

7-1-2001

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Recommended Citation

Bryant M. Richardson, *Casting Light on the Gray Area: An Analysis of the Use of Neutral Pronouns in Non-Testifying Codefendant Redacted Confessions Under Bruton, Richardson, and Gray*, 55 U. Miami L. Rev. 826 (2001)

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Casting Light on the *Gray* Area: An Analysis of the Use of Neutral Pronouns in Non-Testifying Codefendant Redacted Confessions Under *Bruton*, *Richardson*, and *Gray*

I. INTRODUCTION

Deciding when and how to admit a non-testifying codefendant confession at a joint trial has troubled Courts for many years. This problem can best be illustrated by using the hypothetical provided in this section. The police obtain a confession from Stewart, who will not testify at his joint trial. Stewart's confession implicates himself and his codefendants: John, Bob, Harry, and Sam. Furthermore, Stewart describes how the heroin was imported and the role of each in the conspiracy.

There are two evidentiary problems with the admission of Stewart's confession at the defendants' joint trial. First, the confession is hearsay as defined by Federal Rule of Evidence 801, because it is an out of Court statement offered to prove the truth of the matter asserted.¹ Hearsay is inadmissible unless the statement falls into a specific hearsay exception. An example of an exception is Federal Rule of Evidence 803(b)(4) which allows statements against penal interest made by an unavailable declarant to be admissible.² Since Stewart will be unavailable to testify at trial, and because the statement here subjects Stewart to criminal liability, it appears to be a statement against penal interest. At least the portion of Stewart's statement against his interest would therefore seem to be admissible against Stewart under Rule 804(b)(3). Stewart's statement, however, not only implicates Stewart, but each of his codefendants as well by describing how the heroin was imported and the role of each person in the conspiracy. In *Williamson v. United States*, the Supreme Court held that Rule 804(b)(3) does not allow the admission statements incriminating someone other than the declarant, even if they are made within a broader narrative that is generally self-inculpatory.³ In the hypothetical, Stewart confessed to his role in the conspiracy. Stewart did so, however, by describing the roles of his codefendants in the conspiracy, effectively shifting some of the blame to

1. FED. R. EVID. 801.

2. FED. R. EVID. 804(b)(3) states:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

3. 512 U.S. 594, 599-601 (1994).

them. Thus, because Stewart's confession not only incriminates himself but also his codefendants, his statement is not totally self-inculpatory and therefore the non-incriminating portion is not admissible under Rule 804(b)(3).⁴

The second evidentiary problem with admitting Stewart's confession is that its admission violates Stewart's codefendants' rights under the Confrontation Clause.⁵ The Confrontation Clause requires that an accused have the right to confront all witnesses against him.⁶ Therefore, because Stewart will exercise his right not to testify, his confession is inadmissible against his codefendants as they will not be able to confront him through cross-examination. However, this does not mean that his confession will not be admitted into evidence at the joint trial. Federal Rule of Evidence 105 allows for limited admissibility of evidence. It states, "[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."⁷ Applying this rule, the trial judge could admit Stewart's entire confession into evidence, and upon request, could instruct the jury in this manner:

There has been evidence that Defendant *Stewart* may have given a statement to the authorities. You may consider any such statement of Defendant *Stewart*, however, only in deciding the charge(s) against him and not in deciding the charge(s) against any other defendant. You may consider the statement of Defendant *Stewart* in the charge(s) against Defendant *Stewart* and give it such weight as you feel it deserves. You may not consider or even discuss that statement in any way when you are deciding if the government has proven its case against any other defendant.⁸

The problem here is that if the jury hears Stewart's confession in its totality implicating each of his codefendants by name and deed, it is unlikely that the jury will be able to follow this instruction, and it will prejudiced his codefendants.

This issue was presented in *Bruton v. United States*, where a non-testifying codefendant's confession incriminating the defendant by describing his role in the crime was admitted into evidence at their joint

4. For a further discussion on *Lilly v. Virginia*, see Jennifer Christianson, Comment, *Statements Against Interest Under Lilly*, 55 U. MIAMI L. REV. 891 (2001).

5. U.S. CONST. amend. VI.

6. The Sixth Amendment applies to the states through the Fourteenth Amendment Due Process Clause. See *Pointer v. Texas*, 380 U.S. 400 (1965).

7. FED. R. EVID. 105.

8. KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 11.11 (5 ed. 2000).

trial.⁹ The confession referred to the defendant by his proper name and was accompanied by a limiting instruction that the evidence was only to be used against the confessor.¹⁰ The Supreme Court held that the admission of the non-testifying codefendant's confession that implicated the defendant violated the defendant's right of cross-examination under the Confrontation Clause.¹¹

After *Bruton*, an alternative to offering the confession in its original form would be to redact Stewart's confession so that it does not mention his codefendants by name. This method is more protective of his codefendants' constitutional rights of confrontation because the jury may not initially be able to determine who the co-conspirators were and what their respective roles in the conspiracy were. However, because there are different methods of redaction the question as to, whether the Confrontation Clause is violated may depend on the method and the extent of the redaction.¹² In *Richardson v. Marsh*, a confession that was redacted in a manner that removed all references to the defendant's name and existence was held to not violate the Confrontation Clause.¹³

Recently, in *Gray v. Maryland*, the United States Supreme Court held that a redacted confession where the defendant's name was replaced with the term "deleted" was unconstitutional.¹⁴ If Stewart's confession is redacted, however, in a manner in which his codefendant's proper names are removed and are replaced with neutral pronouns, such as "another individual" or "they," is the Sixth Amendment violated? The answer to this question depends on the jurisdiction. As this Comment will discuss, federal and state courts interpret of this line of Confrontation Clause jurisprudence differently.

An alternative to using a redacted confession would be for the prosecutor to refrain from offering Stewart's confession at trial. This is surely not the prosecutor's preferred option, however, since "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him."¹⁵ Furthermore, even with the admission of a redacted confession, the prosecutor will surely benefit from a spill over effect. The jury will be instructed by the judge not to

9. 391 U.S. 123, 124 (1968).

10. *Id.* at 125.

11. *Id.* at 126.

12. The amount of protection would depend on the method of redaction. The author believes that the most protective method of redaction is to omit all references to other co-conspirators. Other less protective methods of redaction that have commonly been used include using neutral pronouns, using letters such as "person X", and using "deleted" to signify a redacted name or term.

13. 481 U.S. 200, 211 (1987).

14. 523 U.S. 185, 188 (1998).

15. *Bruton*, 391 U.S. at 139 (White, J., dissenting).

consider the redacted evidence against anyone other than the confessor, but this does not change the fact that they already heard the confession that implicates more than one individual. While the limiting instruction offers some protection, there is no guarantee that the jury will follow this instruction. Furthermore, the jurors cannot erase from their minds what has been exposed to them, and even if a juror tries to follow the instruction, it remains embedded in his or her subconscious and may nonetheless permeate their thought process. Thus, it will be beneficial for the prosecutor to find a constitutional means to admit the redacted confession at the joint trial.

The codefendants are afforded a possible way out of this situation by filing a motion for severance under Rule 14 of the Federal Rules of Criminal Procedure.¹⁶ Most courts, however, are reluctant to grant these motions and the joint trial usually continues with the admission of a redacted confession accompanied by a limiting instruction, if requested by the codefendant(s). A question remains if Stewart's codefendants are truly afforded their rights under the Confrontation Clause in this hypothetical.

This Comment will first briefly discuss the use of joint trials and courts' reluctance to grant motions to sever under Rule 14. Second, the Comment will discuss and analyze the Supreme Court cases that define the scope of a codefendant's constitutional protection under the Confrontation Clause: *Bruton*, *Richardson*, and *Gray*.¹⁷ Third, the Comment will look at the problems that remain unresolved by *Bruton* and its progeny, specifically the use of singular and plural neutral pronouns in redacted confessions. Fourth, the Comment will argue why confessions that replace a codefendant's name with a neutral pronoun violate the *Bruton* rule. Fifth, the Comment will discuss and evaluate the viable options that would remedy this situation. Sixth, the Comment will discuss and apply a limiting instruction to be used in conjunction with confessions redacted in a manner that removes all references to the codefendants, thereby creating a workable standard that is more protective of non-confessing codefendants' constitutional rights of confronta-

16. FED. R. CRIM. P. 14 states:

Relief from Prejudicial Joinder:

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

17. *Id.*

tion. The Comment will also discuss where the solution is not practical under certain circumstances because of the risk of distortion. In conclusion, the Comment will contend that while there may be no perfect remedy to this problem, courts should make a real attempt to balance an accused's constitutional rights with judicial economy by requiring that redacted codefendant confessions omit all references to the existence of non-confessing codefendants, where practicable.

II. THE INSEVERABILITY OF JOINT TRIALS

Joinder of defendants is governed by Rules 8(b) and 14 of the Federal Rules of Criminal Procedure. Rule 8(b) provides that defendants may be charged together "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."¹⁸ Rule 14 permits a district court to grant a severance of defendants if "it appears that a defendant or the government is prejudiced by the joinder."¹⁹ In *Zafiro v. United States*, the Supreme Court declared that there is a preference in the federal system for joint trials of defendants who are indicted together.²⁰ *Zafiro* held that severance under Rule 14 should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants."²¹ The Court, citing *Bruton*, stated that "evidence that is probative of a defendant's guilt but technically admissible only against a codefendant might present a risk of prejudice" that would require severance.²² The Court, however, also stated that, as they "indicated in *Richardson*, less drastic measures, such as limiting instructions," most often will suffice to cure any risk of prejudice.²³

In *Delli Paoli v. United States*, the Supreme Court declared that the benefits of joint proceedings should not have to be sacrificed by requiring separate trials in order to use the confession against the declarant.²⁴ Joint trials save government funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial. In *Richardson*, the Court stated that joint trials play a vital role in the criminal justice system.²⁵ The *Richardson* Court found that they promote efficiency and serve the interests of justice by avoiding the

18. FED. R. CRIM. P. 8(b).

19. FED. R. CRIM. P. 14.

20. 506 U.S. 534, 537 (1993).

21. *Id.* at 539.

22. *Id.* at 539.

23. *Id.*

24. 352 U.S. 232 (1979).

25. *Richardson*, 481 U.S. at 209.

scandal and inequity of inconsistent verdicts.²⁶ For these reasons, the Supreme Court has repeatedly approved of joint trials.²⁷ These reasons, however, while convincing, support a preference for judicial economy over constitutional rights.

As cited by the *Bruton* majority, Justice Lehman's dissent in *People v. Fisher* warned that judicial economy should not be favored over a defendant's constitutional rights.²⁸ Since the "presumption against severing properly joined cases is strong,"²⁹ this Comment will not focus on severance issues, but instead on the creation of a workable standard to be used in cases where a non-testifying codefendant's confession is admitted at his joint trial and severance is denied. This, however, does not suggest that severance is never granted or should never be granted.³⁰ If a defendant's specific trial right would be compromised by a joint trial, the defendant should always request a severance under Rule 14.

III. *BRUTON* AND ITS PROGENY

A. *Bruton v. United States*

Over thirty years ago, the Supreme Court decided *Bruton*. Justice Brennan, writing for the majority, held that the admission of a non-testifying codefendant's confession that implicated the defendant violated his right of confrontation.³¹ *Bruton* overruled *Delli Paoli*, which held that it was reasonably possible for the jury to follow sufficiently clear limiting instructions to disregard the confessor's extra-judicial statement implicating his codefendant in the crime.³² In *Bruton*, Evans and Bruton were both convicted by a jury on a federal charge of armed postal robbery.³³ At the joint trial, "a postal inspector testified that Evans orally confessed to him that Evans and [Bruton] committed the armed rob-

26. *Id.* at 210.

27. See *Zafiro*, 506 U.S. at 537-38 (1993) (citations omitted).

28. "We still adhere to the rule that an accused is entitled to confrontation of the witnesses against him and the right to cross-examine them . . . We destroy the age-old rule which in the past has been regarded as a fundamental principle of our jurisprudence by a legalistic formula, required of the judge, that the jury may not consider any admissions against any party who did not join in them. We secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high." *Richardson*, 481 U.S. at 218 (quoting *People v. Fisher*, 164 N.E. 336, 341 (1928)).

