cruz make clear that the Bruton doctrine is not an alternative means of determining Constitutional reliability but a test for determining Constitutional harmfulness.

This leads to the second relevant portion of Crawford. Earlier in its opinion, in explaining why it was disposing of the adequate indicia of reliability test, the Crawford Court gave the following explanation and disclaimer:

The Roberts test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.

As the above analysis makes clear, it is equally clear that the Bruton doctrine does not purport to be an alternative means of determining reliability. Rather, the Bruton doctrine is a

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350 See supra note 105 and accompanying text.
351 See supra notes 108-110.
352 See id.
353 See id. & supra notes 162-72 and accompanying text.
means of determining harmfulness, with the *Cruz* Court even noting that a co-defendant’s incriminatory statement can become more harmful as it becomes more reliable.\(^{355}\)

In *Davis* and *Bockting*, the Court did later conclude that the Confrontation Clause is only concerned with testimonial hearsay.\(^{356}\) But, as neither of these cases involved joint jury trials or even cited to a *Bruton* doctrine case, these holdings are clearly dicta with regard to the *Bruton* doctrine.\(^{357}\) Moreover, in *Davis*, the Court reiterated its finding in *Crawford* that the testimonial/nontestimonial dichotomy does not apply to the doctrine of forfeiture by wrongdoing.\(^{358}\) Instead, as the Court found in *Giles v. California* (after both *Davis* and *Bockting*) if a defendant intends to cause and does cause a potential witness against him to be unavailable at his trial, the prosecution can admit that witness’ testimonial hearsay without violating the Confrontation Clause.\(^{359}\) This makes clear that, despite the absolutist language of the Court in *Davis* and *Bockting*, *Crawford* only meant for its testimonial/nontestimonial dichotomy to apply to Confrontation Clause cases that hinge of the Constitutional (un)reliability of hearsay. Conversely, in cases such as forfeiture by wrongdoing and *Bruton* doctrine cases, which hinge on entirely different questions, *Crawford* should have had no effect.

This conclusion is corroborated by the previously mentioned *Bruton* doctrine cases decided by lower courts in the wake of *Bruton*. First, as noted, before *Crawford*, courts consistently held that the *Bruton* doctrine did not apply to bench trials.\(^{360}\) And, as noted, courts continue to reach that conclusion after *Crawford*, even if a co-defendant’s confession is

\(^{355}\) *See supra* notes 164-72 and accompanying text.

\(^{356}\) *See supra* notes 221 & 227 and accompanying text.

\(^{357}\) *See*, e.g., United States v. Williams, 2010 WL 3909480, No. 1:09cr414 (JCC), at *4 (E.D.Va., Sept. 23, 2010), (noting that any statement by the Court that the Confrontation Clause only covers testimonial hearsay was dicta in relation to the *Bruton* doctrine).

\(^{358}\) *See supra* notes 224-26 and accompanying text.

\(^{359}\) *See* *Giles v. California*, 554 U.S. 353, 358 (2008).

\(^{360}\) *See supra* notes 231-41 and accompanying text.
testimonial.\textsuperscript{361} For instance, in \textit{West v. Jones}, the United States District Court for the Eastern District of Michigan found in 2006 that the \textit{Bruton} doctrine does not apply to bench trials in the wake of \textit{Crawford} because “[t]rial courts are presumed to consider only properly admitted and relevant evidence in rendering its decision and to give no weight to improper testimonial evidence, which is taken under objection.”\textsuperscript{362} Conversely, the \textit{Bruton} doctrine of course continues to preclude the admission of certain testimonial hearsay by co-defendants at joint jury trials after \textit{Crawford}.\textsuperscript{363}

This dichotomy cannot be explained in terms of Constitutional \textit{reliability}, but it can be explained in terms of Constitutional \textit{harmfulness}. Obviously, the fact that Herman Coleman and Anthony West were subjected to a joint bench trial rather than a joint jury trial did not make Coleman’s prior confessions to police that West and he committed the crimes charged any less testimonial or any more reliable. Therefore, if \textit{Crawford}’s testimonial/nontestimonial dichotomy applied, Coleman’s confession could not have been introduced at their joint bench trial because West did not have the opportunity to cross-examine him.\textsuperscript{364}

