The Right of Confrontation and the Use of Non-testifying Codefendant's Confessions: Constitutional Law in Microcosm

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I. INTRODUCTION

[And when [they] ... presented their case against him and asked for his conviction ... I told them that Romans are not accustomed to give any man up before the accused has met his accusers face to face and has been given a chance to defend himself against the charges.


One of the most difficult problems in constitutional interpretation that has recently confronted the United States Supreme Court has been when two defendants are being jointly tried and one of the defendants has made an incriminating out of court statement which implicates his codefendant. The problem arises when the prosecution seeks to introduce the inculpatory statement into evidence at the joint trial and the declarant claims his fifth amendment privilege against self-incrimination, thus refusing to either affirm or repudiate the confession. There is no doubt under these circumstances that the confession may properly be entered into evidence against the maker. But unless there is a specific statutory hearsay exception in effect allowing a confession made after the commission of a substantive offense to be admissible into evidence against both the declarant and his co-conspirator, it is clear that the confession may not be properly considered as evidence against a non-declaring codefendant.

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Nevertheless, a jury, having seen the defendants joined together in both the indictment and the trial and having heard the confession of one defendant which implicates the other, may naturally assume the guilt of the non-declarant based upon the confession of his codefendant. The propriety of this assumption is not questioned here, for to do so would be to attempt an invasion of the province of the jury. What is questioned, however, is the reliability of the process by which a jury determines the guilt or innocence of a criminal defendant, where the accused has been denied the opportunity to cross-examine the most damning witness against him—his non-testifying codefendant.

The sixth amendment to the United States Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." The threshold question to be answered is whether a defendant who confesses, implicating his codefendant, and who refuses to testify before the jury as to the facts surrounding his alleged confession is a "witness" within the meaning of the sixth amendment's confrontation clause. If the above question is answered affirmatively, then it would appear that the right of confrontation would attach. But what is the "right of confrontation" and what does it entail? Is the "right of confrontation" merely comparable with the right of cross-examination? Or is the right of cross-examination merely a component of the undefinable entity, confrontation? These are some of the thornier problems implicit in any attempt to define the meaning of this constitutional provision.

In 1968 the United States Supreme Court took a major step forward in interpreting the scope of criminal protection afforded by the confrontation clause with its decision in Bruton v. United States. Bruton held that the use of limiting instructions to a jury to disregard a codefendant's confession when determining the guilt of a non-declarant constituted a violation of the confrontation clause, where the declarant's confession implicated his codefendant and the declarant claimed his privilege against self-incrimination.

It was possible in 1968 to view Bruton as a landmark decision in the struggle to expand the confrontation clause beyond the cursory right to cross-examine witnesses who actually testified in the presence of the jury. However, three decisions of the United States Supreme Court subsequent to Bruton have made it apparent that a majority of the Court no longer considers the confrontation clause sufficient to cover confessing codefendant situations. The first decision to undercut the efficacy of Bruton was Harrington v. California. In Harrington the Supreme Court held that there were some violations of the confrontation clause which in the context of a particular case could be declared harmless error. Shortly after the appointments of Chief Justice Burger and Associate Justice Black-
mun, the Court decided *Dutton v. Evans.* There it was held that a state statute, which extended the co-conspirator exception to the hearsay rule to any statements made after the commission of a substantive offense (i.e., the concealment phase of the conspiracy), did not violate the sixth amendment confrontation clause. Again this result was reached despite the fact that the declarant claimed his privilege against self-incrimination and was not available for cross-examination as to whether he actually made the statement attributed to him.

The most recent case, *Schneble v. Florida,* held the admission of a codefendant's confession to be harmless error where the defendant, who was implicated in the confession, had also confessed. *Schneble* was a retaliatory attack by Florida upon the rationale of *Bruton,* and its acceptance by a majority of the United States Supreme Court can be considered the final blow in the recent battle to delimit the right of confrontation in "the confessing codefendant" situations.

II. THE PROBLEM OF CODEFENDANT'S CONFESSIONS—SOME SOLUTIONS WHICH FAILED

Prior to the United States Supreme Court's decision in *Bruton v. United States,* it was axiomatic that extrajudicial statements made by one conspirator in furtherance of a conspiracy and prior to its termination in a substantive offense were admissible against all other co-conspirators under the co-conspirator exception to the hearsay rule. The theory upon which these statements were admitted into evidence was that the declarant was the agent of the other co-conspirators and the admissions of one were the admissions of all; the admissions were themselves considered steps in the execution of the common purpose. However, statements made by a conspirator *not* in furtherance of the conspiracy or after the conspiracy had ended in the commission of a substantive offense were admissible only against the declarant and not against his non-declaring codefendant. These considerations are the sources of a problem which remains unsolved today.

A device was needed [by the prosecutors]... which would permit the use of this highly probative evidence as against the declarant and, at the same time, protect the interests of the non-confessor during a joint trial.10

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Two devices traditionally proffered to the courts to protect the non-confessing defendant, but still enabling a confession to be used against the confessor at a joint trial, were redaction and limiting instructions. Redaction involved the deletion from a confession of all references to a non-confessing codefendant.\textsuperscript{11} When the references to the non-declarant were deleted, it was supposedly impossible for the jury to consider the confession against the non-declarant. A variation on this theme was the substitution of a fictitious name for that of the non-declarant in the text of the confession. Each time the non-confessing codefendant's name appeared in the confession it was replaced with "Mr. X" or "Mr. Blank."\textsuperscript{12} In order for the deletion to be effective, all indirect references to the non-declarant must have been excluded.\textsuperscript{13} Therefore, once the identity of the non-confessor was established, not only his name, but any portion of the confession which might have inculpated the codefendant had to be stricken.\textsuperscript{14}

However, the problem still remains, that any intelligent juror is likely to come to the conclusion that the mysterious "Mr. X" is in actuality the codefendant of the confessor.

