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Avoiding a Confrontation?

HOW COURTS HAVE ERRED IN FINDING THAT NONTESTIMONIAL HEARSAY IS BEYOND THE SCOPE OF THE *BRUTON* DOCTRINE

Colin Miller

INTRODUCTION

Quite obviously, what the “interlocking” nature of the codefendant’s confession pertains to is not its *harmfulness* but rather its *reliability*: If it confirms essentially the same facts as the defendant’s own confession it is more likely to be true. Its reliability . . . may be relevant to whether the confession should . . . be *admitted as evidence* against the defendant . . . but cannot conceivably be relevant to whether, assuming it cannot be admitted, the jury is likely to obey the instruction to disregard it, or the jury’s failure to obey is likely to be inconsequential. The law cannot command respect if such an inexplicable exception to a supposed constitutional imperative is adopted. Having decided *Bruton*, we must face the honest consequences of what it holds.¹

George Bruton and William Evans were jointly tried before a jury on a bank robbery charge.² After Evans was arrested, he confessed to a postal inspector that Bruton and he had committed the robbery.³ Although Evans did not testify at trial, the prosecution introduced his confession against him.⁴ Because the confession was hearsay as to Bruton—and therefore inadmissible against him under the rules of evidence—the court instructed the jury to use it only as evidence of Evans’s guilt.⁵ Despite the instruction, the United States Supreme Court could not trust the jury to use the

¹ Associate Professor, The John Marshall Law School; Blog Editor, EvidenceProf Blog (<http://lawprofessors.typepad.com/evidenceprof>). I would like to thank James Duane, Jules Epstein, George Fisher, Richard Friedman, James Kainen, Richard Lempert, Frederick Moss, and Ben Trachtenberg for their comments on the issue addressed by the article.

² *Cruz v. New York*, 481 U.S. 186, 192-93 (1987).

³ *Bruton v. United States*, 391 U.S. 123, 124 (1968).

⁴ *Id.*

⁵ *Id.* at 125.

Id.

confession against Evans and not against Bruton. The confession had a devastating practical effect on Bruton's defense, and the Court found that admitting it violated his constitutional rights.⁶ Courts now use this "*Bruton* doctrine" to conclude that the admission at a joint jury trial of a nontestifying codefendant's confession that facially incriminates other defendants (but is inadmissible against them under the rules of evidence) violates the Confrontation Clause.⁷

But what if Evans did not make his statement to a person he knew to be a governmental agent? What if he made the same statement to his mother, his brother, or his lover? Or what if he made the same statement to his cellmate, who turned out to be a confidential informant? Before 2004, the vast majority of courts would have found that the admission of such a "noncustodial" statement violated the *Bruton* doctrine.

Furthermore, before 2004, it would have been irrelevant whether Evans's confession was constitutionally reliable as long as it was inadmissible against Bruton under the rules of evidence. In *Ohio v. Roberts*, the Supreme Court held that the admission of hearsay did not violate the Confrontation Clause if the hearsay declarant was "unavailable" and the statement had "adequate indicia of reliability" (i.e., if it was constitutionally reliable).⁸ As the introductory excerpt from the Supreme Court's opinion in *Cruz v. New York* makes clear, however, the *Bruton* doctrine is a test of constitutional *harmfulness* and not a test of constitutional *reliability*.⁹ In other words, *Bruton* focuses upon the damage to a defendant's case based upon the admission of his codefendant's statement, not the (un)reliability of that statement. Therefore, the doctrine depends on the inadmissibility of codefendant confessions combined with their harmfulness, not their constitutional unreliability.¹⁰ Consequently, codefendant confessions that were inadmissible but reliable under *Roberts* still violated the *Bruton* doctrine.¹¹

⁶ *Id.* at 128-36.

⁷ *See, e.g., State v. Ellis*, 748 P.2d 188, 190 (Utah 1987) ("To invoke the *Bruton* doctrine, a statement must be powerfully and facially incriminating with respect to the other defendant and must directly, rather than indirectly, implicate the complaining defendant in the commission of the crime.").

⁸ 448 U.S. 56, 66 (1980).

⁹ *See supra* note 1 and accompanying text.

¹⁰ *See supra* note 1 and accompanying text.

¹¹ *See supra* note 1 and accompanying text.

In its 2004 opinion in *Crawford v. Washington*, the Supreme Court overruled *Roberts*, rejecting its reliability analysis and holding that “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”¹² And while the Supreme Court is still sorting out exactly which statements are “testimonial” and which statements are “nontestimonial,” three things are clear. First, statements like Evans’s confession to the postal inspector are generally testimonial while statements to a mother, brother, lover, or confidential informant generally are not.¹³

Second, with limited exceptions, only the admission of testimonial hearsay violates the Confrontation Clause.¹⁴ Third, courts presented with the issue have consistently concluded (again, with few exceptions¹⁵) that nontestimonial hearsay now falls outside the scope of the *Bruton* doctrine, with many of these opinions handed down in 2010.¹⁶ Thus, in its 2010 opinion in *United States v. Dale*, the Eighth Circuit could easily conclude that the admission at a joint jury trial of a codefendant’s unwitting confession to a confidential informant did not violate the *Bruton* doctrine because it was nontestimonial.¹⁷

These courts, however, are missing something apparently less clear about *Crawford*. Like its predecessor, *Ohio v. Roberts*, it should have had no effect on the *Bruton* doctrine. Because *Crawford*, like *Roberts*, sets forth a test for constitutional *reliability*, it has no bearing on the *Bruton* doctrine, which sets forth a test for constitutional *harmfulness*. It is thus easy to see why the *Crawford* Court concluded that in *Cruz* it answered an “entirely different question” than the one before it: the *Bruton* doctrine “make[s] no claim to be a surrogate means of assessing reliability.”¹⁸

This article argues that courts have erred in concluding that nontestimonial statements are beyond the scope of the *Bruton* doctrine in the wake of *Crawford*. Therefore, a

¹² 541 U.S. 36, 68-69 (2004).

¹³ See *id.* at 51 (“An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”).

¹⁴ See *Davis v. Washington*, 547 U.S. 813, 821 (2006) (“It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.”).

¹⁵ See *infra* notes 263-65 and accompanying text.

¹⁶ See *infra* notes 266-80 and accompanying text.

¹⁷ 614 F.3d 942, 956 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

¹⁸ *Crawford*, 541 U.S. at 59, 62.

codefendant's confession to a mother, brother, or lover should violate the *Bruton* doctrine to the same extent as a formal codefendant confession to a governmental agent. Moreover, this article asserts that even if *Crawford* did deconstitutionalize the *Bruton* doctrine with regard to nontestimonial statements, rendering these statements beyond the scope of the doctrine, courts should still find that the admission of nontestimonial statements by codefendants violates Federal Rule of Evidence 403 because their probative value is substantially outweighed by the danger of unfair prejudice.

Part I tracks the Supreme Court's treatment of the Confrontation Clause before *Crawford*, including the Court's creation and refinement of the *Bruton* doctrine. Part II discusses *Crawford*, its progeny, and the testimonial/nontestimonial dichotomy created by the Court. Part III addresses the ways in which lower courts have interpreted and applied the *Bruton* doctrine both before *Crawford* and in its wake. Finally, Part IV of this article concludes that courts should find that *Crawford* had no effect on the *Bruton* doctrine, meaning that the admission of nontestimonial codefendant statements can still violate the *Bruton* doctrine. Further, even if the admission of nontestimonial statements by codefendants does not violate the Confrontation Clause, the admission still clearly violates the rules of evidence.

