CRIMINAL LAW—CONFRONTATION CLAUSE—ADMISSION OF NONTESTIFYING CODEFENDANT'S STATEMENT NOT VIOLATIVE OF NONDECLARANT'S CONFRONTATION RIGHTS WHEN NOT DIRECTLY INCULPATORY—*United States v. Belle*, 593 F.2d 487 (3d Cir.), *cert. denied*, 99 S. Ct. 2825 (1979).

On the afternoon of April 30, 1976, Donald E. Belle and Joe C. Munford checked into a hotel near Philadelphia, Pennsylvania.[1] Their colorful dress, their Lincoln Continental with California license plates, the time of day, and the hotel's suburban location attracted the attention of an agent of the Bureau of Alcohol, Tobacco, and Firearms, who was at the hotel on unrelated business.[2] A registration check on the Lincoln provided the agent with the name Edward O'Neil.[3] The agent contacted the Federal Narcotic Drug Enforcement Agency (DEA) whose records indicated that O'Neil was involved in extensive drug trafficking.[4] These records disclosed that O'Neil transported heroin in his late model Cadillac, and that on his trips east, O'Neil typically stopped in the area, having once lived there. Suspecting that heroin was being transported into Philadelphia by these individuals, the DEA placed them under surveillance.[5]

Belle and Munford drove the Lincoln to the parking lot of a donut shop, where agents observed Belle get out of the car and gesture to a 1973 Cadillac. Belle and Munford then left the lot, followed by the Cadillac. One of the agents recognized the Cadillac as belonging to O'Neil Roberts, known to be involved in narcotics trafficking.[6] A short while later the cars stopped and Belle got into the Cadillac with Roberts.[7] One surveillance team followed the Cadillac while

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[1] United States v. Belle, 593 F.2d 487, 489 (3d Cir.), *cert. denied*, 99 S. Ct. 2825 (1979).

[2] *Id.* at 489.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.* at 490. One of the agents recognized the plates on Roberts' car from a previous investigation which also concerned the trafficking of heroin. The plates indicated that the car was registered to a handicapped person. The agent was aware that Roberts had been shot in the back in a previous drug transaction and as a result had been crippled. *Id.*

[7] *Id.* After Belle had been taken into custody, he made a statement while en route to the police station explaining his presence in Roberts' car. A DEA agent testified that:

> [Belle] stated that he didn't know [Roberts], that this man was a stranger to him and that he had been riding along with Mr. Munford when the stranger stopped him and asked him whether or not he would be good enough to get in his vehicle because he was a cripple and whether or not he could go to the store for him; that

the other watched Munford. The latter team observed Munford pulling silver-gray packets from under the hood of the Lincoln. Believing the packets contained heroin, the agents instructed the other team to stop and detain the occupants of the Cadillac.[8] Belle and Roberts were transported back to where the other agents had interrupted Munford's activity.[9] Upon his arrival, one of the agents looked inside the Lincoln where he saw, in plain view, an open bag containing the silver-gray packets. A field test conducted on the packets confirmed that the substance was heroin. Belle and Munford were thereupon placed under arrest.[10]

A DEA agent questioned Munford after his arrival at the police station.[11] At that time Munford made an admission, which the agent included in his testimony at Belle and Munford's joint trial.[12] According to the agent:

> Mr. Munford stated that he had come from California and that he was going to deliver the heroin between 8:00 and 8:30 p.m. that evening of April 30th to a trash can located near the Krispy Kreme Donut Shop at Route 1 on Old Lincoln Highway. He further stated that approximately two or three times in the past he had transported heroin into the same area and on two occasions had met with O'Neil Roberts.[13]

Objecting vigorously to admission of this statement,[14] Belle's attorney motioned for a mistrial. He argued that admission of the statement

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> he wanted to drive to the store and Mr. Belle could run in and bring something out to him.

Id. at 491.

When the agent questioned the credibility of the statement, Belle responded, "Well, that's my story." *Id.* The district court denied Belle's pretrial motion to suppress the statement. *Id.*

[8] *Id.* at 490.

[9] *Id.*

[10] *Id.* at 490–91. The agents discovered a secret compartment in the Lincoln's air conditioning system which was accessible from under the hood. A search of the car also disclosed a letter signed by O'Neil, dated April 27, 1976, which gave both Munford and Belle permission to use the car. *Id.*

[11] *Id.* at 491.

[12] *Id.* In his cross-examination of the agent at the suppression hearing, Belle's attorney learned that the agent would testify that Munford admitted making deliveries to Philadelphia on other trips east. *Id.* at 492 n.9.

[13] *Id.* at 491–92.

[14] *Id.* at 492. Belle claimed to have been surprised and prejudiced by the statement because a report he received from the DEA prior to the trial declared that " 'Munford stated that he had delivered heroin on two occasions in the past to the Philadelphia area but declined to say

abridged Belle's right to confrontation as guaranteed by the sixth amendment, since Munford was not going to testify and, furthermore, that admission of the statement was prohibited by the rule in *Bruton v. United States*.[15] The Supreme Court held in *Bruton* that when a codefendant in a joint trial gives testimony which is "powerfully incriminating" to a nondeclarant codefendant, jury instructions would be an inadequate guarantee that the jury would not consider the evidence in its determination of the nondeclarant's case.[16] Nonetheless, the district court denied Belle's motion. An instruction to the jury limiting use of the statement to consideration of Munford's guilt or innocence was given.[17] The jury found Belle and Munford guilty of conspiracy to possess, and possession with intent to distribute, sixty ounces of uncut heroin.[18]

The Third Circuit Court of Appeals, Judges Adams, Gibbons, and Garth presiding, reversed and remanded for a new trial.[19] Judge Garth submitted a dissenting opinion.[20] On July 28, 1978, the case was ordered to be reheard en banc[21] and the original Third Circuit

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who he had delivered it to.' " According to Belle's attorney, the report contained no reference to Munford's prior meetings with Roberts. *Id.* at 492 n.9. The court rejected Belle's claim because the agent had disclosed in his pre-trial testimony that the report was incomplete, and that Munford admitted meeting Roberts on two prior occasions. Therefore, Belle's attorney had been sufficiently forewarned. *Id.*

[15] *Id.* at 493; Bruton v. United States, 391 U.S. 123 (1968).

[16] 391 U.S. at 135–37.

[17] United States v. Belle, 593 F.2d 487, 492 (3d Cir.), *cert. denied*, 99 S. Ct. 2825 (1979). The jury instruction was not given immediately after the cross-examination of the agent, but after the redirect of the following government witness. *Id.* Belle's attorney did not renew his request for the limiting instruction. *Id.* n.8. The court however, did not consider the tardiness in giving the instruction to be detrimental. *Id.* at 492.

[18] *Id.* at 489, 491. The conspiracy to possess is in violation of 21 U.S.C. § 841 (a)(1) (1976); possession with intent to distribute is in violation of 21 U.S.C. § 846 (1976). On May 24, 1976, Belle filed a motion to dismiss the Count I violation of 21 U.S.C. § 841 (a)(1). At the same time Belle also filed motions to suppress evidence, for severence, and for discovery and inspection. At a hearing on these motions on June 4, 1976, the district court denied the motions to dismiss and to suppress evidence, but granted the motion for severence. The defendant subsequently withdrew the latter motion. Brief for the Appellant at 3, United States v. Belle, 593 F.2d 487 (3d Cir.), *cert. denied*, 99 S. Ct. 2825 (1979).

[19] United States v. Belle, 593 F.2d 487, 491 (3d Cir.), *cert. denied*, 99 S. Ct. 2825 (1979). Munford appealed separately and, in a one-paragraph decision, Judge Gibbons affirmed his conviction. United States v. Munford, 593 F.2d 512 (3d Cir. 1979).

[20] United States v. Belle, 593 F.2d 487, 491 (3d Cir.), *cert. denied*, 99 S. Ct. 2825 (1979).

[21] *Id.* at 491 n.4. The en banc hearing was before Seitz, Chief Judge, and Aldisert, Gibbons, Rosenn, Hunter, Weis, Garth, and Higginbothem, Circuit Judges. Judge Adams, who had sat on the first appellate hearing and had joined Gibbons' dissent, was absent from the en banc hearing as a result of injuries. *Id.* at 488.

decision was vacated.[22] Writing for the majority this time, Judge Garth held that the testimony did not contravene the *Bruton* rule, nor did it infringe upon Belle's right to confrontation.[23] Proclaiming the court's refusal to extend the *Bruton* holding, the court held that admission of an extrajudicial statement made by a nontestifying codefendant did not violate the confrontation clause when the statement was not "powerfully incriminating," and when the statement alone was not inculpatory. Such testimony would be damaging only to the degree that inferences from the statement, based on other clearly admissible evidence, were made by the jury. The court therefore affirmed the trial court's decision.[24] Judge Gibbons filed a vehement dissenting opinion, joined in by Judge Aldisert. He considered the testimony in *Belle* to be "powerfully" incriminating since it linked a nondeclarant codefendant to the crime.[25]

In reaching its conclusion, the *Belle* court was required to determine the rights guaranteed to the defendant by the confrontation clause. The limitations imposed on the introduction of evidence by the confrontation clause were not addressed directly by the Supreme

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[22] 593 F.2d 487, 491 n.4 (3d Cir.), *cert. denied*, 99 S. Ct. 2825 (1979).