29. *United States v. Delpit*, 94 F.3d 1134, 1143 (8th Cir. 1996).

30. *United States v. Mayfield*, 189 F.3d 895, 899 (9th Cir. 1999) (holding in an abuse of discretion to not sever trial where defendant was denied specific trial right of confrontation and where co-defendant's mutually exclusive defense prevented the jury from making a reliable judgment about appellant guilt or innocence).

31. *Id.* at 126.

32. See *Delli Paoli*, 352 U.S. at 239, 242.

33. *Bruton*, 391 U.S. at 124.

bery.”³⁴ While Evans’s conviction was reversed on appeal because his confession was inappropriately admitted at trial, Bruton’s conviction was affirmed.³⁵ The Court of Appeals for the Eighth Circuit relied on *Delli Paoli* and found that because the trial judge instructed the jury that Evans’s confession was inadmissible hearsay against Bruton, it “therefore had to be disregarded in determining [Bruton’s] guilt or innocence.”³⁶

In analyzing the Court of Appeals for the Eighth Circuit’s ruling, the Supreme Court first looked to cases that it had decided since *Delli Paoli*. In 1965, the Court decided in *Pointer v. Texas*, that the Sixth Amendment applied to the states through the Fourteenth Amendment due process clause.³⁷ Later that same year, the Court applied *Pointer* in *Douglas v. Alabama*, where two defendants, Loyd and Douglas were tried separately.³⁸ After Loyd was tried and found guilty, he was called by the state as a witness against Douglas.³⁹ Loyd invoked the privilege against self-incrimination and refused to answer any questions.⁴⁰ The prosecutor then read from Loyd’s confession in order to refresh his recollection.⁴¹ The Court held that Douglas’s inability to cross-examine Loyd denied Douglas “the right to cross-examine secured by the Confrontation Clause.”⁴² The Court found the case in *Bruton* to be an even greater violation of a defendant’s right to confrontation than the case in *Douglas* because the jury read testimony about Evans confession and it was actually in evidence.⁴³ Since the evidence was properly before the jury during its deliberations, there was an even greater chance that the jury would believe that Evans made the statements and that they were true.⁴⁴ The Court reasoned that this added substantial weight to the government’s case in a form not subject to cross-examination.⁴⁵

The Court next supported its decision in *Bruton* by drawing a parallel to *Jackson v. Denno*.⁴⁶ Discussing *Jackson*, the Court stated that a “defendant is constitutionally entitled to have the trial judge first determine whether a confession was made voluntarily before submitting it to

34. *Id.*

35. *Id.*

36. *Id.*

37. *Pointer*, 380 U.S. at 403.

38. *Id.* at 416.

39. *Id.*

40. *Id.*

41. *Id.* at 416-17.

42. *Id.* at 419.

43. *Bruton*, 391 U.S. at 127.

44. *Id.*

45. *Id.* at 127-28.

46. 378 U.S. 368 (1964).

the jury for an assessment of its credibility.”⁴⁷ In *Jackson*, the Court “expressly rejected the proposition that a jury, when determining the confessor’s guilt, could be relied on to ignore his confession of guilt should it find the confession involuntary.”⁴⁸ The Court discussed how its opinion in *Jackson* was supported by Justice Frankfurter’s dissent in *Delli Paoli*, which challenged *Delli Paoli*’s premise “that a properly instructed jury would ignore the confessor’s inculcation of the nonconfessor in determining the latter’s guilt.”⁴⁹ The Court found that “the message of *Jackson* for *Delli Paoli* was clear.”⁵⁰ This message was suggested by Chief Justice Traynor in *People v. Aranda*, which held that a jury cannot determine that a confession is true insofar as it admits that *A* has committed criminal acts with *B* and at the same time effectively ignore the inevitable conclusion that *B* has committed those same criminal acts against *A*.⁵¹

The *Bruton* Court also found that in addition to *Jackson*, the 1966 amendment to Rule 14 also demonstrated the Court’s repudiation of

47. *Bruton*, 391 U.S. at 128 (discussing *Jackson*).

48. *Id.*

49. *Id.* The Court cited Frankfurter’s dissent in *Delli Paoli*:

The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell.

Bruton, 391 U.S. at 129 (citing *Delli Paoli*, 352 U.S. at 247).

50. *Bruton*, 391 U.S. at 128.

51. The *Bruton* court noted:

Although *Jackson* was directly concerned with obviating any risk that a jury might rely on an unconstitutionally obtained confession in determining the defendant’s guilt, its logic extends to obviating the risks that the jury may rely on any inadmissible statements. If it is a denial of due process to rely on a jury’s presumed ability to disregard an involuntary confession, it may also be a denial of due process to rely on a jury’s presumed ability to disregard a codefendant’s confession implicating another defendant when it is determining that defendant’s guilt or innocence.

Indeed, the latter task may be an even more difficult one for the jury to perform than the former. Under the New York procedure, which *Jackson* held violated due process, the jury was only required to disregard a confession it found to be involuntary. If it made such a finding, then the confession was presumably out of the case. In joint trials, however, when the admissible confession of one defendant inculcates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any codefendants of the declarant. A jury cannot ‘segregate evidence into separate intellectual boxes.’ . . . It cannot determine that a confession is true insofar as it admits that *A* has committed criminal acts with *B* and at the same time effectively ignore the inevitable conclusion that *B* has committed those same criminal acts with *A*.

Bruton, 391 U.S. at 130-31, (citing *Aranda*, 407 P.2d at 270-72).

Delli Paoli's basic premise.⁵² The Advisory Committee explained the amendment by stating:

A defendant may be prejudiced by the admission in evidence against a codefendant of a statement or confession made by that codefendant. This prejudice cannot be dispelled by cross-examination if the codefendant does not take the stand. Limiting instruction to the jury may not in fact erase the prejudice . . . ”⁵³

In rejecting the use of limiting instructions in this area, the Court stated that while the prosecution should “not be denied the benefit of the confession to prove the confessor’s guilt,” “alternative ways exist to achieve that benefit without an infringement of the nonconfessor’s right of confrontation.”⁵⁴ Thus, the Court declared that “where viable alternatives do exist, it is deceptive to rely on the pursuit of truth to defend a clearly harmful practice.”⁵⁵ In a footnote, the Court noted that “some courts have required deletion of references to codefendants where practicable,” but also cited law review articles that suggested that redaction is ineffective.⁵⁶ It further recognized that, as in the case of Evans’s confession, “where the confession is offered in evidence by means of oral testimony, redaction is patently impractical.”⁵⁷

In his dissent, Justice White criticized the majority for not “spell[ing] out how the federal courts might conduct their business consistent with [the majority’s] opinion.”⁵⁸ He presumed that under the holding in *Bruton* it would be necessary to exclude all extrajudicial confessions unless all portions of them implicating defendants other than the declarant are effectively deleted.⁵⁹ He stated that “[e]ffective deletion will probably require not only omission of all direct and indirect inculpatations of codefendants but also of any statement that could be employed against those defendants once their identity is otherwise established.”⁶⁰ He also stressed “the deletion must not be such that it will distort the statements to the substantial prejudice of either the declarant

52. *Bruton*, 391 U.S. at 131.

53. *Id.* at 132 (citing advisory committee’s note).

54. *Id.* at 133.

55. *Id.*

56. *Id.* at 134 n.10.

57. *Id.* at 134-35, n.10 (citing Note, *Codefendants’ Confessions* 3 COLUM. J. L. & SOC. PROBS., June 1967, at 80, 88):

“Where the confession is offered in evidence by means of oral testimony, redaction is patently impractical. To expect a witness to relate X’s confession without including any of its references to Y is to ignore human frailty. Again, it is unlikely that an intentional or accidental slip by the witness could be remedied by instructions to disregard.” *Id.*

58. *Bruton*, 391 U.S. at 143 (White, J., dissenting).

59. *Id.*

60. *Id.*

or the Government.”⁶¹

The majority went on to disagree with the arguments advanced by *Delli Paoli* and that it’s attempt to tie its result to the maintenance of the jury system.⁶² The Court found that “there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.”⁶³ The Court declared that “[s]uch a context is presented [in this case], where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.”⁶⁴ This was especially evident in the facts of *Bruton*, in light of the unreliability of the evidence and compounded with the fact that Evans did not testify and could not be tested by cross-examination.⁶⁵

The Court acknowledged that there was no way to actually determine whether in fact the jury did or did not consider Evans’s statement that inculpated Bruton in determining Bruton’s guilt.⁶⁶ It was enough for the Court that the testimony regarding the confession posed substantial threats to a defendant’s constitutional right to confrontation.⁶⁷ The Court simply could not “accept limiting instructions as an adequate substitute for [Bruton’s] constitutional right of cross-examination.”⁶⁸

Bruton thus created a rule that where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused together with a defendant, are offered into evidence at their joint trial, the use of limiting instructions is incapable of preventing the jury from considering the prejudicial evidence.⁶⁹ While *Bruton* was a considerable step for the protection of defendants’ constitutional rights, it left many questions unanswered. For instance, as Justice White noted in his dissent, the majority did not leave the courts with a workable standard that could be used to comply with the *Bruton* rule. Specifically, this left the question of redaction unanswered. Redacted confessions quickly became a very effective way for prosecutors to skirt around *Bruton* and to admit non-testifying codefendant confessions in spite of *Bruton*’s “powerfully

61. *Id.*

62. *Id.* at 135.

63. *Id.*

64. *Id.*

65. *Id.* at 136.

66. *Id.*

67. *Id.* at 137.

68. *Id.*

69. *See id.* at 135-36. “[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical limitations of the jury system cannot be ignored.” *Id.* at 135.

incriminating" rule.⁷⁰

B. *Richardson v. Marsh*

Nearly twenty years after *Bruton*, the Court decided the next case in this line, *Richardson v. Marsh*.⁷¹ Justice Scalia, writing for the majority, held that the Confrontation Clause is not violated by the admission, at a joint criminal trial, of a nontestifying codefendant's confession, even though the defendant is linked to the confession by other evidence properly admitted against the defendant at the joint trial, where: (1) the codefendant's confession is redacted to eliminate not only the defendant's name, but any reference to the defendant's existence; and (2) the jury is given a proper limiting instruction not to use the codefendant's confession against the defendant.⁷²

In *Richardson*, Marsh, Williams, and Martin were "charged with assaulting Cynthia Knighton, and murdering her four-year-old son and her aunt, Ollie Scott."⁷³ Marsh and Williams were tried jointly, over Marsh's objection.⁷⁴ At trial, Knighton testified as to the role of each defendant in the assault and murders.⁷⁵ In addition to Knighton's testimony, the state introduced (over Marsh's objection) a confession given by Williams to the police shortly after his arrest.⁷⁶ The state redacted

70. See Judith L. Ritter, *The X Files: Joint Trials, Redacted Confessions and Thirty Years of Sidestepping Bruton*, 42 VILL. L. REV. 855, 858 (1997) (finding that after *Bruton*, prosecutors turned to the redacted confession as the avenue of choice for preserving their ability to conduct joint trials).

71. 481 U.S. 200 (1987).

72. *Id.* at 211.

73. *Id.* at 202.

74. *Id.* Martin was a fugitive at the time of trial.

75. *Id.* Knighton testified that:

On the evening of October 29, 1978, she and her son were at Scott's home when [Marsh] and her boyfriend Martin visited. After a brief conversation in the living room, [Marsh] announced that she had come to pick something up from Scott and rose from the couch. Martin then pulled out a gun, pointed it at Scott and the Knightons, and said that someone had gotten killed and [Scott] knew something about it. [Marsh] immediately walked to the front door and peered out the peephole. The doorbell rang, [Marsh] opened the door and Williams walked in, carrying a gun. As Williams passed [Marsh] he asked, Where's the money? Martin forced Scott upstairs, and Williams went into the kitchen, leaving [Marsh] alone with the Knightons. Knighton and her son attempted to flee, but [Marsh] grabbed Knighton and held her until Williams returned. Williams ordered the Knightons to lie on the floor and then went upstairs to assist Martin. [Marsh] again left alone with the Knightons, stood by the front door and occasionally peered out the peephole. A few minutes later, Martin, Williams, and Scott came down stairs, and Martin handed a paper grocery bag to [Marsh]. Martin and Williams then forced Scott and the Knightons into the basement, where Martin shot them. Only Cynthia Knighton survived.

