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Parker v. Randolph: The Right of Confrontation and the Interlocking Confessions Doctrine

By Harvey John Lung*

The sixth amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." The significance of this right is that it guarantees a criminal defendant the opportunity to cross-examine any witness who testifies against him or her. Cross-examination allows the defendant to challenge the truth and the credibility of a witness' testimony and permits the jury to observe the demeanor of the witness while on the stand. The right of confrontation traditionally has been afforded great protection by the United States Supreme Court.

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1. U.S. Const. amend. VI states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."


3. Cross-examination has been described as "the greatest legal engine ever invented for the discovery of truth." 5 Wigmore, supra note 2, § 1367.

4. "Confrontation also involves a subordinate and incidental advantage, namely, the observation by the tribunal of the witness' demeanor on the stand, as a minor means of judging the value of his testimony. But this minor advantage is not regarded as essential, i.e. it may be dispensed with when it is not feasible." Id. § 1365.

5. See, e.g., Davis v. Alaska, 415 U.S. 308 (1974) (disclosure of witness' juvenile record deemed to be outweighed by the right of confrontation); Chambers v. Mississippi, 410 U.S.

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Pointer v. Texas, the Court held that the right of confrontation is a "fundamental right" made binding upon the states through the fourteenth amendment. The failure to allow a criminal defendant the opportunity to cross-examine an adverse witness is therefore a denial of due process of law.

The holding in Pointer was applied in Douglas v. Alabama, decided the same day as Pointer. Douglas reversed a state court conviction holding that the introduction of an accomplice's confession implicating the defendant was in violation of the defendant's right of confrontation because the defendant was not afforded the opportunity to cross-examine the witness against him.

284 (1973) (state "voucher" rule prohibiting defendant from cross-examining his own witness for impeachment purposes held to be a violation of the sixth amendment confrontation clause); Barber v. Page, 390 U.S. 719 (1968) (introduction of a witness' transcript from a preliminary hearing without a good-faith showing of unavailability was a denial of defendant's right of confrontation even though he had the opportunity to cross-examine the witness at the preliminary hearing); Smith v. Illinois, 390 U.S. 129 (1968) (right of confrontation violated where defendant not permitted to ask the witness his real name and where he was residing at the time of trial); Douglas v. Alabama, 380 U.S. 415 (1965) (right of confrontation denied when defendant's accomplice refused to answer questions—claiming the privilege against self-incrimination—and his confession was read to the court under the guise of refreshing the witness' memory); Pointer v. Texas, 380 U.S. 400 (1965) (right of confrontation denied when witness' transcript from a preliminary hearing was introduced into evidence at trial and defendant did not cross-examine the witness at the preliminary hearing).

See generally McCormick, supra note 2, at § 19; 5 Wigmore, supra note 2, at §§ 1390-1394. Although the confrontation clause is expressly applicable to criminal prosecutions, its basic principles are so important to the rights and freedoms of an individual that it has been extended to non-criminal cases as well. See, e.g., Wilner v. Committee on Character and Fitness, 373 U.S. 96 (1963); Greene v. McElroy, 360 U.S. 474 (1959).


7. Id. at 405. In the opinion for the Court, Justice Black wrote: "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." Id. See generally Mishkin, The Supreme Court, 1964 Term, 79 Harv. L. Rev. 56, 144 (1965); Smith, Criminal Law—Sixth Amendment Right of Confrontation—Obligatory in State Proceedings, 6 Washburn L.J. 171 (1966); Note, Due Process—Accused's Right to Confront Witness Against Him is Obligatory on States—Pointer v. Texas (United States Supreme Court, 1965), 30 Alb. L. Rev. 151 (1966); Note, Right of Confrontation Applied to the States, 19 U. Miami L. Rev. 500 (1965); Note, Confrontation and the Hearsay Rule, 75 Yale L.J. 1434 (1966).


9. For purposes of this Note, the term "accomplice" refers to multiple defendants tried in separate trials, while the term "co-defendant" refers to multiple defendants tried in a joint trial. See note 12 infra.

10. 380 U.S. at 416-17. The prosecution called an accomplice of the defendant to the
Reversing the defendant's conviction was required because of the prejudicial effect that the accomplice's confession might have had on the jury where the defendant had not been allowed, through cross-examination of the witness, "to test the truth of the statement itself."11

A situation analogous to that presented in Douglas is that of a joint trial12 in which a codefendant's13 confession implicating the defendant is introduced at trial although the codefendant does not testify in person. In Bruton v. United States,14 the Court held that the admission of a codefendant's confession under circumstances in which the codefendant is beyond the reach of the defendant's cross-examination violated the defendant's right of confrontation, despite cautionary instructions to the jury to disregard the confession except as against its maker.15 Thus, any extrajudicial statement made by a codefendant which implicated another defendant had to be excluded if the defendant was not afforded the opportunity to cross-examine the codefendant.

The Bruton rule was subsequently limited by the Supreme Court's harmless error rule in Harrington v. California.16 In Harrington the Court established that in the event of a Bruton error, an appellate court is required to determine whether the constitutional violation was rendered harmless by other circumstances. If

11. Id. at 420.
12. See Fed. R. Crim. P. 8. Subsection (b) of the rule states: "Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count." "The purpose of Rule 8(b) is to balance the need to avoid the potential prejudice that may result from joining multiple defendants with the need to attain trial efficiency." United States v. Adams, 581 F.2d 193, 197 (9th Cir.), cert. denied, 439 U.S. 1006 (1978). See generally Orfield, A Note on Joinder of Offenses, 41 Ore. L. Rev. 128 (1962); Note, Joiner of Defendants in Criminal Prosecutions, 42 N.Y.U. L. Rev. 513 (1967); Note, Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure, 74 Yale L.J. 553 (1965).
13. See note 9 supra.
15. Id. at 126.
the error is found to be harmless, the conviction must be upheld. If the error is not considered harmless, reversal is required.

In the recent case of *Parker v. Randolph*, a plurality of the Supreme Court held that if a defendant's confession "interlocks" with a codefendant's confession, the admission into evidence of the codefendant's statement does not violate the right of confrontation so long as a limiting instruction is given to the jury. The plurality departs from the established *Bruton*-harmless error analysis by establishing a rigid per se rule in those cases in which a defendant has made an interlocking confession. Four members of the Court rejected the interlocking confessions doctrine, however, thereby leaving the Court evenly divided as to which of the two rationales, the *Bruton*-harmless error approach or the interlocking confessions doctrine, is applicable in interlocking confession cases.

The purpose of this Note is to determine whether the United States Supreme Court in its recent decision in *Parker*, adequately protects each codefendant's right of confrontation. The Note initially sets forth the rationale of *Bruton*, which established the ineffectiveness of limiting instructions in safeguarding codefendant confrontation rights, and discusses the application of the harmless error rule to codefendant confession cases prior to *Parker*. The origin of the interlocking confessions doctrine and the divergent approaches within the circuits which led to the granting of certiorari in *Parker* then are traced. Next, the Note analyzes the *Parker* plurality's holding that the introduction of interlocking confessions is nonviolent of the constitutional right of confrontation.

Finally, the Note concludes that there is little justification for the *Parker* plurality's departure from the *Bruton*-harmless error approach in deciding interlocking confession cases. The plurality's reasoning is not only erroneous, but proposes a per se approach which may prove to be difficult and unfair in its application. Be-

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19. See notes 60-67 & accompanying text infra.

20. For purposes of this Note, the "*Bruton*-harmless error approach" refers to the method of review used by appellate courts in deciding codefendant confession cases prior to the adoption by some courts of the interlocking confessions doctrine. See notes 52-58 & accompanying text infra.
cause the Court is evenly divided on the issue, with four members adopting the interlocking confessions doctrine and four members upholding the Bruton-harmless error approach, lower courts may continue to apply either rationale in deciding codefendant confession cases, including those in which interlocking confessions have been made. This Note finds the harmless error approach preferable because it strictly protects a defendant’s confrontation rights, except where a violation is harmless beyond a reasonable doubt.

The Bruton Rule

The “Bruton rule” was established in Bruton v. United States, in which the Supreme Court overruled Delli Paoli v. United States, and with it, the validity of using limiting instructions as a means of protecting a defendant’s confrontation rights. In Delli Paoli, five defendants were charged with conspiring to sell alcohol unlawfully. At a joint trial, the confession of one of the defendants, implicating the other codefendants in the crime charged, was introduced into evidence with limiting instructions to the jury to consider the confession only against the confessor. None of the defendants took the stand, and all were subsequently convicted; one defendant appealed.