I. THE SUPREME COURT'S PRE-*CRAWFORD* CONFRONTATION CLAUSE CASES

A. *The Road to the Bruton Doctrine*

Conceptually, the *Bruton* doctrine represents the convergence of two distinct lines of analysis. The first line flows from the Sixth Amendment's Confrontation Clause, guaranteeing the right of defendants in criminal prosecutions to confront adverse witnesses. The second line flows from courts' distrust in juries' ability to disregard information they have already seen and heard.

1. The Confrontation Clause

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against

him.”¹⁹ In *Douglas v. Alabama*, the Court applied and expanded that right in holding that the introduction of a nontestifying coparticipant’s statement may violate the Sixth Amendment where the defendant does not have the opportunity to cross-examine the declarant about these inculpatory statements.²⁰ The *Douglas* holding is particularly strong since the confession at issue was introduced to the jury but not actually admitted into evidence against the defendant.

In *Douglas*, Jesse Douglas and Olen Loyd were charged with assault with intent to murder and given separate trials.²¹ Loyd’s trial was held first, and he was convicted.²² Before Loyd was sentenced, the prosecutor called him to testify at Douglas’s trial, but Loyd attempted to invoke his Fifth Amendment privilege against self-incrimination.²³ The trial judge precluded Loyd from invoking this privilege because he had already been convicted, but Loyd persisted in refusing to testify.²⁴ Then, under the guise of attempting to refresh Loyd’s recollection, the prosecutor read the entirety of a confession allegedly made by Loyd, which in part named Douglas as the person who fired the shot that struck the victim.²⁵ Three law enforcement officers thereafter identified the confession as one made and signed by Loyd, but the confession was not officially offered into evidence.²⁶ Although Loyd’s confession was not technically admitted into evidence, it is clear that the jury used it in convicting Douglas.

The Supreme Court found that Douglas’s inability to cross-examine Loyd regarding this “alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause.”²⁷ According to the Court, while the prosecutor’s “reading of Loyd’s alleged statement, and Loyd’s refusal to answer, were not technically testimony, the [prosecutor’s] reading may well have been the equivalent in the jury’s mind of testimony that Loyd in fact made the statement”²⁸ Therefore, “Loyd’s reliance on privilege

¹⁹ U.S. CONST. amend. VI.

²⁰ 380 U.S. 415, 419-20 (1965).

²¹ *Id.* at 416.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 416-17.

²⁶ *Id.* at 417.

²⁷ *Id.* at 419.

²⁸ *Id.*

created a situation in which the jury might improperly infer both that the statement had been made and that it was true."²⁹

The Court held that "effective confrontation of Loyd was only possible if Loyd affirmed the statement as his" and that Loyd instead invoked his Fifth Amendment privilege and did not expose himself to cross-examination.³⁰

2. In Jury We Trust: *Delli Paoli* and the Efficacy of Jury Instructions

A limiting instruction is a direction the judge gives to the jury, instructing its members not to use certain evidence for an improper purpose. Whether jurors actually do (or even mentally can) abide by these limiting instructions is fundamental to the rationale underlying the *Bruton* doctrine. When the Supreme Court first addressed the issue, it placed a great deal of trust in jurors' ability to heed limiting instructions. For instance, the 1957 case *Delli Paoli v. United States*³¹ underscored the notion that jurors will follow a court's clear instructions.³² As the Court's opinion in *Delli Paoli* makes clear, courts historically applied this premise in cases where judges instructed jurors in joint trials to use only nontestifying codefendants' confessions as evidence of their guilt—not as evidence against other defendants.

In *Delli Paoli*, Orlando Delli Paoli was tried jointly with four codefendants on charges of conspiracy to deal unlawfully in alcohol.³³ One of those codefendants, James Whitley, signed a written confession after the conspiracy was over that also implicated Delli Paoli.³⁴ The district court admitted Whitley's confession but emphatically instructed the jury to use the confession only in determining Whitley's guilt and not the guilt of the other defendants.³⁵ The Court explained that the confession was hearsay and therefore inadmissible against the other defendants. However, since the confession was considered an admission against Whitley's penal interest (an exception to the hearsay rule) the Court allowed the confession with the instruction that the jury should use it against Whitley only,

²⁹ *Id.*

³⁰ *Id.*

³¹ 352 U.S. 232 (1957).

³² See *infra* note 42 and accompanying text.

³³ 352 U.S. at 233.

³⁴ *Id.*

³⁵ *Id.*

and not against Delli Paoli. In addressing this issue, the Court first noted that if the facts were somewhat different, it would have been clear that there was no evidentiary error.³⁶ First, if Whitley's confession did not implicate Delli Paoli in the conspiracy, its admission would not have been objectionable.³⁷ Second, if the district court admitted the confession but deleted all reference to Delli Paoli, it clearly would have been admissible.³⁸ Third, if Whitley's statement were made in furtherance of the subject conspiracy, it would have constituted a coconspirator admission and been admissible against all codefendants.³⁹ As noted, though, Whitley made his confession after the conspiracy was over, meaning that his confession was "nothing more than hearsay evidence" and thus inadmissible against his codefendants.⁴⁰

The Court's decision about whether to affirm Delli Paoli's conviction hinged on whether the jury followed the district court's limiting instruction and used Whitley's confession as evidence of only his guilt.⁴¹ The Court concluded that it did. This was based not so much upon an actual belief that the jurors did as they were told as it was upon the fear that a contrary conclusion would mean that the very concept of trial by jury would need to be abandoned. According to the Court,

It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. 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. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice.⁴²

While the Court acknowledged that there may be some cases where such blind faith should not be placed in the jury's ability to respect limiting instructions, it found that the case before it was not one of them and affirmed Delli Paoli's conviction.⁴³

³⁶ *Id.* at 237.

³⁷ *Id.*

³⁸ *Id.* According to the Court, "The impracticality of such deletion was, however, agreed to by both the trial court and the entire court below and cannot well be controverted." *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 240.

⁴¹ *Id.* at 241-43.

⁴² *Id.* at 242.

⁴³ *Id.* at 243.

In a dissenting opinion, Justice Frankfurter expressed doubt that jurors had the ability to “put out of their minds” evidence that they had already seen and heard. Jackson wrote, “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.”⁴⁴ Eleven years later, in the 1968 case *Bruton v. United States*, the Court would agree with Justice Frankfurter and lose trust in the jury’s ability to respect limiting instructions.⁴⁵

3. In Jury We Doubt: The Court’s Loss of Faith in the Jury

In its 1964 opinion *Jackson v. Denno*, the Court relied in part on Jackson’s *Delli Paoli* dissent in expressing its distrust in jurors’ ability to disregard involuntary confessions.⁴⁶ *Jackson* considered the constitutionality of a New York rule under which a defendant’s confession was given to jurors rather than the judge to determine its voluntariness, with the judge instructing jurors to disregard the confession entirely if they determined that it was involuntary.⁴⁷ In resolving this issue, the Court posed the following questions:

Under the New York procedure, the fact of a defendant’s confession is solidly implanted in the jury’s mind, for it has not only heard the confession, but it has been instructed to consider and judge its voluntariness and is in position to assess whether it is true or false. If it finds the confession involuntary, does the jury—indeed, can it—then disregard the confession in accordance with its instructions[?] If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest by resort to the confession? Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows the defendant has given a truthful confession?⁴⁸

The Court noted the folly of this venture, finding that “[i]t is difficult, if not impossible, to prove that a confession which a jury has found to be involuntary has nevertheless influenced the verdict or that its finding of voluntariness, if this is the course it took, was affected by the other evidence

⁴⁴ *Id.* at 248 (Frankfurter, J., dissenting).