The jury having seen the defendants tried together and having heard the confession alluding to "Mr. X," it seems unrealistic to assume that the jurors will not deduce the real identity of the mysterious "anonymous nobody."\textsuperscript{15}

Taking a realistic view of the situation, the United States Court of Appeals for the District of Columbia Circuit held in Greenwell v. United States,\textsuperscript{16} and Jones v. United States,\textsuperscript{17} that when a codefendant's name was deleted from a confession that incriminated another, it was error, although perhaps not constitutional error, to admit the confession into evidence at a joint trial when other evidence made it reasonable to assume that the anonymous references pertained to the non-declaring codefendant. The court indicated that if such admissions were intended to be introduced into evidence, separate trials would be necessary.\textsuperscript{18}

The second alternative available to the courts was the use of limiting instructions to the jury. The purpose of these limiting instructions was to

\textsuperscript{11. Stein v. New York, 346 U.S. 156 (1953); People v. Aranda, 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965). In Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court mentioned but did not pass on the practice of redaction.}

\textsuperscript{12. Malinski v. New York, 324 U.S. 401 (1945).}

\textsuperscript{13. People v. Aranda, 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965).}

\textsuperscript{14. Id. at 530, 407 P.2d at 273, 47 Cal. Rptr. at 361. A further limitation imposed by the courts demands that all deletions be without prejudice to the declarant. The concern is not only with the confessor's right to have the jury consider the entire text of the statement but also with the jury's interest in hearing all of the evidence against the declarant. Note, 35 Mo. L. Rev. 125 (1970).}

\textsuperscript{15. Note, 35 Mo. L. Rev. 125, 127-28 (1970).}

\textsuperscript{16. 336 F.2d 962 (D.C. Cir. 1964), cert. denied, 380 U.S. 923 (1965).}

\textsuperscript{17. 342 F.2d 863 (D.C. Cir. 1964).}

\textsuperscript{18. See Calloway v. United States, 399 F.2d 1006 (D.C. Cir. 1968), cert. denied, 399 U.S. 987 (1968).}
allow an inculpatory statement or confession to be introduced into evidence in toto, while eliminating the prejudicial harm to the non-confessor. Serious questions have been raised by this procedure.

The efficacy of effacing the prejudicial hearsay from the minds of jurors via admonitions and instructions delimiting the use of evidence is difficult to ascertain and depends on whether one views the jury as composed of twelve men of average intelligence or twelve men of average ignorance.\textsuperscript{10}

As the evidentiary rules regarding the admissibility of a confession incriminating a codefendant were applied in joint trials, some courts were skeptical of the effectiveness of limiting instructions.\textsuperscript{20} Nevertheless, the Supreme Court in \textit{Blumenthal v. United States};\textsuperscript{21} held that the trial judge's limiting instructions to the jury had sufficiently protected a non-confessing codefendant and left "no room for doubt that the admissions were adequately excluded . . . ."\textsuperscript{22} The Court did recognize, however, the danger that the jury might disregard the court's instructions.\textsuperscript{28} Although it was possible that the jury would consciously or unconsciously consider the confession in determining the guilt of the non-confessor, the Court held that under the circumstances the risk was minimal.

Ten years later in \textit{Delli Paoli v. United States};\textsuperscript{24} the Supreme Court reaffirmed its decision in \textit{Blumenthal}. The government's evidence in \textit{Delli Paoli} consisted of the testimony of eyewitnesses and the confession of one codefendant, which was admitted into evidence with the normal limiting instructions. In holding that \textit{under all the circumstances} it was reasonable to assume that the jury had followed the judge's instructions and, therefore, the petitioner had been sufficiently protected, the majority relied on the fact that the instructions were sufficiently clear and that it was \textit{reasonably} possible for the jury to follow them.\textsuperscript{25} The basic premise for the decision was, however, an unshakable faith in the jury system.

To say that the jury might have been confused amounts to

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  \item[$\text{19.}$] Note, 35 \textit{Brook. L. Rev.} 139, 140 (1968).
  \item[$\text{20.}$] An instruction to a jury to limit the use of a confession to a particular defendant to the exclusion of other codefendants is a device which satisfies form while it violates substance; that is, the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's. Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932), \textit{cert. denied}, 285 U.S. 556 (1932).
  \item[$\text{21.}$] \textit{Id.} at 551-52.
  \item[$\text{22.}$] \textit{Id.} at 559.
  \item[$\text{23.}$] The danger was a real one. "Perhaps even at best the safeguards provided . . . are insufficient to ward off the danger entirely." \textit{Id.} at 559.
  \item[$\text{24.}$] 352 U.S. 232 (1957).
  \item[$\text{25.}$] \textit{Id.} at 239-42. The Court considered five factors to be important in determining whether the instructions to the jury, to consider the confession of a non-testifying codefendant as evidence only against the declarant, were actually followed: The simplicity of the conspiracy; the adequacy of the protection afforded the defendant's individual interest; the point in time the confession was admitted; the contents of the confession; and the lack of any indication of confusion.
\end{itemize}
nothing more than an unfounded speculation that the jurors dis-
regarded clear instructions of the court in arriving at their ver-
dict. Our theory of trial relies upon the ability of a jury to
follow instructions.\(^{26}\)

The minority in *Delli Paoli* subscribed to Judge Frank's dissent in
the Court of Appeals\(^ {27}\) and admonished the government not to gain the
advantage of having the jury be "influenced by evidence against a defen-
dant which, as a matter of law, they should not consider, but which [as a
matter of fact] they cannot put out of their minds."\(^ {28}\)

Although *Delli Paoli* neither held nor purported to establish an abso-
lute rule that juries are presumed to have followed the court's instructions,
trial courts seldom granted severances and appellate courts were reluctant
to reverse trial court decisions. Although there was widespread criticism
of the belief that the jury could or would follow the court's instructions
in a *Delli Paoli* situation, only a small minority of states abandoned the
rule.\(^ {29}\)

### III. THE EROSION OF *Delli Paoli*

That the Supreme Court finally overruled *Delli Paoli* is perhaps not
as interesting as the manner in which it was accomplished. Rarely, if ever,
does the Court render a decision that suddenly reshapes a major portion
of criminal law. Rather, the Court moves very cautiously, attempting to
telegraph its every move as it gently chips away at anachronistic inter-
pretations of the Constitution that it wishes to re-evaluate. In so doing
the Court attempts to create the facade of an unchanging body of "con-
stitutional law." *Bruton* was no exception to this doctrine of constitutional
restraint for it was preceded by three seemingly unrelated decisions of the
Court, each foreshadowing the eventual reversal of *Delli Paoli*.

The most significant harbinger of the demise of *Delli Paoli* was
*Jackson v. Denno*.\(^ {30}\) This case was the first signal to state and federal
trial courts that the rationale upon which limiting instructions were based
was no longer acceptable to a majority of the Supreme Court. In *Jackson*

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26. Id. at 242.
27. Judge Frank prescribed the following formula to govern joint trials:
When several defendants are on trial for criminal conspiracy, if the government seeks
to put in evidence an out of court statement by one defendant which is hearsay as
to the others (i.e., an out of court statement made after the conspiracy has
terminated) then
(a) unless all references to the other defendants can be effectively deleted (so
that the statement will contain no hint of the others' guilt) and unless those refer-
ences are deleted,
(b) the trial judge must (1) refuse to admit the statement or (2) sever the
trial of those other defendants.