The Court in Delli Paoli considered whether the limiting instructions of the trial court were adequate to protect the appellant’s confrontation rights although he had not been afforded the

23. 391 U.S. at 126.
24. 352 U.S. at 233-34. The confession was not admissible against any codefendant because of the hearsay rule. See McCormick, supra note 2, §§ 244-253; 8 Moore's Federal Practice § 14.04[2] (2d ed. 1979); 5 Wigmore, supra note 2, §§ 1360-1365. Nor was the confession admissible against any codefendant under the coconspirator exception to the hearsay rule. The Court in Delli Paoli stated: “[A] declaration made by one conspirator, in furtherance of a conspiracy and prior to its termination, may be used against the other conspirators. However, when such a declaration is made by a conspirator after the termination of the conspiracy, it may be used only against the declarant and under appropriate instructions to the jury.” 352 U.S. at 237. See also Krulewitch v. United States, 336 U.S. 440 (1949); Fiswick v. United States, 329 U.S. 211 (1946). The confession was admissible, however, against the confessor under the admissions exception to the hearsay rule. See generally McCormick, supra note 2, § 262; 5 Wigmore supra note 2, §§ 1048-1050; Morgan, Admissions as an Exception to the Hearsay Rule, 30 Yale L.J. 355 (1921).
25. 352 U.S. at 233.
opportunity to cross-examine the confessing codefendant. The test
the Court applied was "whether the instructions were sufficiently
clear and whether it was reasonably possible for the jury to follow
them." In finding that the admission of the codefendant's confes-
sion did not constitute reversible error, the Court determined that
the instructions had indeed been clear and that the jury had been
capable of understanding and following them. Despite the Court's
conclusion, however, its position that the defendant's confronta-
tion rights had not been violated was somewhat weakened by its
own acknowledgement that, exclusive of the confession, there had
been sufficient evidence against the defendant.

Delli Paoli was a reaffirmation of the belief that jury members
are capable of following the instructions of a judge and of dis-
missing from their minds any prejudicial matter against a defen-
dant when considering the defendant's guilt or innocence. The
Court expressly noted: "Unless we proceed on the basis that the
jury will follow the court's instructions where those instructions
are clear and the circumstances are such that the jury can reasona-
ably be expected to follow them, the jury system makes little
sense."

Delli Paoli's dissent, however, is a biting attack on this "basic
premise" of the jury system:
The fact of the matter is that too often such admonition

26. Id. at 239.
27. Id. at 240-41. In Delli Paoli, the standard established for determining whether the
jury was capable of following the trial court's limiting instructions included: (1) whether the
nature of the crime and the role of each defendant was easily understood; (2) whether the
interest of each defendant was repeatedly emphasized by the court throughout the trial; (3)
whether the codefendant's confession was introduced at the end of the trial in order to
separate it from the rest of the testimony; (4) whether the confession itself merely corrobo-
rated the evidence against the multiple defendants; and (5) whether there was anything in
the record to indicate that the jury was not able to follow the cautionary instructions. Id. at
241-42.
28. The Court stated: "In considering the admissibility of the . . . confession, we start
with the premise that the other evidence against petitioner was sufficient to sustain his
conviction." Id. at 236. The Court implied that even if the jury had not followed the trial
court's instructions, the conviction would still have been upheld. The Supreme Court was
not fashioning a harmless error rule, however, and would not do so until Chapman v. Cali-
ifornia, 386 U.S. 18 (1967), ten years later. See notes 52-58 & accompanying text infra. Pre-
sumably the Court in Delli Paoli drew attention to the other evidence against the defendant
in order to strengthen and to justify its position that a jury is capable of following limiting
instructions. See also 8 Moore's FEDERAL PRACTICE § 14.04[2], at 14-59 n.2 (2d ed. 1979).
29. See also Marcus, supra note 22, at 565-66.
30. 352 U.S. at 242.
against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell.

Following Delli Paoli, both state and federal lower courts expressed the view that limiting instructions could not be assumed as always adequate to protect a criminal defendant's confrontation rights. An indication that the Supreme Court itself was moving away from the holding in Delli Paoli can be seen in the case of Jackson v. Denno. Jackson involved a New York state procedure whereby the jury was required to determine the voluntariness of a defendant's confession as well as his or her guilt. The Court struck down the procedure on the grounds that the jury could not determine a confession to have been involuntary and at the same time perform the mental exercise of disregarding its contents against the accused. Although Jackson was concerned with the voluntariness of a confession, it reflected the Supreme Court's shift in view away from the effectiveness of limiting instructions as a means of safeguarding sixth amendment confrontation rights.

31. Id. at 246. Most commentators also were critical of the Delli Paoli decision. See, e.g., Comment, Post-conspiracy Admissions in Joint Prosecutions—Effectiveness of Instructions Limiting the Use of Evidence to One Co-defendant, 24 U. Chi. L. Rev. 710 (1957); Note, Joinder of Defendants in Criminal Prosecutions, 42 N.Y.U.L. Rev. 513, 520-25 (1967). But see Note, Developments in the Law-Criminal Conspiracy, 72 Harv. L. Rev. 920, 990 (1959) (stating that the view taken in Delli Paoli is preferable because “it recognizes the necessity of weighing the declarant’s interest in admitting the confession in a joint trial against the policy of avoiding prejudice to codefendants”).


33. 378 U.S. 368 (1964). When the Court finally overruled Delli Paoli in Bruton, it cited the Jackson decision as the initial step in repudiating the assumption that limiting instructions were adequate to protect a defendant's right of confrontation. 391 U.S. at 128.

34. 378 U.S. at 398-99.

35. In a California case examining the effectiveness of limiting instructions in codefendant situations, Chief Justice Traynor referred to the Jackson decision: "if it is a denial of due process to rely on a jury's presumed ability to disregard an involuntary confession, it may also be a denial of due process to rely on a jury's presumed ability to disregard a codefendant's confession implicating another defendant when it is determining that defendant's guilt or innocence . . . ."

"In joint trials . . . [a] jury cannot 'segregate evidence into separate intellectual boxes' . . . . It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A." People v. Aranda, 63 Cal. 2d 518,
In *Bruton v. United States*, the Court reconsidered the issue of whether limiting instructions in joint trials sufficiently protected a defendant’s confrontation rights and overruled *Delli Paoli*. In *Bruton*, defendants Bruton and Evans were convicted at a joint trial of armed postal robbery. A postal inspector who had interrogated Evans testified that Evans had confessed and had implicated Bruton in the robbery. The trial court issued instructions to the jury to consider the confession only against Evans.

The Supreme Court reversed Bruton’s conviction, holding that “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 support of its decision, the Court reemphasized the importance of the constitutional right given to criminal defendants to cross-examine witnesses and noted the significant body of case law reflecting disapproval of the *Delli Paoli* assumptions.

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37. Both defendants appealed, and the Court of Appeals for the Eighth Circuit reversed as to Evans on the grounds that his oral confession should not have been introduced into evidence against him. 391 U.S. at 124. The oral confession of Evans was obtained without prior warnings and without counsel as required under *Miranda v. Arizona*, 384 U.S. 436 (1966), and thus had to be excluded. 391 U.S. at 124 n.1. Bruton’s conviction was affirmed, however, because the circuit court relied on the holding in *Delli Paoli* that a judge’s instruction to the jury to disregard inadmissible hearsay evidence against Bruton was adequate to protect him from any possible prejudicial effects of Evans’ confession. *Id.* at 124-25. *See notes* 27-30 & accompanying text *supra*.


39. 391 U.S. at 126-27. *See notes* 1-10 & accompanying text *supra*.

40. 391 U.S. at 128-31. *See notes* 32-35 & accompanying text *supra*. The Court in *Bruton* also cited Rule 14 of the Federal Rules of Criminal Procedure as being in accordance with its decision. 391 U.S. at 131-32. Rule 14 states: “If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attor-
The Court in *Bruton* successfully challenged three major arguments which had supported the Court's prior position in *Delli Paoli*: (1) that the admission of a codefendant's confession without the opportunity of cross-examination but with limiting instructions from the trial judge is in furtherance of the truth-determining process; (2) that joint trials provide for numerous economic and judicial benefits which should not be discarded by the requirement of separate trials; and (3) that unless there is faith that the jury can and will follow instructions from a judge, the integrity of the jury as a deliberative and truth-determining body is called into question.41

First, the Court held that although the admission of a codefendant's confession, subject to limiting instructions, might be of benefit in the truth-determining process, "it overlooks alternative ways of achieving that benefit without at the same time infringing the nonconfessor's right of confrontation. Where viable alternatives do exist, it is deceptive to rely on the pursuit of truth to defend a clearly harmful practice."42

ney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial." Fed. R. Crim. P. 14 (1980). Commenting on the purpose of the rule, the Advisory Committee stated: "A defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice . . . ." Id. Rule 14 is therefore a protective measure, within the discretion of the court, designed to safeguard a defendant in a joint trial from the prejudicial effects of a codefendant's confession or statement. Id. See generally 8 Moore's Federal Practice §§ 14.01-05 (2d ed. 1979).

41. 391 U.S. at 132-36. See notes 22-23 & accompanying text supra.