Id.

76. *Id.* at 203.

confession “to omit all reference to [Marsh].”⁷⁷ The confession gave no “indication that *anyone* other than Martin and Williams participated in the crime.”⁷⁸ Williams’s confession largely corroborated Knighton’s testimony and also described a conversation that Williams and Martin had as they drove to the Scott home, during which “Martin said that he would have to kill the victims after the robbery.”⁷⁹ When the confession was admitted into evidence, the jury was instructed not to use it against Marsh in any way.⁸⁰

While Williams did not testify, Marsh did.⁸¹ She stated that she was going to Scott’s house to borrow money so that Martin could buy drugs.⁸² In addition, she claimed that while she knew that Martin and Williams were having a conversation in the car, she could not hear them because the radio was on and the speaker was right in her ear.⁸³ Marsh testified that during the robbery she was too scared to flee.⁸⁴ She also claimed that “she did not know why she prevented the Knightons from escaping.”⁸⁵ In her petition for a writ of habeas corpus, Marsh “alleged that her conviction was not supported by sufficient evidence and that introduction of Williams’s confession at their joint trial had violated her rights under the Confrontation Clause.”⁸⁶

On appeal, the Court of Appeals for the Sixth Circuit held that in determining whether *Bruton* bars the admission of a non-testifying codefendant’s confession, a court must assess the confession’s “inculpatory value” by examining not only the face of the confession, but also all of the evidence introduced at trial.⁸⁷ The Court of Appeals for the Sixth Circuit concluded that Marsh’s Confrontation Clause rights were violated because Williams’s confession became powerfully incriminating as to the issue of Marsh’s intent when linked to other evidence offered at trial.⁸⁸

The Supreme Court distinguished the situation in *Richardson* from

77. *Id.*

78. *Id.*

79. *Id.* at 203-04; *see id.* at 203 n.1 to read the redacted confession in its entirety.

80. *Id.* at 204.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 205.

87. *Id.* at 205-06. The approach used by the Sixth Circuit is also known as the “evidentiary linkage” or “contextual implication” approach to *Bruton* questions. The Court of Appeals for the Sixth Circuit reversed the district court’s denial of Marsh’ petition. *Id.*

88. *Id.* at 206. The Court found that “Williams’s account of the conversation in the car was the only *direct* evidence that [Marsh] knew before entering Scott’s house that the victims would be robbed and killed.” *Id.* (emphasis in original). Marsh’s own testimony placed her in the car.

that of *Bruton*, finding *Richardson* to fall outside of the *Bruton* rule.⁸⁹ The *Richardson* Court found that the codefendant's confession in *Bruton* was powerfully incriminating because it expressly implicated the defendant as his accomplice.⁹⁰ In *Richardson*, however, the Court found that the confession was not incriminating on its face, but became so only when linked with evidence introduced at trial.⁹¹ The Court then determined that while it was not reasonable to expect a jury to forget an explicit statement when determining the defendant's guilt, it was reasonable to assume that a jury would follow the judge's instructions and not make inferences from the redacted confession that would incriminate the defendant.⁹²

The Court in *Richardson* then went on to reject the "contextual implication" doctrine articulated by the Court of Appeals for the Sixth Circuit.⁹³ The Court found that adopting this doctrine would be impractical because it would be impossible to predict the admissibility of a confession in advance of trial.⁹⁴ The Court also found that this rule would lend itself to manipulation by the defense.⁹⁵

The *Richardson* Court further justified its decision by reinforcing the advantages of conducting joint trials. The Court stated that joint trials play a vital role in the criminal justice system because they had accounted for one-third of federal criminal trials in the past five years.⁹⁶ The Court also stated that "joint trials generally serve the interests of justice by avoiding inconsistent verdicts, and enabling a more accurate assessment of relative culpability."⁹⁷ Thus, the Supreme Court found that, in this case, administrative concerns outweighed the prejudice that the defendant may have received from the admission of her nontestifying codefendant's redacted confession at her joint trial.

Richardson was a drastic limit on the reach of the *Bruton* rule. Effectively, the case turned the "powerfully incriminating" standard into a "facially incriminating" one. Furthermore, the Court declined to rule

89. *Id.* at 208.

90. *Id.*

91. *Id.*

92. *Id.*

93. *See id.* at 202-09.

94. *Id.* at 209. The Court argues that this approach is probably not even feasible under the federal rules. However, Federal Rule of Criminal Procedure 14 allows for a pre-trial in camera inspection by the court of confessions that will be introduced by the prosecutor, in order to determine whether the defendant will be prejudiced in a way that will require severance of his trial. *See* FED. R. CRIM. P. 14.

95. *Richardson*, 481 U.S. at 209.

96. *Id.*

97. *Id.* at 210.

on other methods of redaction,⁹⁸ which left those questions unresolved. In order to comply with *Bruton*, did a prosecutor have to redact the defendant's name and any reference to his existence, as was the case in *Richardson*, or was simply removing his name from the confession, with or without substituting something in place of it, sufficient?

C. *Gray v. Maryland*

Gray v. Maryland is the most recent Supreme Court decision interpreting the *Bruton* rule.⁹⁹ Justice Breyer, writing for the majority held that a confession that substitutes blanks¹⁰⁰ and the word "delete" for the petitioner's proper name, falls within the class of statements protected by *Bruton*.¹⁰¹ The petitioner, Gray, and his codefendant, Bell, were convicted of murder at their joint trial.¹⁰² Before trial, Bell gave a confession to the Baltimore City police, stating that he, Gray, and Vanlandingham had participated in the 1993 beating of Stacy Williams.¹⁰³ "The trial judge, after denying Gray's motion for a separate trial, permitted the prosecution to introduce Bell's confession into evidence" in a redacted form.¹⁰⁴ At trial, "[t]he detective reading the confession into evidence said the word 'deleted' or 'deletion' whenever Gray's name or Vanlandingham's name appeared."¹⁰⁵ "Immediately after the police detective read the redacted confession to the jury, the prosecutor asked, 'after he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?'"¹⁰⁶ The officer replied in the affirmative.¹⁰⁷ Also introduced into evidence was a written copy of the confession with Gray's and Vanlandingham's names omitted, leaving blank white spaces separated by commas.¹⁰⁸ "The prosecutor produced other witnesses, who said that six people, [including Gray and Vanlandingham,] participated in the crime."¹⁰⁹ "Gray testified and denied his participation," but Bell did not testify.¹¹⁰ The trial

98. "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." *Id.* 212 n.5.

99. 523 U.S. 185 (1998).

100. The Court also stated that use of a first name or a nickname descriptions as unique as the "red-haired, bearded, one-eyed man-with-a-limp would also be protected by the *Bruton*." *Id.* at 195.

101. *Id.* at 197.

102. *Id.* at 189.

103. *Id.* at 188. Vanlandingham later died before trial.

104. *Id.*

105. *Id.*

106. *Id.* at 188-89.

107. *Id.* at 189.

108. *Id.*

109. *Id.* at 189.

110. *Id.*

judge instructed the jury that the confession was evidence only against Bell, and that the jury should not use the confession as evidence against Gray.¹¹¹ The jury convicted both and Gray appealed.¹¹²

The Supreme Court declared that redactions that simply replace a name with an obvious blank space, a word such as “deleted” or a symbol or other similarly obvious indications of alteration, resemble *Bruton*’s unredacted statements so closely that the law must require the same result.¹¹³ The Court found that, “unlike *Richardson*’s redacted confession, this confession referred directly to the existence of the non-confessing defendant.”¹¹⁴ The Court declared that “a jury will often react similarly to an unredacted confession and a confession redacted in this way, for the jury will often realize that the confession refers specifically to the defendant.”¹¹⁵ This would be true even if the prosecutor had not “blatantly linked the defendant to the deleted name.”¹¹⁶ The Court discussed how this type of redaction would not fool any type of juror, because “a juror somewhat familiar with criminal law would know immediately that the blank in the phrase refers to a codefendant.”¹¹⁷ “A juror who does not know the law and who therefore wonders to whom the blank might refer need only lift his eyes to [the codefendant,] sitting at counsel table, to find what will seem the obvious answer.”¹¹⁸ If this type of juror hears the judge’s instruction not to consider the confession as evidence against the codefendant, the instruction will provide an obvious reason for the blank.¹¹⁹ A more sophisticated juror, wondering if the blank refers to someone else, might also wonder how, the prosecutor could argue the confession is reliable, if the prosecutor has been arguing that the codefendant, not someone else, helped the confessing defendant commit the crime.¹²⁰

The Court also noted that the deletion might call jurors’ attention specifically to the removed name, therefore encouraging the jury to speculate about the reference and overemphasize the importance of the confession’s accusations.¹²¹ Finally, the Court noted the similarities

111. *Id.*

112. *Id.* “Maryland’s intermediate appellate court accepted Gray’s argument that *Bruton* prohibited use of the confession and set aside his conviction. *Gray v. State*, 667 A.2d 983 (Md. App. 1995). Maryland’s highest court disagreed and reinstated the conviction. *State v. Gray*, 687 A.2d 660 (Md. 1997).” *Id.* at 189.

113. *Id.* at 189.

114. *Id.* at 192.

115. *Id.* at 193.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

between *Bruton*'s protected statements and statements redacted to leave a blank or some other similarly obvious alteration, in that they are both directly accusatory because they function the same way grammatically.¹²²

The Court conceded that there were certain differences between *Bruton* and this case. Specifically, the Court acknowledged that a "confession that uses a blank or the word delete . . . less obviously refers to the defendant than a confession that uses the defendant's full and proper name."¹²³ And that in "some instances the person to whom the blank refers may not be clear."¹²⁴ For instance, the confession might not be transparent in other cases where the confession uses two or more blanks, and only one other defendant appeared at trial.¹²⁵ Nonetheless, the Supreme Court declared that as a class, these types of redactions are similar enough to *Bruton*'s unredacted confession so as to warrant a constitutional violation.¹²⁶

The Court found that nicknames and specific descriptions also fall within the *Bruton* exception, despite the inferential step needed to link those statements to the defendant in those situations.¹²⁷ It reconciled this result with *Richardson* by stating that "*Richardson* must depend in significant part upon the kind of, not the simple fact of, inference."¹²⁸ The Court found that the inferences at issue in *Gray* "involve[d] statements that, despite redaction, obviously referred directly to someone, often obviously the defendant, and which involve[d] inferences that the jury could make immediately."¹²⁹

The Court also found that the policy reasons that were present in *Richardson* were not present in this case. *Richardson* expressed concern that because redaction of confessions in a manner that would eliminate inferential incrimination of the defendant would not be possible in many cases, prosecutors would be forced to abandon the use of confessions at joint trials.¹³⁰ The Court reasoned that because additional redaction in cases that use a blank space, the word "delete," or a symbol, normally is possible, these policy reasons were not present here.¹³¹ The majority

122. *Id.* at 194. The Court pointed out that in contrast, the factual statement at issue in *Richardson* "differs from directly accusatory evidence in this respect, for it does not point directly to a defendant at all." *Id.*

123. *Id.*

124. *Id.* In *Gray*, however, the follow-up question asked by the state eliminated all doubt.

125. *Id.* at 195.

126. *Id.*

127. *Id.*

128. *Id.* at 196.

129. *Id.*

130. *Id.*

131. *Id.*

proposed an example of a constitutionally acceptable redaction:

Consider as an example a portion of the confession before us: The witness who read the confession told the jury that the confession (among other things) said,

"Question: Who was in the group that beat [the victim]?"

"Answer: Me, deleted, deleted, and a few other guys."

Why could the witness not, instead, have said:

"Question: Who was in the group that beat [the victim]?"