United States v. Delli Paoli, 229 F.2d 319, 324 (2d Cir. 1956) (dissenting opinion).
28. 352 U.S. at 248 (Frankfurter, J., dissenting).
29. See Note, The Admission of a Codefendant's Confession after Bruton v. United
States: The Questions and a Proposal for their Further Resolution, 1970 Duke L.J. 329,
332-33.
the Court determined that New York procedure which allowed a jury to first determine the voluntariness of a confession and then determine the defendant's guilt or innocence, with instructions to disregard any involuntary confession, was a violation of due process. Especially significant was the Court's explicit rejection of the proposition that a properly instructed jury could be expected to disregard an involuntary confession when determining the confessor's guilt. The Court based its rejection of limiting instructions in this instance upon Justice Frankfurter's dissent in *Delli Paoli* which had characterized limiting instructions as "intrinsically ineffective" and a "futile collocation of words . . . which fails of its purpose as a legal protection to defendants against whom such a declaration should not tell."

Most lower federal courts undoubtedly understood the implications of *Jackson* because they were used to looking to the Supreme Court for binding precedent, but the state courts obviously were not so accustomed. Soon after *Jackson*, however, the Supreme Court did manage to catch the attention of the state courts in much the same way a headmaster is forced to attract the attention of unruly or inattentive students—with a well placed whack with a ruler. The whack came in the form of *Pointer v. Texas*, which held that the confrontation clause of the sixth amendment was binding upon the states through the fourteenth amendment. *Pointer* was followed immediately by *Douglas v. Alabama*, the object lesson of the whack. In *Douglas*, a co-indictee who had been separately tried was called as a witness by the state prosecutor. After the witness had invoked his fifth amendment privilege against self-incrimination, the prosecutor, under the guise of refreshing the memory of a hostile witness, read to the jury the witness' confession implicating the petitioner.

Speaking for a unanimous Court, Justice Brennan held that this practice constituted a denial of petitioner's right to cross-examination secured by the confrontation clause of the sixth amendment. Under the circumstances the jury could not be expected to disregard the reading of the confession, and Douglas was precluded from cross-examining one who had invoked the fifth amendment and thus refused to affirm or disaffirm the confession.

After the Supreme Court's decisions in *Jackson*, *Pointer*, and *Douglas*, the holding of *Bruton v. United States* should not have been totally unexpected. On a philosophical basis, *Delli Paoli* had been overruled before certiorari was ever granted to George Bruton.

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31. 352 U.S. at 247.
32. Id.
34. 380 U.S. 415 (1965).
35. The co-indictee planned to appeal his convictions and refused to answer any questions concerning his alleged crimes. Id. at 416.
36. The confession itself was never offered into evidence.
37. Justices Harlan and Stewart concurred in the result.
38. 390 U.S. at 419.
IV. Bruton: THE DEMISE OF Delli Paoli

Evans and Bruton were jointly indicted and tried in federal district court on charges of armed postal robbery. The prosecution's evidence included, inter alia, Evans' confession implicating Bruton. Neither defendant took the stand. In admitting the testimony of a postal officer, which included Evans' confession, the trial judge instructed the jury that the confession was hearsay and therefore inadmissible as to Bruton. The trial judge further instructed the jury to disregard Evans' confession in determining Bruton's guilt or innocence. At the close of the trial the court repeated its instructions to the jury. No exceptions were taken by Bruton's counsel, and both defendants were convicted and sentenced to twenty-five years imprisonment.

On appeal to the United States Court of Appeals for the Eighth Circuit, Evans' conviction was reversed. Bruton's conviction was affirmed, however, in reliance upon Delli Paoli. On certiorari, the United States Supreme Court per Mr. Justice Brennan reversed Bruton's conviction.

Because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.

In overruling Delli Paoli, the Court stated that Jackson v. Denno had repudiated the basic premise upon which Delli Paoli stood—that it was reasonably possible for a jury to follow sufficiently clear instructions to disregard a non-testifying codefendant's confession when determining his codefendant's guilt. The Court called the "naive assumption that

39. The instruction stated in part:
A confession made outside of court by one defendant may not be considered as evidence against the other defendant, who was not present and in no way a party to the confession. Therefore . . . you should consider it as evidence in the case against Evans, but you must not consider it, and should disregard it, in considering the case against Bruton.
40. Evans v. United States, 375 F.2d 355 (8th Cir. 1967). On retrial, Evans was acquitted. Bruton v. United States, 391 U.S. 123, 124-25 (1968). However, Evans was subsequently convicted of two crimes in the state of Missouri and then testified over the objection of defense counsel at Bruton's retrial. Bruton was again convicted. United States v. Bruton, 416 F.2d 313 (8th Cir. 1969).
43. Id. Although not relied on by the Court in Bruton, substantial empirical evidence had been generated supporting the distrust of the capacity of a jury to ignore prejudicial evidence. One jury project conducted by the University of Chicago on a Ford Foundation grant gave certain concrete support to the argument that, in fact, jurors did react to prejudicial evidence when they had been instructed to disregard it.
This project constructed a personal injury suit on tape and played it to thirty experimental juries. Before ten juries the defendant reveals that he has no liability insurance, no objection being taken by plaintiff's counsel. The mean award of the ten juries was 33,000 dollars. Before another ten juries the defendant reveals that he
prejudicial effects can be overcome by instructions to the jury” a theory which all practicing attorneys know to be “unmitigated fiction.” The Court concluded that a jury is incapable of segregating evidence into “separate intellectual boxes,” and

[i]t cannot determine that a confession is true insofar as it admits that A has committed acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those acts with A.

As further justification for its actions in Bruton, the Supreme Court pointed to the amendment in 1966 of Rule 14 of the Federal Rules of Criminal Procedure. Rule 14 authorizes a severance where it appears that a defendant might be prejudiced by a joint trial. It was amended in 1966 to provide that the court may order the government’s prosecutor to deliver any statements or confessions made by the defendants which the government intends to introduce in evidence at trial to the court for inspection in camera. The 1966 amendment of Rule 14 was the last overt indication by the Supreme Court that it was considering further expansion of the right of confrontation in codefendant confession situations. During the intervening two years between the rule change and Bruton, the amendment went virtually unnoticed. From an historical viewpoint, it is difficult to perceive how the eventuality of a decision under Bruton-type circumstances could have been made more obvious.

V. RETROACTIVITY AND THE RULE OF Roberts v. Russell

If federal and state prosecutors greeted Bruton with something less than open arms, then their outlook on life must have been darkened further when, three weeks later, the Court held Bruton retroactive. The holding was required, the Court said, because the error in Bruton created

has no liability insurance. Once again no objection was taken. The award was 37,000 dollars. Before the third group of juries it is revealed that the defendant has liability insurance and there is objection by defendant’s counsel. The judge accordingly instructed the jury to disregard the insurance. The mean award for this group of juries was 46,000 dollars.