42. 391 U.S. at 133-34 (footnote omitted). The Court does not specify what these "viable alternatives" might be. In a footnote, the Court does mention the process of redaction—deleting all references in a confession to codefendants—but also seems to imply that this technique is ineffective as a safeguard to a defendant's confrontation rights. Id. at 134 n.10. See generally Comment, supra note 38, at 757-58; Note, Codefendants' Confessions, 3 Colum. J.L. & Soc. Prob. 80, 88-99 (1967); Comment, Post-conspiracy Admissions in Joint Prosecutions—Effectiveness of Instructions Limiting the Use of Evidence to One Co-defendant, 24 U. Chi. L. Rev. 710, 713 (1957); Note, Joiner of Defendants in Criminal Prosecutions, 42 N.Y.U. L. Rev. 513, 523-25 (1967). Other courts and commentators have suggested various alternatives. See, e.g., United States v. Sidman, 470 F.2d 1158, 1167-70 (9th Cir. 1972), cert. denied, 409 U.S. 1127 (1973) (the Ninth Circuit, although not endorsing any scheme, upheld the use of two juries in a joint trial to avoid a *Bruton* problem); United States v. Delli Paoli, 229 F.2d 319, 324 (2d Cir. 1956), aff'd, 352 U.S. 232 (1957) (Judge Frank, dissenting, proposed a "sever or exclude" rule); People v. Aranda, 63 Cal. 2d 518, 530-31, 407 P.2d 265, 272-73, 47 Cal. Rptr. 353, 360-61 (1965) (Chief Justice Traynor proposed a test similar to that of Judge Frank); Note, Codefendants' Confessions, 3 Colum. J.L. & Soc. Probs. 80, 92-93 (1967) (proposal for a modified joint trial); Note, The Admission
Second, the Court defended against the contention that the Bruton rule would necessarily create a greater number of severances in joint trials. The Court agreed that joint trials did "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial"; however, it also stated that to permit the judicial procedure advocated in Delli Paoli would be to "secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high." The Court therefore held that the constitutional rights of confrontation and due process of law clearly outweighed considerations of judicial economy.

Third, in answer to the Delli Paoli argument that to rule out the use of limiting instructions in joint trials would be to undermine the very basis of the jury system, the Court in Bruton stated:

Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently . . . . It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information. Nevertheless . . . there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.


If the prosecution in a joint trial requires the introduction of a codefendant's confession in order to prove its case against that codefendant, then under Bruton the joint trial, in some situations, would have to be severed in order to protect other codefendants from being prejudiced by such an admission. There are, however, alternatives to severing a joint trial. See note 37 supra.

43. 391 U.S. at 134.

44. Id. at 135 (citing People v. Fisher, 249 N.Y. 419, 432, 164 N.E. 336, 341 (1928)). See generally Note, Codefendants' Confessions, 3 COLUM. J.L. & Soc. PROB. 80, 91-92 (1967) (suggesting that a "sever or exclude" policy would not necessarily cause the judicial system to incur as significant an expense in time and money as might be believed). See also Singer, Admissibility of Confession of Codefendant, 60 J. CRIM. L.C. & P.S. 195, 199 (1969).

46. 391 U.S. at 135. Cf. Singer, Admissibility of Confession of Codefendant, 60 J. CRIM. L.C. & P.S. 195, 200 (1969) ("[i]f the jury is the conscience of the community, relying on its extra-legal experience, perceptions, and common sense, then, necessarily, it sometimes
The Court therefore recognized a limited capacity of the jury to follow the instructions of the trial court regarding the significance of criminal confessions. To extend beyond that limited capacity would be to subject the defense of a criminal defendant to harmful evidence without an opportunity to test the truth of that evidence through cross-examination.

The final rationale given by the Court in overturning Delli Paoli was based upon the very nature of codefendants' confessions. The Court recognized that codefendants often will attempt to shift the blame for a crime to others. Thus a codefendant's confession should always be admitted with caution and with the knowledge that the statement may lack substantial reliability. The Court stated that where the confessor has not been cross-examined, the "unreliability of such evidence is intolerably compounded," and implied that the risk that such unconfronted, uncontroverted evidence by a codefendant would influence the jurors when considering the guilt of a defendant is very great. The Court therefore concluded that a limiting instruction was not an adequate substitute for a defendant's constitutional right of cross-examination and that the effect was "the same as if there had been no instruction at all."

The Harmless Error Rule

In Chapman v. California, the Court held that "there may 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." Chapman established

will act outside its narrow legal role but still within the bounds of justice”).

47. But see note 59 & accompanying text infra.
48. 391 U.S. at 136.
49. See notes 107-13 & accompanying text infra.
50. 391 U.S. at 136.
51. Id. at 137.
52. 386 U.S. 18 (1967).
53. Id. at 22. The Court in Chapman relied upon a test established in Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963). "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 386 U.S. at 23. In other words, if the damaging evidence were at all likely to enter into the consideration of the verdict by the jury, then the error would not be harmless and reversal would be necessary.
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."\textsuperscript{54}

The harmless error rule was applied to a codefendant confession situation in \textit{Harrington v. California}.\textsuperscript{55} In a joint trial, defendant Harrington and three codefendants were convicted of attempted robbery and first-degree murder under California's felony murder rule. Each of the three codefendants confessed to the crime, and the confessions were introduced at trial with limiting instructions from the trial judge to consider the confessions only against each respective confessor. One codefendant took the stand, and Harrington had the opportunity to cross-examine him. However, the other two codefendants did not testify. All of the defendants were subsequently convicted.\textsuperscript{56}

The Supreme Court upheld Harrington's conviction, holding that the confessions were merely "cumulative" evidence against him, and that even exclusive of the confessions, "the case against Harrington was so overwhelming that we conclude that this violation of \textit{Bruton} was harmless beyond a reasonable doubt . . . ."\textsuperscript{57} Thus, under \textit{Harrington}, the admission of a defendant's confession implicating codefendants is not always grounds for reversing a conviction as proposed in \textit{Bruton}. As long as other evidence intro-
duced at trial is so overwhelming as to be sufficient to convict a defendant, any Bruton error is considered harmless.58

**Breaking Away From Bruton and Harrington**

Although Bruton was highly critical of the use of limiting instructions as a means of protecting a defendant’s right of cross-examination, the Court refused to make its prohibition absolute. Rather, it conceded that there are “many circumstances” in which the jury could be relied upon to follow the instructions of the trial judge.59

Following Bruton, various exceptions restricting either the applicability or the scope of the Bruton rule were developed by the lower courts as well as by the Supreme Court.60 One such exception was established in cases where a defendant personally confesses, and the confession is introduced into evidence along with those of codefendants. The justification for distinguishing Bruton in this situation is based on the claim that any prejudicial effects from a codefendant’s confession are insignificant because the defendant has confessed to the crime charged. This is the “interlocking confessions” doctrine,61 and it was first developed by the Sec-

59. 391 U.S. at 135. The Court, however, did not suggest what these “circumstances” might be.
60. See Note, The Second Circuit’s Exceptions To Bruton v. United States: The Need for a Reexamination, 29 SYRACUSE L. REV. 793 (1978) [hereinafter cited as Note]. The Supreme Court fashioned several exceptions of its own. See, e.g., Nelson v. O’Neil, 402 U.S. 622, 626-30 (1971) (the admission of an extrajudicial statement made by a codefendant, with limiting instructions, was held not to be a violation of Bruton where the codefendant took the stand and denied having made the statement which implicated the defendant, even though there could have been no effective cross-examination of the statement itself unless the codefendant had affirmed the statement as his); Dutton v. Evans, 400 U.S. 74 (1970) (the introduction of an accomplice’s out of court statement in a separate trial which implicated the defendant was held to be neither a violation of the sixth amendment right of confrontation nor of Bruton, because under state law hearsay evidence made during the concealment phase of a conspiracy is admissible and because the witness who introduced the statement was subject to cross-examination); Frazier v. Cupp, 394 U.S. 731, 733-37 (1969) (the introduction of a codefendant’s expected testimony by defense counsel during his opening statement, cautioned with limiting instructions, was not deemed a violation of Bruton even though the codefendant did not subsequently take the witness stand for direct or cross-examination). See generally 76 DIC. L. REV. 354 (1972); Note, The Admission of A Codefendant’s Confession After Bruton v. United States: The Questions and a Proposal for their Resolution, 1970 DUKES L.J. 329, 336-44 (1970); Comment, supra note 38, at 765, 768-76.
61. See also Marcus, supra note 22, at 580-81.
The Second Circuit held Bruton inapplicable, distinguishing Catanzaro on the fact that the defendant in Bruton had not made a confession. “Where the jury has heard not only a codefendant’s confession but the defendant’s own confession no such ‘devastating’ risk attends the lack of confrontation as was thought to be involved in Bruton.” The rationale of the Second Circuit was that the risk of harm to a defendant, resulting from an inability to cross-examine a codefendant whose confession inculpates the defendant, was not likely to be so damaging or influential upon the jury where a defendant had confessed as well.

