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The Present Status of an Interlocking Confession Exception to Bruton v. United States

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NOTES

THE PRESENT STATUS OF AN INTERLOCKING CONFESSION EXCEPTION TO *BRUTON V. UNITED STATES*

I. INTRODUCTION

In 1968, the United States Supreme Court held in *Bruton v. United States*[1] that the admission of a nontestifying codefendant's confession, which implicated another defendant at a joint trial, violated the implicated defendant's sixth amendment right of confrontation. The Court concluded that such a violation occurred even when the trial court clearly instructed the jury that the codefendant's statement could not be considered against the defendant. Eleven years after *Bruton*, the Court attempted unsuccessfully in *Parker v. Randolph*[2] to decide whether the *Bruton* rule[3] applies if an implicated defendant has himself made a confession. The Court was evenly divided[4] as to whether error occurs when a nontestifying codefendant's incriminating

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1. 391 U.S. 123 (1968).

2. 442 U.S. 62 (1979).

3. *See generally* ABA STANDARDS RELATING TO JOINDER AND SEVERANCE § 2.3(a) (1968). Section 2.3(a) states,

> When a defendant moves for a severance because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court should determine whether the prosecution intends to offer the statement in evidence at the trial. If so, the court should require the prosecuting attorney to elect one of the following courses:
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> (i) a joint trial at which the statement is not admitted into evidence;
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> (ii) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted; or
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> (iii) severance of the moving defendant.

ABA STANDARDS RELATING TO JOINDER AND SEVERANCE § 2.3(a)(1968).

4. Justice Powell did not participate in the *Parker* decision.

confession is admitted during a joint trial at which the complaining defendant's own confession is also before the jury.

The *Parker* plurality opinion[5] held that when the complaining defendant's own confession is properly before the jury, the jury can be relied upon to follow a limiting instruction that any statement by a nontestifying defendant may be considered only against its maker.[6] Thus, the plurality distinguished the "interlocking confession" situation[7] from the *Bruton* situation in which the confessing defendant does not testify and the implicated defendant has made no extrajudicial admission of guilt. The *Parker* plurality stated that, in *Bruton* situations, "limiting instructions cannot be accepted as adequate to safeguard the defendant's rights under the Confrontation Clause."[8]

Although concurring in the plurality's result, Justice Blackmun rejected the per se rule that *Bruton* is inapplicable in an interlocking confession situation.[9] Justice Blackmun preferred to apply the Court's established harmless error analysis to cases involving the admission of a confession by a nontestifying codefendant.[10] Justice Blackmun rejected the plurality's determination that *no error* occurs when a codefendant's incriminating statement is admitted at trial. The dissent[11] agreed with Justice Blackmun that a harmless error analysis should be used, but concluded that the error in *Parker* was not in fact harmless.

The Supreme Court apparently granted certiorari in *Parker* to provide guidance to the lower courts which had been divided on the appropriate constitutional analysis to be used in interlocking confession cases.[12] The Court itself, however, was evenly

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5. Justice Rehnquist wrote the plurality opinion and was joined by Chief Justice Burger and Justices Stewart and White.

6. 442 U.S. at 74.

7. Few courts have focused on the definitional requirements of an "interlocking confession." *See infra* text accompanying notes 79-82, 114-15. At a minimum, however, an interlocking confession involves a self-incriminating statement by a defendant and a statement by a codefendant which also incriminates the defendant.

8. 442 U.S. at 74.

9. *Id.* at 77-79.

10. *Id. See* Harrington v. California, 395 U.S. 250 (1969).

11. Justice Stevens wrote the dissent and was joined by Justices Brennan and Marshall.

12. *See, e.g.*, Mack v. Maggio, 538 F.2d 1129 (5th Cir. 1979)(*Bruton* rule not applicable when guilt of accused is established beyond a reasonable doubt by his own confession); Metropolis v. Turner, 437 F.2d 207, 208-09 (10th Cir. 1971)("We need not concern ourselves with the legal nicety as to whether the instant case [involving 'paralleling con-

divided on the fundamental issue of whether the admission of a nontestifying codefendant's "interlocking confession" was a sixth amendment violation. Whatever else the *Parker* opinions may have accomplished, they did not supply the lower courts with a binding principle of constitutional interpretation. The post-*Parker* reaction by the lower courts has varied. As will be shown in a later section of this Note, many courts have followed Justice Blackmun and the dissenters' harmless error analysis. Other courts, following the *Parker* plurality opinion as if it were binding precedent, have adopted the interlocking confession exception to the *Bruton* rule. One court has suggested that the *Parker* plurality view conflicts with *Bruton* and its progeny, which are undoubtedly binding precedent on inferior courts.[13] This court suggests that the plurality view not only lacks precedential value, but may also be unconstitutional.[14]

The disagreement among both federal and state jurisdictions has increased, rather than decreased, since the Court's pronouncements in *Parker*. This Note will review the relevant Supreme Court case law that culminated in *Parker*. It will also examine the effect of the post-*Parker* confusion on the protection of defendants' rights of confrontation in joint trials.

II. The Supreme Court Case Law: To What Extent Are Limiting Instructions an Adequate Safeguard of a Defendant's Right of Confrontation?

It is well established that a defendant's sixth amendment right of confrontation[15] includes the defendant's right to cross-examine any witness against him.[16] It necessarily follows that in the context of a joint trial, the confession of a codefendant which incriminates another defendant is not admissible against that defendant absent an opportunity to cross-examine the con-

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fessions' by two codefendants] is 'without' the *Bruton* rule, or is 'within' *Bruton* with the violation thereof constituting only harmless error."); People v. Ignacio, 413 F.2d 513 (9th Cir. 1969) (case against defendant was so overwhelming that *Bruton* violation was harmless beyond a reasonable doubt), *cert. denied*, 397 U.S. 943 (1970).

13. *See* Earhart v. State, 48 Md. App. 695, 429 A.2d 557 (1981).

14. *Id.* at 704, 429 A.2d at 564.

15. In relevant part, the sixth amendment of the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. Const. amend. VI.

16. Pointer v. Texas, 380 U.S. 400 (1965).

fessor. Equally well established is the principle that juries must be relied upon to follow any and all instructions by the court. Consequently, prior to *Bruton v. United States*,[17] the Supreme Court had relied on jury instructions to safeguard the confrontation rights of an implicated defendant. So long as the jury was clearly instructed that it was allowed to consider the confession only against its maker, and not against any other defendant, such confessions were admissible.[18]

In 1957 a closely divided Supreme Court in *Delli Paoli v. United States*[19] considered whether limiting instructions sufficiently protected defendant Delli Paoli when a codefendant's confession, which clearly implicated him, was admitted at trial.[20] The *Delli Paoli* majority premised its decision on its observation that "unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense."[21] Under the facts and circumstances of *Delli Paoli*, the Court determined that the trial court's instructions to the jury were especially clear[22] and that it was reasonable to presume that those instructions were followed by the jury.[23] Although the *Delli Paoli* ma-

17. 391 U.S. 123 (1968).

18. Delli Paoli v. United States, 352 U.S. 232 (1957).

19. 352 U.S. 232 (1957). *Delli Paoli* was a 5:4 decision with Justice Frankfurter, joined by Justices Black, Douglas and Brennan, writing in dissent.

20. *Id.* at 239.

21. *Id.* at 242.

22. *Id.* at 239-42. The instruction of the trial court in *Delli Paoli* was as follows:

> The proof of the Government has now been completed except for the testimony of the witness Greenberg as to the alleged statement or affidavit of the defendant Whitley. This affidavit or admission will be considered by you solely in connection with your determination of the guilt or innocence of the defendant Whitley. It is not to be considered as proof in connection with the guilt or innocence of any of the other defendants.
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> The reason for this distinction is this: An admission by defendant after his arrest of participation in alleged crime may be considered as evidence by the jury against him, together with other evidence, because it is, as the law describes it, an admission against interest which a person ordinarily would not make. However, if such defendant after his arrest implicates other defendants in such an admission it is not evidence against those defendants because as to them it is nothing more than hearsay evidence.

Id. at 239-40.

23. *Id.* at 241. The Court expressly relied on several factors in favor of this presumption: (1) the crime charged was simple in nature and evidentiary restrictions were few; (2) the separate interests of each defendant were emphasized throughout the trial;

jority recognized that "there may be practical limitations to the circumstances under which a jury should be left to follow instructions,"[24] it did not find that the facts and circumstances of *Delli Paoli* presented such a case.