⁴⁵ 391 U.S. 123 (1968).

⁴⁶ 378 U.S. 368 (1964).

⁴⁷ *Id.* at 374.

⁴⁸ *Id.* at 388.

showing the confession was true.”⁴⁹ For the Court, though, this uncertainty was enough for it to conclude that New York’s rule contravened the defendant’s rights under the Due Process Clause of the Fourteenth Amendment because the rule “pose[d] substantial threats to a defendant’s constitutional rights to have an involuntary confession entirely disregarded.”⁵⁰

The Supreme Court in 1966 amended Federal Rule of Criminal Procedure 14, which authorized courts to sever defendants’ trials if consolidation appeared to prejudice the government or the defendants.⁵¹ The amendment added a clause to Rule 14, which provided that “[i]n ruling on a motion by a defendant for severance the court may order 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 trial.”⁵² The accompanying Advisory Committee’s Note elucidated the amendment’s rationale: “A defendant may be prejudiced by the admission in evidence against a codefendant of a statement or confession made by that codefendant. This prejudice cannot be dispelled by cross-examination if the codefendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice.”⁵³

Together, the above actions undermined the holding in *Delli Paoli*—that courts can trust jurors to respect limiting instructions when codefendant confessions are introduced at joint jury trials. The Court would later expressly recognize this notion in *Bruton*.

B. *The Bruton Doctrine*

In 1968, *Bruton v. United States* decisively overruled *Delli Paoli*, holding that the admission of certain codefendant confessions at joint jury trials violates the Confrontation Clause.⁵⁴ Several subsequent cases reveal that the Court does—and should—construe the *Bruton* doctrine as a test of constitutional harmfulness, not as a test of constitutional (un)reliability.

In *Bruton*, George William Bruton and William James Evans were jointly tried on the federal charge of bank robbery,

⁴⁹ *Id.* at 389.

⁵⁰ *Id.*

⁵¹ FED. R. CRIM. P. 14(a).

⁵² FED. R. CRIM. P. 14(b).

⁵³ FED. R. CRIM. P. 14 (Notes of Advisory Committee on Rules, 1966 Amendment).

⁵⁴ 391 U.S. 123 (1968).

and Evans did not testify at trial.⁵⁵ After he was arrested, Evans gave a confession to a postal inspector in which he refused to name his accomplice, but he also gave another confession in which he admitted that Bruton and he committed the armed robbery at issue.⁵⁶ As in *Delli Paoli*, the district court allowed the prosecution to introduce the latter confession and issued a limiting instruction informing the jury, among other things, that Evans's confession was "hearsay insofar as the defendant George William Bruton is concerned, and you are not to consider it in any respect to the defendant Bruton, because insofar as he is concerned it is hearsay."⁵⁷

Both Bruton and Evans were convicted, but their trial was actually held one week after the United States Supreme Court decided *Miranda v. Arizona*.⁵⁸ On appeal, the Second Circuit Court of Appeals reversed Evans's conviction upon finding that his confessions were inadmissible under *Miranda* because the interrogations that elicited the confessions were not accompanied by the requisite preliminary warnings.⁵⁹ But because the district judge had instructed jurors not to use Evans's confessions as evidence of Bruton's guilt, the Second Circuit affirmed, assuming the jurors had heeded the instruction and had not used the improper confession against Bruton.⁶⁰

In analyzing the propriety of Bruton's conviction, the Supreme Court began by restating *Delli Paoli's* basic premise: "[I]t is reasonably possible for the jury to follow sufficiently clear instructions to disregard the confessor's extrajudicial statement that his codefendant participated with him in committing the crime."⁶¹ The Court then reiterated that "[i]f it were true that the jury disregarded the reference to the codefendant, no question would arise under the Confrontation Clause, because by hypothesis the case is treated as if the confessor made no statement inculcating the nonconfessor."⁶² Ultimately, however, the Court found that it had effectively repudiated this basic premise through the previously mentioned actions.⁶³

⁵⁵ *Id.* at 124.

⁵⁶ *Id.*

⁵⁷ *Id.* at 125 n.2.

⁵⁸ *Id.* at 124 n.1; *see also* *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁵⁹ *Bruton*, 391 U.S. at 124.

⁶⁰ *Id.* at 124-25.

⁶¹ *Id.* at 126 (quoting *Delli Paoli v. United States*, 352 U.S. 232, 239 (1957)).

⁶² *Id.*

⁶³ *Id.*

First, the Court stated that in *Douglas* it relied upon finding a Confrontation Clause violation when Loyd's confession was read to the jury even though it was not technically admitted into evidence.⁶⁴ The Court then noted that Evans's confession implicating Bruton actually was introduced into evidence, which increased the likelihood that the jury would improperly use the confession as evidence of Bruton's guilt.⁶⁵ The Court thus found that Bruton's inability to cross-examine Evans, like Douglas's inability to cross-examine Loyd, denied him his rights under the Confrontation Clause.⁶⁶

The Court next noted that while *Jackson* did not involve a codefendant's confession, the Court relied in part upon Justice Frankfurter's dissent in *Delli Paoli* to reject the proposition that a court can rely upon a jury to ignore a defendant's confession after being asked to determine whether that confession was voluntary.⁶⁷ The Court facilely agreed with the opinion of the Supreme Court of California in *People v. Aranda*, which had used *Jackson* to reject *Delli Paoli*'s premise that a court can rely upon a jury to not use a codefendant's confession as evidence of the other defendant's guilt.⁶⁸ Indeed, the Court quoted *Aranda* for the proposition that "[i]f 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."⁶⁹

Then, after describing the import of the aforementioned amendment to Rule 14,⁷⁰ the Court set forth and struck down several defenses to the procedure approved in *Delli Paoli*. First, the Court noted that Judge Learned Hand had argued that while a limiting instruction might not prevent a jury from using a codefendant's confession as evidence of the other defendant's guilt, the admission of such a confession along with a limiting instruction "probably furthers, rather than impedes, the search for truth."⁷¹ The Court found that this argument overlooked alternative ways of getting such a confession before

⁶⁴ *Id.* at 126-27.

⁶⁵ *Id.* at 127.

⁶⁶ *Id.* at 127-28.

⁶⁷ *Id.* at 128.

⁶⁸ *Id.* at 130.

⁶⁹ *Id.* (quoting *People v. Aranda*, 407 P.2d 265, 271-72 (Cal. 1965)).

⁷⁰ *Id.* at 131-32.