In holding Bruton inapplicable, Catanzaro is significant not only for creating an exception to the Bruton rule but for breaking with the harmless error approach established in Harrington. Instead of considering whether the other evidence presented at the trial was “so overwhelming” that the admission of the codefendant’s confession would have constituted harmless error, the Second Circuit chose to create a new rule, holding that any resulting prejudice would not affect the jury’s determination because the defendant’s own confession was also squarely before them.

62. 404 F.2d 296 (2d Cir. 1968), cert. denied, 397 U.S. 942 (1970). At a joint trial, defendant Catanzaro and two codefendants were convicted of first-degree murder during the robbery of a United Parcel Service truck. 404 F.2d at 298-99. Incriminating statements made by Catanzaro to the police were introduced at trial, along with the confession of one of the codefendants which also implicated Catanzaro in the crime. Id. at 299-300. On appeal, the defendant claimed that the admission of his codefendant’s confession was in violation of Bruton. Catanzaro applied for a writ of habeas corpus on two separate occasions. The first was on the grounds that (1) his confessions had been made involuntarily, (2) his hotel room had been illegally searched, and (3) one of the prosecution’s key witnesses had perjured himself. Id. at 297. The second writ was based on a claim that the joint trial was a denial of the right to a fair trial. Id. at 298. Both writs were denied and appealed. See Note, supra note 60, at 803.

63. 404 F.2d at 300.

64. Id. “The basic premise of the interlocking confession doctrine is that when confessions coincide on vital points, the confession of a nontestifying codefendant can add nothing to what is already in evidence.” Note, supra note 60 at 793, 804.

65. See notes 52-58 & accompanying text supra.

66. Indeed, had the Second Circuit applied Bruton and Harrington, the court might have been unable to find the other evidence against Catanzaro to be “overwhelming.” If Catanzaro’s confession had been found to be involuntary, as he asserted, and if the codefendant’s confession had been excluded under Bruton, then the prosecution’s case would have rested primarily on the testimony of an eyewitness whose credibility was substantially lacking (the eyewitness had been convicted three times for theft and robbery, had given inconsistent accounts of the crime, and had perjured himself on the stand). 404 F.2d at 300. The results under Bruton and Harrington thus might have differed substantially.
the Second Circuit failed to do, however, was to define exactly what an interlocking confession is and when the doctrine is to apply. 

Although several cases adopted the interlocking confessions doctrine in codefendant confession cases, other courts chose to follow the path the Supreme Court had established in *Bruton* and *Harrington*. The Sixth Circuit in *Hodges v. Rose* expressly rejected the interlocking confessions doctrine stating:

> We . . . reject the notion . . . that [codefendants'] statements might both be admissible because they "interlock" or agree on important parts of the crime. Although this view has been

67. See notes 117-23 & accompanying text infra.


69. 570 F.2d 645 (6th Cir. 1978). At a joint trial defendants Hodges and Lewis were convicted of murder in the perpetration of rape. Both defendants made written confessions as to the rape, but each blamed the other for beating the victim and causing her death. *Id.* at 645. Both confessions were redacted and introduced at the trial. See note 34 supra. In this case, the redaction was effectuated by inserting blanks where mention of a codefendant was made. 570 F.2d at 645. The court noted that a *Bruton* error could be "avoided in some cases by eliminating from the extrajudicial statement all references to defendants other than the declarant, and properly cautioning the jury against use of the statement in determining the guilt of those defendants." *Id.* at 646 (citing United States v. Hicks, 524 F.2d 1001 (5th Cir. 1975), cert. denied, 428 U.S. 953 (1976); United States v. Wingate, 520 F.2d 309 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976); United States v. Alvarez, 519 F.2d 1082 (3d Cir.), cert. denied, 423 U.S. 914 (1975); United States v. English, 501 F.2d 1254 (7th Cir. 1974), cert. denied, 419 U.S. 1114 (1975)). Lewis took the witness stand in his own defense, but Hodges did not testify. Thus Lewis had no opportunity to cross-examine him as to the incriminating written statement. Limiting instructions were given by the trial court directing the jury not to consider the confessions in determining guilt except against the confessor. 570 F.2d at 645.

Both defendants appealed their convictions, claiming denial of their sixth amendment right of confrontation and arguing that the trial court had erred in admitting their confessions. *Id.* Because defendant Lewis had taken the stand, the court for the Sixth Circuit found that no *Bruton* error had occurred as to Hodges, who had full opportunity to cross-examine Lewis. *Id.* at 646. See also Nelson v. O'Neil, 402 U.S. 622, 627-30 (1971). In *Nelson*, the codefendant's incriminating statement was introduced at trial. On the witness stand, however, he denied making the statement and thus could not be cross-examined in regard to it. The Court held that sixth amendment confrontation rights had not been violated. See note 60 supra.

As to Lewis, however, the court found that the redaction deleting his name had been ineffective. Thus there had been a *Bruton* error, regardless of the fact that Lewis' own confession was in evidence—the very distinction upon which the Second Circuit had relied in *Catanzaro*. 570 F.2d at 646-47. See notes 62-67 & accompanying text supra.
We do not think it is consistent with the Bruton rule. The fact that codefendant statements, taken before trial, may agree on certain points does not necessarily vitiate the need for cross-examination.

After rejecting the interlocking confessions doctrine and holding that a Bruton error had occurred, the court in Hodges applied the harmless error test set forth in Harrington v. California. The court in Hodges thus followed the precise rules prescribed by the Supreme Court when confronted with the admission of an incriminating extrajudicial statement. Several other circuits also impliedly rejected the interlocking confessions doctrine by following the harmless error analysis instead.

70. 570 F.2d at 647-48. The court further stated: “In this case, Appellant Lewis took the position at trial that his statement was coercively obtained. He repudiated the statement in his testimony, claiming that he was not near [the scene of the crime] on the night of the murder. Although this testimony was seriously lacking in credibility, it did contradict all of those important points upon which Lewis' and Hodges' extra-judicial statements agreed. Cross-examination of Hodges was thus arguably of importance under Lewis' theory of defense. Certainly the ‘jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place’ on Hodges' statement.” Id. at 648.

71. Id. See notes 52-58 & accompanying text supra. In evaluating the other evidence presented at the trial, exclusive of the codefendant's confession implicating Lewis, the court found that the error was “harmless beyond a reasonable doubt.” 570 F.2d at 648-49.

72. For another case which expressly rejected the interlocking confessions doctrine, see United States v. DiGilio, 538 F.2d 972, 981-83 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977).

73. See, e.g., Hall v. Wolff, 539 F.2d 1146, 1148-49 (8th Cir. 1976); Glinsey v. Parker, 491 F.2d 337, 340-44 (6th Cir.), cert. denied, 417 U.S. 921 (1974); United States v. Brown, 452 F.2d 868 (6th Cir. 1971), aff'd, 411 U.S. 223 (1973); Ignacio v. Guam, 413 F.2d 513, 515-16 (9th Cir. 1969), cert. denied, 397 U.S. 943 (1970); United States ex rel. Johnson v. Yeager, 399 F.2d 508, 510-11 (8th Cir. 1968), cert. denied, 393 U.S. 1027 (1969). Other cases have applied both the interlocking confessions exception and the harmless error approach. These cases have held essentially that even if error was committed in admitting a codefendant's confession under the interlocking confessions doctrine, “additional corroborating evidence may make the error harmless beyond a reasonable doubt.” United States v. Fleming, 594 F.2d 598, 603 (7th Cir.), cert. denied, 442 U.S. 931 (1979). See, e.g., United States v. Walton, 538 F.2d 1348, 1353-54 (8th Cir.), cert. denied, 429 U.S. 1025 (1976); Mack v. Maggio, 538 F.2d 1129, 1130 (5th Cir. 1976); United States v. Spinks, 470 F.2d 64, 65-66 (7th Cir.), cert. denied, 409 U.S. 1011 (1972); Metropolis v. Turner, 437 F.2d 207, 208-09 (10th Cir. 1971); United States ex rel. Dukes v. Wallack, 414 F.2d 246, 247 (2d Cir. 1969).