This apparent demonstration of jury irregularity lends credence to the argument that in some instances the jury functions best only when highly prejudicial information is withheld from it.

46. Id.
47. Joinder of defendants is governed by Fed. R. Crim. P. 8(b) and 14.

The rules are designed to promote economy and efficiency and to avoid a multiplicity of trials, where these objectives can be achieved without substantial prejudice to the rights of the defendants to a fair trial.

Daley v. United States, 231 F.2d 123, 125 (1st Cir. 1956).
a “serious [flaw] in the fact finding process at trial,”50 and “went to the basis of [a] fair hearing and trial.”51 Reliance by state and federal courts upon the standards of *Delli Paoli* was not regarded as persuasive.52 In view of *Jackson v. Denno* and other decisions,53 as well as the continued attack upon *Delli Paoli* from its inception, the Court felt that reliance, albeit in good faith, was unjustified. This position misstates the fact that the vast majority of American trial courts did, in reality, rely on limiting instructions to cure the *Bruton* defect. Nevertheless, the Court stated that even though the impact of retroactive application upon the administration of criminal justice “may be significant, the constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined.”54

The decision in *Roberts*, although consistent with previous retroactive holdings involving the sixth amendment jury trial provision,55 did add some confusion to other issues created by *Bruton*. The retroactive holding of *Roberts* suggested that the admission of a non-testifying codefendant’s confession constituted a per se violation of a defendant’s right of confrontation and required an automatic reversal, because the Court generally has held retroactive only those cases which require automatic reversal.56 Yet the Court’s remand of the case to the district court for further proceedings also suggested that reversal was not considered automatic. Indeed, a claim was made that the remand of *Roberts* indicated that the admission of a confession made by a non-testifying codefendant was not a per se violation of the confrontation clause.57 However, the remanding of three cases58 subsequent to *Roberts* wherein the codefendant

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50. Id. at 294, quoting Stovall v. Denno, 388 U.S. 293, 298 (1967).
51. Id., quoting Linkletter v. Walker, 381 U.S. 618, 639 n.20 (1965). In *Linkletter*, the Court denied habeas corpus relief from a state conviction which, although based upon unconstitutionally obtained evidence, had become final before *Mapp* v. Ohio, 367 U.S. 643 (1961), was decided. The primary purpose of *Mapp* in overruling *Wolf* v. Colorado, 338 U.S. 25 (1949), was to deter police misconduct by the exclusion of evidence obtained by unreasonable searches. In attempting to reconcile its expansion of the concept of fair trial with the need to avoid excessive burdens upon the administration of justice, the Court in *Linkletter* declined to apply *Mapp* retroactively because a violation of the exclusionary rule did not render the fact finding process unreliable, since the evidence was undeniably trustworthy, albeit illegally seized. See *Comment, Bruton v. United States: A Belated Look at the Warren Court Concept of Criminal Justice*, 44 ST. JOHN’S L. REV. 55, 75-76 (1969).
53. See note 56 infra.
did take the stand apparently indicated that the Supreme Court was not defining the scope of Bruton when it remanded Roberts.

Six months after the Roberts decision, the Supreme Court provided the first evidence that not all uses of a non-testifying codefendant's confession constituted a denial of the right of confrontation. In Frazier v. Cupp, the prosecutor included in his opening statement a summary of the testimony that he expected a codefendant, who had pleaded guilty, to give. The summary suggested that the testimony would implicate the petitioner, but as in Bruton, Roberts, and Douglas, the codefendant invoked his privilege against self-incrimination and did not testify. In holding that Bruton did not require a reversal, the Court distinguished Frazier on the basis that the "mental gymnastics" required of the jury in Bruton were not present in Frazier. Furthermore, the Court made mention of the fact that the allusion to the confession was contained in the opening statement and was not entered into evidence as in Bruton. Therefore, it was possible for the jury to easily segregate the information.

The most important feature of the Court's decision, however, was the majority's emphasis on the confession not being a vital part of the prosecution's case. This was the first concrete indication that the mere admission of a non-testifying codefendant's confession would not be considered by the Court to be grounds for automatic reversal. It was also the first indication of a willingness on the part of the Court to consider a violation of the confrontation clause as harmless constitutional error.

VI. Bruton and the Harmless-Error Rule—Constitutional Confusion

The problem previously alluded to—the uncertainty concerning the retroactive scope of Bruton—was a result of the Court's failure in Roberts to define precisely the relationship between a denial of confrontation of a non-testifying codefendant and the harmless-constitutional-error rule first formulated in Chapman v. California. Chapman involved a prosecutor who had commented at length during his summation to the jury upon the defendants' failure to testify and the permissible inferences of guilt implicit in their silence. Prior to the defendants'

60. Id. at 735. The Court in Frazier twice spoke of the importance of the codefendant's extra-judicial statement in the prosecution's case. The Court first observed that "unlike the situation in either Douglas or Bruton, [the codefendant's] statement was not a vitally important part of the prosecution's case." It then concluded:

At least where the anticipated, and unproduced, evidence is not touted to the jury as a crucial part of the prosecution's case, "it is hard for us to imagine that the minds of the jurors would be so influenced by such incidental statements during this long trial that they would not appraise the evidence objectively and dispassionately."

Id. at 736, quoting United States v. Socony Vacuum Oil Co., 310 U.S. 150, 239 (1940).
62. Cal. Const. art. I, § 13 provides:

[1] In any criminal case, whether the defendant testifies or not, his failure to explain or deny by his testimony any evidence or facts in the case against him may be com-
appeal to the Supreme Court of California, the United States Supreme Court held that the fifth and fourteenth amendments prohibited such comment upon a defendant's failure to testify on his own behalf.63 Nonetheless, the Supreme Court of California applied the state's harmless-error rule,64 holding that the error did not result in a "miscarriage of justice." On certiorari, the United States Supreme Court reversed the convictions, holding that an error was not harmless where it was reasonably possible that the error "contributed to the conviction."65 Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.66

Speaking for the Court, Mr. Justice Black specifically declined to adopt a rule that all federal constitutional errors could never be regarded as harmless, realizing that to do so would require the automatic reversal of all convictions so obtained.67 Chapman's conviction was reversed, however, because the constitutional right involved was so fundamental to a fair trial that its infraction could never be treated as harmless error.68 Nevertheless, Justice Black's opinion also concluded that there might be "some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."69

Roberts v. Russell established that the use of limiting instructions to a jury to obviate the denial of confrontation of a non-testifying co-defendant presented a "serious risk" that the issue of guilt might not have been reliably determined. The question remained whether the right of confrontation of a non-testifying co-defendant, whose confession implicating his co-defendant has been introduced into evidence, is a right so fundamental to a fair trial that its infraction can never be regarded as harmless error.70