⁷¹ *Id.* at 133 (quoting *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932)).

the jury without violating the nonconfessor's right of confrontation, such as admitting the confession after redacting references to the nonconfessing codefendant.⁷²

Second, the Court cited the argument that it should maintain the rule of *Delli Paoli* because its abolishment would lead prosecutors to pursue separate trials and sacrifice the numerous benefits of joint trials.⁷³ The Court again turned this argument aside, relying upon the dissenting opinion of Justice Lehman of the New York Court of Appeals in *People v. Fisher*, which concluded that it could not sacrifice a defendant's constitutional rights at the altar of greater convenience, economy, and speed in the administration of justice.⁷⁴

Third, the Court referenced its prior conclusion in *Delli Paoli*—that a contrary result would have required abolishing the very idea of trial by jury.⁷⁵ The Court now regarded this pronouncement as hyperbolic, finding “that in many . . . cases the jury can and will follow the trial judge’s instructions to disregard” inadmissible evidence brought to its attention.⁷⁶ In other cases, however, “as was recognized in *Jackson v. Denno* . . . 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.”⁷⁷ And according to the Court, “Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.”⁷⁸ In other words, when the prosecution has presented an entire case against a codefendant—including that codefendant’s confession, in which he claims that the defendant and he committed the crime—it is simply too much to ask the jury to disregard that confession as evidence of the other defendant’s guilt.

The Court deemed such codefendant confessions devastating to other defendants.⁷⁹ Accordingly, it held that “[d]espite the concededly clear instructions to the jury to disregard Evans’s inadmissible hearsay evidence inculcating

⁷² *Id.* at 133-34 & n.10.

⁷³ *Id.* at 134.

⁷⁴ *Id.* at 134-35 (quoting *People v. Fisher*, 164 N.E. 336, 341 (N.Y. 1928)).

⁷⁵ *Id.* at 135.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 135-36.

⁷⁹ *Id.* at 136.

petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination."⁸⁰ The Court emphasized that it was the inadmissibility of Evans's confession combined with this likelihood of harmfulness that led to the Confrontation Clause violation.⁸¹ The case did not present "any recognized exception to the hearsay rule insofar as [Bruton] is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause."⁸²

Courts later interpreted the Court's opinion as creating the "*Bruton* doctrine," under which the admission at a joint jury trial of a nontestifying codefendant's confession that is inadmissible against other defendants under the rules of evidence violates the Confrontation Clause.⁸³

C. *Harrington v. California and Harmless Error*

In *Harrington v. California*, the Court was presented with the question of whether violations of the *Bruton* doctrine automatically require reversal or whether they are subject to traditional harmless error analysis.⁸⁴ In *Harrington*, three African-American men and one Caucasian man, Glen Harrington, were jointly tried before a jury on charges of attempted robbery and first-degree murder.⁸⁵ Two of the African-American men gave confessions which also implicated "the white guy" or "the white boy."⁸⁶ These two codefendants did not testify at trial, but the prosecution did introduce their confessions, which were inadmissible against Harrington under the rules of evidence.⁸⁷ The third African-American defendant did testify and implicated Harrington, and Harrington also testified and implicated himself.⁸⁸ Moreover, other witnesses testified that Harrington had a gun and was an active participant in the attempted robbery.⁸⁹

⁸⁰ *Id.* at 137.

⁸¹ *Id.* at 128 n.3.

⁸² *Id.*

⁸³ *E.g.*, United States *ex rel.* Winsett v. Anderson, 456 F.2d 1197, 1198-99 (3d Cir. 1972). Later in 1968, the Supreme Court found in *Roberts v. Russell* that this new *Bruton* doctrine was applicable to state court prosecutions. 392 U.S. 293, 294 (1968).

⁸⁴ 395 U.S. 250, 252 (1969).

⁸⁵ *Id.*

⁸⁶ *Id.* at 253.

⁸⁷ *Id.* at 252.

⁸⁸ *Id.* at 253-54.

⁸⁹ *Id.*

Harrington was convicted, and the United States Supreme Court ultimately held that the admission of nontestifying codefendants' confessions violated the *Bruton* doctrine.⁹⁰ That said, the Court found that this Confrontation Clause violation was subject to harmless error review and determined that the trial court's error was harmless in light of other overwhelming evidence of Harrington's guilt.⁹¹

D. *Parker v. Randolph: The Court's First Stab at Interlocking Confessions*

In *Bruton*, the Court found a Confrontation Clause violation in part because Evans's confession had a "devastating" practical effect on Bruton's defense.⁹² In its 1979 opinion in *Parker v. Randolph*, the Court unsuccessfully attempted to answer the question of whether a codefendant's confession could survive Confrontation Clause scrutiny if the prosecution could prove that its admission would not "devastate" the defenses of other defendants in a given case.⁹³ In *Parker v. Randolph*, several defendants were jointly tried before a jury in connection with a murder committed during a robbery, and none of the defendants testified.⁹⁴ Each of the defendants made a confession to police officers that interlocked with the other defendants' confessions—that is, they corroborated the other confessions.⁹⁵ The trial court allowed the State to introduce each of these confessions and instructed jurors to use each defendant's confession solely as evidence of his guilt because each confession was only admissible against the confessor under the rules of evidence.⁹⁶

In finding that the Sixth Circuit improperly granted habeas relief to one of the defendants convicted after this joint trial, the United States Supreme Court concluded in a four Justice plurality opinion "that admission of interlocking confessions with proper limiting instructions conforms to the requirements of the Sixth and Fourteenth Amendments to the United States Constitution."⁹⁷ According to the plurality, the

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See *supra* note 79 and accompanying text.

⁹³ 442 U.S. 62, 74 (1979).

⁹⁴ *Id.* at 64-65.

⁹⁵ *Id.* at 66-67.

⁹⁶ *Id.* at 67.

⁹⁷ *Id.* at 75.

admission of a codefendant's interlocking confession does not violate the *Bruton* doctrine because the other defendant has himself confessed, which is "probably the most probative and damaging evidence that can be admitted against him."⁹⁸ Therefore, admitting the codefendant's interlocking confession would not have the "devastating" practical effect forecast by the *Bruton* Court, and the *Bruton* remedy of "cross-examination would likely yield small advantage to the defendant whose own admission of guilt stands before the jury unchallenged."⁹⁹

Justice Powell took no part in the consideration of the case while three dissenting Justices would have found a *Bruton* doctrine violation and reversed.¹⁰⁰ Meanwhile, Justice Blackmun concurred with the plurality, deeming the admission of the interlocking confessions harmless error based upon the facts of the case before him.¹⁰¹ Justice Blackmun, however, specifically refused to join the plurality's new interlocking confession exception to *Bruton*, concluding that "it abandon[ed] the harmless-error analysis" the Court announced in *Harrington*.¹⁰² Blackmun concluded that when the prosecution admits a nontestifying codefendant's confession that also implicates other defendants, there is a violation of the *Bruton* doctrine, and the question then becomes whether that violation constituted harmless error.¹⁰³ According to Justice Blackmun, the fact that the codefendant's confession interlocks with other defendants' confessions is only relevant to the harmless error analysis—not the baseline question of whether there was a *Bruton* doctrine/Confrontation Clause violation.¹⁰⁴ Eight years later, in *Cruz v. New York*, a majority of the Court would agree with him.¹⁰⁵

E. *Ohio v. Roberts and Adequate Indicia of Reliability*

In the interim, in 1980, the Supreme Court in *Ohio v. Roberts* finally articulated a test that addressed the issue of whether the admission of hearsay violates the Confrontation

⁹⁸ *Id.* at 72 (quoting *Bruton v. United States*, 391 U.S. 123, 139 (1968) (White, J., dissenting)).