\textit{Crawford} did not apply, though, because the prosecution offered Coleman’s confession only against him.\textsuperscript{365} Therefore, the admission of Coleman’s confession could only violate the Confrontation Clause if it violated the \textit{Bruton} doctrine. And, Coleman’s confession could only violate the \textit{Bruton} doctrine if it was Constitutionally \textit{harmful}, i.e., if Coleman in effect became a witness against West because the trier of fact could not be trusted to use Coleman’s confession

\begin{footnotesize}
\begin{enumerate}
\item See supra notes 242-47 and accompanying text.
\item See, e.g., State v. Johnson, 703 S.E.2d 217, 220 (S.C. 2010) (finding that the admission of a nontestifying co-defendant’s testimonial confession to an investigator violated the \textit{Bruton} doctrine).
\item See \textit{Bruton v. United States}, 391 U.S. 123, 127-28 (1968) (“Plainly, the introduction of Evans' confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since Evans did not take the stand. Petitioner thus was denied his constitutional right of confrontation.”).
\item \textit{Jones}, 2006 WL at *3.
\end{enumerate}
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only as evidence of Coleman’s guilt.\textsuperscript{366} Because, however unrealistically,\textsuperscript{367} courts trust judges more than jurors in this regard, the admission of co-defendant confessions at joint bench trials do not violate the Confrontation Clause, but not because they are Constitutionally reliable under \textit{Crawford}.\textsuperscript{368}

Second, as noted, courts before \textit{Crawford} held that prosecutors could admit confessions by nontestifying co-defendants as long as the names of other defendants were replaced with neutral pronouns.\textsuperscript{369} And, as noted, courts continue to allow this practice post-\textit{Crawford}, even when co-defendant confessions are testimonial.\textsuperscript{370} Meanwhile, prosecutors of course still cannot admit unredacted co-defendant confessions that facially incriminate other defendants without violating the \textit{Bruton} doctrine.\textsuperscript{371} Once again, this dichotomy cannot be explained in terms of Constitutional \textit{reliability}, but it can be explained in terms of Constitutional \textit{harmfulness}.

A co-defendant confession redacted to replace other defendants’ names with neutral pronouns is no less testimonial and no more reliable than a confession admitted in its original form. Indeed, in a certain sense, such a confession is less reliable because it is not the actual confession given by the co-defendant but rather an altered version created by the court.\textsuperscript{372} But, according to courts, jurors are more likely to respect a jury instruction to use such a redacted

\textsuperscript{366} See \textit{Bruton}, 391 U.S. at 137 (“Here the introduction of Evans' confession posed a substantial threat to petitioner's right to confront the witnesses against him, and this is a hazard we cannot ignore.”).

\textsuperscript{367} As noted, the judges in both \textit{Lee} and \textit{Jones} improperly used co-defendants’ confessions as evidence of other defendants’ guilt. See \textit{supra} notes 136 & 246 and accompanying text.

\textsuperscript{368} As noted, in \textit{Rogers v. McMackin}, 884 F.2d 252, 257 (6th Cir. 1989), the Sixth Circuit noted that the Court in \textit{Lee} considered whether a co-defendant’s confession was reliable while the Court in \textit{Randolph} considered whether a co-defendant’s confession was devastating.

\textsuperscript{369} See \textit{supra} notes 248-60 and accompanying text.

\textsuperscript{370} See \textit{supra} notes 261-72 and accompanying text.

\textsuperscript{371} See \textit{supra} note 363 and accompanying text.