The dissent, however, determined that such practical limitations had been reached in *Delli Paoli*. Justice Frankfurter, writing in dissent, focused on the dilemma raised in joint trials when an incriminating declaration is admissible against one or more of the defendants but not admissible against others.[25] The dissent found that the majority's resolution of this dilemma, which was to admit the declaration as evidence against the declarant with instructions to the jury that the declaration could not be used in determining the guilt of others, was "intrinsically ineffective in that too often 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."[26]

It is unlikely that the majority in *Delli Paoli* maintained any sincere belief in the jury's capacity to disregard the codefendant's statement during the guilt-determining process. More

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(3) no defendant requested a separate trial; (4) the trial court postponed the admission of the defendant's confession until the end of the government's case, thus making it easier for the jury to consider the confession apart from the other evidence; (5) for the most part the incriminating confession merely corroborated other evidence against Delli Paoli; and finally, (6) there was an absence of anything in the record "indicating that the jury was confused or that it failed to follow the court's instructions." *Id.* at 242.

24. *Id.* at 243.

25. As stated in the dissent:

> It may well be that where such a declaration only glancingly, as it were, affects a co-defendant who cannot be charged with the admitted declaration, the rule enforced by the Court in this case does too little harm not to leave its application to the discretion of the trial judge. But where the conspirator's statement is so damning to another against whom it is inadmissible, as is true in this case, the difficulty of introducing it against the declarant without inevitable harm to a co-conspirator, the petitioner in this case, is no justification for causing such harm. The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds. After all, the prosecution could use the confession against the confessor and at the same time avoid such weighty unfairness against a defendant who cannot be charged with the declaration by not trying all the co-conspirators in a single trial.

Id. at 247-48.

26. *Id.* at 247 (emphasis added).

probably, the majority was swayed by a combination of factors including a belief that the admission of the codefendant's statement was harmless error[27] or, possibly, a belief that the jury's consideration of such statements was generally an aid to the truth-seeking purpose of a trial.[28] Finally, the *Delli Paoli* majority was understandably reluctant to depart from the appellate presumption that juries must be relied upon to follow instructions from the court. As will be discussed below, the blurring of the distinction between harmless error and no error at all, reflected in the *Delli Paoli* majority opinion, has plagued many later judicial decisions.[29]

Regardless of the true basis for the majority decision in *Delli Paoli*, the Supreme Court overruled itself eleven years later in *Bruton v. United States*.[30] Justice Brennan, writing for the *Bruton* majority,[31] rejected *Delli Paoli's* assumption that an encroachment on the defendant's confrontation rights could be avoided by giving jury instructions to disregard the codefendant's statement as it applied to the defendant. The Court in *Bruton* held that limiting instructions, no matter how clear, were not an adequate substitute for a defendant's right of confrontation.[32] The Court recognized that "there are some contexts

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27. The majority in *Delli Paoli* expressly determined that the jury could have found, beyond a reasonable doubt, that the defendant was guilty as charged. 352 U.S. at 236. In addition, the Second Circuit had reached the same conclusion in the earlier disposition in United States v. Delli Paoli, 229 F.2d 319 (2d Cir. 1956). There, the court stated, "[T]he possibility that unless he [Delli Paoli] were a party to the venture, Pierro and Margiano would have associated [with] him to the extent we have mentioned is too remote for serious discussion." 229 F.2d 319, 320 (2d Cir. 1956), *quoted in Delli Paoli*, 352 U.S. at 236.

28. The genesis of this belief may lie in a statement made by Judge L. Hand in Nash v. United States, 54 F.2d 1006 (2d Cir. 1932). Judge Hand wrote,

> There is no reason why the prosecution, if it chooses to indict several defendants together, should not be confined to evidence admissible against all, and if real injustice were done, the result would be undesirable. In effect, however, the rule probably furthers, rather than impedes, the search for truth, and this perhaps excuses the device which satisfies form while it violates substance; that is, the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else.

Id. at 1007. Judge Hand later authored the majority opinion in United States v. Delli Paoli, 229 F.2d 319 (2d Cir. 1956).

29. *See infra* notes 86, 99, 113 and accompanying text.

30. 391 U.S. 123 (1968).

31. Justices White and Harlan dissented from the majority opinion. Justice Black concurred for the reasons stated in his *Delli Paoli* dissent.

32. *Id.* at 137.

in which the risks 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."[33]

Four years earlier, the Supreme Court in *Jackson v. Denno*[34] had first found limiting instructions ineffective as a safeguard to a defendant's right against self-incrimination. In *Jackson*, the Court recognized the futility of expecting a jury to follow instructions that it first determine the voluntariness of a defendant's confession and then disregard the confession entirely if it were found to be involuntary. The Court held that such a procedure did not provide a reliable determination of the voluntariness of a confession, and thus did not adequately protect a defendant's right to be free of a conviction based upon a coerced confession.[35] The core of the *Jackson* decision was an unwillingness to entrust to the jury the "exceedingly sensitive task" of determining the voluntariness of a defendant's confession.[36] Similarly, in *Bruton*, the majority doubted the jury's ability to disregard a nontestifying codefendant's confession to the extent that it incriminated another defendant.[37] The Court in both *Jackson* and *Bruton* concluded that this inability of the jury could in certain instances result in a denial of a constitutionally guaranteed right.

The *Bruton* majority also relied to a certain extent on the

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33. *Id.* at 135.

34. 378 U.S. 368 (1964).

35. *Id.* at 377.

36. *Id.* at 429 (Harlan, J. dissenting).

37. Although *Jackson* and *Bruton* are similar in their express recognition of the jury's inability to follow certain instructions by the trial court, it is worth noting that Justice White, who wrote the majority opinion in *Jackson*, wrote a dissent in *Bruton*, 391 U.S. 123, 138 (1968). He distinguished the two situations on the basis of the devastating effect of the defendant's own confession and the fact that an involuntary confession is excluded not because it is untrue but in order to protect other constitutional values. *Id.* at 139-43. In contrast, Justice White determined that a nontestifying codefendant's confession is inadmissible against a defendant because it is not reliable. *Id.* at 142. Justice White believed that a jury could understand and follow instructions to disregard a codefendant's confession to the extent it incriminated another defendant because they would recognize such evidence as inherently unreliable. In contrast a jury would not be able to understand the rationale behind the instruction not to consider an involuntary confession and thus the jury would be unable to follow any such instruction, thereby depriving the defendant of his recognized constitutional right.

inherent unreliability of extrajudicial codefendant statements.[38] Certainly, an accused often attempts to shift blame away from himself in statements made to the police. The Court's concern in *Bruton* with both the jury's ability to follow limiting instructions and the reliability of a codefendant's statement as it relates to the culpability of another, foreshadowed the exception to *Bruton* later espoused by the *Parker* plurality.[39] In part, the *Parker* plurality distinguished *Bruton* on the basis of the greater reliability of a codefendant's confession that is corroborated by the defendant's own confession.

The Court held *Bruton* to be retroactive.[40] Although the Court recognized that retroactive application of *Bruton* might have considerable impact on decided cases, it deemed retroactivity necessary on the ground that the constitutional error found in *Bruton* presented "a serious risk that the issue of guilt or innocence may not have been reliably determined."[41]

A year after *Bruton*, in *Harrington v. California*,[42] the Supreme Court held that a violation of *Bruton* could be harmless error.[43] The majority in *Harrington* determined that the evidence against the defendant was so overwhelming that the state conviction should be reversed only if the Court concluded that no *Bruton* violation could constitute harmless error.[44] This the

38. 391 U.S. at 136.

39. *See infra* Section A of Part III.

40. Roberts v. Russell, 392 U.S. 293 (1968). The court stated: "We have . . . retroactively applied rules of criminal procedure fashioned to correct serious flaws in the fact-finding process at trial. Despite the cautionary instruction, the admission of a defendant's confession which implicates a codefendant results in such a 'serious flaw.'" *Id.* at 294 (quoting Stovall v. Denno, 388 U.S. 293, 298 (1966))(citations omitted).

41. Roberts v. Russell, 392 U.S. 293, 295 (1968).

42. 395 U.S. 250 (1969).