⁹⁹ *Id.* at 73.

¹⁰⁰ *Id.* at 77, 81.

¹⁰¹ *Id.* at 77 (Blackmun, J., concurring in part and concurring in the judgment).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See *infra* notes 148-51 and accompanying text.

Clause because it is constitutionally unreliable,¹⁰⁶ a test that it would later refine in *Crawford v. Washington*.

According to the Court, its task in *Roberts* was to determine “the relationship between the Confrontation Clause and the hearsay rule with its many exceptions.”¹⁰⁷ And according to the Court, even if a declarant’s hearsay statements are admissible against a defendant under an exception to the rule against hearsay, they run afoul of the Confrontation Clause if the declarant is not present for cross-examination at trial unless the State establishes two elements.¹⁰⁸ First, the State must establish that the declarant is “unavailable.”¹⁰⁹ Second, it must prove that the statement “bears adequate indicia of reliability.”¹¹⁰ The Court concluded that “[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.”¹¹¹ If a statement does not fall within such an exception, “the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.”¹¹²

The Court concluded that when defense counsel tests preliminary hearing testimony with cross-examination or the equivalent of cross-examination, that testimony bears sufficient indicia of reliability and affords the trier of fact a basis for evaluating the truth of the testimony sufficient to satisfy the Confrontation Clause.¹¹³

F. *Lee v. Illinois and Actual Harm*

In 1986, the Supreme Court decided *Lee v. Illinois*,¹¹⁴ a case that resembled *Bruton* in all regards but one: the trier of fact. In *Lee*, Millie Lee and Edwin Thomas were charged with committing a double murder after both signed written confessions.¹¹⁵ As in *Parker v. Randolph*, these confessions interlocked, at least to a certain degree: Thomas’s confession implicated Lee in the murders.¹¹⁶ But unlike the *Randolph* defendants, Lee and Thomas

¹⁰⁶ 448 U.S. 56, 66 (1980).

¹⁰⁷ *Id.* at 62.

¹⁰⁸ *Id.* at 62-66.

¹⁰⁹ *Id.* at 66.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ 476 U.S. 530 (1986).

¹¹⁵ *Id.* at 531-35.

¹¹⁶ *Id.* at 545.

were jointly tried before a judge, not a jury.¹¹⁷ Thomas did not testify, the prosecutor introduced his confession, and the trial judge expressly explained that he relied upon Thomas's confession in finding Lee guilty of both murders.¹¹⁸

Lee appealed thereafter and claimed that the trial court improperly used Thomas's confession as evidence of her guilt. But the Appellate Court of Illinois disagreed and found no *Bruton* doctrine problem because Thomas's confession interlocked with Lee's.¹¹⁹ According to the Court, *Lee* did not involve two issues. First, the Court proclaimed that *Lee* was "not strictly speaking a *Bruton* case because [the Court was] not . . . concerned with the effectiveness of limiting instructions in preventing the spill-over prejudice to a defendant when his codefendant's confession is admitted against the codefendant at a joint trial."¹²⁰ Instead, *Lee* involved a bench trial in which the judge acknowledged that he used Thomas's confession as evidence of Lee's guilt, meaning that "[t]he danger against which the Confrontation Clause was erected . . . actually occurred."¹²¹ Second, the case did not involve the issue of whether the trial court violated Illinois evidence law in using Thomas's confession as evidence of Lee's guilt because that was a matter of state law.¹²²

Instead, the sole issue before the Court was whether Thomas's confession had adequate indicia of reliability under *Ohio v. Roberts* such that it could be admitted directly against Lee without violating the Confrontation Clause.¹²³ While the Court found that Thomas's confession interlocked with Lee's confession to a certain extent, it ultimately concluded that there were discrepancies between the two confessions that were neither irrelevant nor trivial.¹²⁴ Accordingly, the Court found a Confrontation Clause violation because "when the discrepancies between the statements are not insignificant, the co-defendant's confession may not be admitted."¹²⁵ Thus, according to the Court, there simply were inadequate indicia of reliability to allow for the admission of the statement.

¹¹⁷ *Id.* at 536.

¹¹⁸ *Id.* at 538.

¹¹⁹ *Id.* at 538-39.

¹²⁰ *Id.* at 542.

¹²¹ *Id.* at 543.

¹²² *Id.* at 539.

¹²³ *Id.* at 543.

¹²⁴ *Id.* at 546.

¹²⁵ *Id.* at 545.

G. Richardson v. Marsh: *The Redaction Solution*

The Court again addressed a case resembling *Bruton* in every regard but one in *Richardson v. Marsh*. In *Richardson*, Clarissa Marsh, Benjamin Williams, and Kareem Martin were charged with assault and murder.¹²⁶ Marsh and Williams were later given a joint jury trial, and Williams did not testify.¹²⁷ The prosecution, however, introduced Williams's confession, in which he implicated Marsh, Martin, and himself in the subject crimes.¹²⁸ The confession was carefully redacted to remove all references to Marsh; these redactions "omit[ted] all indication that *anyone* other than Martin and Williams participated in the crime."¹²⁹ After admitting the redacted confession, the Court admonished the jury "not to use it in any way against [Marsh]" because the confession was inadmissible against Marsh under the rules of evidence.¹³⁰

The Court found that, unlike the confession in *Bruton*, based upon the redaction, "in this case the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial . . ." ¹³¹ This fact was significant to the Court, which concluded that "[w]here the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence."¹³² According to the Court, while it may not be simple for jurors to respect an instruction to use a codefendant's confession that does not facially incriminate other defendants only as evidence of the codefendant's guilt, "there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton's* exception to the general rule."¹³³

Finally, the Court noted that its decision was at least partly based upon practicality. According to the Court, if the *Bruton* doctrine only applies "to facially incriminating confessions, *Bruton* can be complied with by redaction—a possibility suggested in that opinion itself."¹³⁴ Conversely, if the

¹²⁶ 481 U.S. 200, 202 (1987).

¹²⁷ *Id.*

¹²⁸ *Id.* at 203.

¹²⁹ *Id.*

¹³⁰ *Id.* at 204.

¹³¹ *Id.* at 208.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 208-09.

doctrine were extended to include “confessions incriminating by connection, not only is that not possible, but it is not even possible to predict the admissibility of a confession in advance of trial.”¹³⁵ Instead, trial judges would not be able to determine whether such confessions were sufficiently incriminatory until the close of the evidence, which, “even without manipulation w[ould] result in numerous mistrials and appeals.”¹³⁶

H. *Cruz v. New York: Interlocking Confessions, Take Two*

In 1987, the Supreme Court finally answered—in the affirmative—the question it had left unresolved eight years earlier in *Randolph*¹³⁷: Does the admission of interlocking confessions violate the *Bruton* doctrine? In *Cruz v. New York*, Eulogio and Benjamin Cruz were indicted for felony murder and jointly tried before a jury.¹³⁸ Before trial, Benjamin gave a videotaped confession in which he admitted that Eulogio, two other men, and he committed the crime charged.¹³⁹ Benjamin did not testify at trial, but the trial court, over Eulogio’s objection, allowed the prosecution to introduce Benjamin’s confession into evidence. The court then instructed the jury to use Benjamin’s confession as evidence of his guilt only because it was inadmissible against Eulogio under the rules of evidence.¹⁴⁰ After Eulogio was convicted, he appealed, and the New York Court of Appeals ultimately affirmed, finding that Eulogio gave a confession that “interlocked” with Benjamin’s confession, rendering the *Bruton* doctrine inapplicable.¹⁴¹

A majority of the United States Supreme Court disagreed, rejecting the plurality opinion in *Parker v. Randolph*.¹⁴² As noted, the *Randolph* plurality would have removed interlocking confessions from the purview of the *Bruton* doctrine on the theory that a codefendant’s confession cannot be devastating to the case of a defendant who has himself confessed and devastated his own case.¹⁴³ The *Cruz* Court rejected this reasoning, finding that “[a] co-defendant’s confession will be relatively harmless if the incriminating story

¹³⁵ *Id.* at 209.