[23] *Id.* at 489, 496, 500. Belle listed five other grounds for reversing the judgment or for granting a new trial. The only argument the court considered worthy of discussion was that the agents lacked probable cause for his detention and that the detention actually amounted to an arrest. Because the arrest was without probable cause, Belle's counsel reasoned, the heroin and his statement to the agent were fruits of an illegal search and, therefore, should have been suppressed. The court held that the agents did have probable cause to arrest Belle. *Id.* at 496–99.

As to the contention that the heroin was improperly admitted into evidence, the court held that the plain view doctrine as well as the rule set out in Chambers v. Maroney, 399 U.S. 42 (1970) (exigent circumstances justifying a warrantless search and seizure), permitted the seizure of the heroin; it was, therefore, properly admitted into evidence. 593 F.2d at 499–500; *see* Coolidge v. New Hampshire, 403 U.S. 443 (1971); Harris v. United States, 390 U.S. 234 (1968).

[24] 593 F.2d at 495, 500–01. The majority believed that the "key to Bruton" is that the inadmissible statement had to be "powerfully incriminating." *Id.* at 493. Quoting United States v. Mulligan, 488 F.2d 732 (9th Cir. 1973), Judge Garth wrote:

> Appellants ask us to extend the *Bruton* rule to exclude the admission of one defendant even though the admission does not directly implicate a co-defendant. We decline to do so.
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> There is little danger that a jury in a joint trial, in weighing the evidence against A, will consider against A an admission by B concerning only B's activities. Following the appellants' argument to its logical conclusion would require separate trials in every case where any defendant has made an admission. Such a holding is wholly unwarranted.

593 F.2d at 495 (3d Cir.) (quoting United States v. Mulligan, 488 F.d 732 (9th Cir. 1973)).

[25] 593 F.2d at 501.

Court until 1965.[26] *Pointer v. Texas*[27] was the first case to delineate some formal guidelines and to attempt to structure the analysis to be applied in confrontation clause cases.

In *Pointer*, the petitioner and a codefendant were arrested on a charge of robbery. The two defendants, neither of whom was represented by counsel, were taken before a state judge for a preliminary hearing. The assistant district attorney presented the victim as the prosecution's chief witness; the witness identified Pointer as the person who had robbed him at gunpoint. Pointer did not avail himself of the opportunity to cross-examine the witness.[28] Between the preliminary hearing and the trial, the witness moved out of the state. Upon showing that the witness was unavailable to testify at the trial, the prosecutor succeeded in introducing into evidence the transcript of the witness's prior testimony.[29] The trial judge overruled objections from Pointer's counsel, that admission of the transcript denied Pointer his sixth amendment right to confrontation, on the basis that Pointer had been afforded the opportunity to cross-examine the witness at the preliminary hearing.[30] The Texas Court of Criminal Appeals affirmed the conviction[31] and certiorari was granted by the United States Supreme Court.[32]

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[26] Historically, the hearsay rule covered much of the same area as the confrontation clause. 5 J. H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1398, at 197 (Chadbourn rev. ed. 1974). *See* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 800(04), at 800-18 to -20 (1978); N. Garland & D. Snow, *The Co-Conspirators Exception to the Hearsay Rule: Procedural Implementation and Confrontation Clause Requirements*, 63 J. CRIM. L. C. & P.S. 1 (1972); *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 188–99 (1971).

[27] 380 U.S. 400 (1965). *Pointer* was the first case to apply the confrontation clause to the states.

[28] *Id.* at 401. Although Pointer did not attempt to cross-examine the victim, he did endeavor to cross-examine other witnesses. *Id.*

[29] *Id.* Federal Rule of Evidence 804 controls the situation where a declarant is unavailable. Rule 804(a)(5) states that a declarant is unavailable if "absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means." FED. R. EVID. 804. In that instance, subsection (b) provides for hearsay exceptions to introduce a statement into evidence. FED. R. EVID. 804(b)(1).

In Wigmore's view, statements which have been subjected to cross-examination are not admitted as exceptions to the hearsay rule; they are admitted because the earlier cross-examination fulfills the requirements of the rule. 5 J. H. WIGMORE, *supra* note 26, § 1370, at 55.

[30] 380 U.S. at 402. According to Wigmore, "[t]he principle requiring a testing of testimonial statements by cross-examination has always been understood as requiring, not necessarily an actual cross-examination, but merely an *opportunity to exercise the right to cross-examine* if desired." 5 J.H. WIGMORE, *supra* note 26, § 1371, at 55 (emphasis in original).

[31] 375 S.W.2d 293 (Tex. Crim. App. 1963).

[32] 379 U.S. 815 (1964).

The Supreme Court held that the confrontation clause in the sixth amendment embodies a fundamental right guaranteed to an accused and not to be deprived him by the states.[33] In so holding, the Court nullified its decision in *West v. Louisiana*,[34] where the Court had held that the sixth amendment did not apply to the states.[35] Since Pointer did not have an adequate opportunity to cross-examine the witness through counsel at the time the testimony was given, admission of the transcript denied Pointer his right to confront the witnesses against him.[36] The Court stopped short of holding that all forms of testimony which escaped cross-examination were prohibited. On the contrary, Justice Black noted that its decision was harmonious with the Court's ruling in *Mattox v. United States*,[37] in which the Court recognized the admissibility of dying declarations and of testimony made by a decedent at a prior trial.[38]

In *Pointer's* companion case, *Douglas v. Alabama*,[39] the Court discussed more specifically the types of hearsay that would violate the confrontation clause.[40] *Douglas* involved a prosecution for assault with intent to murder.[41] Douglas' codefendant, who had been convicted in a separate trial, was called as a witness against him.[42] The codefendant was planning to appeal and, on the advice of his attorney, who was also representing Douglas, exercised his privilege

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[33] 380 U.S. at 403.

[34] 194 U.S. 258 (1904).

[35] *Id.* at 261–62. *See* Stein v. New York, 346 U.S. 156 (1953), *overruled on other grounds*, Jackson v. Denno, 378 U.S. 368 (1964).

[36] 380 U.S. at 407–08.

[37] 156 U.S. 237 (1895).

[38] 380 U.S. at 407.

Recognizing the admissibility of dying declarations, the *Mattox* Court had stated:

> For instance, there could be nothing more directly contrary to the letter of the [Confrontation Clause] than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination; nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. They are admitted not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice.

156 U.S. at 243–44; *accord*, FED. R. EVID. 804(b)(2).

[39] 380 U.S. 415 (1965).

[40] *See* notes 46–51 *infra* and accompanying text.

[41] 380 U.S. at 416.

[42] *Id.*

against self-incrimination and refused to answer any questions concerning the crime. The state solicitor's motion to have the witness declared hostile was granted. Under the pretense of refreshing the witness' memory, the solicitor then read into evidence the witness' trial testimony, pausing periodically to ask whether he had made the statement, at which point the witness would reassert his fifth amendment right and refuse to answer.[43] The testimony the solicitor read into evidence went beyond merely implicating Douglas in the crime, it identified him by name and linked him to the crime as the one who had shot the victim.[44] With this powerful evidence the jury had little difficulty finding Douglas guilty.[45]

The Supreme Court reversed and remanded the conviction.[46] In an opinion delivered by Justice Brennan, the Court identified two types of hearsay which are strongly prejudicial to a defendant. The first is linkage testimony, statements which connect the defendant to the crime. In this case, Douglas was linked to the crime when the testimony placed the gun in his hand.[47] The second type is testimony that names or otherwise identifies the defendant as the guilty party, as Douglas was named.[48] The potential impact of these forms of testimony, the Court recognized, was too important for them to be admitted into evidence without providing the defendant with an opportunity to test the truthfulness through cross-examination.[49]

The Court also recognized that a defendant could be improperly prejudiced by testimony not subject to cross-examination because of

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[43] *Id.* at 416–17. At three points, the defendant's lawyer objected to the reading of the testimony. In overruling the first objection, the court replied that the witness was hostile. The second time the solicitor responded that the defendant had already made an objection and need not repeat it. The court again overruled the objection. The third objection was accompanied by a motion to have the evidence stricken from the record. The court overruled the objection and denied the motion. The attorney also moved for a mistrial, which was in turn denied. At this point the attorney stopped objecting. *Id.* at 421 n.4. The Alabama Court of Appeals affirmed the conviction because the attorney waived any right to object further when he ceased in his persistence at the trial level. Douglas v. State, 42 Ala. App. 314, 329, 332, 163 So.2d 477, 493, 495 (Ct. App. 1963). The Supreme Court found that the attorney's objections were sufficient to put the trial court on notice that an error existed. The Court also balked at the appellate court's implication that the objection would have to be repeated after each identical infraction. 380 U.S. at 420–23.

[44] 380 U.S. at 417. The inculpating testimony is reprinted *id.* at 417 n.3.

[45] *Id.* at 417.

[46] *Id.* at 423.

[47] *Id.* at 417–19.

[48] *Id.* at 417.