There has been confusion within the state courts as well. See, e.g., Stewart v. Arkansas, 257 Ark. 753, 519 S.W.2d 733 (1975) (holding Bruton inapplicable and applying the interlocking confessions doctrine); Connecticut v. Oliver, 160 Conn. 85, 273 A.2d 867 (1970) (applying both the harmless error rule and the interlocking confessions doctrine); People v. Rosochacki, 41 Ill. 2d 483, 244 N.E.2d 136 (1969) (applying the harmless error approach); People v. Moll, 26 N.Y.2d 1, 256 N.E.2d 185, 307 N.Y.S.2d 876, cert. denied, 398 U.S. 911 (1970) (applying the harmless error rule, but citing the interlocking confessions doctrine in
sought to resolve this division in various circuits when it granted
certiorari to hear the case of *Parker v. Randolph*.74

**Parker v. Randolph: Turning Back Bruton**

*Parker* involved five defendants tried at a joint trial for mur-
der during the commission of a robbery under Tennessee’s felony
murder rule.75 At the trial, the oral confessions of three of the de-
fendants were admitted into evidence through the testimony of
several police officers; these confessions constituted the basis for
the state’s case against the three.76 Each confession was redacted,
and the jury was instructed to consider each confession only
against the defendant who had made it.77 All of the defendants

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74. 439 U.S. 978 (1978). See also Marcus, supra note 22, at 582. The Supreme Court
had actually been confronted with an interlocking confessions situation in the prior case of
Brown v. United States, 411 U.S. 223 (1973). In that case two defendants were convicted at
a joint trial of “transporting stolen goods and of conspiracy to transport stolen goods in
interstate commerce . . . .” Id. at 224. Both codefendants had made confessions to the police
upon their arrest, and their statements coincided on all material aspects of the crime. Id. at
225. Portions of both confessions, implicating each other in the crime, were introduced at
the trial. The Court of Appeals for the Sixth Circuit held that a Bruton error had occurred
but that other evidence at the trial was so overwhelmingly against the defendants that the
error was harmless. Id. at 226 (relying on Harrington). The case went up to the Supreme
Court on appeal, and instead of deciding the case on the basis of the interlocking confes-
sions doctrine, the Court affirmed the decision of the Sixth Circuit. Brown was distinguished
in Parker, however, “[b]ecause the Solicitor General [in Brown] conceded that the state-
ments were admitted into evidence in violation of Bruton [thus] we had no occasion to
consider the question whether introduction of the interlocking confessions doctrine violated
Bruton.” 442 U.S. at 64 n.5.

75. 442 U.S. at 64. The murder victim, Douglas, a professional gambler, had engaged
in a poker game with defendant Robert Wood. Wood did not know that the game was
played with a marked deck and lost a sum of money to Douglas. Two subsequent games led
to the same result. Suspicious of having been cheated, Robert Wood arranged with his
brother Joe Wood to commit a robbery at the next game. Joe Wood enlisted the services of
defendants Randolph, Pickens, and Hamilton. During the fourth game, before the robbery
could take place, Douglas armed himself with a pistol and a shotgun. Seeing this, Joe Wood
pulled out a weapon, gave it to Robert Wood to hold on Douglas and an accomplice, and
got to call in the other defendants. Before they could arrive, however, Robert Wood shot
and killed Douglas when the latter made a move for his gun. When Joe Wood, Hamilton,
Randolph, and Pickens arrived, the five men took the cash from the game and fled. Id.

76. Id. at 67. An eyewitness to the crime could not positively identify Randolph, Pick-
ens, or Hamilton as the men who had participated in the robbery. Defendant Robert Wood
could only name Hamilton as one of the accomplices. Thus, but for their oral confessions,
the state’s case against the defendants was not very substantial.

77. Id. The Court, however, noted that the redaction had been ineffective, leaving “no
possible doubt in the jurors’ minds concerning the ‘person[s]’ referred to.” Id. at 67 n.3
(quoting Randolph v. Parker, 575 F.2d 1178, 1180 (6th Cir. 1978)).
were convicted of murder in the first degree, and all of them appealed, claiming that the admission of confessions at the trial was a violation of *Bruton.*

In *Parker,* four members of the Supreme Court held that the admission of codefendant confessions where those confessions interlock and are accompanied by a limiting instruction is not a violation of the sixth amendment right of confrontation. They further held that *Bruton* is inapplicable in such situations. Although agreeing with the *Bruton* rationale that a codefendant’s confession could be highly prejudicial to a defendant who has maintained his or her innocence by not confessing, the plurality claimed that a different question is presented where a defendant’s own confession has been offered into evidence.

The incriminating statements of a codefendant will seldom, if ever, be of the “devastating” character referred to in *Bruton* when the incriminated defendant has admitted his own guilt. The right protected by *Bruton*—the “constitutional right of cross-examination”—has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence. Successfully impeaching a codefendant’s confession on cross-examination would likely yield small advantage to the defendant whose own admission of guilt stands before the jury unchallenged.

The plurality justified its decision by looking exclusively to

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78. The Tennessee Court of Criminal Appeals reversed the convictions of Randolph, Hamilton, and Pickens. The court held that the admission of their confessions at trial had violated *Bruton.* 442 U.S. at 67. The Tennessee Supreme Court subsequently reversed and reinstated the convictions, relying on the interlocking confessions exception to *Bruton.* 442 U.S. at 68. The District Court for the Western District of Tennessee granted applications for writs of habeas corpus, holding that the *Bruton* rule had been violated. *Id.* The Sixth Circuit affirmed and commented on the conflict over the interlocking confessions doctrine: “We are fully aware that our rejection of the ‘interlocking’ confession theory underscores a conflict between the . . . Sixth Circuit . . . and the views of the Second Circuit . . . .”

“But in no instance has the Supreme Court overruled *Bruton* or suggested that either identity or greater or lesser similarity of confessions presented by hearsay and without confrontation served to make them admissible . . . . We believe that *Bruton v. United States* is controlling law.” *Randolph v. Parker,* 575 F.2d 1178, 1183 (6th Cir. 1978), *modified,* 442 U.S. 62 (1979). Certiorari was subsequently granted by the Supreme Court. 439 U.S. 978 (1978).

79. 442 U.S. at 75. Although the Supreme Court considered only the *Bruton* issue, other questions also had been raised by the three defendants. The first was whether they could be found guilty of felony murder because they had arrived on the scene after the shooting had taken place. The second was whether a written confession made by Pickens had been a violation of his rights under Miranda *v.* Arizona, 348 U.S. 436 (1966). Both issues were considered satisfactorily resolved by the lower courts. 442 U.S. at 67-68.

80. 442 U.S. at 73.
the character of the defendants' confessions. In the plurality's view, a confession is "‘probably the most probative and damaging evidence that can be admitted’" against a defendant, who is "‘the most knowledgeable and unimpeachable source of information about his past conduct.’"81 The plurality thus proposed that the effect of a defendant's confession upon a jury is so damaging and so persuasive that the admission of any other information would have an insignificant effect on the outcome of the jury's determination.82

The defendant in Parker did not have the opportunity to cross-examine the witness who made a statement inculpating him in the commission of the crime. Nevertheless, the plurality of the Court, in contrast to its prior position in Bruton, held that no violation of the right of confrontation had occurred, because limiting instructions had been given.83 Noting that the primary purpose of cross-examination is to test the truth of an adverse witness' testimony,84 the plurality reasoned that little could be gained by confronting the witness because "[s]uccessfully impeaching a codefendant’s confession would likely yield small advantage to the defendant whose own admission of guilt stands before the jury unchallenged."85 Under the Parker plurality's rationale; if a defendant's confession contains the same facts as a codefendant's confession, no controversy or issue will be raised when the co-defendant's confession also is introduced at trial. The necessity of cross-examination thus is negated. If the confession completely interlocks, the plurality continued, Bruton protective measures to guard against unreliable codefendant confessions would serve little purpose because the reliability of such a confession would be enhanced by a defendant's own corroborative confession.86 Accord-

81. Id. (citing Justice White's dissent in Bruton). "[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. Though itself an out-of-court statement, it is admitted as reliable evidence because it is an admission of guilt by the defendant and constitutes direct evidence of the facts to which it relates. Even the testimony of an eyewitness may be less reliable than the defendant's own confession. An observer may not correctly perceive, understand, or remember the acts of another, but the admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct." 391 U.S. at 139-40.

82. See note 64 supra.
83. 442 U.S. at 75.
84. See notes 1-5 & accompanying text supra.
85. 442 U.S. at 73.
86. Id.
ingly, the danger of a jury being incapable of following limiting instructions and any resulting prejudice to the defendant are neutralized under the *Parker* plurality's rationale; no additional testimony of a codefendant could add to a defendant's self-incrimination.

Four members of the Court rejected the plurality's adoption of the interlocking confessions doctrine. Instead, the dissenting and concurring opinions expressed strict adherence to the *Bruton*-harmless error approach as established prior to *Parker*. According to the dissent:

[P]roper analysis of this case requires that we differentiate between (1) a conclusion that there was no error under the rule of *Bruton v. United States* . . . and (2) a conclusion that even if constitutional error was committed, the possibility that inadmissible evidence contributed to the conviction is so remote that we may characterize the error as harmless.

Contrary to the plurality view, the other members of the Court did not recognize the introduction of a defendant's own confession as significant but instead focused on the lack of opportunity to cross-examine a codefendant who has made an interlocking confession.

The implication of *Parker* is that the Supreme Court has left unresolved the question of which approach—the interlocking confessions doctrine or the *Bruton*-harmless error analysis—is proper for deciding interlocking confessions cases. Because the Supreme Court is evenly divided on the issue, lower courts may continue to utilize either approach.