¹³⁶ *Id.*

¹³⁷ See *supra* notes 93-105 and accompanying text.

¹³⁸ 481 U.S. 186 (1987).

¹³⁹ *Id.* at 188-89.

¹⁴⁰ *Id.* at 189.

¹⁴¹ *Id.*

¹⁴² *Id.* at 191.

¹⁴³ See *supra* note 99 and accompanying text.

it tells is different from that which the defendant himself is alleged to have told, but enormously damaging if it confirms, in all essential respects, the defendant's alleged confession."¹⁴⁴

This finding led the *Cruz* Court to conclude, contrary to the position of the *Parker* plurality, that interlocking confessions are covered by the *Bruton* doctrine, which is merely concerned with the harmfulness of codefendant confessions, not their (un)reliability.¹⁴⁵ According to the Court,

Quite obviously, what the "interlocking" nature of the codefendant's confession pertains to is not its *harmfulness* but rather its *reliability*. If it confirms essentially the same facts as the defendant's own confession it is more likely to be true. Its reliability . . . may be relevant to whether the confession should (despite the lack of opportunity for cross-examination) be *admitted as evidence* against the defendant, see *Lee v. Illinois*, 476 U.S. 530, 106 S. Ct. 2056, 90 L.E.2d 514 (1986), but cannot conceivably be relevant to whether, assuming it cannot be admitted, the jury is likely to obey the instruction to disregard it, or the jury's failure to obey is likely to be inconsequential. The law cannot command respect if such an inexplicable exception to a supposed constitutional imperative is adopted. Having decided *Bruton*, we must face the honest consequences of what it holds.¹⁴⁶

And for the Court, the honest consequence was that the case before it was "indistinguishable from *Bruton* with respect to those factors the Court has deemed relevant in this area: the likelihood that the instruction will be disregarded, . . . the probability that such disregard will have a devastating effect, . . . and the determinability of these factors in advance of trial."¹⁴⁷

In other words, the *Cruz* Court "adopt[ed] the approach espoused by Justice Blackmun" in his concurrence in *Parker v. Randolph*.¹⁴⁸ Under this approach, even interlocking confessions are covered by the *Bruton* doctrine, and the only question is whether the improper admission of such a confession is harmless error.¹⁴⁹ According to the Court, lower courts could use the fact that the defendant made a confession that interlocked with his codefendant's confession in this harmless error analysis.¹⁵⁰ But the fact that the defendant gave an interlocking

¹⁴⁴ 481 U.S. at 192.

¹⁴⁵ *Id.* at 192-93.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 193.

¹⁴⁸ *Id.* at 191.

¹⁴⁹ *Id.* at 194.

¹⁵⁰ *Id.*

confession had no bearing on the issue of whether there was a *Bruton* doctrine violation.¹⁵¹

I. *Gray v. Maryland: Obvious Omissions*

The Supreme Court resolved its last major *Bruton* doctrine case eleven years later in 1998, holding that prosecutors cannot bypass the *Bruton* doctrine by blatantly redacting codefendant confessions. In *Gray v. Maryland*, Anthony Bell and Kevin Gray were jointly tried for the murder of Stacey Williams.¹⁵² After Bell was arrested, a police detective asked him, “Who was in the group that beat Stacey?” and he responded that it was “he (Bell), Kevin Gray, and Jacquin ‘Tank’ Vanlandingham.”¹⁵³ Bell did not testify at trial, but the trial court allowed the detective to repeat his question and restate Bell’s confession as “Me, deleted, deleted, and a few other guys.”¹⁵⁴ Immediately thereafter, the prosecutor asked the detective whether it was true that Bell’s confession led the police to be able to arrest Gray; the officer responded, “That’s correct.”¹⁵⁵ Finally, the trial court allowed the prosecution to introduce a written copy of Bell’s confession with the names of Gray and Vanlandingham “omitted, leaving in their place blank white spaces separated by commas.”¹⁵⁶ Later, the court instructed the jury that Bell’s “confession was evidence only against Bell; the instructions said that the jury should not use the confession as evidence against Gray” because the confession was inadmissible against Gray under the rules of evidence.¹⁵⁷

After Gray was convicted, he appealed in the Maryland state courts and ultimately filed a successful petition for writ of certiorari with the United States Supreme Court. The Court acknowledged that in *Richardson v. Marsh*, it held that the admission of codefendant confessions redacted to remove any reference to the existence of other defendants does not violate the *Bruton* doctrine because they do not facially incriminate other defendants.¹⁵⁸ The Court, however, distinguished the redacted confession before it from the redacted confession in *Marsh*:

¹⁵¹ *Id.*

¹⁵² 523 U.S. 185, 188 (1998).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 196.

¹⁵⁵ *Id.* at 188-89.

¹⁵⁶ *Id.* at 189.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 190-91.

Redactions that simply replace a name with an obvious blank space or a word such as “deleted” or a symbol or other similarly obvious indications of alteration . . . leave statements that, considered as a class, so closely resemble *Bruton*’s unredacted statements that, in our view, the law must require the same result.¹⁵⁹

The Court dismissed the argument that its ruling would leave prosecutors with no alternative but to abandon the use of codefendant confessions or joint trials, instead finding that “[a]dditional redaction of a confession that uses a blank space, the word ‘delete,’ or a symbol . . . normally is possible.”¹⁶⁰ For example, the Court wondered why Bell’s confession could not have been altered to read, “Me and a few other guys.”¹⁶¹

Justice Scalia wrote a dissenting opinion joined by three other Justices.¹⁶² He took particular exception to the majority’s suggestion that the detective could have testified that Bell admitted that he “and a few other guys” beat Stacey.¹⁶³ Scalia was aware of no prior case in which the Court had endorsed “the redaction of a statement by some means other than the deletion of certain words, with the fact of the deletion shown.”¹⁶⁴ According to Scalia, “[t]he risk to the integrity of our system (not to mention the increase in its complexity) posed by the approval of such freelance editing seems to me infinitely greater than the risk posed by the entirely honest reproduction that the Court disapproves.”¹⁶⁵

J. Constitutional Harmfulness, Not Constitutional Reliability

These Supreme Court cases reveal that the Supreme Court construes the *Bruton* doctrine as a test of constitutional harmfulness, not as a test of constitutional (un)reliability. In *Ohio v. Roberts*, the Supreme Court laid out the constitutional reliability test: if a statement lacks adequate indicia of reliability, its admission violates the Confrontation Clause, even if it qualifies for admission under an exception to the rule against hearsay.¹⁶⁶

¹⁵⁹ *Id.* at 192.