[49] *Id.* at 419–20. *See* 5 J.H. WIGMORE, *supra* note 26, §§ 1367, 1397, at 32, 155.

the inferences available to the jury or trier of fact. This type of testimony is exemplified in *Douglas* by the solicitor's misconduct in forcing the witness to repeatedly invoke the privilege against self-incrimination, allowing the jury to infer that by refusing to deny the statements, the witness was in essence admitting them.[50] This form of evidence is even more prejudicial to the defendant when it is an integral part of the prosecution's case, as it was in *Douglas*.[51]

Thus, in one day the Supreme Court had extended the sixth amendment's right to confrontation to include state courts and provided a guideline for protecting the right. It was against this background that *Bruton v. United States*[52] was decided. The issue in *Bruton* was "whether the conviction of a defendant at a joint trial should be set aside although the jury was instructed that a codefendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence."[53] The Court held that it should.[54]

Bruton and his codefendant, Evans, were jointly tried and convicted of armed postal robbery.[55] At their trial, a postal inspector testified that Evans had confessed and orally named Bruton as his accomplice.[56] Both defendants appealed their convictions. Because his confession had been received in violation of *Miranda v. Arizona*,[57] Evans' conviction was set aside.[58] Bruton's conviction, however, was affirmed. The Court of Appeals for the Eighth Circuit

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[50] 380 U.S. at 419–20. The likely prejudicial effect of the inference was heightened by the solicitor presenting law enforcement officers who identified the document as the confession given and signed by the witness. The confrontation clause could not be satisfied by defendant cross-examining the officers since their testimony could do nothing to verify the truthfulness of the confession. *Id.*

[51] *Id.* at 420. Commenting on the importance of the statements the Court said:

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

Id. (citation omitted).

[52] 391 U.S. 123 (1968). *See* Roberts v. Russell, 392 U.S. 293 (1968) (decision in *Bruton* held retroactive).

[53] 391 U.S. at 123–24.

[54] *Id.* at 126.

[55] *Id.* at 124.

[56] *Id.* Evans actually gave the inspector two confessions: one naming Bruton, the other stating only that he had an accomplice. *Id.* n.1.

[57] 384 U.S. 436 (1966).

[58] Evans v. United States, 375 F.2d 355, 361 (8th Cir. 1967). Before the postal inspector arrived, the local police interrogated Evans without advising him of his rights. Thus the confes-

applied the holding in *Delli Paoli v. United States*,[59] where the Supreme Court had held that in a joint trial, jury instructions which limited consideration of one defendant's confession to the determination of that defendant's guilt or innocence were adequate to protect the nondeclarant's rights.[60] The circuit court thus ruled that the jury instructions given at the trial, which restricted the jury's use of the confession only to its consideration of the declarant's guilt, sufficiently protected Bruton from its improper use against him.[61]

In *Bruton*, the Supreme Court reconsidered its holding in *Delli Paoli* and decided that permitting a confession by a codefendant into evidence, without providing an opportunity for cross-examination, violates the nondeclarant's right to confrontation. So profound is this violation, that instructing the jury to confine its use of the statement to the declarant alone was insufficient to assure that the nondeclarant's rights had been safeguarded.[62] Justice Brennan found that de-

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sions Evans later gave to the inspector "were tainted and infected by the poison of the prior, concededly unconstitutional confession obtained by the local officer." The confession was, therefore, inadmissible. *Id.*

[59] 352 U.S. 232 (1957).

[60] 375 F.2d at 361–63.

[61] *Id.* at 233–43.

The dissent in *Delli Paoli* had recognized the futility of instructing a jury to magically forget a statement made by a codefendant while considering the case against the nondeclarant after using the statement in its consideration of the declarant's guilt. "The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors." *Id.* at 247 (Frankfurter, J., dissenting).

In accord with the *Delli Paoli* dissent is Justice Jackson's concurring opinion in Krulewitch v. United States, 336 U.S. 440 (1949). *See also* Fiswick v. United States, 329 U.S. 211 (1946); Kotteakos v. United States, 328 U.S. 750 (1946). *But see* Blumenthal v. United States, 332 U.S. 539 (1947).

[62] *Id.* at 126, 136–37.

There are three means of complying with the *Bruton* rule. The first is to delete, or redact, the inculpatory sections of the confession and/or the nondeclarant's name. *See* Malinski v. New York, 324 U.S. 401 (1945). Although widely used by the state courts, the use of this method may prove an ineffective gesture. In a joint trial, the deletion will probably not suffice to dissociate the nondeclarant from the declarant to the extent required to remove any prejudicial affect. *See generally* Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L. J. 763 (1961). When the two defendants are before the same jury and charged with the same crime, and the other evidence in the case links them to the crime, it is hard to imagine a jury will not perceive that "Mr. X" is a pseudonym for the nondeclarant codefendant.

Excluding the confession is a second method of compliance. This, although effective, is less than satisfying from the prosecutorial point of view. The final way of meeting *Bruton's* dictates, severing the trials under Rule 14 of the Federal Rules of Criminal Procedure, is perhaps the most effective. However, eliminating joint trials in an effort to comply with *Bruton* would consume additional expense and worsen an already overburdened caseload in the courts. *See generally 1 J.* WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 105(04), at 105-20 to -30 (1978). *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 231 (1968).

spite the limiting instructions there would be no way of knowing whether the confession made by Evans was considered in the jury's determination with respect to Bruton.[63] The Justice acknowledged there are instances where the jury will be able to follow clear limiting instructions from the court but, citing *Jackson v. Denno,* he noted that where "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, . . . the practical and human limitations of the jury system cannot be ignored."[64] Justice Brennan opined that, where the codefendant's extrajudicial statements were "powerfully incriminating" and "devastating to the defendant" in a joint trial, such a risk existed.[65]

In light of this opinion, when testing for a confrontation clause violation, the court must consider whether the evidence is "powerfully incriminating," whether there is a risk that the jury will improperly employ the testimony despite limiting instructions, and what harm would result to the defendant if they failed to heed the instructions.[66] The Supreme Court recognized that evidence directly implicating a defendant by name is "powerfully incriminating."[67] At least two methods have been proposed for testing whether the jury has improperly used testimony. The first is premised on the belief that to be able to follow the instructions the jury must understand why the evidence is being excluded.[68] The second requires inspecting the complexity of the mental gymnastics the jury must execute in applying the instructions: is the evidence to be excluded for one pur-

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Among the criticisms of the *Bruton* holding is the allegation that it goes too far; there was no necessity requiring the decision to be founded on constitutional grounds. Because the statement was inadmissible hearsay, an unreliable statement made by one not subject to cross-examination, the Court could have confined its ruling to making jury instructions no longer sufficient to admit evidence which violates the hearsay rules. *See The Supreme Court, 1967 Term, supra,* at 236–37.

In his dissent, Justice White opined that juries are generally quite capable of following instructions, including ignoring inculpating sections of a codefendant's statement. 391 U.S. at 138 (White, J., dissenting).

[63] 391 U.S. at 136–37.

[64] *Id.* at 135.

[65] *Id.* at 135–36. The Court noted that there was no applicable hearsay exception in *Bruton,* and refrained from extending their analysis to question whether hearsay exceptions necessarily violate the confrontation clause. *Id.* at 128 n.3.

[66] *The Supreme Court, 1967 Term, supra* note 62, at 234.

[67] 391 U.S. at 126–28.

[68] Justice White reasoned that the better a jury can understand the motive for the limiting instructions and the exclusion, the better they will be able to follow the instructions. *Id.* at 142 (White, J., dissenting).

pose but considered for another?[69] The Court reaffirmed that "'[a] defendant is entitled to a fair trial but not a perfect one.'"[70] Moreover, if a court decides that a jury has improperly considered testimony, contrary to instructions and to a defendant's detriment, it will have to determine whether the harm was substantial enough to require a new trial.[71]

Immediately following its decision in *Bruton*, the Supreme Court began handing down a series of cases which distinguished and narrowed that holding. In *California v. Green*,[72] the Court upheld a conviction based largely upon prior inconsistent statements admitted into evidence to prove the truth of the matter asserted[73] and, in so doing, answered criticisms that its recent decisions were constitutionalizing the hearsay rule and its traditional exceptions.[74] While the

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[69] Judge Learned Hand discussed the inadequacies of a limiting instruction when the jury is called upon to perform "a mental gymnastic which is beyond, not only their powers, but anybody's else [*sic*]." Nash v. United States, 54 F.2d 1006, 1007 (2d Cir.1932).

[70] 391 U.S. at 135 (quoting Lutwak v. United States, 344 U.S. 604, 619 (1953)).

[71] *Id.* For a discussion of harmless error, see notes 105–16 *infra* and accompanying text.

[72] 399 U.S. 149 (1970).

[73] 399 U.S. at 152, 154–55 (1970).

California Evidence Code Section 1235 provides in part: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." CAL. EVID. CODE § 1235 (West 1966). California Evidence Code Section 770 provides that a witness be given an opportunity to explain or deny his prior statement at trial. *Id.* § 770.