Several criticisms, however, may be directed at the plurality opinion in *Parker*: (1) a defendant's confession will not always be so reliable and so compelling that the admission of a codefendant's confession would be rendered insignificant; (2) limiting instructions designed to negate any prejudicial effects of a codefendant's confession are not more effective than in a *Bruton* situation simply

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87. Justice Blackmun, although concurring in the result, joined dissenting Justices Stevens, Brennan, and Marshall in rejecting the plurality's adoption of the interlocking confessions doctrine. Justice Powell took no part in the case. *Id.* at 77.

88. *Id.* at 81. Applying the *Bruton*-harmless error analysis to the *Parker* case, Justice Blackmun found that "any *Bruton* error . . . clearly was harmless." Justice Stevens, with Brennan and Marshall joining, deferred to the determinations of the lower courts in finding that there had been a *Bruton* error and that the error was not harmless beyond a reasonable doubt. *Id.* at 82.

89. See notes 59-61 & accompanying text supra. See also Marcus, *supra* note 22, at 584.
because a defendant's own confession has been introduced at trial; (3) an unchallenged, unconfronted confession of a codefendant may be unreliable, resulting in substantial prejudice to a defendant; and (4) \textit{Parker} creates a per se rule whereby the admission at a joint trial of a codefendant's interlocking confession will automatically preclude a court from considering whether a defendant might have been prejudiced by such an admission.

The dissent in \textit{Parker} points out a crucial assumption made by the plurality in support of the interlocking confessions doctrine: that a defendant's own confession is so reliable that the admission of a codefendant's confession would not significantly add to the case against the defendant.\textsuperscript{90} The plurality offers no support for this assumption but implicitly relies on the fact that each codefendant's confession was unchallenged and thus reliable.\textsuperscript{91} Because the plurality proceeds from this assumption, a showing that it is not always true illuminates a significant flaw in the interlocking confessions doctrine.\textsuperscript{92}

\textsuperscript{90}442 U.S. at 84. Rather than offer convincing authority for this assumption, the Court simply gives reference to Justice White's dissent in \textit{Bruton}. See notes 80-82 & accompanying text \textit{supra}.

\textsuperscript{91}442 U.S. at 72. The Court does not define the term unchallenged confession. Justice Stevens, in his dissent, makes note of this omission in the Court's reasoning, stating that there is no reason why the failure of a defendant to challenge his or her own confession should make it any more reliable and that even if a defendant challenged his or her own confession, under \textit{Parker} he or she would not be able to dispel the incriminating effect of a codefendant's confession. \textit{Id.} at 84, 86.

\textsuperscript{92}In his dissent in \textit{Parker}, Justice Stevens constructs the following hypothetical to show the fallacy in the Court's belief that confessions by defendants invariably would be reliable:

"Suppose a prosecutor has 10 items of evidence tending to prove that defendant X and codefendant Y are guilty of assassinating a public figure. The first is a tape of a televised interview with Y describing in detail how he and X planned and executed the crime. Items two through nine involve circumstantial evidence of past association between X and Y, a shared hostility for the victim, and an expressed wish for his early demise—evidence that in itself might very well be insufficient to convict X. Item 10 is the testimony of a drinking partner, a former cellmate, or a divorced spouse of X who vaguely recalls X saying that he had been with Y at the approximate time of the killing. Neither X nor Y takes the stand."

"If Y's televised confession were placed before the jury while Y was immunized from cross-examination, it would undoubtedly have the 'devastating' effect on X that the \textit{Bruton} rule was designed to avoid. . . . [I]t would also plainly violate X's Sixth Amendment right to confront his accuser. Nevertheless, under the plurality's . . . remarkable assumption, the prejudice to X—and the violation of his constitutional right—would be entirely cured by the subsequent use of evidence of his own ambiguous statement. In my judgment, such dubious corroboration would enhance, rather than reduce, the danger that the jury would rely on Y's televised confession when evaluating X's guilt. . . . Even if I am wrong, however, there is no reason to conclude that the prosecutor's reliance on item 10 would obviate the harm flowing
The findings of fact in *Parker* attest to the weakness of the plurality's assumption that a defendant's confession is always reliable. The Sixth Circuit did not find any of the defendants' confessions to be so reliable that admission of their codefendants' confessions would have been nonprejudicial. Instead, the circuit court determined that the results reached by the jury may indeed have depended upon the admission of all three codefendants' confessions, rather than upon each defendant's individual confession standing alone. This is exactly the situation which the interlocking confessions doctrine purports to avoid. The Sixth Circuit found, in essence, that reasonable persons could differ as to whether a defendant's own confession was sufficiently reliable to allow the jury to reach its verdict irrespective of the codefendant confessions. Significantly, in applying the harmless error test, the circuit court could not find that the evidence, exclusive of the codefendant confessions, was so overwhelming that any error was harmless beyond a reasonable doubt.

The import of the Sixth Circuit's opinion is that if a defendant's own confession is not sufficiently reliable or self-incriminating, the jury very well may look to the inculpatory statements of codefendants when considering the guilt or innocence of the defendant. The Supreme Court's assumption that a defendant's own unchallenged confession is always reliable, therefore, is improper.
Although a defendant’s unchallenged confession may be reliable in many cases, this fact does not justify dispensing with the Bruton-harmless error analysis and the confrontation clause which it protects.99

The dissent in Parker also takes exception to the plurality’s assumption that a jury is more capable of following a limiting instruction when a defendant has placed his or her confession before the jury100 than in a Bruton situation in which only a codefendant has confessed and the defendant has remained silent. The plurality resorted to the rationale previously set forth in Delli Paoli,101 that juries can be trusted to follow limiting instructions from the trial court,102 and ignored the rejection of this rationale in Bruton, which expressly overruled Delli Paoli.103

Parker did not overrule Bruton in favor of its prior holding in Delli Paoli. However, it appears that the Bruton rationale, restricting the use of limiting instructions in those cases where a codefendant’s confession has been introduced at trial, was lost upon the

99. See note 94 & accompanying text supra.
100. 442 U.S. at 84.
101. See notes 22-31 & accompanying text supra.
102. "A crucial assumption underlying [the jury] system is that juries will follow the instructions given them by the trial judge." 442 U.S. at 73. The plurality relies on a case decided prior to Delli Paoli to support its position that no Bruton violation would occur under the interlocking confessions doctrine. The Court cites Opper v. United States, 348 U.S. 84 (1954), in stating that "an instruction directing the jury to consider a codefendant's extrajudicial statement only against its source has been found sufficient to avoid offending the confrontation right of the implicated defendant . . . ." 442 U.S. at 73-74. The decision in Opper is based on the same premise found in Delli Paoli, namely, that the "theory of trial relies upon the ability of a jury to follow instructions." 348 U.S. at 95. The Parker Court therefore appears to circumvent the fact that Delli Paoli was overruled by merely citing a case which preceded it.

103. See note 36 & accompanying text supra. In his concurring opinion in Bruton, Justice Stewart wrote: "I think it clear that the underlying rationale of the Sixth Amendment's Confrontation Clause precludes reliance upon cautionary instructions when the highly damaging out-of-court statement of a codefendant, who is not subject to cross-examination, is deliberately placed before the jury at a joint trial. A basic premise of the Confrontation Clause, it seems to me, is that certain kinds of hearsay . . . are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, whatever instructions the trial judge might give." 391 U.S. at 137-38 (citations omitted). It also has been suggested that instructions actually might alert jurors to the fact that codefendant confessions refer to a defendant when the jurors had not realized this fact during the trial. 442 U.S. at 90 n.14. Cf. Lakeside v. Oregon, 435 U.S. 333, 345 (1978) (Stevens, J., dissenting) (instructions commenting on defendant's failure to testify); Broeder, The University of Chicago Jury Project, 38 Nw. L. Rev. 744, 754 (1959) (instructions to disregard evidence of defendant's insurance coverage in determining damages).
plurality in \emph{Parker}. Even assuming, as the plurality did, that the failure of a jury to follow limiting instructions would not be harmful to a defendant because the confessions would be interlocking and therefore substantially the same, the possibility of a detrimental "cumulative impact"\textsuperscript{104} where a defendant's confession alone is not sufficiently compelling for a conviction remains.\textsuperscript{105} Although the Court in \emph{Bruton} did not say that limiting instructions could never be effective,\textsuperscript{106} the \emph{Parker} plurality's approach always would preclude exclusion of a codefendant's confession so long as the defendant has made an interlocking confession.

The plurality also summarily dismisses \emph{Bruton} safeguards which protect against unreliable codefendant confessions, reasoning that "the incriminated defendant has corroborated his codefendant's statements by heaping blame onto himself."\textsuperscript{107} However, a significant risk of harm is created where the plurality's preceding assumptions fail, as where a defendant's confession is not sufficient for a conviction but where the cumulative effect of interlocking confessions upon a jury that is unable to follow limiting instructions is harmful.\textsuperscript{108}

The Court in \emph{Bruton} addressed the very nature of codefendant confessions and concluded that they are so unreliable that they should not heavily influence the jury's verdict.

Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame to others. The unreliability of such evidence is intolerably compounded when the alleged accomplice . . . does not testify and cannot be tested by cross-examination. It was against such

\textsuperscript{104} See note 112 infra.

\textsuperscript{105} The plurality in \emph{Parker} assumed that if confessions interlocked, the risk of harm to codefendants would be slight because the confessions would overlap as to admissions of guilt. However, "it does not necessarily follow that the additional evidence of the [defendant's] confession mitigated the prejudice resulting from the admission of the confession of his nontestifying codefendant. If anything, the [defendant is] even more prejudiced by the admission in that his codefendant's statement bolstered the [defendant's] own confession and made it more believable to the jury. Thus, the jury might have interlocked the two confessions, thereby increasing the likelihood of a guilty verdict." Note, supra note 60, at 804 (commenting on the use of the interlocking confessions doctrine in \emph{Catanzaro}). See notes 62-67 & accompanying text supra.

\textsuperscript{106} See note 46 & accompanying text supra.

\textsuperscript{107} 442 U.S. at 73.

\textsuperscript{108} See notes 90-106 & accompanying text supra.
threats to a fair trial that the Confrontation Clause was directed.109

This warning from Bruton goes unheeded in Parker, however, because the plurality assumes that a defendant's own confession is beyond reproach.110 The plurality proposes simply to excuse unreliable codefendant confessions from Bruton protective measures, assuming as Justice White did in his dissent in Bruton, that a defendant's confession is the most "knowledgeable and unimpeachable source of information about his past conduct."111 Nor does Parker present a compelling reason why the right of cross-examination would not serve important truth-determining functions where interlocking codefendant confessions are introduced into evidence at trial; there can be no assurance that the jury will consider only a defendant's confession exclusive of any interlocking confessions.112 Therefore, the plurality's assertion that there had not been a violation of the confrontation clause because the right of confrontation would serve no purpose to the defendant is incorrect.

In Parker, the plurality's departure from the Bruton-harmless error approach moves the courts away from the use of a flexible, case by case analysis toward a nondiscretionary per se rule in considering whether confrontation rights have been violated under the sixth amendment. Under the Bruton-harmless error approach, a reviewing court must scrutinize all of the evidence and circumstances of the case in determining whether any error has been

109. 391 U.S. at 136. See Note, supra note 60, at 804 n.62. "[T]he evidence of a witness [who is a confessed accomplice] is not to be taken as that of an ordinary witness, of good character, in a case whose testimony is generally and prima facie supposed to be correct. On the contrary, the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses." Crawford v. United States, 212 U.S. 183, 204 (1909). Accord, Caminetti v. United States, 242 U.S. 470, 495 (1917).

110. See notes 90-99 & accompanying text supra.

111. 391 U.S. at 140.

112. In United States ex rel. Ortiz v. Fritz, 476 F.2d 37 (2d Cir.), cert. denied, 414 U.S. 1075 (1973), a panel of the Second Circuit criticized the interlocking confessions doctrine because of its failure to guard against unreliable codefendant confessions: "Despite the defendant's own confession, the jury may still look to the incriminating statements of a codefendant, or to the cumulative impact of those statements coupled with the defendant's own statements, to find the defendant's guilt—despite the 'placebo' of curative instructions." 476 F.2d at 40. The court adopted the interlocking confessions doctrine in deciding the case only because it felt compelled to do so by prior decisions in that circuit. Id. at 38.
committed that requires reversal.\textsuperscript{113} However, under \textit{Parker}, the admission in evidence of a defendant's interlocking confession automatically precludes consideration of whether a defendant has been unduly prejudiced by a codefendant's confession;\textsuperscript{114} so long as the defendant has made an interlocking confession there can be no violation of \textit{Bruton} and no violation of the constitutional right of confrontation. Thus, \textit{Parker} abolishes examination of the totality of circumstances in determining whether the fundamental right of an individual to confront adverse witnesses has been violated.\textsuperscript{115}

The split within the Supreme Court in \textit{Parker} means that the appropriateness of the interlocking confessions doctrine as applied to codefendant confession cases is unresolved. Even if the doctrine were to be adopted by a majority of the Court upon reconsideration of the issue, however, the Court would have to address a significant omission in \textit{Parker}. In applying the interlocking confessions doctrine, the plurality failed to define both what constitutes a confession and what constitutes an interlocking confession.

Not every extrajudicial statement implicating a defendant is a confession.\textsuperscript{116} However, the plurality in \textit{Parker} offers no guidance as to what criteria should be applied in determining what constitutes a confession for interlocking confessions purposes. Trial courts have been left to grapple with the problem on their own, creating the possibility of inconsistent determinations.

Even if it is assumed that a trial court could distinguish a confession from other types of extrajudicial statements in order to apply the interlocking confessions doctrine, there would be a serious problem in determining what constitutes an interlocking confession because \textit{Parker} fails to define this term as well. The plurality opinion does not specify what degree of overlap in the confessions

\begin{enumerate}
\item[113.] See notes 52-58 & accompanying text supra.
\item[114.] See notes 80-86 & accompanying text supra.
\item[115.] In his \textit{Bruton} dissent, Justice White criticized the \textit{Bruton} rule as being "excessively rigid," because it disregarded other "circumstances" of a particular case. 391 U.S. at 139. \textit{Harrington} and the harmless error test apparently remedied the inflexibility of \textit{Bruton} by permitting a reviewing court to look at other evidence in the case in deciding whether the violation of confrontation rights was harmless. See notes 52-58 & accompanying text supra.
\item[116.] In \textit{Harrington} v. California, 395 U.S. 250 (1969), and \textit{Roberts} v. Russell, 392 U.S. 293 (1968), extrajudicial statements made by the defendant were introduced at a joint trial along with their codefendant's confessions. Justice Rehnquist distinguished both cases from an interlocking confessions case by stating that the extrajudicial statements of the defendants were not in fact confessions, indicating that some types of statements are not subject to the interlocking confessions doctrine. 442 U.S. 71-72 n.5, 75-76 n.8.
\end{enumerate}
is necessary to invoke the interlocking confessions doctrine.\textsuperscript{117} More significantly, as stated by Justice Blackmun in his concurring opinion, the interlocking confessions approach does not appear to require an inquiry as to whether confessions actually interlocked before the doctrine could be imposed.\textsuperscript{118} Without a definition of what an interlocking confession is and without a preliminary determination as to whether two confessions do in fact interlock, there may be a substantial risk of harm to a defendant should trial courts invoke \textit{Parker}. Justice Blackmun concluded:

The fact that confessions may interlock to some degree does not ensure, as a \textit{per se} matter, that their admission will not prejudice a defendant so substantially that a limiting instruction will not be curative. The two confessions may interlock in part only. Or they may cover only a portion of the events in issue at the trial. Although two interlocking confessions may not be internally inconsistent, one may go far beyond the other in implicating the confessor's codefendant. In such circumstances, the admission of the confession of the codefendant who does not take the stand could very well serve to prejudice the defendant who is incriminated by the confession, notwithstanding that the defendant's own confession is, to an extent, interlocking.\textsuperscript{119}

A substantial risk of prejudice attends any defendant whose own confession does not "interlock" or cover the same incriminating aspects of a codefendant's confession. If a defendant has the opportunity to cross-examine the codefendant, any discrepancies between their confessions can be brought to the attention of the jury for consideration.\textsuperscript{120} When, however, there is no opportunity to confront a codefendant as to his or her extrajudicial statement, the failure to exclude such a statement from the trial clearly would be

\begin{itemize}
  \item \textsuperscript{117} See note 128 & accompanying text \textit{infra}.
  \item \textsuperscript{118} 442 U.S. at 80.
  \item \textsuperscript{119} \textit{Id.} at 79 (Blackmun, J., concurring). In United States \textit{ex rel.} Johnson \textit{v.} Yeager, 399 F.2d 508 (3d Cir. 1968), \textit{cert. denied}, 393 U.S. 1027 (1969), a case which implicitly rejected the interlocking confessions doctrine by following the \textit{Bruton}-harmless error approach, the Third Circuit noted the significance of noninterlocking confessions: "In this case, the confessions varied materially on the extent of the participation of the co-defendants in the planning and execution of the crime. . . . Under these circumstances, the constitutional error of admitting these confessions in evidence during a joint trial 'presents a serious risk that the issue of guilt or innocence may not have been reliably determined.' . . . 'Plainly the introduction of [these] confessions added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since [the defendants] did not take the stand. [Appellants] thus [were] denied [their] right of confrontation.'" 399 F.2d at 510-11 (quoting \textit{Bruton v. United States}, 391 U.S. at 127-28).
  \item \textsuperscript{120} See notes 1-5 & accompanying text \textit{supra}.
\end{itemize}
harmful; the defendant would be denied the right to cross-examine the codefendant regarding items of conduct to which the defendant had not confessed. The *Parker* plurality creates this possibility by failing to define precisely what would constitute an interlocking confession and by failing to require a preliminary inquiry as to whether codefendant confessions sufficiently interlock.\(^{121}\)

Moreover, the danger in not having a working definition is magnified by the possibility that codefendant confessions may be unreliable\(^{122}\) and that juries may not be able to follow a judge's limiting instructions.\(^{123}\) When codefendant confessions do not completely interlock, there is a risk that a defendant will be prejudiced by evidence he or she did not confess to, that the corroborative evidence may be highly unreliable, and that such corroborative evidence is subject not to cross-examination but only to protective instructions to the jury not to consider it against the defendant. In such a situation, it is difficult to maintain that the confrontation clause has not been infringed upon.