43. *Id.* at 253.

44. *Id.* at 254. *Harrington* is significant not only in the context of the sixth amendment, but also in its effect on harmless error review by federal courts. In Chapman v. California, 386 U.S. 18 (1967), the Supreme Court held for the first time that constitutional error could be harmless. The standard of review proposed by the Court in *Chapman* was to place on the beneficiary of the error, *i.e.*, the state, the burden of proving beyond a reasonable doubt that the constitutional error did not contribute to the verdict. In contrast, the Court in *Harrington* determined that the properly admitted evidence was so "overwhelming" that the violation of *Bruton* was harmless beyond a reasonable doubt. Thus the Court lessened the burden of proof on the state, and shifted the harmless error inquiry "from whether the constitutional error contributed to the conviction to whether the untainted evidence provided 'overwhelming' support for the conviction." Harrington v. California, 395 U.S. 250, 255 (1969)(Brennan, J., dissenting).

Supreme Court was unwilling to do.

Until the plurality opinion in *Parker v. Randolph*, the Supreme Court had consistently applied a harmless error analysis to the *Bruton* violations that came before the Court.[45] The question raised in *Parker* was whether *Bruton* required that the conviction of a defendant who has himself confessed be reversed when the complaining defendant's confession "interlocks" with and supports the confession of his codefendant.[46] As noted in Justice Blackmun's concurrence, the conviction in *Parker* could have been upheld by using the Court's traditional harmless error analysis.[47] Instead, however, the plurality chose to affirm the conviction on the ground that it is constitutionally permissible to admit a nontestifying codefendant's confession that implicates another defendant when proper limiting instructions are given and the jury has before it an "interlocking confession" made by the defendant himself.

Thus, the critical distinction between the *Parker* plurality's opinion and those of the concurrence and dissent is whether limiting instructions are a sufficient safeguard of a defendant's sixth amendment rights when the defendant has himself made an interlocking confession.[48] Justice Rehnquist, writing for the plurality, characterized *Bruton* as an exception to the general rule that juries can be trusted to follow instructions by the court.[49] Perhaps the crux of the plurality rationale was its determination that it is "entirely reasonable to apply the general rule, and not the *Bruton* exception, when the defendant's case has already been devastated by his own extrajudicial confession of guilt."[50] Arguably, the *Parker* plurality holding depends not on any expectation that a jury faced with interlocking confessions will, in fact, be able to consider each confession only with respect to its maker, but on a belief that the confessing defendant will not be harmed by a codefendant's confession which merely corroborates

45. *See* Brown v. United States, 411 U.S. 223 (1973); Schneble v. Florida, 405 U.S. 427 (1972).

46. Parker v. Randolph, 442 U.S. 62, 64 (1979).

47. *Id.* at 77.

48. *Id.* at 74, 77, 81-82. This was the same issue that separated the dissent and majority opinions in Delli Paoli v. United States, 352 U.S. 232 (1957). *See supra* text accompanying notes 19-29.

49. 442 U.S. at 75 n.7.

50. *Id.*

his own.[51] The distinction is significant.

III. *Parker v. Randolph*: A Divided Supreme Court Confirms the Split of Opinion in the Lower Courts over Whether Nontestifying Codefendant Interlocking Confessions May Be Admitted in a Joint Trial

As outlined above, the Supreme Court in *Bruton* made clear to the lower courts that limiting instructions do not sufficiently protect a defendant's sixth amendment rights when an incriminating statement by a nontestifying codefendant is admitted into evidence in a joint trial. The same year that *Bruton* was decided, the Second Circuit Court of Appeals held in *United States ex rel. Catanzaro v. Mancusi*[52] that *Bruton* did not apply to situations in which the jury had heard not only the codefendant's confession implicating the defendant, but also the defendant's own self-incriminating confession.

The court in *Catanzaro* appears to have originated what is now known as the interlocking confession doctrine. The court developed this doctrine in the following two paragraphs of its decision:

> The reasoning of . . . *Bruton* is not persuasive here. [*Bruton*] involved a defendant who did not confess and who was tried along with a codefendant who did. In our case Catanzaro himself confessed and his confession interlocks with and supports the confession of McChesney.
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> 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*.[53]

In the wake of *Catanzaro* and *Bruton*, the federal courts divided on the question of whether *Bruton* need be applied in

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51. 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.

Id. at 73 (citation omitted).

52. 404 F.2d 296, 300 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1970).

53. 404 F.2d at 300.

cases involving interlocking confessions.[54] It was to resolve this split of authority that the Supreme Court granted certiorari in *Parker*. Unfortunately, the Supreme Court was of two minds on the issue and resolved nothing for the lower courts. This section looks in some detail at the two analyses proposed by the Court.

A. *The* Parker *Plurality: An Attempt to Adopt an Interlocking Confession Exception to* Bruton

Although the *Parker* plurality took more than two paragraphs to develop a rationale in support of the interlocking confession doctrine, it agreed with the basic premise of the court in *Catanzaro* that *Bruton* is distinguishable from the interlocking confession situation. The Court in *Parker* saw the basis for the *Bruton* rule as lying in the "devastating consequences" to a nonconfessing defendant of a jury's failure to follow an instruction to disregard a codefendant's incriminating statement.[55] Both the *Parker* plurality and the court in *Catanzaro* contrasted *Bruton* with the interlocking confession case, in which the jury has before it the most devastating of all evidence, the defendant's own confession.[56]

The *Parker* plurality further distinguished *Bruton* by noting that a codefendant's confession is less suspect in the *Parker* situation in which the incriminating defendant has "corroborated his codefendant's statements by heaping blame onto himself."[57] Finally, the Court distinguished *Bruton* by suggesting that the constitutional right of cross examination protected by *Bruton* "has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence."[58]

Having distinguished *Bruton* in terms of actual harm to the defendant and the relative reliability of a codefendant's confes-

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54. *See Parker*, 442 U.S. at 68 n.4.

55. *See id.* at 72-73. "The possible prejudice resulting from the failure of the jury to follow the trial court's instructions is not so 'devastating' or 'vital' to the confessing defendant to require departure from the general rule allowing admission of evidence with limiting instructions." *Id.* at 74-75; *Catanzaro*, 404 F.2d at 300.

56. In this respect the *Parker* plurality relied in part on Justice White's dissent in *Bruton*. *See Bruton*, 391 U.S. at 139-40 (White, J., dissenting).

57. 442 U.S. at 73.

58. *Id.*

sion, the *Parker* plurality proceeded to focus on the "crucial assumption underlying [a system of trial by jury] that juries will follow the instructions given them by the trial judge."[59] Although the plurality acknowledged that in a *Bruton* situation[60] limiting instructions are not an adequate safeguard of a defendant's rights under the confrontation clause, it held that the admission of an interlocking confession with proper limiting instructions was constitutional. As stated by the plurality:

> Under [the circumstances of *Bruton*], the "practical and human limitations of the jury system" override the theoretically sound premise that a jury will follow the trial court's instructions. But when the defendant's own confession is properly before the jury, we believe that the constitutional scales tip the other way. The possible prejudice resulting from the failure of the jury to follow the trial court's instructions is not so "devastating" or "vital" to the confessing defendant to require departure from the general rule allowing admission of evidence with limiting instructions.[61]

The reasoning of the *Parker* plurality appears to be based on two distinct propositions. First, a jury in a *Parker* situation is more likely to follow the trial court's instruction to consider a confession only against its maker when it simultaneously incriminates another defendant. Second, a defendant who has himself confessed is harmed less by the jury's failure to follow the instruction than is a defendant who has consistently maintained his innocence.[62] Thus, a nonconfessing defendant has a much greater stake than a confessing defendant in retaining his right to confront the witnesses against him.

As suggested above, the Supreme Court expressed two justifications for the *Bruton* rule: (1) the risk that, even with clear limiting instructions, a jury would be unable to disregard a nontestifying codefendant's confession as it incriminated another

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59. *Id.* at 73. Interestingly, the Court's language at this point is highly reminiscent of Delli Paoli v. United States, 352 U.S. 232, 242 (1957). In fact the *Parker* plurality expressly relied on Opper v. United States, 348 U.S. 84 (1954), which was implicitly overruled by *Bruton*. *See infra* note 63.