Unlike the majority of jurisdictions, California allows the use of hearsay to prove the truth of the matter asserted. The majority only permit this form of testimony to be admitted to impeach a witness who has altered his story. The reasons for the restriction are the same that limit admission of hearsay in general: "[T]he statement may not have been made under oath; the declarant may not have been subjected to cross-examination when he made the statement; and the jury cannot observe the declarant's demeanor at the time" the statement is made. 399 U.S. at 154. The contrary minority view is supported by many legal commentators, including Wigmore, who at one time advocated the orthodox view. Wigmore later espoused the theory that if a witness has at some time been cross-examined, the requirements of the confrontation clause have been met. 3A J.H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1018, at 995–1007 (Chadbourn rev. ed. 1970).

[74] In his concurrence, Justice Harlan noted the basis for the criticisms and addressed it by stating:

> numerous decisions of this Court, old and recent, . . . have indiscriminately equated "confrontation" with "cross-examination."
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> These decisions have, in my view, left ambiguous whether and to what extent the Sixth Amendment "constitutionalizes" the hearsay rule of the common law.
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> If "confrontation" is to be equated with the right to cross-examine, it would transplant the ganglia of hearsay rules and their exceptions into the body of constitutional protections. The stultifying effect of such a course upon this aspect of the law of evidence in both state and federal systems need hardly be labored, and it is good that the Court today, as I read its opinion, firmly eschews that course.

Court acknowledged that the hearsay rules and the confrontation clause do "protect similar values," it hastened to add that the overlap is not complete.[75] The Court denied that "the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law,"[76] or that the Court ever supported such a view.[77] The majority opinion, written by Justice White, explained that "merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied."[78]

The problem in *California v. Green* arose when the prosecution's chief witness claimed a lapse of memory. The trial court, acting pursuant to a provision in the state rules of evidence, permitted the admission of the witness' preliminary hearing testimony.[79] The Supreme Court held that this practice is not unconstitutional.[80] In a double-edged decision, the Court held that on the one hand the "literal right to 'confront' the witness at the time of trial . . . forms the core of the values furthered by the Confrontation Clause. . . ."[81] Thus, if the witness is present to testify, is under oath, is subject to cross-examination, and can be observed on the stand by the jury, the

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399 U.S. at 172–73 (Harlan, J., concurring) (footnotes and citations omitted). *But see* 5 J.H. WIGMORE, *supra* note 26, § 1365 at 27–28 ("Now confrontation is, in its main aspect, *merely another term for the test of cross-examination* . . . . The right of confrontation is the right to the opportunity of cross-examination." (emphasis in original)). *See* Baker, *The Right to Confrontation, the Hearsay Rules, and Due Process–A Proposal for Determining When Hearsay May Be Used in Criminal Trials*, 6 CONN. L. REV. 529, 529–31 (1974); Griswald, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711, 717–18 (1971); *The Supreme Court, 1967 Term, supra* note 62, at 236; Note, *Confrontation and the Hearsay Rule*, 75 YALE L. J. 1434, 1436 (1966). *But see* Note, *Confrontation, Cross-Examination, and the Right to Prepare a Defense*, 56 GEO. L. J. 939, 940–41 (1968).

[75] 399 U.S. at 155. *See* Note, *Confrontation and the Hearsay Rule*, 75 YALE L. J. 1434, 1436 (1966). *See generally* 4 J. WEINSTEIN & M. BERGER, *supra* note 26, ¶ 800(04) at 800-18 to -20; N. Garland and D. Snow, *supra* note 26, at 15; 5 J.H. WIGMORE, *supra* note 26, § 1397, at 184. *See* notes 86–104 *infra* and accompanying text.

[76] 399 U.S. at 155.

[77] *Id.* at 155–56.

[78] *Id.* at 156.

[79] *Id.* at 152; *see* note 73 *supra*. Rule 804(a)(3) of the Federal Rules of Evidence defines a declarant as unavailable if he "testifies to a lack of memory of the subject matter of his statement." FED. R. EVID. 804(a)(3). Thus, under hearsay exception 804(b)(1), *supra* note 29, the prior testimony was allowed into evidence.

[80] 399 U.S. at 153–70. *See* note 73 *supra*. *See generally* N. Garland and D. Snow, *supra* note 26, at 17–18.

[81] 399 U.S. at 157.

purposes of the confrontation clause have been effectuated.[82] On the other hand, however, even if the witness cannot be cross-examined at trial, testimony from a preliminary hearing where the witness was under oath and subject to cross-examination by the accused will accomplish the protections intended by the confrontation clause.[83] The Court's holding then suggested that the confrontation clause is satisfied if the witness has, at some point in the proceedings, been subject to cross-examination.[84] This implied that the Court was concerned with the factor of reliability in determining confrontation clause issues, since the essential purpose of cross-examination is to test the truth, the reliability, of testimony.[85]

While *California v. Green* implied the importance of reliability in protecting the confrontation clause rights, one term later, in *Dutton v. Evans*,[86] it had ripened into a factor of recognized importance. The *Dutton* plurality opinion, penned by Justice Stewart, stressed again that the hearsay rule and the confrontation clause are not synonymous.[87]

Dutton involved a murder trial. Evans and a codefendant, Williams, were tried separately. After Williams' arraignment, his cellmate, Shaw, inquired as to the outcome. Williams replied: " 'If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be

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[82] *Id.* at 158, 160. The jury will scrutinize the witness' demeanor with particular care if the witness must explain away a prior inconsistent statement, as in *Green*.

[83] *Id.* at 165–68. Observation, although desirable, is not necessary.

[84] *Id.* at 153–68.

According to the Federal Rules of Evidence, the hearsay rule is met if the witness is under oath and subject to cross-examination, provided the requirements of Federal Rule of Evidence 801(d)(1)(A) and/or rule 801(d)(1)(B) are met. The rules read:

> (d) Statements which are not hearsay. A statement is not hearsay if (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, ...

FED. R. EVID. 801(d)(1)(A), (B).

See generally MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 253, at 608–14 (2d ed. 1972).

[85] *See* 5 J.H. WIGMORE, *supra* note 26, § 1367, at 32–33 (cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth."). *Id.*

[86] 400 U.S. 74 (1970).

[87] *Id.* at 86. "It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now." *Id.* (footnotes omitted). *See* note 75 *supra*.

in this now.' "[88] The trial court overruled the defense attorney's objection that the statement was hearsay and that it violated his client's right to confrontation.[89] As in *Green*, the trial court in *Dutton* relied upon a state hearsay exception broader than the federal rule.[90] The plurality affirmed the conviction on the grounds that the confrontation clause is not automatically violated whenever hearsay exceptions are expanded,[91] and that the federal rule is restrictive because of the Court's policy to avoid abuse of conspiracy prosecutions. Since Evans was tried for murder, not conspiracy, no such policy issue arose.[92]

With virtually no analysis at all,[93] Justice Stewart embarked upon laying a groundwork for admitting hearsay evidence by itemizing the distinguishing features of this case and the principal cases cited by Evans. First, the evidence offered by Shaw was not "crucial" or "devastating" but was only of "peripheral significance" because the "most important witness, by far" was another codefendant who had testified under a grant of immunity.[94] Secondly, the confession was not coerced. Thirdly, there was no prosecutorial misconduct or use of a paper transcript. Moreover, the case was not a joint trial. Finally, there was no denial of cross-examination; indeed almost twenty witnesses were produced by the prosecution and were subjected to

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[88] 400 U.S. at 76–77.

[89] *Id.* at 77–78.

[90] *Id.* at 81. The Georgia Code Annotated Section 38-306 (1954) provides that "[a]fter 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." GA. CODE ANN. § 38-306 (1954).

The plurality held that "it does not follow that because the federal courts have declined to extend the hearsay exception to include out-of-court statements made during the concealment phase of a conspiracy, such an extension automatically violates the Confrontation Clause." 400 U.S. at 81.

The Court had specifically refused to extend the federal rule as far as Georgia's rule in Grunewald v. United States, 353 U.S. 391 (1957); Lutwak v. United States, 344 U.S. 604 (1953), and Krulewitch v. United States, 336 U.S. 440 (1949).

[91] 400 U.S. at 81.

[92] *Id.* at 82–83.

[93] *See The Supreme Court, 1970 Term, supra* note 26 at 191–99.

[94] 400 U.S. at 87. The cases cited are Roberts v. Russell, 392 U.S. 293 (1968); Bruton v. United States, 391 U.S. 123 (1968); Barber v. Page, 390 U.S. 719 (1968); Brookhart v. Janis, 384 U.S. 1 (1966); Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965).

Dutton has come under considerable attack, particularly on the grounds of vagueness. *See generally* Natali, *Green, Dutton and Chambers: Three Cases In Search Of A Theory*, 7 RUTGERS L. J. 43 (1975-76); *The Supreme Court, 1970 Term, supra* note 26 at 188–99; N. Garland and D. Snow, *supra* note 26, at 18–22.

cross-examination by the defense counsel.[95] Thus, according to the plurality, the statement by Williams, as related to the court through Shaw, was not impermissible hearsay because it did not fit any of the itemized descriptions.[96]

The statement, though attributed to Williams, did not violate the confrontation clause by being testified to by Shaw. According to Justice Stewart, the confrontation issue was presented in the context of "the jury . . . being invited to infer that Williams had implicitly identified Evans as the perpetrator of the murder when he blamed Evans for his predicament."[97] Since the statement was void of any assertion of past fact it "carried on its face a warning to the jury against giving the statement undue weight."[98] Also, the third codefendant's testimony had "abundantly established" Evans' role in the murder; it would have been "inconceivable that cross-examination could have shown that Williams" did not know what part Evans had played.[99] It is noteworthy that, although the plurality considered the statement unimportant, it did not apply the harmless error rule.[100] The Court saw no reason why Williams' memory would be inaccurate when he

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[95] 400 U.S. at 87.