¹⁶⁰ *Id.* at 196.

¹⁶¹ *Id.* at 192.

¹⁶² *Id.* at 200 (Scalia, J., dissenting).

¹⁶³ *Id.* at 203.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 203-04.

¹⁶⁶ See *supra* notes 106-13 and accompanying text.

Conversely, according to the Court in *Cruz*, if a nontestifying codefendant's confession that facially incriminates another defendant is inadmissible against that other defendant under the rules of evidence, its admission at a joint jury trial violates the *Bruton* doctrine and Confrontation Clause, regardless of the statement's reliability.¹⁶⁷ Instead, the *Bruton* doctrine is a test of constitutional harmfulness: if a codefendant's confession is sufficiently harmful or damaging to another defendant, it violates the *Bruton* doctrine; if it is not sufficiently harmful or can be made less harmful, it may be admitted.¹⁶⁸

Thus, a codefendant's confession that does not facially incriminate another defendant is admissible despite the *Bruton* doctrine not because it is any more reliable, but because it is less harmful to the other defendant.¹⁶⁹ Similarly, a codefendant's confession that redacts any reference to another defendant does not violate the *Bruton* doctrine not because it is any more reliable than that same confession before redaction, but because, again, it is less harmful to the other defendant.¹⁷⁰ On the other hand, a redacted confession with the other defendant's name replaced with an obvious sign of redaction does violate the *Bruton* doctrine; the other defendant is harmed substantially by the admission of such an obviously redacted confession.¹⁷¹

II. THE CONFRONTATION CLAUSE AND THE *CRAWFORD* REVOLUTION

A. *Crawford v. Washington* and "Testimonial" Hearsay

In the 2004 case *Crawford v. Washington*, the Supreme Court reconsidered and replaced the adequate indicia of reliability test from *Ohio v. Roberts*. In *Crawford*, Michael Crawford stabbed Kenneth Lee, who allegedly tried to rape Michael's wife, Sylvia.¹⁷² Officers arrived and *Mirandized* Michael and Sylvia, who each gave tape-recorded statements.¹⁷³ And while Sylvia's account of the events leading up to the stabbing generally corroborated her husband's story, "her account of the fight was arguably different—particularly with

¹⁶⁷ See *supra* notes 138-51 and accompanying text.

¹⁶⁸ See *supra* notes 77-83 and accompanying text.

¹⁶⁹ See *supra* notes 77-83 and accompanying text.

¹⁷⁰ See *supra* notes 126-36 and accompanying text.

¹⁷¹ See *supra* notes 152-65 and accompanying text.

¹⁷² 541 U.S. 36, 38 (2004).

¹⁷³ *Id.*

respect to whether Lee had drawn a weapon before [Michael] assaulted him . . . [.]”¹⁷⁴

At Michael’s trial for assault and attempted murder, Sylvia did not testify pursuant to Washington’s spousal testimonial privilege.¹⁷⁵ Therefore, the State introduced Sylvia’s tape-recorded statement over Michael’s objection as a statement against penal interest (an exception to the rule against hearsay).¹⁷⁶ After he was convicted, Michael appealed, claiming that the admission of Sylvia’s statement violated the Confrontation Clause, and the Washington Court of Appeals agreed with him.¹⁷⁷ But the Supreme Court of Washington found no Confrontation Clause violation: it concluded that Sylvia’s statement bore guarantees of trustworthiness sufficient to satisfy *Ohio v. Roberts*.¹⁷⁸ Michael thereafter filed a successful petition for writ of certiorari with the United States Supreme Court, asserting that the *Ohio v. Roberts* test strayed from the original meaning of the Confrontation Clause.¹⁷⁹

The Court considered the historical background of the Confrontation Clause to ascertain the validity of Crawford’s claim and concluded that this history supported two inferences.¹⁸⁰ First, the Court found that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused”¹⁸¹—that is, examinations of accusers conducted before trial and without the defendant present. Therefore, the Court concluded that the Confrontation Clause covers live testimony in court as well as *ex parte* testimony or “testimonial” statements.¹⁸²

The Court articulated various formulations of “testimonial statements,” defining them at one point as “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”¹⁸³ The Court, however, neither chose one of these formulations nor concluded that the Confrontation Clause was only concerned

¹⁷⁴ *Id.* at 39.

¹⁷⁵ *Id.* at 40.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 41.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 42.

¹⁸⁰ *Id.* at 43.

¹⁸¹ *Id.* at 50.

¹⁸² *Id.* at 51-52.

¹⁸³ *Id.* at 52 (internal quotation marks omitted).

with testimonial hearsay. Instead, it was enough for the Court to conclude that “even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.”¹⁸⁴ According to the Court, “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”¹⁸⁵

The Court’s second inference was “that the Framers would not have allowed the admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”¹⁸⁶ The Court then explained that the case law had largely been consistent with both of these principles.¹⁸⁷ According to the Court, with one arguable exception, its cases remained faithful to the Framers’ understanding of the Confrontation Clause: “Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”¹⁸⁸ In reaching this conclusion, however, the Court noted that its prior opinions in *Parker v. Randolph* and *Cruz v. New York* did not address the question of whether testimonial hearsay by an unfronted declarant violated the Confrontation Clause but instead “addressed the entirely different question whether a limiting instruction cured prejudice to codefendants from admitting a defendant’s *own* confession against him in a joint trial.”¹⁸⁹

Conversely, the Court concluded that the *Ohio v. Roberts* test departed from the Framers’ understanding in ways that both helped and hurt criminal defendants. First, the test was too broad because it required the exclusion of even nontestimonial hearsay if a prosecutor could not prove that the hearsay had adequate indicia of reliability.¹⁹⁰ Second, the test was too narrow because it allowed for the admission of even testimonial hearsay as long as a prosecutor could prove that it was sufficiently reliable.¹⁹¹ In these ways, the *Roberts* test

¹⁸⁴ *Id.* at 53.

¹⁸⁵ *Id.* at 51.

¹⁸⁶ *Id.* at 53-54.

¹⁸⁷ *Id.* at 57.

¹⁸⁸ *Id.* at 59.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 60.

¹⁹¹ *Id.*

“replace[d] the constitutionally prescribed method of assessing reliability with a wholly foreign one.”¹⁹² This rendered the *Roberts* test “very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability.”¹⁹³ As a counterpoint, the Court referenced and accepted the doctrine of forfeiture by wrongdoing, which “extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.”¹⁹⁴

Moreover, the Court deemed the adequate indicia of reliability test to be “so unpredictable that it fail[ed] to provide meaningful protection from even core confrontation violations.”¹⁹⁵ The Court, though, deemed this unpredictability a forgivable sin compared with “[t]he unpardonable vice of the *Roberts* test”: “its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.”¹⁹⁶

The Court thus replaced the adequate indicia of reliability test with the following test: “Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”¹⁹⁷ Or, put simply, “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”¹⁹⁸ Finding that Sylvia’s statement to the police officers was testimonial and that Michael had no opportunity to cross-examine her, the Supreme Court thus concluded that a Confrontation Clause violation existed.¹⁹⁹

But does the Confrontation Clause only cover testimonial hearsay? The Court would answer that question in the affirmative a few years later.