"Answer: Me and a few other guys."¹³²

The Court stated that this example was similar to the kind of redaction seen in *Richardson*.¹³³ Therefore, the Court felt *Gray* was consistent with *Richardson* because the *Richardson* confession had no indication of redaction, omitted all reference to the defendant, and could only be incriminating to the defendant when linked to other evidence at trial.¹³⁴

The Supreme Court in *Gray* also found that inclusion of these types of redactions within the *Bruton* rule could be practically administered by Courts because it did not require the judge or prosecutor to predict whether or not *Bruton* would bar the use of the confession, which was the main problem with the "contextual implication" doctrine rejected by *Richardson*.¹³⁵ The use of blanks, the word "delete," symbols, and other indications of redaction created no risk of mistrial because they are easily identifiable prior to trial and do not depend, in any special way, upon the other evidence introduced in the case.¹³⁶ The Court found support in the fact that several circuit courts have interpreted *Bruton* this way for many years and no complaint or difficulties have been seen with the administration of this rule.¹³⁷

Gray was a partial victory for defendants' rights. Part of the question left unresolved by *Richardson* was answered, and the Court eliminated the most harmful and violative type of redaction being used by prosecutors. The Court, however, did not answer the question of whether the use of neutral pronouns in place of a defendant's proper name was sufficiently protective of a defendant's confrontation rights. This lingering problem has become the new thorn in *Bruton's* side.

IV. LIFE AFTER GRAY

In the two and a half years since the Supreme Court decided *Gray*, courts have again faced a *Bruton* situation that calls for more clarifica-

132. *Id.*

133. *Id.* at 197.

134. *See id.* at 196-97.

135. *Id.* at 197.

136. *Id.*

137. *Id.*

tion. *Gray* left unanswered, or perhaps unclear, the constitutionality of admitting non-testifying codefendant confessions redacted in a manner where neutral pronouns, such as “someone” or “another person,” are used in place of a defendant’s proper name. Since the *Bruton* rule is imposed on the states as well as on the federal courts, the scope of protection under *Bruton* that a defendant in a joint trial receives ultimately depends upon the jurisdiction they are tried in.

A. *Majority View: The Use of Neutral Pronouns and Phrases as a Constitutional Method of Redaction*

Following *Gray*, many courts ruled that redactions using neutral pronouns in place of a defendant’s proper name fall outside of the scope of the *Bruton* rule. Depending on the facts of each case, some courts have allowed singular pronouns to be used in place of a particular codefendant’s proper name. Other courts have also allowed plural pronouns to be used in place of a particular group of codefendants’ proper names or in reference to the confessor’s proper name and one or more codefendants’ proper names.

1. THE USE OF SINGULAR NEUTRAL PRONOUNS AND PHRASES AS A CONSTITUTIONAL METHOD OF REDACTION

Many courts have found that redactions that use a singular neutral pronoun and phrases such as “another person” or “someone” in place of a nonconfessing codefendant’s proper name, are constitutional. These courts offer nonconfessing criminal defendants a lower form of constitutional protection than courts that reject the use of singular pronouns and phrases.

A host of circuits have adopted this limited reading of *Gray*.¹³⁸ For instance, in *United States v. Logan*, the Court of Appeals for the Eighth Circuit held that the admission of a nontestifying codefendant’s post-arrest statements that he planned and committed a robbery with “another individual” did not violate the defendant’s Confrontation Clause rights.¹³⁹ The primary argument was that the redacted confession pointed an accusatory finger directly at him because he testified and admitted that he was present at the robbery and murder, but argued that he was coerced.¹⁴⁰ The Court of Appeals for the Eighth Circuit distin-

138. See generally *United States v. Smith*, 172 F.3d 865 (4th Cir. 1999); *United States v. Akinkoye*, 174 F.3d 451 (4th Cir. 1999); *United States v. Logan*, 210 F.3d 820 (8th Cir. 2000); *United States v. Verduzco-Martinez*, 186 F.3d 1208 (10th Cir. 1999); *United States v. Vejar-Urias*, 165 F.3d 337 (5th Cir. 1999).

139. 210 F.3d 820, 821 (8th Cir. 2000).

140. *Id.* at 821-22.

guished this case from *Gray* on two grounds. First, the court found that there was no indication that there had actually been a redaction.¹⁴¹ Second, the court declared that the statement was not “powerfully incriminating” because it only occurred once and was oral evidence instead of visual evidence.¹⁴² Thus, in contrast to the situation in *Gray*, where the jury was permitted to see a written copy of the confession with the names omitted, the evidence in this case was orally communicated to the jury and therefore potentially less damaging.¹⁴³

The Court of Appeals for the Fourth Circuit in *United States v. Akinkoye*, held that the use of the phrases “another person” and “another individual” did not violate the defendants’ rights under the Confrontation Clause.¹⁴⁴ The court declared that the Supreme Court has strongly implied that such phrases do not offend the Sixth Amendment and based this broad presumption on the *Gray* Court’s proposed redaction.¹⁴⁵ The court found that the prosecutor in *Akinkoye* used the same type of neutral phrase as the one proposed in *Gray*.¹⁴⁶ Next, the circuit court decided that because the retyped versions of the confessions were read to the jury, the jury neither saw nor heard anything in the confessions that directly pointed to the defendant.¹⁴⁷ Sufficient evidence existed to convict both defendants without the confessions.¹⁴⁸ Thus, the court reasoned that the motion to sever and the use of the redacted confession was properly denied.¹⁴⁹

In *United States v. Verduzco-Martinez*, the Court of Appeals for the Tenth Circuit held that no *Bruton* violation occurred when a police officer testified to the confession of a non-testifying codefendant and used the neutral pronoun “another person” in place of the defendant’s name.¹⁵⁰ At trial, the police officer “testified that [the codefendant] told her that he was being paid by *another person* to drive the van to Casper, Wyoming, and that ‘*another person* had paid for the flight from Casper, Wyoming to LAX.’”¹⁵¹ The defendant argued that his *Bruton* rights had been violated because his codefendant’s redacted statements could not refer to anyone other than himself when viewing the evidence as a

141. *Id.* at 823.

142. *Id.*

143. *Id.*

144. *United States v. Akinkoye*, 185 F.3d 195, 198 (4th Cir. 1999).

145. *See infra*, for an analysis on the proposed redaction in *Gray*.

146. *Akinkoye*, 185 F.3d at 198.

147. *Id.*

148. *Id.*

149. *Id.*

150. 186 F.3d 1208, 1213-14 (10th Cir. 1999).

151. *Id.* at 1214 (emphasis on original).

whole.¹⁵² The court found that as redacted, the statements did not clearly violate *Bruton* because the defendant was not mentioned by name, alias, or description, and they did not clearly fall within *Gray* because no blank spaces or “deleted” phrases were used in the testimony.¹⁵³ Unlike *Richardson*, however, the redaction did not remove all evidence of the existence of a coconspirator.¹⁵⁴ Thus, the court framed the issue in this case to be “whether the substitution of a neutral pronoun or phrase in place of [the defendant’s] alleged alias so closely resemble the statements in *Gray* that it violates *Bruton*’s protective rule.”¹⁵⁵

The court held “that where a defendant’s name is replaced with a neutral pronoun or phrase there is no *Bruton* violation, providing that the incrimination of the defendant is only by reference to evidence other than the redacted statement and a limiting instruction is given to the jury.”¹⁵⁶ If it is obvious from looking at the confession as a whole that the redacted phrase was a reference to the defendant, then the admission of the confession violates *Bruton*, regardless of how the redaction was accomplished.¹⁵⁷ The court went on to find that the “Supreme Court indicated its approval of redaction with non-identifying pronouns in *Gray* when it asked why the statements could not have been redacted to read ‘Me and a few other guys’ instead of ‘Me, deleted, deleted, and a few other guys.’”¹⁵⁸

Using this logic, the court then considered the statements in this case and found the use of the neutral pronoun/phrase “another person” “did not identify [the defendant] or direct the jury’s attention to him nor did it obviously indicate to the jury that the statements had been altered.”¹⁵⁹

The court found that while it “may be possible to infer that the ‘another person’ referred to Verduzco-Martinez, it was not an inference that [could] be made by the jury immediately from the redacted confession alone.”¹⁶⁰ The Court of Appeals for the Tenth Circuit then likened this case to *Richardson*, in that “[the defendant] linked himself to the statements in his testimony.”¹⁶¹ The court declared that the defendant’s

152. *See id.* at 1212.

153. *Id.* at 1214.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* In support of its holding, the Court cited *United States v. Akinkoye*, 174 F.3d 451, 457 (4th Cir. 1999); *United States v. Vejar-Urias*, 165 F.3d at 340; *United States v. Edwards*, 159 F.3d 1117, 1125-26 (8th Cir. 1998); *United States v. Peterson*, 140 F.3d 819, 821-22 (9th Cir. 1998).

158. *Verduzco-Martinez*, 186 F.3d at 1214 (citing *Gray*, 523 U.S. at 196).

159. *Id.* at 1214.

160. *Id.*

161. *Id.* The defendant testified that: he talked to his codefendant about getting the van from

Bruton rights were not violated by the admission of his codefendant's redacted statements through the police officer's testimony.¹⁶²

Following the Supreme Court's decision in *Gray*, state courts have also held that the use of singular neutral pronouns or phrases in redactions do not violate *Bruton*'s protective rule.¹⁶³ In *State v. Baines*, the Connecticut Court of Appeals held that the admission of a codefendant's post-arrest statement to the police that "there is one more person you should get" did not violate defendant's confrontation rights.¹⁶⁴ The defendant claimed that the trial court should have granted his motion to sever because his codefendant's statement effectively inculpated him in the crime, in violation of *Bruton*.¹⁶⁵ The court found that the statement did not name or incriminate the defendant directly.¹⁶⁶ While the court acknowledged that the statement inferentially incriminated someone other than the confessing codefendant, it stated that the jury could only infer that person was the defendant by linking the statement to other evidence.¹⁶⁷ Further, the court found that the trial court specifically instructed the jury that it could use the statement as evidence only against the person who made it.¹⁶⁸ Thus, because the "jury is presumed to follow the court's instructions,"¹⁶⁹ the court held that "the defendant did not suffer substantial prejudice by the admission of the codefendant's statement so as to require a separate trial."¹⁷⁰

Similarly, in *State v. Brooks*, the Louisiana Court of Appeal held that a redaction where the word "friend" was used in place of the defendant's proper name did not violate the defendant's rights under *Bruton*.¹⁷¹ The court found that through its proposed redaction in *Gray*, the Supreme Court approved of redaction that "made it clear that the codefendant had accomplices, but did not call the jury's attention to an

California for him; he was paying his codefendant to drive the van to Wyoming; he accompanied his codefendant to the travel agency to purchase the airline ticket; he gave his codefendant money for the ticket to California and for expenses; and he took his codefendant to the airport. *Id.*

162. *Id.* at 1215.

163. *See, e.g.*, *State v. Brooks*, 758 So. 2d 814 (La. Ct. App. 1999); *State v. S.T. No. 42223-5-I*, 1999 WL 44214 (Wash. Ct. App. Feb. 1, 1999); *State v. Baines*, 743 A.2d 666 (Conn. App. Ct. 2000).

164. *Baines*, 743 A.2d at 668.

165. *Id.*

166. *Id.* at 669.

167. *Id.* The court also stated that the Connecticut Supreme Court "limited the application of *Bruton*, [finding] that extrajudicial statements or confessions by one defendant which do not directly inculpate the codefendant are not within the prohibition of *Bruton* . . . and are admissible." *Id.* (citing *State v. Cosgrove*, 436 A.2d 33 (Conn. 1980)).

168. *Id.*

169. *Id.* (citing *State v. Griffin*, 397 A.2d 89 (Conn. 1978)).