\textsuperscript{372} As Justice Scalia noted in his dissenting opinion in \textit{Gray v. Maryland}, 523 U.S. 185, 203-03 (1998), “such freelance editing seems to me infinitely greater than the risk posed by the entirely honest reproduction that the Court disapproves.”
confession only as evidence of the co-defendant’s guilt.\textsuperscript{373} In its opinion in \textit{Cruz}, the Court found that the case before it, which involved interlocking confessions, was “indistinguishable from \textit{Bruton} with respect to those factors the Court has deemed relevant in this area: the likelihood that the instruction will be disregarded,…the probability that such disregard will have a devastating effect,…and the determinability of these factors in advance of trial.”\textsuperscript{374} Conversely, courts have found that cases involving sufficiently redacted confessions are distinguishable from \textit{Bruton} because there is less likelihood that jurors will disregard limiting instructions.\textsuperscript{375}

On the other hand, cases with nontestimonial co-defendant confessions are indistinguishable from \textit{Bruton} with respect to the factors that are relevant to the \textit{Bruton} doctrine. As noted, in \textit{Bruton}, Evans confessed to a postal inspector that Bruton and he committed armed robbery.\textsuperscript{376} The \textit{Bruton} Court found that the admission of Evans’ confession along with an instruction telling jurors only to use the confession as evidence of his guilt violated the Confrontation Clause because of the likelihood that the jury would disregard the jury instruction, creating a devastating effect to Bruton’s defense.\textsuperscript{377} Moreover, unlike with a non-facially incriminatory confession,\textsuperscript{378} the Court could reach this conclusion in advance of trial without wondering about what evidence might be presented at trial.

If Evans had made this same confession to his mother, brother, lover, or acquaintance, this analysis would not change. This is because, “[w]hether or not it is testimonial, a defendant's extrajudicial statement directly implicating a co-defendant is equally susceptible to improper use

\textsuperscript{373} See supra note 153 and accompanying text.
\textsuperscript{375} See supra note 153 and accompanying text.
\textsuperscript{376} See supra note 67 and accompanying text.
\textsuperscript{377} See supra notes 90-91 and accompanying text.
\textsuperscript{378} See supra notes 104-06 and accompanying text.
by the jury against that co-defendant.” And, if the co-defendant’s statement is facially incriminatory, the court should equally be able to determine these issues before trial.

B. Second Interpretation: Nontestimonial Hearsay Should Still Be Held to Violate a Deconstitutionalized Version of the Bruton Doctrine

A second interpretation is that the Court intended for the testimonial/non-testimonial dichotomy created in Crawford and its progeny to apply to the Bruton doctrine. Under this reading, the admission at a joint jury trial of a non-testifying co-defendant’s nontestimonial statement that facially incriminates another defendant no longer violates the Confrontation Clause and likely does not violate any other Constitutional provision. Such an interpretation, however, only resolves the Confrontation Clause issue, not the issue of whether the admission of such a nontestimonial statement violates the rules of evidence.

Federal Rule of Evidence 403 and most state counterparts state that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue

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380 See id.
381 Some have argued that courts should find that the admission of co-defendant confessions at joint jury trials can violate the Due Process Clause based upon the likelihood that jurors would ignore limiting instructions. See, e.g., 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 (1980). This position makes a certain amount of sense because the Bruton Court cited the opinion of the Supreme Court of California in People v. Aranda for the proposition that “[i]f 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 when it is determining that defendant’s guilt or innocence.” See supra note 80 and accompanying text. However, while the Supreme Court has hinted that it might reframe Bruton doctrine violations as Due Process violations, it has only done so with regard to confessions that would be deemed testimonial. See Dutton v. Evans, 400 U.S. 74, 98 (1970) (Harlan, J. dissenting) (“Alternatively, I would be prepared to hold as a matter of due process that a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused, absent some circumstance indicating authorization or adoption.”).
delay, waste of time, or needless presentation of cumulative evidence.\textsuperscript{382} Meanwhile, Federal Rule of Evidence 105 and most state counterparts provide that “[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.”\textsuperscript{383} Moreover, the Advisory Committee Note to Rule 403 indicates that “[i]n reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.”\textsuperscript{384} Finally, as noted, Federal Rule of Criminal Procedure 14 states that

If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.\textsuperscript{385}

Under these Rules, it is well established that the introduction of evidence against a co-defendant at a joint jury trial can violate the rules of evidence if it is inadmissible against other defendants.\textsuperscript{386} In such cases, the court needs to decide whether jurors would adhere to an instruction to use the evidence only against the co-defendant and whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the other defendants.\textsuperscript{387}