60. As represented by the plurality, a *Bruton* situation is one in which the "confessing codefendant has chosen not to take the stand and the implicated defendant has made no extrajudicial admission of guilt." 442 U.S. at 74.

61. *Id.* at 74-75 (citation omitted).

62. *See supra* text accompanying note 39.

defendant; and (2) the potentially devastating effect of the jury's failure to do so. Perhaps the most reasonable interpretation of the *Parker* plurality opinion is that absent one of the justifications for the *Bruton* rule, *Bruton* simply does not apply.[63] There is, however, an analytical problem with this interpretation. Given the Court's acknowledgment in *Bruton* that the jury cannot reasonably be relied upon to disregard entirely one codefendant's confession as it incriminates another defendant, the plurality opinion may be read as saying, in effect, that although the defendant's sixth amendment right is violated by his inability to cross-examine the codefendant, the defendant is not likely to be harmed by this inability; therefore, there is no sixth amendment violation. This analysis contrasts sharply with those of Justice Blackmun's concurrence and the dissenters. Those analyses admit that a sixth amendment error exists in the *Parker* situation, but go on to inquire whether that error is harmless.[64]

The primary advantage to recognizing the interlocking confession exception, as the *Parker* plurality did, is that it allows a trial court to assess in a forthright manner the issue of severance in a case involving codefendants' interlocking confessions. Instead of speculating on the possible harm of the error, the trial court can focus on the codefendants' statements to see if they are in fact interlocking. Under the *Parker* plurality view, the trial court would commit no error by admitting nontestifying codefendant confessions so long as they are "interlocking" and the jury is properly instructed that the respective confessions can

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63. Another reading of *Parker* is that the plurality attempted to diminish *Bruton* and to return eventually to the holding of *Delli Paoli*. This reading is supported in part by the plurality's reliance on Opper v. United States, 348 U.S. 84 (1954), for the proposition 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 in numerous decisions of this Court." 442 U.S. at 73-74.

However, *Opper*, while not expressly overruled by *Bruton*, was clearly overruled by implication, at least as it related to any sixth amendment issue. In *Opper*, the "clear and repeated admonitions to the jury . . . that [the codefendant's] incriminatory statements were not to be considered in establishing the guilt of the petitioner" and the fact that "[o]ur theory of trial relies upon the ability of a jury to follow instructions" were sufficient reason for the Supreme Court in 1954 to find no error. 348 U.S. at 95. In contrast, the holding in *Bruton* was that limiting instructions, no matter how clear, are an inadequate substitute for a defendant's right of confrontation. *Bruton*, 391 U.S. at 137.

64. 442 U.S. at 80-82.

only be considered against their makers.

One major shortcoming of the *Parker* plurality opinion is its failure to define the term "interlocking confession." As will be more fully developed in Section B of Part IV, subsequent courts have required as little as an "incriminating statement" on the part of a complaining defendant, and as much as substantially equal statements by codefendants, to trigger the *Parker* exception to *Bruton*.

B. The Parker *Concurrence and Dissent*

Although the concurring and dissenting opinions differed as to whether harmless error did in fact exist in *Parker*,[65] they were in complete agreement as to the continued vitality of the harmless error standard of review in all cases involving the admission at trial of a nontestifying codefendant's statement incriminating another defendant. In his concurrence, Justice Blackmun recognized that error in most interlocking confession cases would be harmless,[66] but concluded that merely because the codefendants' "confessions may interlock to some degree does not ensure, as a *per se* matter, that their admission will not prejudice a defendant so substantially that a limiting instruction will not be curative."[67]

The concurring opinion questioned the potential impact of the plurality's decision. Justice Blackmun speculated that the interlocking confession doctrine might merely signify a shift in inquiry.[68] Unlike the harmless error analysis, which focuses on the effect of a *Bruton* violation, the interlocking confession exception inquires whether the confessions were sufficiently interlocking to permit a conclusion that *Bruton* does not apply. Either analysis would produce the same result. However, Justice Blackmun noted that the plurality simply presumed the existence of an interlock.[69] He criticized the plurality opinion, stating that it came "close to saying that so long as all the defen-

65. *See id.* at 80 (Blackmun, J., concurring); *id.* at 81-82 (Stevens, J., dissenting). The finding by the district and circuit courts that the *Bruton* error in *Parker* was not harmless should preclude the Court from reaching a different result. *Id.* at 81 n.1.

66. 442 U.S. at 79.

67. *Id.*

68. *Id.*

69. *Id.* at 80.

dants have made some type of confession which is placed in evidence, *Bruton* is inapplicable without inquiry into whether the confessions actually interlock and the extent thereof."[70]

The dissent shared Justice Blackmun's concern over the scope of the exception to *Bruton* that was proposed by the plurality. The dissent questioned whether the plurality's attempt to "create a vaguely defined exception for cases in which there is evidence that the defendant has also made inculpatory statements which he does not repudiate at trial"[71] was compatible with the Court's prior rulings.[72] The dissent distinguished cases in which the defendant's own confession constitutes convincing evidence of his guilt from cases in which the defendant's confession was not conclusive on the question of guilt.[73] The dissent

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70. *Id.*

71. *Id.* at 82. Interestingly, the dissent's assumption that the interlocking confession doctrine would be limited to cases in which the defendant had failed to repudiate his own confession has proved unwarranted. *See, e.g.*, Damon v. State, 397 So. 2d 1224, 1226 (Fla. Dist. Ct. App. 1981)("The interlocking confession doctrine, however, has full vitality even when the defendant's admissions are themselves challenged at the trial.").

72. 442 U.S. at 83 n.3.

73. *Id.* at 82. Justice Stevens used the following example to illustrate the potentially devastating effect of a codefendant's confession on a case in which the defendant's own "confession" is not convincing evidence of the defendant's guilt:

> 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 the tape of a televised interview with Y describing in detail how he and X planned and executed the crime. Items 2 through 9 involve circumstantial evidence of a 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 *Bruton* rule was designed to avoid. As Mr. Justice Stewart's characteristically concise explanation of the underlying rationale in that case demonstrates, it would also plainly violate X's Sixth Amendment right to confront his accuser. Nevertheless, under the plurality's first 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 from the use of item 1.

442 U.S. at 84-85 (citations and footnote omitted).

asserted that in many cases the defendant's own confession was no more reliable than other kinds of evidence, such as finger prints or eyewitness testimony, and that "if these types of corroboration are given the same absolute effect that the plurality would accord confessions, the *Bruton* rule would almost never apply."[74]

The dissent also criticized the plurality for relying on two erroneous assumptions. First, the plurality assumes that it is reasonable to rely on the jury's ability to disregard the codefendant's incriminating statement when that statement is at least partially corroborated by the defendant's statement. Second, it assumes that all unchallenged confessions by a defendant are equally reliable.[75]

Before attempting to evaluate the relative merits of an interlocking confession exception to *Bruton* and the continued use of harmless error review in all situations involving the admission of an incriminating statement by a nontestifying codefendant, it may be useful to examine how the lower courts have reacted to *Parker* and how the interlocking confession doctrine has developed in practice.

IV. Post-*Parker*: The Reaction by the Lower Courts

A. The Federal Courts

Only the Second Circuit, which orginated the interlocking confession exception to *Bruton*, and the Eleventh Circuit[76] have wholeheartedly accepted the *Parker* plurality analysis. Several circuits have rejected the *Parker* plurality reasoning and have chosen instead to follow the harmless error analysis set forth in Justice Blackmun's concurring opinion. The Seventh Circuit saw no need to choose between the two analyses since it would find no reversible error under either standard.[77] In short, the division of authority, which presumably led the Supreme Court to grant certiorari in *Parker*, has in no way diminished since the Court handed down its own divided opinion.

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74. *Id.* at 86.
75. *Id.* at 84.
76. *See* United States v. Kroesser, 731 F.2d 1509 (11th Cir. 1984).
77. *See* Montes v. Jenkins, 626 F.2d 584 (7th Cir. 1980).