170. *Id.*

171. 758 So. 2d 814, 822 (La. Ct. App. 1999).

obvious redaction.”¹⁷² The court stated that because the redaction in this case did not refer to the defendant by his proper name, but instead referred to the nontestifying confessor’s accomplice as his “friend,” the redacted statement comported with the acceptable example used by the Court in *Gray*.¹⁷³ Therefore, the court found that the trial court did not err because the redaction did not fall within the *Bruton* rule.¹⁷⁴

In *State v. S.T.*,¹⁷⁵ the Washington Court of Appeals found that a statement redacting the defendant’s proper name and replacing it with the phrase “another person” did not violate *Bruton*.¹⁷⁶ The statement made by a nontestifying codefendant and admitted against both defendants was redacted to read, “[confessor] and someone else had taken the bike from the victim and someone else had the bike.”¹⁷⁷ In holding that the right of confrontation was not violated by the admission of this statement, the court declared that *Gray* did not govern here because the codefendant’s statement mentioned “another person” and was the same as the “me and a few other guys” statement approved in *Gray*.¹⁷⁸ The court felt the statement here did not call attention to an obvious redaction and was not incriminating on its face.¹⁷⁹ Reasoning that the statement only became incriminating when the state introduced other evidence linking the defendant to the crime, the court declared that the statement fell outside of *Bruton*’s protections.¹⁸⁰

2. THE USE OF PLURAL NEUTRAL PRONOUNS AND PHRASES AS A CONSTITUTIONAL METHOD OF REDACTION

Many courts have found redactions using plural neutral pronouns and phrases such as “we,” “they,” or “other people” in place of a particular group of codefendants or in reference to the confessor and one or more codefendants to be constitutional. These courts offer nonconfessing criminal defendants a lower level of constitutional protection than courts that reject the use of plural pronouns and phrases.

Several jurisdictions have held that redactions using plural neutral pronouns and phrases in place of a group of codefendants or in reference to the confessor and one or more of his codefendants do not violate the nonconfessing codefendant’s rights under *Bruton*.¹⁸¹ For example, in

172. *Id.*

173. *Id.*

174. *Id.*

175. No. 42223-5-I, 1999 WL 44214 (Wash. Ct. App. Feb. 1, 1999).

176. *Id.*

177. *Id.* at *2.

178. *Id.* at *3.

179. *Id.*

180. *Id.*

181. *See, e.g.,* United States v. Taylor, 186 F.3d 1332 (11th Cir. 1999) (holding that the

Plater v. United States, the Court of Appeals for the District of Columbia held that the use of the plural pronoun “we” in a redaction did not violate the defendant’s Confrontation Clause rights.¹⁸² Plater, Morrison, Grayson, and Capies were tried jointly after being indicted on charges of second-degree murder for the beating and death of Thomas Davis.¹⁸³ A jury convicted Capies and Plater of armed voluntary manslaughter and Morrison of unarmed voluntary manslaughter.¹⁸⁴ Morrison and Grayson both made statements that were admitted into evidence.¹⁸⁵ Plater objected to the portions of Morrison’s statement in which he narrated the group beating of Davis and used the pronouns “we” and “us.”¹⁸⁶ After analyzing the holdings of *Bruton* and *Richardson*, the court looked to its decision¹⁸⁷ in *Foster v. United States*.¹⁸⁸ In *Foster*, the Court held that:

a redacted statement that does not eliminate all references to the existence of a defendant, but substitutes a neutral pronoun in place of an individual’s name may be properly admitted at trial, along with limiting instructions, without violating a defendant’s right to confrontation, unless a substantial risk exists that the jury will consider the statement when determining the defendant’s guilt.¹⁸⁹

The court then went on to analyze *Gray*, where it limited *Gray*’s expansion of *Bruton* as to apply only to “obvious indications of alteration [that] facially incriminated a defendant because [the statement’s] reference to his identity could be inferred from the statement itself.”¹⁹⁰ Applying this limited holding of *Gray*, the court found that the admission of the redacted confession did not violate Plater’s rights under *Bruton* as interpreted by *Richardson* and *Gray*.¹⁹¹ More specifically, the

codefendant’s redacted statement, containing references to “they” and the “captain,” did not directly or indirectly incriminate the defendant in violation of his confrontation rights); *United States v. Stockheimer*, 157 F.3d 1082 (7th Cir. 1998) (holding that nontestifying codefendant’s statements, indicates “inner circle” of members in criminal activity, incriminated defendants only in conjunction with other evidence, if at all); *Plater v. United States*, 745 A.2d 953 (D.C. Cir. 2000) (holding that the use of “we” in a nontestifying defendant’s confession did not violate the Confrontation Clause); *United States v. Edwards*, 159 F.3d 1117, 1125-26 (8th Cir. 1998) (finding that defendant’s redacted statement with neutral pronouns such as “we,” “they,” “someone,” and “others” constitutional).

182. 745 A.2d 953, 961 (D.C. Cir. 2000).

183. *Id.* at 956.

184. *Id.*

185. *Id.* at 959 n.9.

186. *Id.* “We was all around “A” Street. And the guy Boo [Davis] was walking down the street. That meant he coming around here so that meant that he giving us a cue that he was gonna kill us. We walked around the corner and jumped in it *Foster v. United States*. All of us jumped in.” *Id.* (emphasis added).

187. *Id.* at 960.

188. 548 A.2d 1370 (D.C. Cir. 1988).

189. *Plater v. United States*, 745 A.2d 953, 960 (D.C. Cir. 2000).

190. *Id.* (citing *Gray*, 523 U.S. at 193-97).

191. *Id.* at 961.

court found that there was “no reference to Plater’s existence or participation in the offense because the statements did not introduce the name or descriptions of individual participants.”¹⁹² The use of the pronoun “we” did not link Plater to the crime because no dispute existed to the fact that the incident was a group assault.¹⁹³ The court declared that the use of “we” was not prejudicial because the term did not connote a particular number of people and there was “no symmetry between the number of alleged perpetrators and the number of defendants on trial.”¹⁹⁴ The court found that use of “‘we’ comports with the proposed redaction, ‘me and a few other friends.’”¹⁹⁵ The court concluded by finding that even if there was an error by the lower court, it was harmless beyond a reasonable doubt because of the overwhelming, independent evidence of the defendant’s guilt.¹⁹⁶

In *United States v. Edwards*, the Court of Appeals for the Eighth Circuit held that the district court’s admission of a nontestifying defendant’s redacted confession, accompanied by limiting instructions, was consistent with *Gray*.¹⁹⁷ The trial court ordered the confessing defendant’s statement redacted to replace inculpatory references to her codefendants with several neutral pronouns such as “we,” “they,” “someone,” and “others.”¹⁹⁸ The trial, the court repeatedly instructed the jury to consider each admission only against the declarant.¹⁹⁹ No defendant testified at trial, but fifty-nine witnesses testified to the defendants’ various out-of-court admissions.²⁰⁰

The court found that in *Gray* the use of the word “deleted” directed the jury’s attention to an obvious redaction, while the use of the pronouns “we” and “they” in this case did not draw attention to the redaction.²⁰¹ Thus, the court declared that the pronouns in the redacted confession were not incriminating unless linked to a codefendant by other trial evidence.²⁰² No further redaction of the statement was possible in this situation, since, especially “[w]hen an admission refers to joint activity, it is often impossible to eliminate all references to the

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. 159 F.3d 1117, 1125-26 (8th Cir. 1998).

198. *Id.* at 1124. “The court also approved the government’s plan to instruct its witnesses not to mention the names of codefendants when testifying to each defendant’s out-of-court admissions.” *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 1126.

202. *Id.*

existence of other people without distorting the declarant's statement."²⁰³ The court found that "[b]ecause joint trials 'play a vital role in the criminal justice system,' it is important to adopt workable redaction standards."²⁰⁴ Thus, the court found that the admission of the statements did not violate the defendants' rights of confrontation.

Several district courts have also found that using plural neutral pronouns and phrases in redaction passes constitutional muster.²⁰⁵ For instance, in *United States v. Cambrelen*, the District Court for the Eastern District of New York held that *Gray* did not require the exclusion of confessions that were redacted so as to replace the names of the codefendants with "guy," "guys," or "the guys."²⁰⁶ The confession of one defendant, Vazquez, described some of the calls and meetings of the "guys" prior to the attempted robbery of the warehouse.²⁰⁷ The confession also referred to the arrival of the "guys" at the warehouse, three in a van and three in a car.²⁰⁸ The confession of a second defendant, Brown, in substance, described that he met "the other guys" and that three "guys" got in a van and he and "two guys" got in a car and later arrived at the location.²⁰⁹ The district court instructed the jury were that each statement could be considered only against the defendant who made it and not against anyone else.²¹⁰

The *Cambrelen* court stated that the "documents had no blank spaces and no facial indication to suggest that they referred to the other defendants or had been redacted or altered."²¹¹ The court also found that had the "confessions been 'the very first item introduced at trial,'

203. *Id.*

204. *Id.* (quoting *Richardson*, 481 U.S. at 209).

205. See *United States v. Colon*, No. 97-CR-659, 1999 WL 77226, at *5 (N.D.Ill. Jan. 8, 1999) (finding that the redaction of the defendants' proper names with personal pronouns, such as "certain members" of the Latin Kings, did not compromise the Sixth Amendment rights of any defendants); *Grasso v. Yearwood*, 2000 WL 502849, at *3 (N.D. Cal. Apr. 17, 2000) (holding that the use of third party references in redacted statement, such as "us" and "they," did not violate *Gray*, because the redacted confession did not contain blanks, deletions, or any symbols to indicate where the redaction occurred); *United States v. Barroso*, 108 F. Supp. 2d 338, 346 (S.D.N.Y. 2000) (holding that statement in codefendant's redacted plea allocution that he conspired with "more than one person" was properly admitted); *United States v. Massanova*, Crim. No. 98-631-02, 1999 WL 761136, at *4 (E.D. Pa. Sept. 21, 1999) (finding that nontestifying codefendant's statement, that "to cooperate he would have to implicate friends," did not violate *Gray* because the statement did not facially incriminate the defendant, was not redacted with an obvious blank or the word "delete," and did not include specific details about the defendant).

206. 18 F. Supp. 2d 226, 229-30 (E.D.N.Y. 1998).

207. *Id.* at 230.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* Both confessions were admitted in neat, typewritten form so as to disguise the identity of the defendants are the fact of alteration. *Id.* at 229.

the jurors would have been hardly likely, in the light of the court's limiting instruction, to have considered the confessions as incriminating the other defendants."²¹² Until other evidence was admitted, the jurors would have had a "dubious basis, [but] not an 'overwhelming' basis to infer that 'guys' referred to the other defendants."²¹³ In conclusion, the court stated that even if admitting the confessions was an error, it was harmless beyond a reasonable doubt.²¹⁴

State courts have also endorsed the use of plural pronouns as constitutionally acceptable redactions.²¹⁵ One example can be found in *Commonwealth v. McGlone*, where the Pennsylvania Superior Court held that the admission of a codefendant's redacted confession, using "other persons" instead of the defendants' names, did not violate the defendants' Confrontation Clause rights.²¹⁶ The court differentiated this statement from the one in *Gray* by finding that the redacted statement in this case "did not reveal to the jury a specific name or the fact that one was omitted," as the statement did in *Gray*.²¹⁷ The court further declared that the use of the term "other people" was precisely what *Gray* suggested the prosecution should have done in that case.²¹⁸ The court interpreted *Gray* as "precluding the prosecution from offering a statement where the redaction itself is obvious to the jury, thereby drawing attention to the codefendant."²¹⁹

B. *Minority View: Neutral Pronouns and Phrases as Unconstitutional Methods of Redaction*

While many courts have expressed the view that neutral pronouns in redactions of extrajudicial statements do not violate a defendant's constitutional rights, other courts have found these forms of redaction constitutionally inadequate. There have been several different approaches by these courts. Some courts have found that the use of singular neutral pronouns and phrases in a redaction violates the *Bruton*

212. *Id.* at 230 (citing *Gray*, at 523 U.S. at 196).

213. *Id.*

214. *Id.*

215. See *Commonwealth v. Wilson*, 705 N.E.2d 313, 316-17 (Mass. App. Ct. 1999) (holding that the admission of codefendant's extrajudicial statement that "we stabbed" the victim did not violate the defendant's rights under the Confrontation Clause); *Butler v. State*, 511 S.E.2d 180, 185 (Ga. 1999) (holding that redaction of six codefendants in confessing defendant's statement, using the letters A-F in place of the codefendants' names, did not violate the codefendants' rights of confrontation because the statement did not directly indicate which defendant corresponded with which letter).