[96] *Id.* Justice Harlan's concurring opinion rejected a view he had embraced in California v. Green, 399 U.S. 149, 172 (1970). Citing Wigmore as authority, Harlan stated that it is not the sixth amendment's purpose to "prevent overly broad exceptions to the hearsay rule." 400 U.S. at 94. The Justice proposed testing admissibility of hearsay evidence through the fifth and fourteenth amendments due process clauses, as opposed to Stewart's test which is applied in terms of the sixth amendment's confrontation clause. *Id.* at 96–97. This approach would have subjected the rules of hearsay evidence to constitutional scrutiny in civil, as well as criminal trials. *Id.* n.4. Applying a due process analysis, Justice Harlan decided that the Georgia statute still passed constitutional muster: attainment of the goal of a conspiracy seldom terminates the conspiracy of interest; declarations against interest are likely to be trustworthy; the jury can be alerted to the dangers of giving too much credit to the testimony; it allows in evidence which would otherwise be subject to exclusion by the fifth amendment privilege which will enable a jury to get closer to the truth; and the statement did not demand exclusion as being inflammatory. *Id.* at 99. Although he said that he would prefer exclusion as required under the federal rule, Harlan "[could not] say that it is essential to a fair trial. The Due Process Clause requires no more." *Id.* at 100.

[97] 400 U.S. at 88.

[98] *Id.*

[99] *Id.* at 88–89.

[100] *Id.* at 90. Justice Blackmun, in a concurring opinion, expressed the view that the circumstances surrounding the statement were so incredible that the testimony would more likely hurt than help the prosecution. *Id.* Moreover, the significance of the statement vanished in light of the testimony offered by two other witnesses who corroborated each other and directly inculpated the defendant in the crime. *Id.* at 92–93. Justice Blackmun concluded that the statement was admissible because "in the light of the entire record, [it was] harmless error if it was error at all." *Id.* at 90.

made the statement, nor did it see any reason why Williams would lie to Shaw.[101] Furthermore, the statement was spontaneous and against his penal interest,[102] both factors which Justice Stewart emphasized are "indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant."[103] Justice Stewart summarized the reliability argument by noting that the Court has consistently interpreted the confrontation clause as a means of arriving at the truth in criminal trials through cross-examination.[104]

One final consideration in evaluating confrontation clause issues is the harmless error rule.[105] The rule has been applied to affirm

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[101] *Id.* at 89.

[102] *Id.* Although the plurality found the statement to be spontaneous, the traditional exception also encompassed the requirement of exciting circumstances, *see* MCCORMICK, *supra* note 84, § 272 at 656–59; 6 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 1745–47 at 191–98 (Chadbourn rev. ed. 1976), to allow in a declaration of mental state, *see* MCCORMICK, *supra* note 84, §§ 268–71 at 647–56, or a statement regarding a physical condition, *see* MCCORMICK, *supra* note 84, §§ 265–67 at 633–47. None of these exceptions comfortably fits the situation here; arguably the statement may have had a bearing on Williams' mental state, but that was not in issue.

Traditionally, declarations against interest included only proprietary or pecuniary interests. Federal Rule of Evidence 804(b)(3) now permits hearsay statements against penal interest, but with qualification. The rule provides in pertinent part: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused *is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.*" FED. R. EVID. 804(b)(3) (emphasis added). But when *Dutton* was decided, the penal interest exception was not established, and the rule was still only a proposal. *See* N. Garland and D. Snow, *supra* note 26, at 21 nn.213 & 214.

[103] 400 U.S. at 89. Justice Marshall's dissenting opinion emphasized that the statement which Justice Stewart termed "spontaneous" very likely was never made. *Id.* at 103 (Marshall, J., dissenting). Justice Blackmun, in his concurrence, noted the incredibility of the statement. *Id.* at 90 (Blackmun, J., concurring). Justice Stewart himself said the very nature of the statement warned the jury not to give undue weight. *See* note 98 *supra* and accompanying text. As Justice Marshall pointed out, cross-examination would have determined whether the "spontaneous" statement was actually against Williams' penal interest and Justice Stewart's opinion would not permit those "indicia of reliability" to be exercised to prove the truth of the statement. 400 U.S. at 109–10 (Marshall, J., dissenting).

[104] 400 U.S. at 89. Justice Marshall, joined by Justices Black, Douglas, and Brennan, dissented. He compared this case to *Douglas*, noting that in *Douglas* the police officers who testified regarding Loyd's statement were subject to cross-examination. *Id.* at 102.

The Court followed the *Dutton* reasoning two years later, however, in Mancusi v. Stubbs, 408 U.S. 204 (1972), in which it held that the "indicia of reliability" was met by introducing prior testimony from a witness who was unavailable but who had been cross-examined when he testified against the defendant in another unrelated trial. Only Justice Marshall dissented, joined in part by Justice Douglas.

[105] Federal Rule of Evidence 103(a) provides:

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a ***substantial*** right of the party is affected . . . .

convictions where there has admittedly been a *Bruton* violation. Two cases so holding are *Harrington v. California*[106] and *Schneble v. Florida*.[107] *Harrington* involved a prosecution of four codefendants for attempted robbery and first degree murder. The confessions of all three of Harrington's codefendants were admitted at the trial with instructions that they were to be considered only with regard to their declarants. Harrington was Caucasian and his codefendants were Black. One codefendant identified Harrington by name and placed him at the scene armed with a gun. But because this codefendant was cross-examined, no confrontation issue arose. However, the other two codefendants identified Harrington in their confessions as " 'the white guy,' " but did not take the stand. On appeal, Harrington founded his argument on *Bruton*, claiming he was deprived of his right to confront by not having an opportunity to cross-examine the latter two defendants.[108] Based on the "harmless beyond a reasonable doubt" test,[109] Justice Douglas held that the harmless error rule will allow a

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FED. R. EVID. 103(a) (emphasis added). *See generally*, MCCORMICK, *supra* note 84, § 183, at 429–32; J. WEINSTEIN & M. BERGER, *supra* note 26, ¶103[06], at 103-43 to -57 (1978); Note, *Harmless Error*, 59 VA. L. REV. 988 (1973).

[106] 395 U.S. 250 (1968).

[107] 405 U.S. 427 (1972).

[108] 395 U.S. at 252–53.

[109] Chapman v. California, 386 U.S. 18 (1967), established the present harmless error test. The Court stated that "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." *Id.* at 24. The *Chapman* Court claimed to do nothing more than reaffirm their holding in Fahy v. Connecticut, 375 U.S. 85 (1963), where the test was held to be "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 86–87. Applying that test to the circumstances in *Fahy*, the Court held that admission of the evidence seized in violation of the fourth amendment was not harmless. The record clearly indicated that the defendant had been prejudiced by the admission and, therefore, the question of whether constitutional error could ever be harmless was never reached. *Id.* at 91–92. The Court in *Chapman* declared "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." 386 U.S. at 23. But the Court rejected the suggestion that constitutional errors require automatic reversal. *Id.* Because the error might have contributed to the conviction it was not shown to be harmless beyond a reasonable doubt, and the Court reversed the conviction. *Id.* at 24.

There are two main interpretations of the *Chapman* rule. One maintains that the error contributed to the conviction if it entered into the jury's determination. Note, *Harmless Constitutional Error*, 83 HARV. L. REV. 814, 819 (1970). However, since no one knows how juries arrive at their decisions, this interpretation would in practice necessitate an automatic reversal rule. *Id.* The second idea is, in actuality, the "overwhelming" test: if the other evidence offered is overwhelmingly more probative than the disputed evidence, it is harmless beyond a reasonable doubt. The latter is the interpretation adopted by the Court in *Harrington* and *Schneble*.

For earlier Court interpretations of the harmless error rule see Krulewitch v. United States, 336 U.S. 440 (1949); Blumenthal v. United States, 332 U.S. 539 (1947); Fiswick v. United States, 329 U.S. 211 (1946); Kotteakos v. United States, 328 U.S. 750 (1946).

Bruton statement into evidence when the other evidence against the defendant is overwhelming.[110] The Justice concluded, "unless we say that no violation of *Bruton* can constitute harmless error, we must leave this state conviction undisturbed."[111] He declined to give *Bruton* such weight.[112]

Schneble v. Florida was also a murder case. Neither defendant took the stand, but police officers testified to admissions made by both defendants implicating them in the crime. Schneble appealed his conviction, alleging a violation of the *Bruton* rule in the admission of his codefendant's statement, which had not been subject to cross-examination.[113] Following the reasoning in *Harrington*, Justice Rehnquist held that because the evidence against Schneble was overwhelming, the violation was harmless beyond a reasonable doubt.[114] According to the Court, the state would not have had a case had it not been for Schneble's own confession; all other evidence, including his codefendant's extrajudicial statement, was merely corroborative.[115] Therefore, because the " 'minds of an average jury' " would not have been significantly less persuaded by the omission of the codefendant's admission, the error was harmless.[116]

Based primarily upon circuit court interpretations of *Bruton v. United States*, the court in *United States v. Belle* concluded that Munford's extrajudicial statement did not deprive Belle of his confrontation clause rights.[117] In the court's opinion, "[t]he key to *Bruton* was that the extrajudicial statement by the nontestifying codefendant Evans was 'powerfully incriminating' of Bruton in that it

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[110] 395 U.S. at 254. The majority specifically declined to follow the minority view in *Chapman* calling for automatic reversal whenever constitutional procedures are not respected, without concern for the weight of the evidence. *Id.* at 254.