The Second Circuit, which presaged the *Parker* plurality's interlocking confession doctrine,[78] has the most extensive case law on the issue.[79] In determining whether an interlocking confession exists in a case, the Second Circuit courts have recognized that the defendant's confession need not be a "maternal twin" with the confession of the codefendant.[80] It is enough under the law of the Second Circuit that the codefendants' confessions are "[a]s to motive, plot and execution of the crime . . . essentially the same,"[81] or that a statement made by a complaining defendant interlocks on "all essential points" with the codefendant's incriminating statement.[82]

The Second Circuit, like many state courts, has not expressly distinguished between a defendant's "confession" or "statement." However, it has apparently required a defendant's own statement to admit culpability to the same extent that a codefendant's statement incriminates him.

The Second Circuit has not placed any restrictions on the source of the defendant's own interlocking confession. For example, in *Tamilio v. Fogg*,[83] the defendant was denied *Bruton* protection on the basis of a statement allegedly made to a fellow prisoner after the two had been together for approximately five minutes. Arguably, allowing a "prison confession" to preclude *Bruton* protection is incompatible with the *Parker* plurality's rationale that a defendant's own confession is "probably the most probative and damaging evidence that can be admitted against him."[84] The plurality's reasoning assumes that once the defendant's own confession has been admitted at trial, the subsequent

78. United States *ex rel.* Catanzaro v. Mancusi, 404 F.2d 296 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1970). *See supra* text accompanying notes 52-53.

79. *See, e.g.*, Tamilio v. Fogg, 713 F.2d 18 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 706 (1984); Kirksey v. Jones, 673 F.2d 58 (2d Cir. 1982); United States *ex rel.* Ortiz v. Fritz, 476 F.2d 37 (2d Cir.), *cert. denied*, 414 U.S. 1075 (1973); United States *ex rel.* Catanzaro v. Mancusi, 404 F.2d 296 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1970); United States v. Bethea, 505 F. Supp. 698 (E.D.N.Y. 1980); Forehead v. Fogg, 500 F. Supp. 851 (S.D.N.Y. 1980); Felton v. Harris, 482 F. Supp. 448 (S.D.N.Y. 1979).

80. *See* United States *ex rel.* Stanbridge v. Zelker, 514 F.2d 45, 48 (2d Cir.), *cert. denied*, 423 U.S. 873 (1975); Forehead v. Fogg, 500 F. Supp. 851, 853 (S.D.N.Y. 1980).

81. United States *ex rel.* Ortiz v. Fritz, 476 F.2d 37, 39 (2d Cir.), *cert. denied*, 414 U.S. 1075 (1973). *See also* Felton v. Harris, 482 F. Supp. 448, 455 (S.D.N.Y. 1979).

82. Tamilio v. Fogg, 713 F.2d 18, 20 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 706 (1984).

83. 713 F.2d 18 (2d Cir. 1983).

84. *Parker*, 442 U.S. at 72 (quoting *Bruton*, 391 U.S. at 139 (White, J., dissenting)).

admission of the codefendant's incriminating statement will seldom have the devastating effect at issue in *Bruton*.[85] Of course, the linchpin of this theory is that the defendant's own confession is reliable. It may be argued that jail house confessions lack the requisite reliability to fall legitimately within the category of an interlocking confession exception to *Bruton*.

The Second Circuit has noted the similarity between the harmless error doctrine and the interlocking confession doctrine.[86] In addition, the Second Circuit has applied the interlocking confession doctrine without defining the term "interlocking confession" and without referencing the contents or the similarity of the codefendants' statements.[87]

Prior to *Parker*, the *Catanzaro* interlocking confession rule was questioned within the Second Circuit itself. In *United States ex rel. Ortiz v. Fritz*,[88] a panel consisting of Judges Oakes, Friendly, and Timbers openly challenged the soundness of *Catanzaro*. The panel, however, affirmed the district court's decision because it felt bound to follow *Catanzaro* as the law of the circuit.[89] The court in *Ortiz* was disturbed by the failure of the *Catanzaro* rationale[90] to address the "second underpinning of *Bruton*," namely, the "inevitably suspect" nature of a codefendant's statement incriminating a defendant.[91] As stated in *Ortiz*, "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."[92] Certainly if the jury actually considers such evidence there is a sixth amendment viola-

85. *Parker*, 442 U.S. at 72-73.

86. Tamilio v. Fogg, 713 F.2d 18, 21 (2d Cir. 1983). *See also* United States v. Bethea, 505 F. Supp. 698 (E.D.N.Y. 1980). In *Bethea*, the court stated: "[T]he theory of the interlocking confession cases is essentially one of harmless error. If the major elements of the crime are confessed by both defendants, there is little harm in having a co-defendant's confirmation of the defendant's responsibility." *Id.* at 704 (citing *Parker*, 442 U.S. 62 (1979)).

87. *See, e.g.*, Kirksey v. Jones, 673 F.2d 58 (2d Cir. 1982).

88. 476 F.2d 37 (2d Cir.), *cert. denied*, 414 U.S. 1075 (1973).

89. *Id.* at 38-40.

90. *Id.* at 40. "The *Catanzaro* rationale is that the ' "devastating" risk' that a jury will not be able to disregard the codefendant's confession is not present when the defendant's own confession is in evidence." *Id.* (citation and footnote omitted).

91. *Id.* at 40.

92. *Id.* at 40 (citation and footnote omitted).

tion since the defendant has not been allowed to test the veracity of the codefendant's statement by cross-examination.

A survey of the Second Circuit case law[93] suggests that the appellate results would have been the same under a harmless error analysis. As will be shown below, this is not the case with all the courts that have adopted the interlocking confession doctrine.

Most circuits that have considered the issue continue to apply a harmless error analysis to situations involving incriminating statements by codefendants.[94] One circuit court, noting the four to four split in *Parker*, refused to choose the appropriate analysis and instead upheld the conviction under both the plurality and harmless error approaches.[95]

B. The State Courts

The range of reaction to the *Parker* plurality opinion has been much greater in state courts than in federal courts. Some state courts have accepted the *Parker* plurality holding without question as if it were binding precedent.[96] Other courts, highly critical of the *Parker* plurality opinion, have stated that it is of no precedential value.[97] Still other state courts, which adopted the interlocking confession exception prior to *Parker*, continue to use it post-*Parker*.[98] Other courts blur the distinction be-

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93. *See supra* note 79.

94. *See, e.g.*, United States v. Ruff, 717 F.2d 855 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 733 (1984); United States v. Iron Thunder, 714 F.2d 765 (8th Cir. 1983); Poole v. Perini, 659 F.2d 730 (6th Cir. 1981), *cert. denied*, 455 U.S. 910 (1982); United States v. Espericueta-Reyes, 631 F.2d 616 (9th Cir. 1980); United States v. Parker, 622 F.2d 298 (8th Cir.), *cert. denied*, 449 U.S. 851 (1980); Mayes v. Sowders, 621 F.2d 850 (6th Cir.), *cert. denied*, 449 U.S. 922 (1980).

95. Montes v. Jenkins, 626 F.2d 584 (7th Cir. 1980). *See also* Metropolis v. Turner, 437 F.2d 207 (10th Cir. 1971).

96. *See* State v. Gerlaugh, 134 Ariz. 164, 168, 654 P.2d 800, 804 (1982); United States v. Jones, 438 A.2d 444, 446 (D.C. 1981)(dicta), *cert. denied*, 456 U.S. 918 (1982); Damon v. State, 397 So. 2d 1224, 1225-26 (Fla. Dist. Ct. App. 1981); Fortner v. State, 248 Ga. 107, 108-09, 281 S.E.2d 533, 535-36 (1981); State v. Thompson, 279 S.C. 405, 407-08, 308 S.E.2d 364, 365-66 (1983); State v. Painter, 614 S.W.2d 86, 89 (Tenn. Crim. App. 1981).

97. *See* Quick v. State, 599 P.2d 712, 722-25 (Alaska 1979); State v. Rodriguez, 226 Kan. 558, 561-63, 601 P.2d 686, 689-90 (1979); State v. Bleyl, 435 A.2d 1349, 1362-63 (Me. 1981); Earhart v. State, 48 Md. App. 695, 697-706, 429 A.2d 557, 560-63 (1981).