216. 716 A.2d 1280, 1285 (Pa. Super. Ct. 1998).

217. *Id.*

218. *Id.* at 1285-86.

219. *Id.* at 1286.

rule. At least one state has found that the use of plural neutral pronouns and phrases is unacceptable. Certain courts look to whether the extrajudicial statement attempts to shift the blame to other defendants, and if they do so, determine that they are inadmissible. Other courts have declared that in order to pass constitutional muster, all references to the defendant's existence must be omitted, as was the case with the constitutionally acceptable redaction in *Richardson*.

1. SINGULAR AND PLURAL NEUTRAL PRONOUNS AS UNCONSTITUTIONAL METHODS OF REDACTION

A few of the federal circuits have found that the use of singular neutral pronouns in redaction of extrajudicial statements constitutes a *Bruton* violation.²²⁰ One such case is *United States v. Eskridge*, where the Court of Appeals for the Seventh Circuit found that the defendant's rights of confrontation were violated by the admission of his nontestifying codefendant's confession.²²¹ At trial, neither defendant testified,²²² and over Eskridge's objection, the government introduced the written confession of his codefendant, Pointer.²²³ The confession implicated both defendants, but any direct reference to Eskridge was eliminated by replacing his name with the word "another."²²⁴ The judge instructed the jury to use Pointer's confession only against Pointer.²²⁵ During closing argument, however, the prosecutor referred to Pointer's confession as implicating Eskridge.²²⁶ The prosecutor immediately caught his error, and thereafter referred to "another" rather than Eskridge.²²⁷

The court held that "clearly, the use of Pointer's confession with the word 'another' in place of the Eskridge's name falls within the class of statements described in *Gray* as violative of *Bruton*."²²⁸ The type of confession at issue here was addressed in *Gray*, and the court likened Pointer's confession with "a redacted statement that replaces a defendant's name with an obvious indication of deletion, such as a blank

220. See *United States v. Vejar-Urias*, 165 F.3d 337, 340 (5th Cir. 1999) (holding that a codefendant's rights under *Bruton* were violated when, on redirect examination, a customs agent's testimony clarified who the identity of "someone" he had been testifying about on direct examination); *United States v. Peterson*, 140 F.3d 819, 822-23 (9th Cir. 1998) (finding that the admission of a nontestifying codefendant's confession was improperly redacted by using the term "Person X" in place of the defendant's name, in violation of the defendant's confrontation rights).

221. 164 F.3d 1042, 1044 (7th Cir. 1998).

222. *Id.* at 1043.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 1044.

space, the word ‘deleted,’ or similar symbol.”²²⁹ Despite the *Bruton* violation, the court found the redaction to be a harmless error in light of the other evidence offered at trial.²³⁰

In *United States v. Logan*, a non-testifying codefendant confession was redacted using the term “another individual” in place of the defendant’s proper name.²³¹ The Court of Appeals for the Eighth Circuit held that there was no indication that there had been a redaction, therefore *Bruton* was not violated.²³² Judge Heaney, however, in his dissent, found that the use of “another individual” violated *Bruton* because it was obvious to the jury that the “individual” was the defendant.²³³ Judge Heaney felt the majority had erroneously applied a “four-corners” analysis to the issue, instead of the standard suggested by *Gray*.²³⁴ The dissent also found that when the detective referred to this “other individual,” it was clear he was talking about Logan, since at the very outset of the joint trial, the district court informed the jury of the nature of the indictments.²³⁵ Since Roan and Logan were the only defendants charged with the robbery of Lloyd’s Gun Shop, it was apparent to the jury who the other “individual” was who helped in the robbery, even without inferential evidence that the mystery person was Logan.²³⁶ The dissent suggested that “an acceptable way to reconcile preference for joint trials with *Bruton*’s constitutional mandate is to simply remove all reference to the codefendant in the defendant’s confession.”²³⁷

Some state courts have also found redactions that use neutral pronouns to be inadmissible.²³⁸ Georgia is one of these states.²³⁹ In *Davis*

229. *Id.* (citing *Gray*, 523 U.S. at 192).

230. *Id.* at 1045.

231. 210 F.3d 820, 821 (8th Cir. 2000).

232. *Id.* at 823.

233. *Id.* at 825.

234. *Id.*

235. *Id.*

236. *Id.* The dissent stated that indictments are not evidence. Thus, when the indictment linked Logan to the confession, he was not being linked by other trial evidence, but rather by the ordinary inferences a juror would be expected to make immediately upon hearing the redacted confession.

237. *Id.* at 826.

238. *See Lopez v. State*, No. F96-52769-W, 1999 WL 280716 (Tex. Crim. App. May 7, 1999) (holding that redacted confession violated *Bruton*, where the use of the neutral pronoun “someone” did not fool anyone, in the statement, “I got in the back of the truck and someone, someone, and Gilbert got in the front of the truck”); *In matter of L.A.*, No. 04-97-00434-CV, 1998 WL 904294, at *7 (Tex. Crim. App. Dec. 30, 1998) (holding that two confessions read back-to-back clearly reference the existence of another individual with the inclusion of the terms “my friend,” “he,” and “his,” thereby violating *Bruton*).

239. *See Hanifa v. State*, 505 S.E.2d 731, 736-38 (Ga. 1998) (holding that admission of statements of nontestifying codefendants, replacing defendants names with “someone,” “someone else,” and “they,” violates the Confrontation Clause, but was harmless error); *Collins v. State*, 529 S.E.2d 412, 414 (Ga. Ct. App. 2000) (holding that the use of the terms “anyone else,” “anybody,”

v. State, the Supreme Court of Georgia declared the use of “someone” and “anybody” in a redacted statement of a nontestifying codefendant violated the defendant’s right of confrontation.²⁴⁰ Hill, the defendant, argued that the admission into evidence of his codefendant Davis’s statement to police, which inculpated Hill in the murder, violated his right to confrontation under *Bruton*.²⁴¹ The court looked to its interpretation of the *Bruton* line of cases in *Hanifa v. State*,²⁴² where that court held that:

unless the statement is otherwise directly admissible against the defendant, the Confrontation Clause is violated by the admission of a non-testifying co-defendant’s statement which inculpates the defendant by referring to the defendant’s name or existence, regardless of [whether there are] limiting instructions or of whether the incriminated defendant has made an interlocking incriminating statement.²⁴³

In *Hanifa*, the Georgia Supreme Court held that despite the use of generic terms in redaction, such as “someone,” “others,” or “they,” the jury knew a person’s name had been redacted, and therefore admitting the statement constituted a violation of *Bruton*.²⁴⁴

In *Davis*, Davis made a pre-trial statement to the police identifying Hill as the person who repeatedly shot the victim and Guy as the person who hit the victim in the head with a gun.²⁴⁵ The court found that Davis did not incriminate himself in the statement besides admitting his presence at the crime scene.²⁴⁶ Davis’s statement was redacted by substituting ‘someone’ and ‘anybody’ for the names of Hill and Guy.²⁴⁷ None of the defendants testified at trial.²⁴⁸

The court found it significant that Davis’s statement was admitted in evidence after the state’s eyewitnesses identified Hill as the shooter.²⁴⁹ The court reasoned that the “likelihood that the jury attributed these actions to Hill [was] increased by the fact that although the

“this other individual,” the man,” and “this individual” in a redacted confession violated the defendant’s confrontation rights); *Cunningham v. State*, 522 S.E.2d 684, 690 (Ga. Ct. App. 1999) (holding that the admission of the defendant’s improperly redacted statement, using “another guy” in place of the codefendant’s proper name, violated the codefendant’s confrontation rights under *Bruton*).

240. 528 S.E.2d 800, 805-06 (Ga. 2000).

241. *Id.* at 804.

242. 505 S.E.2d 731 (Ga. 1998).

243. *Davis*, 528 S.E.2d at 805 (citing *Hanifa*, 505 S.E.2d at 736).

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* “As read to the jury, Davis’s redacted statement maintained that someone kept shooting at Ray, someone kept shooting till the gun was empty . . . and then someone reloaded a gun and shot Ray one more time.” *Id.*

248. *Id.*

249. *Id.*

eyewitnesses identified three men involved in the murder, Davis did not implicate himself in his statement or his interview."²⁵⁰ Davis's statement left the jury to choose between Hill and Guy as the shooter.²⁵¹ The court found that since Hill lacked an opportunity to cross-examine Davis's inculpatory statement this violated his Sixth Amendment rights.²⁵² The court went on to find that the error was not harmless beyond a reasonable doubt and therefore reversed Hill's conviction.²⁵³

Georgia courts have also rejected the use of plural pronouns in redacted confessions.²⁵⁴ In *Montijo v. State*, the Georgia Court of Appeals held that a redacted statement using "others," "another," and "other guys" was an impermissible means of avoiding the *Bruton*.²⁵⁵ As in *Davis*, the court relied on the holding of *Hanifa*, and found that while it was not clear that the "generic terms" used in the statements referred directly to the defendant, "the jury was notified by the use of the terms . . . that a name had been redacted, making it similar to *Bruton's* unredacted confessions so as to be a constitutional violation."²⁵⁶

2. AN ANTI-INCRIMINATION STANDARD OF REDACTION

If a redacted statement points an accusatory finger at another individual, it may violate *Bruton*.²⁵⁷ In *United States v. Gonzales-Garcia*, the Western District of Michigan held that a codefendant's redacted confession was not admissible against a nonconfessing defendant under the Confrontation Clause.²⁵⁸ The redacted statement in part said:

Pollo and Ed Perez went to the barn. Pollo stated he grabbed Ed Perez by his shoulder and arm and put handcuffs on Ed Perez. Pollo indicated Ed Perez was handcuffed behind his back. Pollo stated that he left the barn to have a cigarette[.] Pollo said Ed Perez was covered with blood. Ed Perez' [sic] feet were tied together and Ed was lying on the floor on his stomach. Pollo said he did shake Perez' [sic] face and grabbed his mouth. While doing this, Pollo said, "wake up, what's wrong." Pollo didn't get a response. Pollo said he didn't take part in the beating[.] Pollo said there was a piece of duct

250. *Id.*

251. *Id.* There was also testimony in the case by an investigator who stated that that this portion of Davis's interview led him to obtain an arrest warrant for Hill, and that this arrest led him to recover a gun that was later identified as the murder weapon. *Id.* at 805-06.

252. *Id.* at 806.

253. *Id.*

254. See also *Hanifa v. State*, 505 S.E.2d 731 (Ga. 1998).

255. 520 S.E.2d 24, 29 (Ga. Ct. App. 1999).

256. *Montijo*, 520 S.E.2d at 29-30 (citing *Hanifa*, 505 S.E.2d 731).

257. See *United States v. Pendegraph*, 791 F.2d 1462 (11th Cir. 1986) (holding that nontestifying second defendant's confession even as redacted to omit references to the first defendant, clearly implicated the first defendant in violation of the confrontation clause).

258. 73 F. Supp. 2d 819 (W.D. Mich. 1999).

tape, gray in color, by Ed's head. Pollo said there wasn't any tape on Ed's face while Pollo was there. Pollo picked up the tape[.] Pollo said he didn't put the gray tape on Ed Perez. Pollo said he didn't remember seeing a knife. Pollo said he didn't bring any weapons in the barn or take any weapons out of the barn. Pollo said he left the Perez residence[.]²⁵⁹

Based on its interpretation of *Bruton*, *Richardson*, and *Gray*, the *Gonzales-Garcia* court found that the proper questions regarding whether a redacted statement is admissible under the confrontation clause are: "Does the person who made the statement point an accusatory finger at someone else, and can that person be identified, without further evidence, as the codefendant?"²⁶⁰ The court stated that if the answer to this inquiry is yes, then the redacted statement is not admissible.²⁶¹

Applying this test to the redaction at hand, the court found two constitutional deficiencies.²⁶² First, the court found that although the statement lacked a literal blank or asterisk, a logical blank and asterisk existed.²⁶³ No reasonable juror could hear and understand the statement "without understanding that someone's name was being kept out."²⁶⁴ The court found that the inference that could be drawn in this case was the immediate type of inference described in *Gray*.²⁶⁵ Second, the non-confessing defendant, Alvarez, was the only person who could fit into the confession as the missing link to the murder, since the government alleged the two defendants were the only people present when the murder occurred.²⁶⁶ The court concluded that "the statement at issue in this case [was] not materially different than the statement in *Gray*."²⁶⁷

3. JURISDICTIONS REQUIRING THAT ALL REFERENCES TO THE DEFENDANT MUST BE OMITTED IN REDACTION

Some courts require that all references to the defendant's existence be omitted in order for the redaction not to run afoul of the constitution.²⁶⁸ *People v. Hampton* provides an example of a properly and

259. *Id.* at 822.