[111] 395 U.S. at 254.

[112] *Id.*

[113] 405 U.S. at 427–28.

[114] *Id.* at 430–32. The Court said:

> The mere finding of a violation of the Bruton rule in the course of the trial, . . . , 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.

Id. at 430.

[115] *Id.* at 431.

[116] *Id.* at 432 (quoting *Harrington*, 395 U.S. at 254).

[117] 593 F.2d at 489. The majority did not rely on the important confrontation clause cases decided by the Supreme Court after *Bruton*. Rather, Judge Garth founded his analysis on the interpretations given to *Bruton* in the circuit courts, primarily the Second and Third Circuits.

named Bruton as an accomplice."[118] Therefore, the court reasoned that, because Munford had not implicated Belle directly, the *Bruton* rule did not apply.[119] Munford's extrajudicial statement may have provided an "evidentiary [link] or contextual implication" associating Belle with Munford and Roberts; however, that was insufficient to

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Judge Gibbons, dissenting, provided a survey of the cases the Supreme Court decided on the confrontation clause issue. He articulated the following outline which he applied to his analysis and proposed as a guideline in deciding cases on confrontation rights:

> The Supreme Court has set forth the relevant factors: to the extent that the challenged statement directly accuses the defendant, see Bruton . . . ; supplies substantial linkage evidence, see Douglas . . . ; is particularly significant in the prosecution's case, see Douglas . . . ; Dutton . . . ; creates a risk that the jury will improperly use it against the defendant, see Bruton . . . ; was never subject to any cross-examination, see Green . . . ; was offered in a potentially coercive setting, see Bruton . . . ; Dutton . . . ; and is neither so merely cumulative nor so plainly reliable that cross-examination would be superfluous, see Dutton . . . , a Confrontation Clause violation occurs.

Id. at 508 (Gibbons, J., dissenting) (footnotes and citations omitted).

[118] *Id.* at 493 (emphasis added).

[119] *Id.* As support, the court cited United States v. Gerry, 515 F.2d 130 (2d Cir. 1975), *cert. denied*, 423 U.S. 832 (1975), and Nelson v. Follette, 430 F.2d 1055 (2d Cir. 1970), *cert. denied*, 401 U.S. 917 (1971). In *Gerry*, the trial court had permitted an FBI agent to testify to a post-conspiracy admission Gerry had made to a third party. Gerry's codefendant alleged that allowing the testimony into evidence violated his sixth amendment right as discussed in *Bruton*. On appeal, the second circuit held "since the admission contained no reference to any other defendant and since the jury was properly instructed that the testimony was received only against Gerry," there was no error in admitting the evidence. 515 F.2d at 142. The *Gerry* court failed to address the impossibility of testing the truth of the statement by cross-examining the FBI agent, a problem that was considered in *Bruton* and by the dissent in *Belle*.

Nelson v. Follette held that "for the *Bruton* rule to apply, the challenged statements must be clearly inculpatory." 430 F.2d at 1057. Extrajudicial statements made by Nelson's codefendant, describing his accomplice, were admitted into evidence although the declarant did not take the stand. The description was of a man named "Oliver," but could have applied to Nelson. The appellate court held that Nelson was not "clearly inculpated by his general resemblance to 'Oliver.' " *Id.* Nelson's codefendant claimed to have met "Oliver" in a bar prior to the crime. The bar owner testified that he had seen Nelson and the codefendant together in his bar that same evening. The court answered:

> The jury would have had to make a *substantial inference* to implicate Nelson in the crime by virtue of his mere presence in the bar where [the co-defendant] said he ran into "Oliver." . . . In short [the] statements were not clearly inculpatory because *they alone* did not serve to connect Nelson with the crime.

Id. at 1058 (emphasis added).

The *Nelson* court stated the other evidence weighed so heavily against Nelson that the admission was not a vital part of the government's case. The court noted the credibility of the declarant was so suspect that the statement might have been altogether disregarded by the jury. It was, therefore, determined that the jury would most likely be able to follow the limiting instructions. *Id.* at 1058–59. By so holding, the court had satisfied that concern as expressed in *Bruton*.

In his *Belle* dissent, Judge Gibbons maintained that it was the latter two factors, rather than the possibility that the jury would draw inferences that "Oliver" was Nelson, which led the court in *Nelson* to decide as it did. 593 F.2d at 510 (Gibbons, J., dissenting).

bring the statement into the purview of *Bruton*.[120] Judge Garth emphasized that the statement alone did not inculpate Belle.[121] In order to implicate Belle to Munford, Roberts, and the crime, the jury would have to have drawn considerable inferences from Munford's claim that he had conducted drug transactions with Roberts on two previous occasions. Accordingly, the statement itself was not found to be "powerfully incriminating."[122] The court contended that any potential linkage testimony was available for cross-examination simply by calling Roberts as a witness.[123]

That Belle was not named by Munford was of further importance to the majority. Acknowledging that many courts have adopted the practice of admitting redacted versions of admissions made by codefendants in joint trials, the court stressed that since Munford did not name or otherwise identify Belle, nor even refer to having an accomplice, a redaction was unnecessary and, *a fortiori*, Munford's admission should be permitted into evidence.[124] Addressing the reliability issue, the court opined that no threat of unreliability existed because Munford did not shift the blame to Belle or any other per-

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[120] 593 F.2d at 494. The court followed the rationale employed in United States v. Wingate, 520 F.2d 309 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976). In *Wingate*, a codefendant's redacted statement was admitted into evidence with limiting instructions. The circuit court held that there was no *Bruton* or sixth amendment violation because the evidence was not vital to the government's case, nor was it clearly inculpatory of Wingate. In a section quoted by the court in *Belle*, *Wingate* held that "[o]nly when combined with considerable other evidence, which amply established Wingate's guilt [did] the statements tend to implicate him." *Id.* at 314. Borrowing this analysis, Judge Garth concluded, "In short, evidentiary linkage or contextual implication may not be utilized to convert a non-*Bruton* admissible statement into a *Bruton* inadmissible statement." 593 F.2d at 494.

Judge Gibbons agreed with the court in *Wingate*, but did not consider the holding applicable to this case. Judge Gibbons felt that, unlike *Wingate*, the other evidence against Belle did not amply establish his guilt. *Id.* at 509 (Gibbons, J., dissenting).

[121] 593 F.2d at 493. Distinguishing the case from *Bruton*, Judge Garth wrote:

> it was in such a circumstance—where the challenged *statement* (and we emphasize, the *statement only*) directly implicated the complaining defendant Bruton—that the Supreme Court held that the codefendant's statement could not be admitted into evidence at a joint trial.

Id. (emphasis in original).

[122] *Id.* at 494.

[123] *Id.*

[124] 593 F.2d at 493–94. At the supression hearing, the agent testified that Munford had stated that he and Belle had come from California together. The agent did not include this reference to Belle in his trial testimony. The majority found the redaction significant, but stated "it is not necessary to our disposition that we regard Munford's statement as having been informally 'redacted.' " *Id.* at 492 n.6.

son.[125] In his statement Munford said only that he had met with Roberts in prior drug transactions; he did not say that Belle, or anyone else, accompanied him on the previous rendezvous.[126]

Lastly, the court directed its attention to the severance issue. Federal Rule of Criminal Procedure 14 authorizes a court to sever on a defendant's motion.[127] The court may also require the prosecution to furnish it with "any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial" for *in camera* inspection.[128] The court considered it "highly significant that neither the federal rule, examined [in *Bruton*], nor Mr. Justice Brennan's majority opinion, made any reference to any judicial inspection of evidence other than the statements or confessions of the defendants."[129] The court concluded that this omission was proof that the Supreme Court did not intend to include linkage evidence in the *Bruton* decision. If the Supreme Court had included such evidence, it would have to be subjected to the same *in camera* scrutiny as statements or confessions made by codefendants. In Judge Garth's opinion, such a procedure would force the government to "expose its entire case on a motion for severance."[130] Moreover, even in the absence of a motion for severance, the trial judge would have to be satisfied that any extrajudicial statement made by a nontestifying codefendant did not have implications which carry over to other independent linkage evidence. Meeting this requirement would require a review "under a microscope" of all the prosecution's evidence, "necessarily lead[ing] to either a complete 'mini-trial' before the judge, or to the practical prohibition of joint trials."[131] Finding

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[125] *Id.* at 495 n.12. The *Bruton* Court had been concerned about the reliability of a codefendant's statement when it shifted blame to another individual. That concern increased when the statement was not subjected to cross-examination. 391 U.S. at 136. Judge Garth believed that "[u]nlike Bruton, [Munford's statements did] not shift responsibility to Belle . . . , [but] directly implicate[d] only Munford." 593 F.2d at 495.