It was into this mold that the Supreme Court injected Harrington v. California.71 Harrington involved the joint trial of four defendants, three of whom had confessed implicating Harrington.72 All three confessions

64. CAL. CONST. art. 6, § 4 1/2 required the affirmation of the conviction unless "the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."
68. Id. at 21-22.
69. Id. at 24-26.
70. Id. at 22 (emphasis added).
71. Id. at 23. See note 63 supra and accompanying text.
73. Harrington had objected that his trial was not severed from his codefendants. Id. at 252.
were introduced into evidence with limiting instructions\textsuperscript{74} that the jury was to consider each confession only against its maker. Only one co-defendant took the stand and he was cross-examined by Harrington's attorney.\textsuperscript{75} Harrington's own statements, which fell short of a confession, placed him at the scene of the crime.\textsuperscript{76} Other witnesses, including the victims, identified Harrington and likewise placed him at the scene. Upon these special facts a majority of the Court concluded that the lack of opportunity to cross-examine the two defendants who did not testify constituted harmless error under Chapman. The Court's decision, according to Mr. Justice Douglas, was based purely upon the evidence contained in the record.

The case against Harrington was not woven from circumstantial evidence. It is so overwhelming that unless we say that no violation of Bruton can constitute harmless error, we must leave this state conviction undisturbed.\textsuperscript{77}

Speaking for the minority,\textsuperscript{78} Mr. Justice Brennan concluded that Harrington had overruled Chapman, the very case it purported to apply. Chapman was interpreted as having "left no doubt that for an error to be 'harmless' it must have made no contribution to a criminal conviction."\textsuperscript{779} Thus, Brennan decried what he considered to be a shift of the test from "whether the constitutional error contributed to the conviction to whether the untainted evidence provided 'overwhelming' support for the conviction. . . .”\textsuperscript{780}

It is arguable whether Harrington diluted the "test" of Chapman.\textsuperscript{81} Justice Douglas was careful to point out in his opinion that Chapman admonished "against giving too much emphasis to 'overwhelming evidence' of guilt . . . ."\textsuperscript{782} Nevertheless, it was implied that in view of the "overwhelming" weight of evidence, Harrington simply had no "substantial rights" which were violated by the denial of confrontation.\textsuperscript{83} In the final analysis it appears that the Court declined to protect against the possibility of harm, preferring instead to guess as to the "probable impact of the two confessions on the minds of an average jury."\textsuperscript{784}

It should be noted at this point that because Harrington was tried before the decision in Bruton, but his case was decided by the Supreme Court after Bruton.

\textsuperscript{74} Harrington was tried before the decision in Bruton, but his case was decided by the Supreme Court after Bruton.
\textsuperscript{75} Rhone, the only defendant to testify, placed Harrington inside the store, gun in hand, during the robbery. Harrington v. California, 395 U.S. 250, 253 (1969).
\textsuperscript{76} Harrington admitted that one defendant, Bosby, was the "trigger man;" that he fled with the other three defendants; and that after the murder of the store keeper he dyed his hair and shaved his moustache. Id.
\textsuperscript{77} Id. at 254.
\textsuperscript{78} Chief Justice Warren and Justice Marshall joined Justice Brennan in his dissent.
\textsuperscript{79} 395 U.S. at 255.
\textsuperscript{80} Id. (emphasis added).
\textsuperscript{81} See section VIII infra.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
before Bruton was decided, Harrington is not absolute authority for the proposition that Chapman is always applicable to a violation of Bruton. It is possible that a future Supreme Court may limit Harrington to a definition of the retroactive scope of Bruton and apply an automatic reversal test to cases tried after Bruton. Such an interpretation of Harrington would enable the Court to follow the suggestion of other commentators who would have the harmless-error test applied retroactively and the automatic reversal test prospectively. In order to avoid raising false hopes, however, it must be admitted that the above likelihood appears remote indeed, especially in view of the “Burger Court’s” position in the recent case of Dutton v. Evans.

VII. THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE—Bruton Dies Another Death

In one of the first decisions since the addition of Chief Justice Burger and Justice Blackmun, the Supreme Court held in Dutton v. Evans that a Georgia hearsay exception, allowing declarations uttered by a conspirator after the perpetration of a substantive offense to be admissible in evidence against all other co-conspirators, did not violate the confrontation clause of the sixth amendment. One of the three principals in Dutton was Truett, a conspirator who was granted immunity from prosecution in exchange for his testimony. Evans then severed his trial from Williams, the other alleged co-conspirator. Among the twenty witnesses for the state at Evans’ trial was a fellow prisoner of Williams who testified that upon returning from his arraignment Williams had said, “If it hadn’t been for that dirty son-of-a-bitch Alex Evans, we wouldn’t be in this now.” This testimony was admitted into evidence by the trial court over objection and upheld by the Supreme Court of Georgia on the basis of the state’s conspiracy statute.

The rule is that so long as the conspiracy to conceal the fact that a crime has been committed or the identity of the perpetrators of the offense continues, the parties to such conspiracy are to be considered so much a unit that the declarations of either are admissible against the other.

85. See note 63 supra and accompanying text.
86. 400 U.S. 74 (1970).
87. Id.
[after the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all.
90. Justice Stewart particularly emphasized the number of prosecution witnesses, recounting the number four times in his majority opinion.
91. 400 U.S. at 77.
92. See note 88 supra.
After his conviction, Evans petitioned the United States District Court for the Northern District of Georgia for a writ of habeas corpus which was denied. On appeal, the Court of Appeals for the Fifth Circuit reversed the district court because it could find no “salient and cogent reasons” for the Georgia hearsay exception, an exception considerably broader than permitted in conspiracy trials in federal courts.\(^4\)

On appeal, the United States Supreme Court reversed the Fifth Circuit, holding that the Georgia hearsay exception was not constitutionally invalid merely because it did not “exactly coincide with the hearsay exception applicable in the entirely different context of a federal prosecution for the substantive offense of conspiracy.” Thus, Evans was not denied the right of confrontation merely because he was not able to cross-examine Williams as to whether or not he actually made the statement attributed to him.\(^9\)

Writing for the majority,\(^9\) Justice Stewart concluded that the case sub \textit{judice} did not “involve evidence in any sense ‘crucial or devastating’” to the defendant as did \textit{Pointer v. Texas},\(^9\) \textit{Douglas v. Alabama},\(^1\) \textit{Brokhart v. Janis},\(^1\) \textit{Barber v. Page},\(^1\) and \textit{Roberts v. Russell}.\(^1\) Justice Stewart pointed out that \textit{Dutton} did not involve the “use or misuse of a confession made in the coercive atmosphere of official interrogation,” nor any “prosecutorial misconduct or negligence.”\(^1\) There was not a

\(^9\) Evans v. Dutton, 400 F.2d 826, 830-31 (5th Cir. 1969).