98. *See* People v. Sanders, 103 Ill. App. 3d 700, 705-06, 431 N.E.2d 1145, 1150, *cert. denied*, 459 U.S. 871 (1982); Commonwealth v. Bianco, 388 Mass. 358, 365, 446 N.E.2d

tween the harmless error approach and the interlocking confession doctrine.[99] Finally, a significant number of state courts have preferred to follow Justice Blackmun's harmless error analysis even in those cases in which the defendant has made a self-incriminating statement.[100]

Before looking more closely at the state courts' reactions to *Parker*, it is worth recalling the concerns voiced by Justice Blackmun in his *Parker* concurrence.[101] On the one hand, he thought that the interlocking confession exception to *Bruton*, endorsed by the plurality, might just be a shift in analysis, that is, a shift from a focus on the question of whether the error involved was harmless to an inquiry as to whether the codefendants' confessions were interlocking to such an extent that *Bruton* did not apply.[102] This shift of focus would not necessarily change the net result as long as the degree of interlock required was such that any error would also be harmless.[103] On

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1041, 1046 (1983); People v. Berzups, 49 N.Y.2d 417, 425-26, 402 N.E.2d 1155, 1158-59, 426 N.Y.S.2d 253, 256-57 (1980); State v. Gray, 628 S.W.2d 746, 749 (Tenn. Crim. App. 1982).

99. *See* State v. Bleyl, 435 A.2d 1349, 1365 (Me. 1981); State v. Elwell, 380 A.2d 1016, 1021 n.5 (Me. 1977); People v. Hartford, 117 Mich. App. 413, 418-20, 324 N.W.2d 31, 34 (1982).

100. *See* State v. Moritz, 63 Ohio St. 2d 150, 155-56, 407 N.E.2d 1268, 1272 (1980). *See also supra* cases cited in note 97.

101. 442 U.S. at 77-81.

102. *Id.* at 78-80.

103. For example, consider the following two statements:

> Defendant X: Me and Y decided to rob the 7-11. Y drove the car and I went in with a gun and got money from the clerk.
>
> Defendant Y: Me and X decided to rob the 7-11. I waited in the car. X went into the store and came running out. We drove to my place and split the money.

Suppose X and Y are tried jointly for armed robbery and both their statements are admitted. Obviously redaction would not successfully conceal the nondeclarant's identity in either statement. Under the *Parker* plurality approach both statements would be admissible with proper limiting instructions as interlocking confessions. The result would be the same on appeal if the harmless error analysis were applied since both X and Y have admitted their guilt as to all the essential elements of the crime.

In contrast, consider the following two statements:

> Defendant X: Y and I decided to rob the 7-11. Y drove the car and I went in with a gun and got money from the clerk. Y drove the getaway car.
>
> Defendant Y: I'd been to a party with X. We were going home and stopped at the 7-11 to get cigarettes. I waited for X to get the cigarettes and when he came out we went to his house and listened to classical music—Le Sacre du Printemps by Stravinsky, I believe. X paid me some money that he owed me.

Here, the defendants' statements interlock in some respects, but not with respect to the

the other hand, Justice Blackmun noted with concern that the plurality itself had not truly inquired into the existence of an adequate interlock between the codefendants' statements but, rather, had assumed the existence of an interlock. Justice Blackmun acknowledged that the plurality came "close to saying that so long as all the defendants have made some type of confession which is placed in evidence, *Bruton* is inapplicable without inquiry into whether the confessions actually interlock and the extent thereof."[104] As will be shown below, some state courts following the *Parker* plurality have reacted in a manner that is primarily a shift in focus while other courts have assumed sufficient interlock in some questionable situations.

Although the *Parker* plurality is not binding precedent on the states,[105] several state courts have followed the plurality opinion without question.[106] These states' judicial implementation of the interlocking confession doctrine espoused by the *Parker* plurality varies considerably. The reach of the *Parker* plurality's exception to the *Bruton* rule depends, of course, on the definitions of "interlocking" and "confession." The *Parker* plurality, however, neglected to define these terms and, consequently, that task has been left to the lower courts. By examining the working definitions used by the courts, one can gauge to a certain extent the scope of the "interlocking confession doctrine" in a given jurisdiction.

In Tennessee, for example, the inquiry appears to be whether "the confession of one non-testifying codefendant contradicts, repudiates, or adds to material statements in the confession of the other non-testifying codefendant, so as to expose the latter to an increased risk of conviction or to an increase in the degree of the offense with correspondingly greater punishment."[107] If a nontestifying codefendant's confession fits within

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material elements of the crime. Whether the result in this example would be the same regardless of whether a harmless error analysis or an interlocking confession inquiry were used would depend on the degree of interlock required by a reviewing court.

104. Parker v. Randolph, 442 U.S. 62, 80 (1979).

105. *See* Marks v. United States, 430 U.S. 188, 193 (1977); Neil v. Biggers, 409 U.S. 188, 192 (1972); State v. Rodriguez, 226 Kan. 558, 565, 601 P.2d 686, 690 (1979); State v. Bleyl, 435 A.2d 1349, 1363 (Me. 1981).

106. *See supra* note 96.

107. State v. Gray, 628 S.W.2d 746, 749 (Tenn. Crim. App. 1982) (quoting State v. Elliott, 524 S.W.2d 473, 478 (Tenn. 1975)).

this category, *Bruton* would be applicable; otherwise *Bruton* would not be applicable, and the codefendant confession that incriminated a self-confessing defendant would, with appropriate limiting instructions, be admissible. Given the Tennessee definitional requirements for interlocking confessions, it is likely that all cases in which the codefendants' confessions are found to be interlocking will also be cases in which harmless error would be found should that analysis be used. This same phenomenon can be seen in other jurisdictions which require that the codefendants' confessions agree with respect to the material elements of the crime in order for *Bruton* not to apply.[108]

Some state courts have expressly recognized an overlap between the harmless error and interlocking confession doctrines.[109] In *State v. Elwell*,[110] the Supreme Judicial Court of Maine agreed with the Tenth Circuit's determination in *Metropolis v. Turner*[111] that the distinction between no *Bruton* violation and a harmless violation was a "legal nicety."[112] The Maine Court summarized its analysis as follows: "[S]uffice it to say, when interlocking confessions are admitted, *Bruton* does not require reversal."[113] The Maine court, however, has recognized the relative disutility of the harmless error analysis in the pretrial context. The court has therefore endorsed the interlocking confession doctrine as an analytical tool to decide pretrial motions for severance in the trial court.[114]

In contrast to courts that have been somewhat restrictive in their definition of "interlocking confession," and thus in their

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108. *See, e.g.*, State v. Mata, 125 Ariz. 233, 238, 609 P.2d 48, 53 (1980)("[T]he confessions of the Mata brothers did interlock in that they were consistent on the major elements of the crime and there was nothing in Alonzo's confession that implicated the defendant any more in the commission of the crime than did his own confession.").

109. *See supra* note 99.

110. 380 A.2d 1016 (Me. 1977).

111. 437 F.2d 207 (10th Cir. 1971).

112. *Id.* at 208.

113. State v. Elwell, 380 A.2d 1016, 1021 n.5 (Me. 1977). *See also* State v. Bleyl, 435 A.2d 1349 (Me. 1981). A slightly different analysis is suggested in People v. Miller, 88 Mich. App. 210, 276 N.W.2d 558 (1979), *rev'd on other grounds*, 411 Mich. 321, 307 N.W.2d 335 (1981). There, the court stated, "Where the various confessions are interlocking or substantially similar, the 'powerfully incriminating extrajudicial statements of a codefendant' are not present as in *Bruton*, and, hence, it is harmless error at most to admit such statements." 88 Mich. App. at 221, 276 N.W.2d at 563 (citations omitted). *Accord* People v. Hartford, 117 Mich. App. 413, 324 N.W.2d 31 (1982).

114. State v. Bleyl, 435 A.2d 1349, 1363 (Me. 1981).

application of the interlocking confession exception to *Bruton*, are courts that have tended either to assume the existence of an "interlocking confession" or to broadly define the term. Georgia and South Carolina case law illustrate the development of what might be called the "somewhat similar statement" doctrine.