**A Proposal**

With an evenly divided Court, lower courts will be able to choose either the interlocking confessions doctrine of *Parker* or the *Bruton*-harmless error approach as a rationale in deciding interlocking confessions cases. Because the interlocking confessions doctrine contains several inherent dangers, the preferable approach to codefendant confession cases would be the *Bruton*-harmless error analysis. Such an approach protects a defendant's confrontation rights by prohibiting the introduction of codefendant confessions where there is no opportunity to cross-examine that codefendant, except in those instances where a denial of that right clearly would be harmless. The *Bruton*-harmless error approach has operated satisfactorily, even in an interlocking confessions situation,\(^{124}\) and a departure from this approach is not mandated.

Should the interlocking confessions doctrine be adopted, however, several precautions should be taken to ensure greater protec-

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121. Justice Blackmun noted that the plurality did not make a determination as to whether the confessions of the defendants in *Parker* interlocked but that the plurality merely assumed they did. 442 U.S. at 80.
122. See notes 107-11 & accompanying text supra.
123. See notes 100-06 & accompanying text supra.
124. See note 74 supra.
tion for a defendant who is not afforded the opportunity of cross-examination. To apply the interlocking confessions doctrine properly, the trial court must make a two-step preliminary determination as to: (1) whether the extrajudicial statements of codefendants constitute confessions; and (2) whether the confessions interlock completely.125

An accepted definition of a confession is a statement by the defendant “admitting or acknowledging all facts necessary for conviction of the crime.”126 Only by requiring that all of the essential elements of the crime be present in a defendant’s extrajudicial statement can the plurality’s proposition—that the defendant’s own confession is “‘probably the most probative and damaging evidence that can be admitted against him’”127—be supported. This definition of a confession would protect a defendant from any unfair influence of codefendant confessions where the interlocking confessions doctrine is utilized.

A more difficult task is creating a standard to determine whether codefendant confessions interlock. Several of the circuit courts adopting the interlocking confessions doctrine have required only that the confessions be “substantially” interlocking or at least consistent as to the material aspects of the confessions.128 However, because the fundamental right of confrontation is involved, a

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125. See notes 116-21 & accompanying text supra. See also Marcus, supra note 22, at 588.

126. McCormick, supra note 2, at § 144. “A confession is generally defined as an acknowledgment by accused in a criminal case of his guilt of the crime charged. A confession implies that the matter confessed constitutes a crime, and it is limited in its nature and in its precise scope and meaning to the criminal act itself. In order that a statement may constitute a confession it must be made after the offense has been committed, and must be of such nature that no other inference than the guilt of the confessor may be drawn therefrom. Accordingly, the term ‘confession’ excludes exculpatory statements... and in general all statements, declarations, and admissions, by word or act, which do not amount to an acknowledgment of guilt.” 23 C.J.S. Criminal Law § 816, at 150-52 (1961). See Opper v. United States, 348 U.S. 84, 91 n.7 (1954).

127. 442 U.S. at 72.

128. See, e.g., United States v. Fleming, 594 F.2d 598, 603 (7th Cir.), cert. denied, 442 U.S. 931 (1979) (requiring “substantially similar” confessions); United States ex rel. Stanbridge v. Zelker, 514 F.2d 45, 49 (2d Cir.), cert. denied, 423 U.S. 872 (1975) (the interlocking confessions doctrine “does not require absolute identity of statements[;] it is sufficient if the two confessions are substantially the same and consistent on the major elements of the crime involved”); United States ex rel. Ortiz v. Fritz, 476 F.2d 37, 39 (2d Cir.), cert. denied, 414 U.S. 1075 (1973) (“Although the three confessions do not all cover the same facts, they do interlock and are consistent as regards the slaying. As to the time of commission, there is a considerable discrepancy... But we do not think it takes away from the ‘interlocking’ aspect of the confessions”).
much stricter standard should be adopted. In order for the interests of the defendant to be adequately protected, the confessions of each codefendant should corroborate every essential element necessary to convict each codefendant of the crime. Such a standard likely would reduce the risk that the admission of a codefendant's confession might contribute to the conviction of another codefendant because the confessions would be essentially the same. Where the confessions do not completely interlock, as where each confession does not admit to each of the essential elements of a crime, the case should be removed from the realm of *Parker* and the interlocking confessions doctrine, and should be analyzed under the *Bruton*-harmless error approach.

**Conclusion**

A problem arises in joint criminal trials where the prosecution attempts to introduce into evidence a confession made by a codefendant implicating other codefendants in the crime. Where there is no opportunity to cross-examine the defendant who made the confession, substantial prejudice may be imposed upon other codefendants who cannot test the confession for its truth. Under the rule of *Bruton v. United States* and *Harrington v. California*, the admission of such a confession is a violation of the confrontation clause of the sixth amendment and grounds for reversal unless the constitutional error is harmless beyond a reasonable doubt. Recently, however, federal and state courts have used an interlocking confessions approach, holding that the admission of a codefendant's confession, where the jury is cautioned with limiting instructions, does not violate the confrontation clause so long as the other codefendants have also confessed and the confessions interlock.

The United States Supreme Court, in *Parker v. Randolph*, did not resolve the issue of which approach is proper in cases in which interlocking confessions have been made. Four members of the Court adhered to the *Bruton*-harmless error approach, whereas a four-member plurality adopted the interlocking confessions doctrine. Lower courts may therefore continue to utilize either rationale in the disposition of interlocking confessions cases, even though there are significant weaknesses in the plurality's opinion in *Parker*.

The plurality in *Parker* ignores the *Bruton*-harmless error reasoning that in general if a defendant is denied the opportunity to
cross-examine an adverse witness the defendant is deprived of his or her confrontation rights, although that error may later be determined to have been harmless by an appellate court. Even though a defendant faces a similar situation where a codefendant has made an interlocking confession and the defendant is unable to cross-examine him or her, no violation of the right of confrontation is said to have occurred. This assertion rests primarily on the fact that the defendant also has confessed, that this confession is completely reliable, and that it interlocks with codefendant confessions. Under a per se rule, a defendant may at times be deprived of a valuable right, especially because (1) the defendant’s confession may be unreliable; (2) limiting instructions are rendered no more effective, and a jury no more capable of following them, merely because the defendant has confessed; and (3) the interlocking confessions doctrine provides absolutely no protection against the likelihood that a codefendant’s confession may be unreliable and that a jury may indeed be influenced by the cumulative impact of those confessions.

On its face, the interlocking confessions doctrine appears to be a valid protective measure against the highly prejudicial nature of codefendant confessions, because a codefendant’s confession alone will often be incriminating and reliable enough to sustain a conviction. As this Note has demonstrated, however, the underlying assumptions upon which this doctrine is based contain inherent flaws. As Justice Blackmun noted:

I fully recognize that in most interlocking-confession cases, any error in admitting the confession of a nontestifying codefendant will be harmless beyond a reasonable doubt. Even so, I would not adopt a rigid per se rule that forecloses a court from weighing all the circumstances in order to determine whether the defendant in fact was unfairly prejudiced by the admission of even an interlocking confession. Where he was unfairly prejudiced, the mere fact that prejudice was caused by an interlocking confession ought not to override the important interests that the Confrontation Clause protects.\(^{129}\)

In addition, the plurality’s opinion in *Parker* fails to define precisely what constitutes an interlocking confession. At present, there is no requirement that codefendant confessions completely interlock, thereby creating the possibility that a defendant could

\(^{129}\) 442 U.S. at 79.
be prejudiced by items of evidence not confessed to should the jury fail to follow the trial court’s instructions. For this reason it is urged that the courts adopt the Bruton-harmless error rationale and discard the interlocking confessions doctrine as an erroneous construction of the sixth amendment right to confront inculpatory witnesses. To diminish the risk of prejudice to a defendant, the following procedural safeguards should be implemented if the interlocking confessions doctrine is applied. Before invoking the interlocking confessions doctrine, a trial court should make a preliminary inquiry to determine that (1) an extrajudicial statement admits to all the facts necessary for conviction of a crime and thus constitutes a confession; and (2) that each codefendant confession agrees on all of the essential elements of a crime in order to be an interlocking confession.

Perhaps the Supreme Court will reconsider the issue in a subsequent case. Until then, the application of either the interlocking confessions doctrine or the Bruton-harmless error approach lies within the province and discretion of the lower courts.