The Second Circuit’s opinion in \textit{United States v. Figueroa},\textsuperscript{388} is instructive on this issue and strikingly similar to the Supreme Court’s seminal opinion in \textit{Bruton}. As noted, in \textit{Bruton}, Bruton’s co-defendant Evans did not testify at trial, but the prosecution admitted his confession,

\begin{quote}
\textsuperscript{382} Fed. R. Evid. 403.
\textsuperscript{383} Fed. R. Evid. 105.
\textsuperscript{384} Fed. R. Evid. 403 advisory committee’s note.
\textsuperscript{385} Fed. R. Crim. P. 14.
\textsuperscript{386} \textit{See infra} notes 387-421 and accompanying text.
\textsuperscript{387} \textit{See id}.
\textsuperscript{388} 618 F.2d 934 (2\textsuperscript{nd} Cir. 1980).
\end{quote}
which also implicated Bruton, and the judge instructed jurors to use Evans’ confession only as evidence of Evans’ guilt.\(^{389}\) The Eighth Circuit reversed Evans’ conviction, finding that his confession was taken in violation of Miranda.\(^{390}\) Thus, the question was whether jurors honored the limiting instruction.\(^{391}\) Because the Court could not trust the jury in this regard and because Evans’ confession was powerfully incriminatory, it reversed Evans’ conviction.\(^{392}\)

In *Figueroa*, in 1979, Jose Figueroa, Angel Lebron, and Ralph Acosta were convicted after a joint jury trial of conspiracy to possess heroin and possession of heroin.\(^{393}\) At trial, the prosecution had presented evidence of Acosta’s 1968 conviction for selling heroin, and the judge issued a specific limiting instruction that told jurors to use the conviction only as evidence of Acosta’s guilt.\(^{394}\) The Second Circuit subsequently determined that this conviction was inadmissible and reversed Acosta’s conviction.\(^{395}\)

This left the Second Circuit with the question of whether it also needed to reverse the convictions of Figueroa and Lebron. According to the court, “[w]hen evidence is offered against one defendant in a joint trial, determination of admissibility against that defendant resolves only the Rule 403 balancing as to him, *i.e.*, that the probative value of the evidence in his ‘case’ is not substantially outweighed by unfair prejudice to him.”\(^{396}\) When that evidence also “creates a significant risk of prejudice to the co-defendants, a further issue arises as to

\(^{389}\) See supra note 68 and accompanying text.
\(^{390}\) See supra notes 69-70 and accompanying text.
\(^{391}\) See supra note 73 and accompanying text.
\(^{392}\) See supra notes 91-92 and accompanying text.
\(^{393}\) *Figueroa*, 618 F.2d at 938.
\(^{394}\) *Id.* at 948-49.
\(^{395}\) *Id.* at 944.
\(^{396}\) *Id.*
whether the evidence is admissible in a joint trial, even though limited by cautionary instructions to the ‘case’ of a single defendant.”

The court then noted that in some cases, “the evidence is admitted against one defendant, leaving the issue as to the co-defendants to be resolved solely under the severance standards of Fed.R.Crim.P. 14.” Conversely, “other cases have viewed the issue solely in terms of admissibility, i. e., admissibility in a joint trial.” Because the district court allowed for the admission of Acosta’s conviction at the joint trial, the Second Circuit had to decide whether the admission of that conviction violated Rule 403 and necessitated a new trial.

According to the Second Circuit, there is a spectrum of harm that results from the introduction of evidence admissible against one co-defendant but inadmissible against other defendants. At one extreme is the introduction of garden-variety prior bad act evidence against one co-defendant, which the court deemed “far too tenuous to bar admissibility of evidence in a joint trial.” Conversely, “[a]t the other extreme is the high risk of prejudice to co-defendants when evidence of a defendant's prior act, like a Bruton confession, tends to prove directly, or even by strong implication, that the co-defendants also participated in the prior act.” The court found that “[u]nlike a Bruton confession, prior act evidence is not so inevitably prejudicial to co-defendants that the worth of limiting instructions can be totally discounted.” Nonetheless, the Second Circuit concluded that Acosta’s conviction was closer to a Bruton confession than garden-variety prior bad act evidence and reversed the convictions of

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397 Id.
398 Id. at 945.
399 Id.
400 Id.
401 Id. at 946.
402 Id.
403 Id.
404 Id.
Figueroa and Lebron. The Second Circuit is not alone in this conclusion. Instead, courts across the country at both the federal and state levels have found that evidence admissible against one co-defendant but inadmissible against other defendants at a joint trial violates Rule 403 or prompts the need for severance under Rule 14.