\(^95\) 400 U.S. at 83. At this juncture it appears to be reasonable to ask whether or not this argument is merely the old procedural-substantive gambit in somewhat obfuscated garb. If one is able to conclude from reading the Court’s opinion that the majority was attempting to rest its decision upon a procedural-substantive distinction, the next question is whether the distinction can be adequately justified. If it can be justified then why wasn’t it?

\(^96\) Id. at 89.

\(^97\) Justice Stewart was joined by Justice White. Justice Blackmun joined by Chief Justice Burger concurred with opinion, and Justice Harlan concurred in the result.

\(^98\) 400 U.S. at 87.

\(^99\) 380 U.S. 400 (1964). In \textit{Pointer} the victim of a robbery, Phillips, testified at a preliminary hearing as to the details of the robbery and identified the defendant. The defendant was not represented by counsel and made no attempt to cross-examine Phillips. At \textit{Pointer’s} subsequent trial the prosecution was permitted to introduce into evidence the transcript of Phillips’ testimony at the preliminary hearing. This was held to be a violation of the confrontation clause of the sixth amendment, binding upon the state through the fourteenth amendment.

\(^1\) 380 U.S. 415 (1965). See notes 34-38 supra and accompanying text.

\(^1\) Brookhart had been “denied the right to cross-examine at all any witnesses who testified against him . . . . There was also Introduced as evidence against him an alleged confession, made out of court by one of his codefendants . . . . who did not testify in court.” The only issue in the case was one of waiver because the state conceded that such a wholesale and complete denial of cross-examination without waiver “would be constitutional error of the first magnitude . . . .” Id. at 3-4.

\(^1\) 390 U.S. 719 (1962). In \textit{Barber} the principal evidence at trial was a transcript of preliminary hearing testimony admitted by the trial judge under an exception to the hearsay rule. This exception was, by its terms, applicable only if the witness was unavailable. The Supreme Court held that Oklahoma could not use the transcript at trial without a showing of “good faith effort” to obtain the witness’ presence at trial. Id. at 725.

\(^1\) 392 U.S. 293 (1967).

\(^1\) 400 U.S. 74, 87 (1970).

\(^1\) Id.
wholesale denial of cross-examination,\textsuperscript{106} nor the use of a transcript\textsuperscript{107} nor a joint trial.\textsuperscript{108} While all of the foregoing is true, the latter two of Justice Stewart's points merit closer inspection.

First, \textit{Dutton}, unlike \textit{Barber}, did not involve a transcript of testimony. This distinction seems to be more important than Justice Stewart made it appear. It is an article of faith of a normally skeptical profession that an oral statement made out of court is much less trustworthy than one made in court. And while the transcription of a statement made in open court may not insure the accuracy of the statement, it does at least assure that the statement was actually made. Indeed, Justice Blackmun and the Chief Justice doubted whether Williams truly made the statement attributed to him.\textsuperscript{109} Unfortunately Blackmun's studied skepticism missed the point entirely. Only by affording Evans the opportunity to cross-examine Williams could the jury have been able to ascertain the accuracy of the statement. Without the aid of a cross-examination of the alleged maker of the statement, the jury was forced to engage in pure speculation as to the veracity of Shaw, a practice Justice Blackmun unhesitatingly imitated. Justice Stewart, on the other hand, chose to term Williams' statement a "spontaneous" declaration "against his penal interest."\textsuperscript{110} This was taken to be an "indicia of reliability . . . determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant."\textsuperscript{111} Thus Justice Stewart, unlike Justice Blackmun, assumed \textit{a fortiori} the statement to be true and properly presented to the jury for consideration.

The second distinction given a cursory analysis by Justice Stewart was his statement that \textit{Roberts} was inapplicable to \textit{Dutton} because Evans was not being tried jointly with Williams. If \textit{Bruton} and \textit{Roberts} have any meaning whatsoever, it must be that Williams' statement could not have been introduced into evidence at his joint trial with Evans because to do so would have necessitated the use of limiting instructions declared unconstitutional in \textit{Bruton}. Consequently, if the statement could not have been used at Evans' and Williams' joint trial, how could it be constitutionally permissible to use the same statement at Evans' severed trial where Evans was still denied the right to confront and cross-examine Williams, the alleged declarant? In short, has not the Supreme Court allowed the Georgia trial court to do indirectly that which it could not do directly?

\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} I am at a loss to understand how any normal jury, as we must assume this one to have been, could be led to believe, let alone influenced by this astonishing account by Shaw of his conversation with Williams in a normal voice through a closed hospital room door.
\textsuperscript{110} Id. at 91 (emphasis added).
\textsuperscript{111} Id. at 89.
It appears that the above problem occurred only to Justice Blackmun, who declared that— if there was error, it was harmless beyond a reasonable doubt.\textsuperscript{112} His reliance upon the harmless-error rule was necessitated by Georgia law requiring the corroboration of testimony given by an accomplice.\textsuperscript{113} Reliance upon harmless error in this instance seems self-defeating. If Shaw’s testimony was given for the purpose of corroborating the testimony of the immune accomplice, Truett, then it would appear that it “contributed” to Evans’ conviction. If, on the other hand, Justice Blackmun was correct in concluding that other record testimony fully satisfied the corroboration requirement,\textsuperscript{114} then the purpose of the introduction of Shaw’s testimony and its questionable materiality appear to be an object of legitimate inquiry.

The only possible purpose for the introduction of Shaw’s testimony, other than the corroboration of Truett’s testimony, appears to be its prejudicial effect upon the defendant, Evans. Despite the patent ambiguity of Williams’ alleged statement, it clearly stands as an accusation by one conspirator against another.\textsuperscript{115} This damaging accusation was admitted without the benefit of cross-examination of its alleged maker under a novel state statute\textsuperscript{116} which devastates the traditional view of conspiracy and its concomitant hearsay exception. Yet the manifest difference between Georgia’s hearsay exception and the federal rule does not, as the Supreme Court realized, automatically make the Georgia rule unconstitutional.\textsuperscript{117} It is the confrontation clause of the sixth amendment that makes the Georgia rule unconstitutional although \textit{Dutton v. Evans} is to the contrary.