The Georgia Supreme Court initially applied *Parker* in *Casper v. State*[115] in 1979.[116] The court in *Casper* interpreted the *Parker* plurality's opinion as holding that "no denial of confrontation occurs when the confessions of all defendants in the joint trial are admitted."[117] In *Casper*, as in *Parker*, no definition of "interlocking confession" was offered. Of the three codefendants in *Casper*, two had signed written "confessions" and one had made an "incriminating statement" to a police officer. The court in *Casper*, however, neither mentioned the contents of nor distinguished between the "confessions" or "statement."[118]

Without formulating a clear distinction between "confessions" and "statements," the Georgia Supreme Court in *Casper* hypothesized a novel definition of "interlocking." The confessions and statement in *Casper* had been edited, or redacted, by the trial court in an attempt to comply with the requirements of *Bruton* by deleting the names of nondeclarant defendants. The supreme court apparently reasoned that since the redaction was unsuccessful, in that a jury listening to the three "confessions" could still discern the identity of the defendants even after deletion of their names, the confessions were in fact "interlocking."[119]

This apparent definitional requirement for an "interlocking" confession was reasserted by the Georgia court two years later in *Fortner v. State*.[120] In *Fortner* the court distinguished *Bruton* and determined that the case before it was similar to *Parker*, which was characterized by the Georgia court as follows:

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115. 244 Ga. 689, 261 S.E.2d 629 (1979).

116. It is unclear to what extent the Georgia courts may have adopted the interlocking confession doctrine prior to *Parker*. *Compare* Gamarra v. State, 142 Ga. App. 196, 197, 235 S.E.2d 652, 654 (1977)("There is no *Bruton* violation, however, when the testimony presented in the co-defendant's confession is supported by the complaining defendant's own confession.") *with* Baker v. State, 238 Ga. 389, 233 S.E.2d 347 (1977)(harmless error analysis applied).

117. 244 Ga. at 691, 261 S.E.2d at 631.

118. *Id.*

119. *Id.*

120. 248 Ga. 107, 281 S.E.2d 533 (1981).

> In *Parker*, the three defendants in issue were tried jointly, confessions of all three were admitted as having been freely and voluntarily given, with the names of the other two defendants redacted . . ., the confessions were interlocking (i.e., corroborated each other, leaving no doubt in the jurors' minds concerning the other persons referred to), and the trial court instructed the jury that each confession could be considered only as against its maker and not against the other defendants.[121]

In view of the fact that *Bruton* allows the use at trial of incriminating nontestifying codefendant statements only if they *can be effectively redacted* so as not to incriminate another defendant, it is troubling that *Casper* and *Fortner* appear to immunize from *Bruton* protection those statements which *cannot be effectively redacted.* This aspect of the Georgia case law might be less troubling if it were coupled with a requirement that the codefendants' confessions agree with respect to all material elements of the crime. Examination of the codefendants' statements in *Fortner*, however, shows that no such requirement exists.[122]

Georgia has also addressed the question of whether the interlocking confession doctrine extends to incriminating *statements* made by codefendants.[123] Relying in part on a reference to "incriminating statements" in the *Parker* plurality opinion, the Georgia court in *Tatum v. State*[124] rejected a defense argument that *Parker* applies only when the defendant has confessed, and not when he has made an incriminating statement.[125] The court noted that seldom will a defendant's statement contain direct admissions as to each element of the crime. The court interpreted *Parker* "to require only that the confessions or incriminating statements of co-defendants be interlocking to a substantial degree. Juries are expected to heed limiting instruc-

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121. *Id.* at 108-09, 281 S.E.2d at 535.

122. *See Fortner*, 248 Ga. at 108 n.2, 281 S.E.2d at 535 n.2.

123. Georgia's first opportunity to decide this question was presented in Casper v. State, 244 Ga. 689, 261 S.E.2d 629 (1979), but the court avoided the issue by stating, "If a distinction is to be drawn between a confession and an incriminating statement, then the admission of the confessions as against [the defendant] who also made a statement, was harmless beyond a reasonable doubt. . . ." 244 Ga. at 691, 261 S.E.2d at 631 (citing Harrington v. California, 395 U.S. 250 (1969)).

124. 249 Ga. 422, 291 S.E.2d 701 (1982).

125. *Id.* at 425, 291 S.E.2d at 704 (citing *Parker*, 442 U.S. at 73).

tions, and slight disparities in the statements of co-defendants rarely, if ever, will be so prejudicial as to require exclusion under the *Bruton* rule."[126]

An examination of the case law reveals to what extent "slight" disparities might be allowed under the Georgia Supreme Court's interpretation of *Parker*.[127] For example, in *Fortner v. State*, there were three codefendants. Two codefendants, Riley and McCluskey, were convicted of murder and armed robbery; Fortner was convicted of felony murder. All three claimed *Bruton* error as to the admission at trial of the other codefendants' confessions. The court found *Parker* controlling, and thus that no sixth amendment violation existed. The substance of the defendants' statements is summarized below.

> FORTNER STATEMENT: McCluskey was driving Fortner and Riley around in Fortner's car when they decided to use Riley's gun to get money.
> RILEY STATEMENT: Riley was influenced by McCluskey to commit the robbery. The gun cocked and discharged when the victim grabbed Riley.
> McCLUSKEY STATEMENT: The three defendants were riding around for another purpose when Riley demanded that McCluskey stop the car. Riley announced that he was going back to the Magik Mart phone booth where the three defendants had seen a man standing. When Riley returned he said he had shot a man.[128]

Certainly one may doubt the truthfulness of McCluskey's statement standing on its own. The fact is, however, that although he did not admit participating in either the armed robbery or the murder, McCluskey was seriously implicated in both crimes by his codefendants' confessions. Even so the court characterized the statements as "clearly interlocking."[129] Given the

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126. 249 Ga. at 425, 291 S.E.2d at 704. It should be noted that nowhere in the interlocking confession analysis proposed by the Georgia court is there a mechanism by which the "rare" prejudicial case can be separated from the standard interlocking confession case, unless a harmless error inquiry lurks beneath the express inquiry as to whether a substantial degree of interlock exists.

127. *See, e.g.*, Tatum v. State, 249 Ga. 422, 291 S.E.2d 701 (1982); Fortner v. State, 248 Ga. 107, 281 S.E.2d 533 (1981); Edwards v. State, 162 Ga. App. 216, 290 S.E.2d 553 (1982).

128. 248 Ga. 107, 108 n.2, 281 S.E.2d 533, 535 n.2 (1981).

129. *Id.* at 109, 281 S.E.2d at 536.

rationale of *Bruton*, it seems strange to distinguish the situation in *Fortner*, in which McCluskey's statement corroborated those of his codefendants only with respect to the fact that the three were in the same car, from a hypothetical situation in which McCluskey had never given the police a statement. In the latter situation, *Bruton* would apply even in Georgia, and presumably, it would preclude the admission of the codefendants' statements because there would be no statement by the defendant capable of interlocking with those of the codefendants.

Fortner is one example from Georgia of what this writer will call the "somewhat similar statement" exception to *Bruton*.[130] Another example is *State v. Thompson*,[131] the case in which the South Carolina Supreme Court ostensibly adopted the *Parker* plurality's holding.

Sallie Thompson was accused and convicted of being an accessory before and after the fact to murder. The victim was appellant's husband, and the accused murderer, appellant's codefendant, was her lover.[132] Both Thompson and her codefendant, Dennis McCurry, gave statements to the police which the trial court admitted along with limiting instructions.[133] The South Carolina Supreme Court upheld the trial court's determination that the "confessions" of the two defendants were "interlocking" under *Parker*.[134] The supreme court found that there was an interlock because "[t]he statements of appellant and her co-defendant support each other in several respects."[135] It is equally true, however, that the two statements differed significantly with respect to the elements of the crimes with which Thompson had been charged.[136]

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130. *See also* Edwards v. State, 162 Ga. App. 216, 290 S.E.2d 553 (1982). For additional information on the statements involved in *Edwards*, see Tatum v. State, 249 Ga. 422, 291 S.E.2d 701 (1982)(Tatum and Edwards were codefendants).

131. 279 S.C. 405, 308 S.E.2d 364 (1983). For a discussion of *Thompson*, see *Criminal Law, Annual Survey of South Carolina Law*, 36 S.C.L. Rev. 71, 103 (1984).

132. 279 S.C. at 406, 308 S.E.2d at 365.

133. *Id.* at 407, 308 S.E.2d at 366. Thompson's statement was redacted by the trial court at the point she stated that McCurry, having just told her that he had shot her husband, told her "but I believe I made it look like a suicide." Record at 108. This statement conflicted with McCurry's statement which claimed the shooting had been an accident. *See* Record at 115.

134. 279 S.C. at 407, 308 S.E.2d at 366.