Bruton makes sense in connection with Figueroa and these other cases. Basically, the Bruton Court concluded that because co-defendant confessions are at the top of the spectrum of harm, their admission at joint jury trials is not merely evidentiary error, but Constitutional error if the co-defendant does not testify at trial. A finding that Crawford indeed placed nontestimonial hearsay beyond the scope of the Bruton doctrine would merely resolve the Constitutional issue, not the underlying evidentiary issue. Even if the admission of nontestimonial, facially incriminatory confessions at joint jury trials by nontestifying co-defendants no longer violates the Confrontation Clause, their admission still creates a high risk of prejudice to other defendants because they tend to prove directly that the other defendants committed the charged crime. Such co-defendant confession cases, then, are the paradigmatic cases in which courts should sever the defendants’ trials or find that the nontestimonial confession cannot be admitted consistent with Rule 403.

Ironically, however, litigants and courts seem to have missed this point in the wake of Crawford. Courts continue to hold that the introduction of less prejudicial evidence admissible

405 Id.
406 See, e.g., United States v. Sampol, 636 F.2d 621, 647 (D.C. 1980) (“Applying this standard to this case, we would find it unreasonable to expect that the jury succeeded in compartmentalizing the evidence adduced at this trial.”).
407 See, e.g., Hubbard v. State, 909 A.2d 270, 282 (Md. 2006) (“The exclusion of Sabrina Rogers's testimony against Hubbard would have remedied the situation caused by the joint prosecution. Maryland Rule 5-403 states the general principal that evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.”).
408 See supra note 91 and accompanying text.
409 See supra note 402 and accompanying text.
against only one co-defendant can violate Rule 403 based upon spillover effect. But, when presented with nontestimonial co-defendant confessions, the most prejudicial co-defendant evidence, they now curtly conclude that these confessions are beyond the scope of the Bruton doctrine after Crawford and fail to conduct a Rule 403 or Rule 14 analysis. Indeed, in none of the previous cases cited in this article finding a nontestimonial co-defendant confession beyond the scope of the Bruton doctrine did the court address severability or admissibility under these Rules.

In fact, the only case to address these Rules after finding that nontestimonial hearsay is beyond the scope of the Bruton doctrine was the District of Columbia Court of Appeals in its 2009 opinion in United States v. Thomas. In Thomas, Keith Thomas and Ron Herndon were charged with first-degree premeditated murder while armed as well as possession of a firearm during a crime of violence and jointly tried before a jury. During a break in trial, Thomas was placed in a holding cell with Danny Winston, who was charged with a different murder, and told him that he was with Ron when Ron shot the victim a couple of times in the back. Thomas did not testify at trial, but the prosecution called Winston to testify regarding Thomas’ confession, with Ron Herndon’s name replaced with the neutral pronoun “someone.”

After he was convicted, Herndon appealed, claiming that the admission of Thomas’ confession violated the Bruton doctrine and D.C.’s counterpart to Federal Rule of Criminal Procedure 14. The D.C. Court of Appeals disagreed with Herndon’s former argument, finding

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410 See supra note 406 and accompanying text.
411 See supra note 402 and accompanying text.
412 See supra notes 286-300 and accompanying text.
413 978 A.2d 1211 (D.C. 2009).
414 Id. at 1218.
415 Id. at 1221.
416 Id.
417 Id. at 1222.
that “if a defendant's extrajudicial statement inculpating a co-defendant is \textit{not} testimonial, \textit{Bruton} does not apply, because admission of the uncensored statement in evidence at a joint trial would not infringe the co-defendant's Sixth Amendment rights, whether or not the statement fits within a hearsay exception.”\textsuperscript{418}