\textit{Bruton} and \textit{Roberts} make it abundantly clear that an out of court statement made \textit{after} the commission of a substantive offense may not be admitted into evidence without affording the defendant an opportunity to cross-examine its alleged maker. The only salient difference between \textit{Bruton} and \textit{Dutton} was that \textit{Bruton} involved a federal prosecution for armed postal robbery, whereas \textit{Dutton} involved a state prosecution for the murder of three police officers. The practice of admitting the alleged statements of a non-testifying codefendant without affording cross-examination was held in \textit{Bruton} to be repugnant to the sixth amendment. That same amendment is also binding upon the states through the fourteenth amendment.\textsuperscript{118} Therefore, it is difficult to see how the practice proscribed in \textit{Bruton} is made any less unconstitutional by the use of a

\begin{itemize}
  \item \textsuperscript{112} \textit{Id.} at 93.
  \item \textsuperscript{113} The trial judge instructed the jury that it could not lawfully convict upon the strength of testimony by an accomplice alone. “The testimony . . . must be corroborated . . . [T]he corroboration . . . must be such as to connect the defendant with the criminal act.” \textit{Id.} at 108.
  \item \textsuperscript{114} \textit{Id.} at 93.
  \item \textsuperscript{115} \textit{Id.} at 104.
  \item \textsuperscript{116} See note 88 supra.
  \item \textsuperscript{117} \textit{400 U.S.} at 83.
  \item \textsuperscript{118} See note 99 supra.
\end{itemize}
state statute, albeit "a long-established and well-recognized rule of state law." One might well ask, after noting the complete absence of authority of reasoning to explain this result, how the confrontation clause of the sixth amendment and the cases interpreting it—Bruton and Roberts—came to be superseded by a state statute. At this point, it is only reasonable to ask whether the Confrontation Clause has any independent vitality at all in protecting a criminal defendant against the use of extrajudicial statements not subject to cross-examination and not exposed to a jury assessment of the declarant's demeanor at trial.

Dutton v. Evans suggests that it does not.

VIII. Bruton and Roberts in Florida—The Sunshine State Leads the Return to Darkness

Florida appellate courts were less than cordial in their initial greeting of Bruton and Roberts. In one of the first reported cases of the District Court of Appeal, Third District, the court consoled a trial judge who was being reversed on appeal that he was "not the only victim of 'Monday-morning quarterbacking.'" Another trial judge had also been reversed by the District Court of Appeal, Second District, because the United States Supreme Court has now, after the game is over and the score is in, said the rules are changed and the game must be played again. The trial judge was right at the time of the trial, but wrong at the time of appeal.

This same Third District panel also decided in Brown v. State that Bruton was limited merely to jury trials and did not affect a trial judge sitting in his capacity as trier of fact. The facts of Brown are somewhat more interesting than the specious reasoning used by the court. During the trial of Brown and his two codefendants, Brown's private attorney received permission from the court to leave for a 6:30 P.M. appointment, entrusting his client to another attorney. This was done upon the assurances of the state attorney that subsequent proceedings would not pertain to Brown. Once Brown's attorney had left the courtroom, however, the state attorney moved into evidence two confessions implicating Brown made by Brown's codefendants. The Third District refused to reverse the conviction on the grounds that a trial

119. 400 U.S. at 83.
120. Id. at 104-05.
121. Id. at 110 (emphasis added). Justice Harlan would have tested the propriety of the admission by due process standards, a standard which "concededly [has] nothing to do with the Confrontation Clause," Id. at 110 n.11.
123. Id., citing Branch v. State, 212 So.2d 29, 33 (Fla. 2d Dist. 1968).
124. 223 So.2d 337 (Fla. 3d Dist. 1969).
125. Judges Carroll, Hendry and Swann.
judge was incapable of completely disregarding the confessions in determining Brown's guilt or innocence, holding that to do so "would be to cast aspersions on the entire foundation of the judge's role in any court proceeding."

Casting aside the limited logic of Brown, a slightly different Third District panel\textsuperscript{127} decided in Mackey v. State,\textsuperscript{128} that although a trial judge could be trusted to disregard highly prejudicial information in his capacity as trier of fact, he could not be so trusted sitting in his capacity as trier of law. This apparent conflict is not as much a representative of conflicting logic by the Third District as it is an attempt by the court to undo some of the harm inflicted upon Bruton by the court in Brown. The precipitating factor in Mackey was an unsworn statement implicating Mackey, made by his codefendant after he had changed his plea to guilty in apparent exchange for the dismissal of additional charges.\textsuperscript{129} Realizing that the question of whether Mackey had received a fair trial depended on whether the trial judge could completely disregard the unsworn incriminating statement, the court concluded that if a jury could be presumed to have been influenced by the statement, there was a "reasonable probability" that the trial judge also could have been influenced.\textsuperscript{130} It is submitted that Mackey probably represented the better interpretation of Bruton and despite the emphasis placed upon the superior training of a trial judge's mind in Brown v. State, he is still subject to the same human prejudices which affect everyone.

The Fourth District's reaction to Bruton was less phlegmatic and more constitutionally precise. In one opinion the court stated that Bruton had led to the "singular conclusion that irrespective of the presence of a defendant's inculpatory statements, prejudicial error is committed by the use of confessions of codefendants who do not testify."\textsuperscript{131} Nevertheless, the Fourth District concluded that Harrington v. California\textsuperscript{132} now compels us to gauge . . . the adverse effect of the use of co-confessions against other "overwhelming" evidence of guilt. Although we believe Bruton construed this violation of a constitutional right so basic that its infraction could never be considered as harmless, we are committed to another course. In futuro, prosecutors will have to second guess whether to introduce co-confessions, use of which being subject to assessment by the trial judge and running the gauntlet of appellate reviews. So be it.\textsuperscript{133}

\textsuperscript{126} 223 So.2d at 339.
\textsuperscript{127} Judge Hendry was replaced by Judge Barkdull.
\textsuperscript{128} 234 So.2d 418 (Fla. 3d Dist. 1970).
\textsuperscript{129} \textit{Id.} at 419.
\textsuperscript{130} \textit{Id.} at 420. "Our system of law protects against the probability of unfairness, where that appears, as well as against unfairness which is patent." \textit{Id.}
\textsuperscript{131} Jones v. State, 227 So.2d 326, 327 (Fla. 4th Dist. 1969).
\textsuperscript{132} 395 U.S. 250 (1969). See notes 72-84 supra and accompanying text.
\textsuperscript{133} 227 So.2d at 327.
One such Florida case, Schneble v. Florida,134 serves as a perfect example of what happens to a case when it runs the "gauntlet of appellate reviews." In Schneble two defendants were jointly tried and convicted by a jury of first degree murder. Neither defendant testified at the trial, but police witnesses testified as to admissions made by both defendants implicating each other. Despite some valid questions concerning the voluntariness of the confessions,135 the Supreme Court of Florida affirmed the convictions.136 The United States Supreme Court vacated the convictions and remanded the case for further consideration in light of Bruton v. United States.137 Upon remand, the Supreme Court of Florida reversed one defendant's conviction, finding that it had been obtained in violation of Bruton, but affirmed the other conviction.138 The United States Supreme Court again granted certiorari limited to the question of whether Schneble's conviction had been obtained in violation of Bruton. The Court affirmed the conviction, holding that any violation of Bruton was harmless beyond a reasonable doubt.139