135. *Id.*

136. In determining that a sufficient interlock existed in *Thompson*, the South Carolina Supreme Court wrote:

The South Carolina and Georgia cases discussed above are

> [Both defendants admit] to having discussed the murder of appellant's husband. Each states that McCurry told appellant that he planned to kill appellant's husband immediately prior to the crime. According to both accounts, McCurry hid in appellant's bedroom after the murder. Although appellant's statement emphasizes her fear of McCurry, McCurry's statement suggests the shooting was accidental. However, this discrepancy was not so significant as to require exclusion of the statements.

Id. at 407, 308 S.E.2d at 366.

Below is a breakdown of the actual statements in *Thompson* upon which the court based its finding that the statements were interlocking and thus admissible under *Parker*.

> *Court*: Each [defendant] admits to having discussed the murder of appellant's husband. [279 S.C. 407, 308 S.E.2d 366 (1983).]
>
> *Sallie Thompson*: Then Dennis told me about killing Steve, he asked me about it. He said "it looks like the only way I'm going to get you is to kill Steve, because you are not going to leave him." . . . I thought I loved Dennis, I thought I loved Steve too. I was torn between two people. Dennis started asking me about killing Steve, and I told him no. The more Dennis talked about it, and kept after me about it, I started telling him, "I just don't know Dennis, I just don't know." . . . Dennis rode hard about killing Steve. I thought if I told him I just didn't know, he would leave me alone. . . . Well, he kept asking me when to do it, when to kill him. I told him that I didn't want to have no part in a killing, that we would both go to jail. . . . Dennis had told me he could kill Steve at the Tan Yard. . . . Dennis had kept after me about killing Steve. I told Dennis "if you are going to do it, I don't want to know about it." I guess this was about a week before Steve was shot. I was pretty sure of the fact, by this time, that Dennis could commit a murder. [Record at 107-08.]
>
> *Dennis McCurry*: [Sallie and I] talked about if Steve wasn't around we would get married. . . . We was just talking about it, just aggravating each other. . . . Me and Sally had talked about getting Steve out of the way. [Record at 112.]
>
> *Court*: Each [defendant] state[d] that McCurry told appellant that he planned to kill appellant's husband immediately prior to the crime. [279 S.C. 407, 308 S.E.2d 366 (1983).]
>
> *Sallie Thompson*: Dennis told me "You know I am going to kill him tonight?" I said, "Yes." I didn't believe he would do it. [Record at 108.]
>
> *Dennis McCurry*: Sally asked me if I was going to do it tonight. I thought she was joking. I said yea, I probably will. [Record at 113.]

It seems clear from a review of both statements that McCurry's statement incriminated Thompson to an extent far beyond her own. As in *Parker* and *Bruton*, the issue in *Thompson* was not whether McCurry's statement was admissible against Thompson; obviously it was not. The issue was whether the jury could reasonably be expected to follow the court's instruction that it consider the McCurry statement only with respect to its declarant. Had Sallie Thompson never made a statement to the police she would have been unquestionably entitled to *Bruton* protection. Query whether the statement made by Thompson was such that "the defendant's case ha[d] already been devastated by [her] own extrajudicial confession of guilt," thereby justifying the application of the general rule that juries will follow instructions and not the "*Bruton* exception." *Parker*, 442 U.S. at 75 n.7 (Rehnquist, J., plurality).

instructive as to the possible reach of the interlocking confession doctrine. But for the rubric "interlocking confession," appellants in cases such as *Fortner* and *Thompson* would have received the protection provided by *Bruton*. These were not cases in which the defendant's case had been "devastated by his own extra-judicial confession of guilt,"[137] the factor which ostensibly propelled the *Parker* plurality to distinguish interlocking cases from those governed by *Bruton*.

It would be pure speculation to comment on whether the appellants in *Thompson* and *Fortner* would have been afforded greater protection of their confrontation rights had the appellate courts followed the *Parker* concurrence and dissent's harmless error analysis. As the case below suggests, it would be naive and simplistic to characterize the harmless error standard as the great protector of defendants' sixth amendment rights[138] and the interlocking confession doctrine as the diminisher of those same rights.

In *Hendrix v. Smith*,[139] an armed robbery case, two state courts and a federal district court had found a *Bruton* violation to be harmless error beyond a reasonable doubt before the Second Circuit finally reversed. The district court in *Hendrix* determined that "[t]he strength of the eyewitness identification, which was not challenged in any material respect . . . and *which the jury accepted*, [made] the case an appropriate one for application of the harmless error standard."[140] Such a finding failed to take into account the credibility of the eyewitness testimony or the corroborative effect of the codefendant's statement incriminating the defendant. The district court presumed that the jury was ultimately persuaded by the untainted eyewitness testimony without regard to the tainted statement by the codefendant.[141] The court in *Hendrix* indulged in a presumption, seen in

137. *Parker*, 442 U.S. at 75 n.7 (Rehnquist, J., plurality).

138. *See, e.g.*, Harrington v. California, 395 U.S. 250, 256-57 (1969)(Brennan, J., dissenting). *See generally* Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421 (1980).

139. 639 F.2d 113 (2d Cir. 1981), *rev'g*, 494 F. Supp. 314 (E.D.N.Y. 1980). *See also* People v. Hendrix, 56 A.D.2d 580, 391 N.Y.S.2d 186 (1977), *aff'd by memorandum order*, 44 N.Y.2d 658, 376 N.E.2d 192, 405 N.Y.S.2d 31 (1978).

140. 494 F. Supp. 314, 318 (E.D.N.Y. 1980)(emphasis added).

141. The district court's analysis brings to mind the concern of the dissent in *Harrington v. California* that "the focus of appellate inquiry should be on the character and quality of the tainted evidence as it relates to the untainted evidence and not just on the

many harmless error cases, that the proper evidence was both credible and persuasive to the trial jury.

Oddly enough, although three courts of review had found harmless error in *Hendrix*, the court of appeals held that it was "clear that absent [codefendant's] statement, the independent evidence of appellant's guilt is not so overwhelming that the conviction must stand."[142] The circuit court focused on the fact that the victim who gave the eyewitness testimony had been previously convicted of murdering a police officer, a crime of moral turpitude.[143] Further, there was testimony by witnesses for the defense that the victim had approached certain individuals asking for money in exchange for his dropping the charges against Mr. Hendrix, and offering to pay a defense witness to testify for the prosecution.[144] Thus, the *Hendrix* case demonstrates how the constitutional protection afforded a defendant may fluctuate when harmless error analysis is used by a reviewing court.

It is probably fair to conclude that the extent of sixth amendment protections afforded codefendants in joint trials when one nontestifying defendant has made a statement that incriminates another defendant is governed not so much by whether a court applies the so-called interlocking confession doctrine or whether it applies a harmless error standard of review. Rather, the extent of protection afforded the defendant's confrontation rights depends on the rigorousness with which an appellate court applies either standard.[145]

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amount of untainted evidence." *Harrington*, 395 U.S. 250, 256 (1969).

142. Hendrix v. Smith, 639 F.2d 113, 116-17 (2d Cir. 1981).

143. *Id.* at 116.

144. 494 F. Supp. at 316 ("Eartha Crowell testified that Henry Jefferson [the victim] called her and offered her $50 to testify. . . . Judy Lawrence testified that Elroy [the petitioner] was not at the party on the night of the crime and that she had a conversation with Henry Jefferson in which he told her that he would drop the charges if they paid him $2,000 or $2,500.").

145. Two examples of stringent appellate review are found in United States v. Iron Thunder, 714 F.2d 765 (8th Cir. 1983), and State v. Rodriguez, 226 Kan. 558, 601 P.2d 686 (1979). In both cases the complaining defendant made a somewhat incriminating statement, but both courts closely examined the codefendant's statement to determine whether it incriminated the defendant to a degree greater than that of the defendant's own statement.

V. Conclusion

The Supreme Court's failure in *Parker v. Randolph* to either fashion or reject as constitutionally impermissible an interlocking confession exception to *Bruton* has exacerbated what was already a serious lack of consensus in the lower courts. Worse, the *Parker* plurality's failure to explicitly define what it meant by "interlocking confession" has allowed courts, which so choose, to violate the spirit and holding of *Bruton* by ostensibly following the *Parker* plurality's holding.

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