[126] 593 F.2d at 495 n.12.

[127] FED. R. CRIM. P. 14.

[128] *Id.* This portion of the rule was quoted in *Bruton*, 391 U.S. at 131–32, and again by the *Belle* court, 593 F.2d at 495. *See generally* Note, *Joint and Single Trials Under Federal Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 YALE L.J. 553 (1965).

[129] 593 F.2d at 495.

[130] *Id.* at 495–96.

[131] *Id.* at 496. Addressing the majority's contention that accepting Belle's position would require "minitrials" on evidence or a "practical prohibition of joint trials," Judge Gibbons said that he did not "believe that applying Bruton to circumstantial evidence, as well as to direct accusations, entails such draconian consequences." *Id.* at 511 n.25. In the Judge's opinion, a trial judge could survey the codefendant's statements and require production of those which

no support for such an "astonishing result" in Federal Rule of Criminal Procedure 14, in *Bruton*, or in any other court opinion, the court declined to read linkage testimony into the *Bruton* rule. The court therefore concluded that Belle had not been deprived his confrontation clause rights.[132]

Judge Gibbons, in his dissent, argued that although the statement was "obviously linkage testimony," it was unquestionably "crucial" or "devastating" to Belle.[133] Without the evidence associating Belle with a known drug trafficker, Roberts, the dissent felt there was insufficient evidence to convict Belle. In the judge's view, the only evidence seriously bringing into question the legitimacy of Roberts' presence was Munford's assertion that he had conducted drug transactions with Roberts in the past.[134] According to Judge Gibbons, the statement thus comprised the only inculpatory evidence against Belle, making it not merely cumulative but of primary importance in the government's case.[135]

The dissent did not consider the statement to have sufficient indicia of reliability to make cross-examination superfluous. Munford's penal interest did not provide an adequate basis to assure the statement's trustworthiness;[136] conversely, he was in custody when he made the statement and it would be in his interest to cooperate or to shift the blame to another in order to dilute the effect of "having

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might be "substantial enough to supply meaningful linkage evidence." *Id.* (Gibbons, J., dissenting).

The dissenting judges believed that, at most, their suggestion would create only a small "loss in the efficiency of the adjudicatory process," a loss which could be justified by *Pointer's* holding that confrontation clause rights are "fundamental." *Id.* (Gibbons, J., dissenting). *See* Pointer v. Texas, 380 U.S. at 404.

[132] 593 F.2d at 496.

[133] *Id.* at 501, 508–09 (Gibbons, J., dissenting).

[134] *Id.* at 508 (Gibbons, J., dissenting). The prosecution had introduced in evidence the fact that Roberts was carrying $1,300 when he was arrested. Judge Gibbons did not view this as clearly implicating Roberts; he maintained that other explanations for the money's presence were feasible, i.e., that the money was cash from Roberts' restaurant business. Also, Judge Gibbons did not regard Belle's "implausible explanation" for being with Roberts as "substantive proof of Belle's participation in the crime." *Id.* (Gibbons, J., dissenting).

[135] *Id.* at 501, 508–09 (Gibbons, J., dissenting). The dissent reasoned:

> [S]ince the *remaining* circumstantial evidence linking Belle to an illicit narcotics arrangement was, at best, fragile, the use of this hearsay testimony, and the resulting violation of Belle's Confrontation Clause rights under *Bruton*, were not harmless beyond a reasonable doubt.

Id. at 501 (Gibbons, J., dissenting) (emphasis in original). For a discussion of harmless error, see notes 113–24 *supra* and accompanying text.

[136] 593 F.2d at 509 (Gibbons, J., dissenting).

been caught so plainly 'redhanded.' "[137] Munford did say he had met twice before with Roberts on similar business. Hence it was imperative, according to Judge Gibbons, that the extrajudicial statement be subjected to cross-examination at some stage. Yet the statement was not offered at the preliminary hearing, nor did the declarant testify at trial.[138]

In Judge Gibbons' opinion, the true "key to *Bruton*" is the potential risk of improper jury use of hearsay evidence.[139] Several factors led the dissent to fear that Munford's statement would be misused: a government agent testified that Munford had made the statement, a factor which Judge Gibbons pointed out was considered highly prejudicial by the *Bruton* Court;[140] the evidence had "great significance" in the government's case;[141] and the jury might have relied too heavily on the statement which was "seemingly against Munford's penal interest."[142] These combined factors convinced the dissent that the jury instructions could not have adequately protected Belle from improper use of the statement by the jury.[143]

The primary disagreement between the majority and the dissent centers upon whether the extrajudicial testimony was "powerfully incriminating." The dissent's concern over jury misuse of a statement admitted into evidence without cross-examination, would be alleviated if the statement was insignificant. If the testimony is unimportant, its admission would be merely harmless error, and the jury might be inclined to ignore it even without limiting instructions. To

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[137] *Id. See also* Davenport, *The Confrontation Clause and The Co-conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1395–96 (1972).

[138] 593 F.2d at 509 (Gibbons, J., dissenting). Although a DEA agent testified that Munford made the statement, the testimony could not attest to the truth of the claim or Munford's reason for making it. *Id.* (Gibbons, J., dissenting).

[139] 593 F.2d at 504 n.7 (Gibbons, J., dissenting).

[140] 593 F.2d at 508–09 (Gibbons, J., dissenting). Judge Gibbons emphasized that the *Bruton* Court had considered the situation where testimony is entered into evidence by a person other than the declarant to be even more prejudicial than the procedure in *Douglas*, where the witness' refusal to answer only permitted the jury to infer guilt. Presenting the admission in such a manner precluded the possibilty of a cross-examination to determine its truth or the declarant's reason for saying it; the agent could only testify that it had been said. *Id.* (Gibbons, J., dissenting); *see* 391 U.S. at 127–28.

[141] 593 F.2d at 509 (Gibbons, J., dissenting).

[142] *Id.* (Gibbons, J., dissenting).

[143] 593 F.2d at 508–09 (Gibbons, J., dissenting). Judge Gibbons regarded the rationale in United States v. Leonard, 494 F.2d 955 (D.C. Cir. 1974), as more persuasive. In *Leonard*, two extrajudicial statements made by a codefendant, one linkage testimony, the other directly inculpatory, were allowed into evidence. Based on the factors addressed in *Bruton*, *Green* and *Dutton*, the court determined that the statements were neither so reliable nor so vital to the government's case that a confrontation clause violation existed. The court said in dicta that "[h]ad

pose a threat of jury misuse the testimony must first be "powerfully incriminating." The likelihood of jury misuse is the second step in the analysis. In the court's opinion, the second step was never at issue because the testimony was not significant. The majority opinion was largely determined by the fact that Munford's statement did not name Belle as his accomplice.[144] The practice of redaction indicates some consensus that a statement lacking the accomplice's name is not "powerfully incriminating."[145] This has been so when the nondeclarant's name has been substituted with another name[146] or the word "blank."[147] Although it might be obvious from the facts that one person alone could not have done all the acts alleged, redacting *all* references to accomplices would present even less risk to the nondeclarant.[148] This was the situation in *Belle,* where there was no neces-

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these declarations been a singular or critical element in sustaining the government's burden of proof, their admission in a trial where the defendant could not cross-examine the declarant would raise a serious confrontation clause issue." *Id.* at 970.

The dissenters in *Belle* believed Munford's statements were vital to the government's case and, therefore, presented a confrontation clause problem, as would follow from the *Leonard* analysis. 593 F.2d at 511 (Gibbons, J., dissenting). The dissent concluded:

> [The majority's] holding, confining the Confrontation Clause to direct accusations and placing circumstantial evidence outside the ambit of the Clause, cannot be reconciled with [the] case law. A harmless error analysis, while unjustified on this record, would, since it would have fewer future consequences, be less offensive. Instead, the majority has chosen to give the Confrontation Clause the narrowest possible reading it could devise, and thus to maximize the government's opportunity for exposing defendants to the risk that juries will use devastating hearsay against them.

Id. at 511–12 (Gibbons, J., dissenting).

[144] *See* notes 118–24 *supra* and accompanying text.

[145] *E.g.*, United States v. Dady, 536 F.2d 675 (6th Cir. 1976); United States v. Wingate, 520 F.2d 309 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976); United States v. Lipowitz, 407 F.2d 597 (3d Cir.), *cert. denied*, 395 U.S. 946 (1969).

[146] *E.g.*, Nelson v. Follette, 430 F.2d 1055 (2d Cir. 1970).

[147] In United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977), the redacted statement admitted into evidence replaced the defendant's name with the word "blank." The defendant claimed that the contextual implications where the "blanks" occurred in the testimony permitted the jury to infer that he was the "blank." The court held that "in the particular circumstances of [the] case a Bruton violation did occur." *Id.* at 983. After consideration of the other evidence against the defendant, the court held the violation to be harmless error. *Id.*

[148] The court in United States v. Stewart, 579 F.2d 356 (5th Cir. 1978), stated:

> This court and others have held that a statement made by one defendant, not inculpatory of a codefendant on its face, is admissible in a joint trial even though other evidence in the case indicates that a codefendant not mentioned in the statement was also involved in the activities described.