260. *Id.* The court cited *United States v. Peterson*, 140 F.3d 819, 822 (9th Cir. 1998) in support of this test.

261. *Gonzales-Garcia*, 73 F. Supp. 2d at 822.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* (citing *Gray*, 523 U.S. at 196).

266. *Id.*

267. *Id.*

268. *See, e.g., State v. Brewington*, 532 S.E.2d 496, 506 (N.C. 2000) (finding no violation of *Bruton* where state redacted the confessions to the extent that each defendant's confession contained no references to the other defendant.); *State v. Mercier*, No. 95-1-00265-0, 1999 WL

effectively used redaction where all references to the defendant were omitted.²⁶⁹ In this California state case, Hampton robbed a Burger King restaurant and Williams drove the getaway car.²⁷⁰ They were both tried jointly and convicted by a jury of robbery.²⁷¹ The court admitted into evidence Hampton's custodial confession concerning his part in the robbery and gave instructions to the jury that it was not admissible against Williams.²⁷² Hampton's confession was carefully edited to omit any mention of Williams or of Williams's participation, and the prosecutor was careful to avoid using Hampton's statement against Williams.²⁷³ As to Williams, the prosecutor relied on the testimony of two other witnesses.²⁷⁴ The court found that because this case so closely resembled the facts in *Richardson*, the admission of Hampton's confession in its carefully redacted form did not violate Williams's constitutional right to confront the witnesses against him.²⁷⁵

The state of North Carolina has similarly adopted a protective approach to *Bruton*. In *State v. Brewington*,²⁷⁶ a defendant argued that allowing the words "Grandma" and "grandmother" to remain in the redacted offering of his codefendant's confession prejudiced him.²⁷⁷ The state redacted the confession in a way that there were no references to the defendant by name and complete sentences and groups of sentences that mentioned, connected, or referenced the existence of the defendant were removed.²⁷⁸ The court found that the references to "Grandma" and "grandmother" in the redacted confession did not refer to the existence of someone else who was involved in the crime.²⁷⁹ The court reaffirmed its stance on *Bruton* by announcing that *Bruton* and its progeny would affect criminal trials in North Carolina in the following manner:

The result is that in joint trials of defendants it is necessary to exclude

100874 (Wash. Ct. App. Feb. 26, 1999) (finding that trial court's redaction of statements to omit all reference to defendants other than the speaker met the requirements of *Bruton*, *Richardson*, and *Gray*).

269. 86 Cal. Rptr. 2d 665 (Cal. App. Ct. 1999).

270. *Id.* at 666-69.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 669.

275. *Id.* at 672.

276. 532 S.E.2d 496, 509 (N.C. 2000).

277. *Id.* at 509.

278. *Id.* at 510.

279. *Id.* Frances, who is the victim referred to as "grandma," had adopted both the defendant and his brother, Patrick, as her children. Therefore, she was both their mother and grandmother. Furthermore, because Brian, the other victim, was Patrick's son, Frances was both Brian's grandmother and his great-grandmother. Therefore, the references in the redacted confession to the familial connection when referring to Frances Brewington do not point to the defendant. *Id.*

extra-judicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately.²⁸⁰

V. ANALYSIS OF THE CONSTITUTIONALITY OF NEUTRAL PRONOUNS

As stated above, various federal and state courts have interpreted *Gray* in different ways. Some of these courts provide defendants with stronger constitutional protections than others. Since the right of confrontation is a basic constitutional right provided by the Sixth Amendment, should not all jurisdictions afford defendants the same degree of constitutional rights and protections?

Richardson was the only Supreme Court case that has approved of a specific form of redaction: redaction that omits all reference to the defendant's existence. *Richardson* rejected the "contextual implication" doctrine, which would have all but eliminated the use of confessions in joint trials if accepted by the *Richardson* Court.²⁸¹ Therefore, the Court struck the balance in *Richardson* in favor of judicial economy over defendants' rights. In the case of neutral pronouns, it is time that the Court strike the balance back in favor of defendants' rights. Redaction that omits all reference to the defendant's existence is the only type of redaction that can satisfy the constitutional mandates of the *Bruton* rule. This is because the purpose of the rule is to protect the nonconfessing defendant from the substantial prejudice that arises from the admission of codefendant's "powerfully incriminating" extrajudicial statements. If the non-confessing codefendant or even his existence is referred to in the extrajudicial statement, then it is beyond the jury's ability to ignore the judge's instructions to consider the statement as evidence only against its confessor. This was the message in *Gray*, although it has been misinterpreted and misapplied by many courts in the context of neutral pronouns.

The Supreme Court's decision in *Gray* was based on many factors. However, it appears that many courts that seek to continue to permit the

280. *Id.* at 507-08 (citing *State v. Tucker*, 414 S.E.2d 548, 554 (N.C. 1992)).

281. *Richardson v. Marsh*, 481 U.S. 200, 208 (1987). "Contextual implication," or "inferential incrimination" (as it is referred to by Justice Scalia in his majority opinion in *Richardson*) would cause the introduction of a nontestifying defendant's confession to violate the Confrontation Clause rights of his codefendant, even if it is redacted to remove all references to the existence of the codefendant, if the confession incriminates the nonconfessing codefendant when linked to other evidence at trial. The adoption of this principle would probably eliminate the introduction of a majority of confessions at joint trials because the nonconfessing codefendant will likely be able to provide this linkage through other evidence, including his own testimony.

use of neutral pronouns only discuss the factors that support their conclusions. First, like blank spaces and the word "delete," neutral pronouns refer directly to the "existence" of the nonconfessing defendant.²⁸² Second, neutral pronouns function the same way grammatically as Evans's confession did in *Bruton*, because they are directly accusatory.²⁸³ Third, some courts defend the use of neutral pronouns by stating that the identity of the defendant who is referred to by a neutral term, such as "someone," can only be established by linking the statement to other evidence. Thus, these courts find that because *Richardson* rejected contextual implication, then this type of redaction is acceptable.

These courts overlook two things. First, in *Richardson*, the confession was redacted in a manner that omitted all reference to the defendant's existence. Thus, it was more difficult for the jury to ignore the instruction and place the defendant in the confession. However, when the defendant's existence is referred to in the confession, it is much easier for the jury to perform the impermissible task of substituting the defendant's name for the "symbol" that stands for their role in the crime. Second, these courts ignore *Gray*'s answer to this problem. In *Gray*, the Court stated that, "in some instances, the person to whom the blank (pronoun) refers to may not be clear."²⁸⁴ However, *Gray* found that nonetheless, "considered as a class, redactions that replace a proper name with an obvious blank, the word 'delete,' a symbol, or similarly notify the jury that a name has been deleted are similar enough to *Bruton*'s unredacted confessions as to warrant the same legal results."²⁸⁵ Next, in *Gray*, the Court recognized that a juror who "wonders to whom the blank might refer need only lift his eyes to [the defendant], sitting at the counsel table, to find what will seem the obvious answer."²⁸⁶ In the cases where the use of neutral pronouns have been found to be constitutionally acceptable forms of redaction, these blanks have been filled with pronouns such as "someone," "another individual," and "we." Lastly, Courts often contend that if the confession was the first piece of evidence introduced at trial, the jury would not be able to immediately determine the identity of the neutral pronoun. These courts seem to ignore the fact that the jury undergoes *voire dire* and listens to the criminal indictments and the prosecution's opening statements before hearing any evidence at all. Therefore, as Judge Heaney noted in his dissent in *United States v. Logan*, often times, it will be obvious whom the pronoun refers to.

282. *Gray*, 523 U.S. at 192.

283. *Id.* at 194.

284. *Id.*

285. *Id.* at 195.

286. *Id.* at 193.

Moreover, the most frequently cited authority in favor of finding redactions using neutral pronouns to be constitutional is the proposed redaction in *Gray*. Many courts have proclaimed that by providing this example, the Supreme Court was bestowing its blessing on the use of neutral pronouns. These courts, however, have failed to read the language of *Gray* carefully. The Supreme Court stated: "Why could the court not instead have said: 'Who was in the group that beat [the victim]? 'Me and a few other guys.'"²⁸⁷ Reading this proposed redaction out of context, it seems fair to say that the *Gray* Court approved of redaction using neutral pronouns. However, the next line of the case states: "*Richardson* itself provides a similar example of this kind of redaction."²⁸⁸ In other words, what the Supreme Court really meant by its proposed redaction in *Gray*, was that if you omit all references to the defendants, then the redaction is constitutional. Therefore, the two codefendants who were originally implicated by the confession by the terms "deleted and deleted" were no longer referred to in the confession. Their existence was not referred to by the term "other guys." The term "other guys" referred to the individuals other than the codefendants that were originally mentioned in the statement. On the contrary, most courts have interpreted this redaction to mean that it is permissible to refer to the other defendants in a neutral way, such as "other guys."

Furthermore, as the *Gonzales-Garica* court noted, through their extrajudicial statements, confessing defendants often times attempt to shift the blame to their codefendants. This argument shares the common sense of the rationale behind the rule in *Williamson v. United States*. In *Williamson*, the Supreme Court held that the exception to the hearsay rule for statements against penal interest does not allow admission of nonself-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.²⁸⁹ While redacted statements are not as damaging as the statements in *Williamson* because they do not expressly name the codefendant as in the context of the statements against penal interest exception to the hearsay rule, the confessor should not have the benefit of shifting the blame to his codefendants. In *Lilly v. Virginia*, the Supreme Court's plurality opinion found that accomplices' confessions that inculcate a criminal defendant are not within a firmly rooted hearsay exception to the hearsay rule as that concept has been defined by Confrontation Clause jurisprudence.²⁹⁰ The plurality found that accomplice statements that shift or spread blame to a criminal

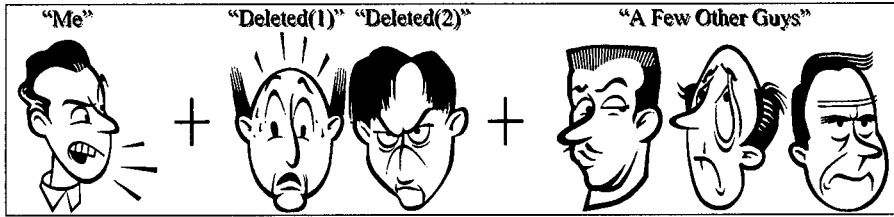
287. *Id.* at 193.

288. *Id.* at 197.

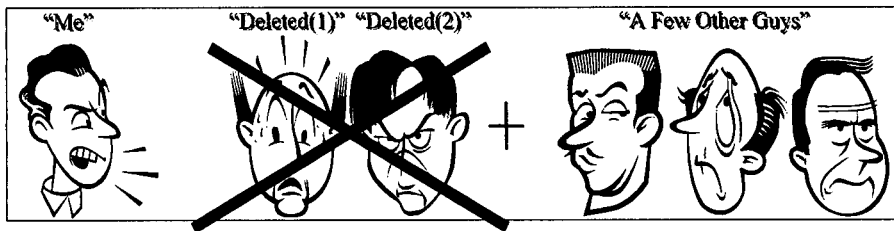
289. 512 U.S. 594, 599-600 (1994).