With regard to Herndon’s second argument, however, the court concluded that “[w]hether or not it is testimonial, a defendant's extrajudicial statement directly implicating a co-defendant is equally susceptible to improper use by the jury against that co-defendant.”\textsuperscript{419} Accordingly, the court found that “[a] defendant's non-testimonial out-of-court statement therefore remains a candidate for redaction (or other remedial measures) under Criminal Rule 14 unless it fits within a hearsay exception rendering it admissible against the non-declarant co-defendant.”\textsuperscript{420} Therefore, if the trial court had not redacted Thomas’ confession, its admission would have constituted potentially reversible error, but because the trial court replaced Herndon’s name with a neutral pronoun, there was no such error.\textsuperscript{421}

In other words, even if nontestimonial hearsay is beyond the scope of the \textit{Bruton} doctrine after \textit{Crawford}, courts can still find reversible error under Rule 14 and/or Rule 403 based upon the same considerations—whether [the co-defendant]'s extrajudicial statements (with or without excisions) so “powerfully” incriminated [other defendants] as to create a “substantial risk” that a reasonable jury would be unable to follow the court's limiting instruction and would consider those statements in deciding [the other defendants’] guilt.\textsuperscript{422}

To the extent that defense attorneys are not arguing that the admission of nontestimonial co-defendant confessions violates Rule 14 and/or Rule 403 as a fallback argument to the

\textsuperscript{418} \textit{Id.} at 1224-25.
\textsuperscript{419} \textit{Id.} at 1225.
\textsuperscript{420} \textit{Id.}
\textsuperscript{421} \textit{Id.} at 1237-38.
\textsuperscript{422} \textit{Id.} at 1233.
traditional Bruton/Confrontation Clause argument, they should now advance such arguments. And, as the D.C. Circuit’s opinion in Thomas makes clear, courts should treat these Rules-based arguments the same as Bruton-based Constitutional arguments and find that the admission of facially incriminatory nontestimonial statements by co-defendants constitutes evidentiary error unless they are sufficiently redacted.423

VI. CONCLUSION

In Cruz v. New York, the Supreme Court rejected the argument that interlocking confessions were beyond the scope of the Bruton doctrine because they had adequate indicia of reliability to satisfy the Ohio v. Roberts test for Constitutional reliability.424 In rejecting this argument, the Court cautioned that “[t]he law cannot command respect if such an inexplicable exception to a supposed constitutional imperative is adopted. Having decided Bruton, we must face the honest consequences of what it holds.”425

By finding that nontestimonial hearsay is beyond the scope of the Bruton doctrine, courts have created just such an inexplicable exception and failed to face the honest consequences of what Bruton holds. Like a case involving an interlocking confession, a case involving a nontestimonial confession is “indistinguishable from Bruton with respect to those factors the Court has deemed relevant in this area: the likelihood that the instruction will be disregarded,…the probability that such disregard will have a devastating effect,…and the

423 Of course, if Crawford did indeed deconstitutionalize Bruton with regard to nontestimonial hearsay, state courts, as opposed to federal courts, would no longer be bound by the Supreme Court’s Bruton doctrine precedent in cases involving nontestimonial hearsay. See generally Old Chief v. United States, 519 U.S. 172 (1997). As the above analysis makes clear, however, state courts should easily be able to find that the admission of nontestimonial co-defendant confessions violates Rule 14 and/or Rule 403.
424 See supra notes 162-72 and accompanying text.
determinability of these factors in advance of trial.” These factors do not depend to any extent on whether a co-defendant confesses to a police officer, a confidential informant, a mother, a brother, a lover, or a friend. These latter, casual confessions are Constitutionally reliable according to the test set forth in Crawford, but the Bruton doctrine does not depend upon the unreliability of co-defendant confessions; it depends upon their Constitutional harmfulness.

Moreover, even if Crawford deconstitutionalized the Bruton doctrine with regard to nontestimonial hearsay because it is Constitutionally reliable, “[w]hether or not it is testimonial, a defendant’s extrajudicial statement directly implicating a co-defendant is equally susceptible to improper use by the jury against that co-defendant.” Therefore, even if such confessions are admissible despite the Confrontation Clause, courts should find that their admission violates the rules of evidence.

426 Id. at 193.