One of the first of many inconsistencies present within Schneble is that the Supreme Court of Florida reaffirmed Schneble's conviction upon remand, holding that it was "not inconsistent with Bruton."140 However, the United States Supreme Court per Justice Rehnquist rejected the Supreme Court of Florida's position that Schneble could be squared with Bruton, and yet at the same time, the Court studiously avoided passing upon the threshold question of whether Schneble's conviction had been obtained in violation of Bruton. The Court instead addressed itself to the problem that

[t]he mere finding of a violation of the Bruton rule in the course of the trial, however, does not 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.141

Unfortunately, the scope of this article does not permit a detailed analysis of the questionable harmlessness of the statements in question.142 It is within the purview of this article, however, to examine

134. 92 S. Ct. 1056 (1972), aff'g Schneble v. State, 215 So.2d 611 (Fla. 1968).
140. 215 So.2d at 612.
141. 92 S. Ct. at 1059 (emphasis added).
the apparent transition of the harmless error “test” from that first enunciated in *Chapman*—whether the constitutional error contributed to the conviction—to the latest definition of whether other evidence of guilt is “so overwhelming, and the prejudicial effect . . . is so insignificant by comparison . . .”

It is significant to note that the author of both *Chapman* and *Harrington*, Justice Douglas, joined Justice Marshall in dissenting in *Schneble*. Justice Douglas admonished, in *Chapman*, against giving too much weight to “other overwhelming evidence of guilt,” an admonition apparently lost on Justice Rehnquist. Rehnquist came to the conclusion that other independent evidence of guilt was “so overwhelming” that the introduction of Schneble’s codefendant’s confession “was at most harmless error.” But this argument proves too much, for without Schneble’s confession, Rehnquist concedes that the “State’s case against Schneble was virtually non-existent.” Justice Marshall took the position that “an average jury” might well have doubted the voluntariness of a confession induced by a 50 mile car ride commencing at 9:30 P.M. Sunday evening, during which another police officer followed in a car shooting off firecrackers in an attempt to convey to Schneble the impression that his alleged accomplice was trying to “put him out of business.” The conclusion then becomes inescapable that it is reasonably possible that the confession of Schneble’s codefendant could have contributed to Schneble’s conviction. What prevents second guessing is that *Schneble* already contains too much second-guess work. Was the taint of the dubious tactics used by the police to secure Schneble’s confession attenuated by the passage of time? Did the jury consider Schneble’s confession to be voluntary or involuntary? Did the confession of Schneble’s codefendant contribute to Schneble’s conviction? Was the other evidence of Schneble’s guilt really “overwhelming”? Was the other evidence of guilt really independent?

The point which seems to have been lost on the Supreme Courts of Florida and the United States is that *Harrington* made it clear that constitutional error, whether reversible or not, occurs whenever a confession of a codefendant (which incriminates another codefendant) is admitted into evidence without the benefit of cross-examination of its alleged maker. Neither court has attempted to correct this constitutionally abusive practice. Instead both courts have collaborated to issue a virtual rubber stamp marked “Harmless Error” to be used whenever a possible violation of *Bruton* rears its ugly head.

It seems somewhat anti-climactic at this point to relate that, in the intervening period between the reaffirmation of *Schneble* by the Supreme

143. Id. at 1059.
145. 92 S. Ct. at 1060.
146. Id.
147. Schneble v. State, 201 So.2d 881, 884 (Fla. 1967).
Court of Florida and the approval of that position by a majority of the United States Supreme Court, the Supreme Court of Florida prescribed a "test" for escaping the effects of Bruton. This test is to be used in situations where the defendant was denied the opportunity of cross-examining his accusing codefendant who has also confessed. The test is five times more complicated than Judge Frank's original proposal of "sever or exclude."

IX. CONCLUSION

As may be seen from the foregoing discussion, constitutional law has shown a marked aversion to simple solutions for simple problems. Sixteen years ago a federal appeals judge had the simplest, most workable, and perhaps the fairest of all proposed solutions to the problem created by a confessing codefendant who claims his right under the fifth amendment not to be compelled to testify against himself. Instead of adopting Judge Frank's proposal—sever the defendants or exclude the confession—the Supreme Court has chosen a more torturous route.

The first departure was redaction, a legal fiction so transparent that even the most naive of jurors must have instantly known what was transpiring. Then there was the use of limiting instructions, a triumph of form over substance. Perhaps the biggest disadvantage accruing to the defendant by the use of limiting instructions was that the instructions had a tendency to attract attention to the poisoned testimony. The latest device is the harmless-error rule. It is bad enough that the concept of harmless constitutional error exists at all, with no language whatsoever in the Constitution to support it. It is even worse when the "test" changes from opinion to opinion, amounting in Schneble to little more than a sufficiency of the evidence test.

It must be remembered that Harrington and Schneble make it abundantly clear that federal constitutional error, whether reversible or not, occurs whenever the confession of a non-testifying defendant, which confession implicates his codefendant, is introduced into evidence at their joint trial. Therefore, it is suggested that a bona fide motion for severance alleging that a defendant, joined in the indictment or information, has


[W]here the confessions of all the defendants affirm substantially the same material facts of the offense charged; where there appears to be sufficient independent proof of the unquestionable guilt of each party; where the confession of the defendant is given freely and voluntarily, and with reasonable independence of confessions of co-defendants; where no unfavorable evidence is introduced at a defendant's joint trial separately; and where instructions are given to the jury to disregard statements admitted into evidence against one defendant and not against another; that where these requirements are met, the risk of "prejudicial spillover" incrimination without cross-examination is reduced to an insignificant level.

Id. at 242.

It appears that Schneble v. State violated the Supreme Court of Florida's test on at least points two and three.

149. See note 27 supra.
confessed implicating the movant, that the state intends to introduce this
confession into evidence at the joint trial, and that the declarant intends
to claim his privilege against self incrimination, constitutes a showing of
"probable prejudice" sufficient to justify a severance. Under such cir-
cumstances the denial of a motion for severance would seem tantamount
to a hope that other "overwhelming" evidences of guilt could later be
found on appeal.

150. Where from the nature of the case it appears that a joint trial probably would
be prejudicial to the rights of one or more parties, a separate trial should be granted
when properly requested.
Reddick v. State, 190 So.2d 340, 347 (Fla. 2d Dist. 1966), quoting Suarez v. State, 95 Fla.
42, 50, 115 So. 519, 522 (1928) (emphasis added).