Id. (citations omitted).

sity for a redaction because there was no reference to any accomplice, and where one person, Munford, could have performed the acts.[149]

In their refusal to extend the *Bruton* rule to linkage testimony, the majority followed the reasoning of other courts which have held that linkage testimony does not violate *Bruton* unless it is "clearly inculpatory."[150] Belle could only be linked to the crime by other clearly admissible evidence, and the possibility that the jury would be able to *infer* from the testimony that Belle was an accomplice was not enough to make the statement "powerfully incriminating."[151] The statement did not even "hint"[152] that Belle was involved in the crime and a "substantial inference" would have to be made by the jury to inculpate Belle in the crime on the basis of the testimony alone.[153]

The Third Circuit passed a similar judgment in United States v. Alvarez, 519 F.2d 1052 (3d Cir.), *cert. denied*, 423 U.S. 914 (1975). In *Alvarez* the court noted:

> Of course, a reasonably intelligent reader could determine that two persons . . . could not possibly have done all the things recounted in the redacted confession, but the confession did not disclose whether the other participants were male or female or even how many others there were. Because the confession does not, in its redacted form, so much as hint that . . . , the appellant herein, was involved in the crime, we find that the confession did not "inculpate" [the appellant] within the meaning of Bruton v. United States.

Id. at 1053 (citations omitted).

[149] 593 F.2d at 491–92.

[150] The United States Supreme Court addressed the issue of interlocking confessions in the context of the sixth amendment in Parker v. Randolph, 99 S. Ct. 2132 (1979). In an opinion written by Justice Rehnquist, the Court declared that "the Confrontation Clause has never been held to bar the admission into evidence of every relevant extrajudicial statement made by a nontestifying declarant simply because it in some way incriminates the defendant." 99 S. Ct. at 2139. This view reflects the opinions of numerous circuit courts holding that linkage testimony is not violative of confrontation rights or the *Bruton* rule unless it is "clearly inculpatory." *E.g.*, Nelson v. Follette, 430 F.2d 1055, 1057 (2d Cir. 1970), *cert. denied*, 401 U.S. 917 (1971).

[151] The possibility of the jury drawing inferences does not alone make the statement "powerfully incriminating." *See* United States v. Wingate, 520 F.2d 309 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976); United States v. Mulligan, 488 F.2d 732 (9th Cir. 1973); Nelson v. Follette, 430 F.2d 1055 (2d Cir. 1970).

In discussing whether confrontation clause rights were violated by a redacted statement admitted at trial, the Third Circuit stated in United States v. Alvarez, 519 F.2d 1052 (3d Cir.), *cert. denied*, 423 U.S. 914 (1975):

> Whenever the redacted confession of a co-defendant is introduced at a joint trial, there is some danger of prejudice to the other defendants. In some cases this will arise simply as a matter of guilt by association; in others . . . the redacted confession will tend to corroborate other evidence in the Government's case.

Id. at 1054. Testimony, however, cannot be held to be "powerfully incriminating" simply because the jury may infer the nondeclarant's guilt through association or corroborative evidence. *See also* United States v. Trudo, 449 F.2d 649, 653 (2d Cir. 1971), *cert. denied*, 405 U.S. 926 (1972).

[152] *See* United States v. Alvarez, 519 F.2d 1052, 1053 (3d Cir.), *cert. denied*, 423 U.S. 914 (1975).

[153] *See* Nelson v. Follette, 430 F.2d 1055, 1058 (2d Cir. 1970), *cert. denied*, 401 U.S. 917 (1971); notes 119–21 *supra* and accompanying text.

The clearly admissible evidence against Belle, although circumstantial, was not insignificant. Belle and Munford were driving a car owned by a known drug trafficker who frequently delivered narcotics to the Philadelphia area; a search of the car produced a piece of paper signed by the owner giving Belle and Munford permission to use the car; Munford was arrested while unloading heroin from the car he and Belle had driven from California; Belle and Munford drove to a parking lot, where Belle stepped out of the car and signalled to the occupant of another car to follow them; the driver of the other car was Roberts, also a known drug dealer; after traveling a distance, Belle joined Roberts in the latter's car; when arrested, Roberts was carrying $1,300 and Belle gave an incredible accounting of his presence with Roberts; Belle denied knowing Roberts, but it was shown that a phone call was made from his hotel room to Roberts' home. In light of this evidence, the testimony which neither named Belle nor referred to the presence of an accomplice was not vital to the government's case.[154]

It is conceivable that a harmless error test could have been applied by the court in its analysis since the facts were, if not overwhelming, strongly against Belle. Unlike the testimony in other harmless error cases, however, Munford's statement did not implicate Belle by naming or otherwise identifying him.[155] Thus, while the evidence might support such an analysis and holding, there was no need for the court to found its decision on the test because Belle was not implicated strongly enough in Munford's statement for admission of the statement to constitute error.[156]

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[154] 593 F.2d at 497.

In United States v. Dady, 536 F.2d 675 (6th Cir. 1976), one codefendant admitted to going to a bank with the intent to rob it. The declarant's confession did not name the other two codefendants, but other evidence showed that they had accompanied the declarant on other occasions to "case" the bank. Since the declarant confessed his intent to rob the bank, the jury could reasonably infer that the codefendants had the same intent. The court held that any inference that the codefendants planned to rob the bank arose from independent evidence showing that they had accompanied the declarant previously and had discussed and planned the crime with him; "[n]one of [that] evidence came from the confession" and, therefore, the confession was not "powerfully incriminating." *Id.* at 678.

Munford admitted that he had conducted drug transactions with Roberts before, but his statement did not implicate Belle. Other independent evidence permitted the jury to infer that Belle was involved in the same drug transaction as Munford; but Munford's admission did not provide this evidence. The rationale in *Dady* readily applies to *Belle*.

[155] *E.g.*, Brown v. United States, 411 U.S. 223 (1973) (in light of overwhelming evidence, *Bruton* violation did not require reversal but constituted harmless error); Schneble v. Florida, 405 U.S. 427 (1972); Harrington v. California, 395 U.S. 250 (1969); United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

[156] For a discussion of harmless error, see notes 105–16 *supra* and accompanying text. Although the harmless error cases involved circumstances where the evidence, independent of the

The majority and dissent also disagreed on the issue of reliability. The majority held that Munford's testimony did not shift the blame to anyone else; the dissent viewed the statement as a shift of blame to Roberts. A third interpretation, a compromise between the majority and dissenting opinions, is equally plausible. This analysis views the statement not as a shifting, but rather a sharing of blame. Munford's claim that he dealt previously with Roberts unquestionably inculpated Roberts. Yet Munford did not minimize his own participation in the crime or in the earlier transactions. Munford did not attempt to excuse his personal involvement, but merely included the name of his contact in this and prior transactions. Furthermore, the veracity of his claim could have been tested by calling Roberts as a witness.[157] The dissent accurately emphasized that testimony given while in police custody is inherently suspicious and subject to judicial scrutiny. Even in the absence of coercion, a person "caught-in-the-act" might be inclined to speak up, and in the process shift the blame away from himself. Nonetheless, the reliability here was attested to by the factors discussed above, and was also against Munford's penal interest in that it clearly implicated him in this and other previous drug transactions.[158] The reliability, while not beyond all challenge, is amply supported.

In *Bruton* the United States Supreme Court held that "powerfully incriminating" evidence, in the form of a codefendant's extrajudicial statement, admitted without cross-examination, presents a risk to the nondeclarant so severe that limiting instructions to the jury cannot assure the defendant adequate protection. The *Bruton* Court recognized, however, that "[n]ot every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions."[159] The circuit courts have held that to be "powerfully incriminating" or "clearly inculpatory" the hearsay statement must name or otherwise identify the nondeclarant codefendant; where it does not do so, instructions to the

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contested statement, was found to be overwhelming, the errors being considered were clearly inculpatory statements in which the nondeclarant codefendants were named or identified. Because Belle was not clearly inculpated there was no need to balance error against independently overwhelming evidence in a harmless error analysis.

[157] Roberts could have been called to testify whether he and Munford had met previously for the purpose of transferring drugs. Roberts could also have testified to the presence of Belle in those prior transactions and, more importantly, in the attempted transaction in this case.

See generally United States v. Trudo, 449 F.2d 649, 653 (2d Cir. 1971), *cert. denied*, 405 U.S. 926 (1972).

[158] *See* Chambers v. Mississippi, 410 U.S. 284, 300–01 (1972); Dutton v. Evans, 400 U.S. 74 (1970).

[159] 391 U.S. at 135.

jury provide a sufficient safeguard. Thus, while the confrontation clause guarantees a defendant the right to confront his accusers, when admitted testimony does not directly implicate the defendant, confrontation rights are not infringed by the absence of cross-examination. This is the interpretation accepted by the majority in *Belle*. In *Belle* the court has refused to extend the *Bruton* rule to include linkage testimony when the testimony does not shift the blame to the codefendant but only permits a jury to infer the codefendant's involvement in the crime when viewed in the light of other clearly admissible evidence. To hold otherwise would be an unwarranted extension of the confrontation clause and would reveal an unjustified distrust of the jury system.

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