290. 527 U.S. 116, 134 (1999).

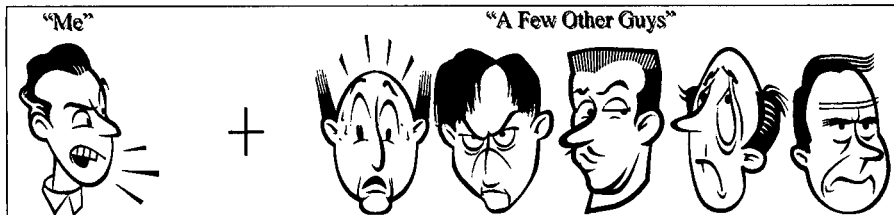
DIAGRAM
ORIGINAL STATEMENT REDACTED



GRAY PROPOSED REDACTION: NO REFERENCE TO THE EXISTENCE OF
"DELETED (1)" OR "DELETED (2)"



MISAPPLICATION OF THE GRAY PROPOSED REDACTION



defendant fall outside the realm of those hearsay exceptions that are so trustworthy that adversarial testing can be expected to add little to the statements' reliability.²⁹¹ Likewise, confessions that are redacted in a manner where defendants' names are replaced with neutral pronouns are just as unreliable because they shift the blame to others. These confessions provide an opportunity for confessing defendants to exculpate themselves at the expense of their codefendants. Their admission hinders the truth seeking function of the court because of the statements' inherent unreliability. Thus, if all references to the existence of codefendants are removed from the statements, this problem will often times be resolved because the statements will only incriminate their confessor.

Another problem that arises when courts allow for the redaction of statements through the use of neutral pronouns is that defendants who

291. *Id.* at 133.

were not originally implicated in the confession may be prejudiced. For example, in *Floudiotis v. State*, the Supreme Court of Delaware held that where a confession implicated a particular defendant and was redacted to refer to "someone," the codefendants who were not originally implicated in the confession could not elicit testimony that they were not mentioned in the confession.²⁹² This situation may lead to improper convictions if the jury relies on the inadmissible evidence and then fills in the blanks with the wrong defendant. This is yet another situation that can be cured by the adoption of redactions where all references to codefendants' existence are omitted.

Moreover, North Carolina and Georgia have adopted this approach. State courts usually have a larger number of joint criminal trials than do the respective federal courts in their state. If states such as North Carolina and Georgia can administer their criminal justice system with the exclusion of neutral pronouns in redacted confessions, then it appears that the federal justice system will be able to accommodate this type of redaction as well. This view is the most protective of the defendant's constitutional rights. If the *Richardson* Court found that the contextual implication doctrine had too high a price for efficient maintenance of our judicial system, then the remaining balance must be struck in favor of the defendant's rights by mandating that prosecutors comply with the method of redaction used in *Richardson*.

Also, many courts that have found *Bruton* violations have gone on to find that the error is harmless beyond a reasonable doubt.²⁹³ Thus, the defendant's conviction is not automatically overturned, in spite of the constitutional violation, usually because there is overwhelming evidence against the defendant. If it is usually unnecessary for prosecutors to violate the defendant's constitutional rights in order to obtain criminal convictions against them, then it is only logical that requiring them to remove all references to these defendants in a redacted confession will not impede the deliberation of justice.

VI. PROPOSED JURY INSTRUCTIONS

One concern that arises when a court mandates that a nontestifying codefendant's confession be redacted to remove any reference to the existence of other defendants is that the statement may be distorted.

292. 726 A.2d 1196, 1213 (Del. 1999).

293. See *Schneble v. Florida*, 405 U.S. 427, 430 (1972) (holding that "[t]he mere finding of a violation of the *Bruton* rule in the course of the trial does not, however, automatically require reversal of the ensuing criminal conviction. In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.").

This concern can be remedied somewhat by the adoption of a limiting instruction. Rule 105 of the Federal Rules of Evidence governs the limited admissibility of evidence. Rule 105 states that “when 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.”²⁹⁴

Continuing with our hypothetical once again, let us suppose that Stewart played a minor role in the conspiracy to traffic heroin. For example, suppose say that Stewart and Harry delivered the heroin to distributors, collected the payments from the distributors, and then Stewart and Bob delivered the money to John. Because Stewart was involved in the conspiracy, he also knows the respective roles of his co-conspirators, and he relates this additional information in his post-arrest confession. At trial, the judge, after reading this law review article, decides that redaction using neutral pronouns is unconstitutional and informs the prosecutor that if he plans to use Stewart’s confession at the joint trial, he must omit all references to the existence of other defendants. The prosecutor is then faced with the daunting task of redacting this confession. After careful thought, however, the prosecutor redacts Stewart’s confession as follows: “I was involved in heroin importation. I delivered heroin to some distributors; then I collected the money from them and delivered this money.” Following the admission of the confession, the judge might give the following instruction:

There has been evidence that Defendant *Stewart* may have given a statement to the authorities. You may consider any such statement of Defendant *Stewart*, however, only in deciding the charge(s) against him and not in deciding the charge(s) against any other defendant. You may consider the statement of Defendant *Stewart* in the charge(s) against Defendant *Stewart* and give it such weight as you feel it deserves. You may not consider or even discuss that statement in any way when you are deciding if the government has proven its case against any other defendant. Furthermore, you should not imply anything regarding the number of individuals involved in the activity that was described in such statement. The statement is a statement only about the actions of Defendant *Stewart*, and you are to consider it only as to his activities. The statement has no bearing on the actions of any other defendant. Thus you are to draw no conclusions or implications about any other defendant’s actions based on the statement of Defendant *Stewart*.²⁹⁵

294. FED. R. EVID. 105.

295. Instruction based in part on: KEVIN F. O’MALLEY ET AL., FEDERAL JURY PRACTICE & INSTRUCTIONS §11.11 (5th ed. 2000).

VII. A WORKABLE STANDARD

This proposed remedy and jury instruction will allow for the maintenance of joint trials in our criminal justice system, while at the same time affording an accused his constitutional rights. First, the remedy will need no constitutional interpretation, as the Supreme Court has already held that redacted statements that omit all references to a defendant's existence comply with the *Bruton* protective rule. Second, this approach has already been adopted by some states. For example, in *State v. Brewington*, a confession was redacted in a way that there was no references to the defendant Brewington by name, and complete sentences that mentioned, connected, or referenced the existence of the defendant Brewington were removed.²⁹⁶ The admission of the redacted confession was held to be constitutional under North Carolina's protective rule.²⁹⁷ Other courts seeking to implement a similar rule need only look to how states such as North Carolina have resolved their conflicts in cases like *Brewington*, to curb potential problems with the administration of this standard in their respective jurisdictions.

This rule will require prosecutors to work a little harder, and be a bit more creative when redacting confessions. However, it is their responsibility to prove the defendant's guilt beyond a reasonable doubt and solely with the use of admissible evidence. Furthermore, a responsible defense attorney would offer a proposed redaction that would ensure that his client fully benefits from this standard. This rule will probably affect the confessing defendant in the most drastic way, because the confession which at one time might have incriminated many now only incriminates him. As stated earlier, however, the confessing defendant should not be allowed to use his redacted confession to shift the blame to others, even if it incriminates him in part. Furthermore, it was this defendant who decided to offer these statements in the first place. Since he offered this evidence, it should only be admitted against him. The nonconfessing defendant will usually be better off with this rule because it offers greater protection. If the defendant feels that the suggested limiting instruction might notify the jury that the confession is redacted, then he can either request a different limiting instruction or not request one at all.

The question of when and how to admit a nontestifying codefendant confession at a joint trial does not have a simple answer. The solutions proposed in this article might not be practicable in every case. For instance, there are cases where even when redaction that removes all reference to a defendant's existence may still violate that defendant's

296. 532 S.E.2d 496, 510 (N.C. 2000).

297. *Id.* at 508.

rights under the Confrontation Clause. In *People v. Archer*, the Second District Court of Appeal of California held that admission of a nontestifying codefendant's redacted statement, which did not refer to the defendant through the use of neutral pronouns or other symbols, violated the defendant's right to confrontation.²⁹⁸ In *Archer*, the confessing defendant gave a statement to the police in which he admitted involvement in the killing.²⁹⁹ At one point, the statement described how the confessor stabbed the victim twice in the arm while he held him up and that the victim was subsequently stabbed eight more times in the chest or in the stomach.³⁰⁰ The court found that these portions of the statement left no doubt that the serious stab wounds were inflicted by someone other than the confessor.³⁰¹ The court held that while the statement was redacted as much as it could have been, it still informed the jury that the confessor planned the crime with someone else, and that the other person stabbed the victim at least eight times in the chest or stomach.³⁰² Therefore, in a case such as this, it seems that the only possible options that remain would be to sever the trials of the two defendants, use two juries, or for the prosecutor to refrain from offering the confession. As the *Gray* Court stated: "[u]nless the prosecutor wishes to hold separate trials or to use separate juries or to abandon the use of the confession, he must redact the confession to reduce significantly or to eliminate the special prejudice that the *Bruton* Court found."³⁰³

Also, the solutions proposed in this article may not be practicable when the meaning of the confession is distorted in a manner in which a reasonable jury would not be able to comprehend its meaning. This might have been the situation in *Brewington*, where "the state elected to try defendants Brewington and McKeithan in a joint trial, while trying [defendant] Lee separately."³⁰⁴ In that case, it might have been too difficult to redact McKeithan's confession in a manner that all reference to Lee's existence was removed. While Lee was tried separately and the prosecution did not benefit from the possible use of a redacted confession that would have referred to Lee through a neutral pronoun if Lee had been tried at the joint trial of Brewington and McKeithan, she was still convicted at her separate trial. Thus, in this case, both judicial economy and the defendants' rights prevailed and justice was served in a constitutional manner. The state was able to try two out of three defend-

298. 99 Cal. Rptr. 2d 230, 236 (Cal. Ct. App. 2000).

299. *Id.* at 232.

300. *Id.* at 235.

301. *Id.*

302. *Id.* at 236.

303. *Gray*, 523 U.S. at 192.

304. *State v. Brewington*, 532 S.E.2d 496, 500 (N.C. 2000).

ants at a joint trial, neither defendant was prejudiced because their codefendant's confession did not refer to their existence, and the state was able to convict all three defendants.

The solutions proposed in this Comment can, however, work in a majority of cases. Where these solutions can be implemented, defendants' constitutional rights of confrontation will be upheld. When the solutions proposed here are impracticable, other viable alternatives exist. While the Supreme Court, through *Gray*, has restored some of the force behind the *Bruton* rule, it is important that this new interpretation not be misapplied. For if it is, it may lead to many years of constitutional violations of defendants' rights under the confrontation clause in both federal and state Courts.

VIII. CONCLUSION

Bruton was intended to shield defendants from the prejudice of uncross-examined evidence that inculpated them. *Richardson's* disavowal of the contextual implication doctrine weakened *Bruton* significantly because it presumes that, after being instructed by a judge, a jury will not disobey this instruction and put all of the pieces of the puzzle together. *Richardson* presumes that juries can be trusted to follow instructions in ignoring a non-testifying codefendant's completely redacted confession when determining the guilt or innocence of a defendant. *Gray* was a significant step forward towards resurrecting *Bruton*. However, if prosecutors are allowed to admit into evidence a non-testifying codefendant's redacted confession that when linked to other evidence incriminates a defendant, and then are allowed to redact that confession in a way that specifically refers to the defendant through the use of pronouns, then the government can have their cake and eat it too. A jury will not be blind to this evidence, and they are not to blame, for "the practical and human limitations of the jury system cannot be ignored" by the Supreme Court any longer.³⁰⁵ As the *Bruton* Court declared, "[w]here viable alternatives do exist, it is deceptive to rely on the pursuit of truth to defend a clearly harmful practice."³⁰⁶ The harmful practice is the continued use of redacted statements using neutral pronouns when referring to non-confessing defendants, and the viable alternative is to redact the confession in a manner that omits all reference to the existence of the non-confessing defendant coupled with effective limiting instructions.

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305. *Bruton*, 391 U.S. at 135.

306. *Id.*