¹⁹² *Id.* at 62.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 63.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 68.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

B. *Davis, Bockting and the Testimonial/Nontestimonial Dichotomy*

In 2006, the Court resolved the companion cases of *Davis v. Washington* and *Hammon v. Indiana*. In *Davis*, Michelle McCottry made statements to a 911 operator identifying Adrian Davis as her assailant, just after he had assaulted her.²⁰⁰ In *Hammon*, police responded to the site of a “reported domestic disturbance at the house of Amy and Hershel Hammon.”²⁰¹ Amy initially told officers that “nothing was the matter,” but while an officer was with Hershel in the kitchen, Amy filled out and signed a battery affidavit in the living room with the other officer.²⁰²

McCottry did not testify at Davis’s trial, and Amy Hammon did not testify at her husband’s trial, but their statements were each admitted under exceptions to the rule against hearsay.²⁰³ Deciding whether the admission of either statement violated the Confrontation Clause, the *Davis* Court answered two questions left unresolved by *Crawford*: (1) whether the Confrontation Clause applies only to testimonial hearsay and (2) which police interrogations produce testimonial hearsay.²⁰⁴

The Court answered the first question in the affirmative, concluding that “[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.”²⁰⁵ In response to the second question, the Court created a dichotomy to resolve the cases before it:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.²⁰⁶

Using this test, the Court deemed Michelle McCottry’s statements nontestimonial and properly admitted but

²⁰⁰ 547 U.S. 813, 817-18, 827 (2006).

²⁰¹ *Id.* at 819.

²⁰² *Id.* at 819-20.

²⁰³ *Id.*

²⁰⁴ *Id.* at 823.

²⁰⁵ *Id.* at 821.

²⁰⁶ *Id.* at 822.

concluded that Amy Hammon's statements were testimonial.²⁰⁷ The Court acknowledged that Hammon's statements, despite being testimonial, could still be admitted against her husband if he procured or coerced silence from her because "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation."²⁰⁸ According to the Court, this rule of forfeiture by wrongdoing still survived because "*Crawford*, in overruling *Roberts*, did not destroy the ability of courts to protect the integrity of their proceedings."²⁰⁹ But in the absence of such forfeiture, the admission of her statements violated the Confrontation Clause.²¹⁰

Later, in *Whorton v. Bockting*, the Supreme Court reiterated that "[u]nder *Crawford*, . . . the Confrontation Clause has no application to [nontestimonial] statements and therefore permits their admission even if they lack indicia of reliability."²¹¹ In its 2011 opinion in *Michigan v. Bryant*, however, a majority of the Court noted that to conduct the primary purpose analysis of *Davis*, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant."²¹² This led some,²¹³ including Justice Scalia in his dissenting opinion, to conclude that the majority was resurrecting the *Roberts* adequate indicia of reliability test without explicitly overruling *Crawford*.²¹⁴

III. LOWER COURT INTERPRETATIONS OF *BRUTON*

Lower court interpretations of the *Bruton* doctrine corroborate the claim that the doctrine is a test of constitutional harmfulness and not a test of constitutional reliability. This section breaks down the way that lower courts have handled the *Bruton* doctrine, before and after *Crawford*, to reveal that *Crawford* did not transform the *Bruton* doctrine into a test of constitutional reliability concerned with whether codefendant statements are testimonial or nontestimonial.

²⁰⁷ *Id.* at 828-30.

²⁰⁸ *Id.* at 833.

²⁰⁹ *Id.* at 834.

²¹⁰ *Id.* at 833-34.

²¹¹ 549 U.S. 406, 420 (2007).

²¹² *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011).

²¹³ See, e.g., Colin Miller, *Michigan v. Bryant, Part 6*, EVIDENCEPROF BLOG (Mar. 3, 2011), <http://lawprofessors.typepad.com/evidenceprof/2011/03/yesterday-i-posted-an-entry-about-justice-scalia-accusing-the-majority-in-michigan-v-bryant-of-retreating-from-crawford-v-washi.html>.

²¹⁴ 131 S. Ct. at 1168-76 (Scalia, J., dissenting).

Instead, these cases reveal that the testimonial/nontestimonial dichotomy is entirely separate from the *Bruton* doctrine.

A. *The Inapplicability of the Bruton Doctrine at Bench Trials*

1. Pre-*Crawford* Precedent

In the wake of the Court's opinion in *Lee v. Illinois*, several courts grappled with the question of whether the *Bruton* doctrine applies to bench trials or whether it applies only to jury trials. Every federal appellate court that addressed the issue before *Crawford* concluded the doctrine was inapplicable to cases heard by judges rather than juries.²¹⁵

For example, in *Rogers v. McMackin*, Darrick Rogers, Mimi Cash, Ricardo Forney, and Andre Robinson were allegedly coparticipants in a restaurant robbery and the fatal shooting of its proprietor.²¹⁶ Rogers confessed to the crime, and Robinson also gave a confession that largely interlocked with Rogers's confession.²¹⁷ The two were given a joint bench trial, and the prosecution introduced Robinson's confession despite the fact that he did not testify at trial.²¹⁸ After Rogers was convicted and exhausted his state court remedies, he brought a habeas corpus proceeding in the United States District Court for the Northern District of Ohio, claiming that the admission of Robinson's confession violated the *Bruton* doctrine.²¹⁹

The district court agreed with Rogers, finding that *Lee* made the *Bruton* doctrine applicable to bench trials.²²⁰ With this "understanding of *Lee*, the district court looked for the 'particularized guarantees of trustworthiness' required by *Ohio v. Roberts* . . . ; finding none, the court concluded that the admission of Robinson's confession constituted prejudicial error of constitutional dimension."²²¹

The Sixth Circuit disagreed, noting that the Court explicitly found that *Lee* was "not strictly speaking a *Bruton* case" because it did not concern the effectiveness of limiting

²¹⁵ See, e.g., *United States v. Cardenas*, 9 F.3d 1139, 1155 (5th Cir. 1993) (joining several other circuits in finding that the *Bruton* doctrine is inapplicable to bench trials).

²¹⁶ 884 F.2d 252, 253 (6th Cir. 1989).

²¹⁷ *Id.*

²¹⁸ *Id.* at 254.

²¹⁹ *Id.*

²²⁰ *Id.* at 257.

²²¹ *Id.*

instructions to the jury.²²² Indeed, “[t]he *Lee* Court did not even consider whether the co-defendant’s confession was so ‘devastating’ as to prevent its proper use.”²²³ Moreover, the Sixth Circuit pointed out that “although *Lee*, like *Parker v. Randolph*, . . . was a case of interlocking confessions, the *Lee* Court focused not on whether their interlocking nature made them ‘devastating,’ but on whether their interlocking nature made them reliable.”²²⁴ Finally, the court then refused to make this extension itself, finding that there was no reason to conclude that judges, like jurors, are “incapable of separating evidence properly admitted against one defendant from evidence admitted against another.”²²⁵

2. Post-*Crawford* Precedent

In the wake of the Court’s opinion in *Crawford* and its progeny, courts categorically continue to conclude that the *Bruton* doctrine does not apply to joint bench trials, even if the codefendant’s confession is testimonial, implying that the testimonial/nontestimonial dichotomy does not apply to the *Bruton* doctrine. For instance, in *West v. Jones*, the court found the *Bruton* doctrine inapplicable to bench trials because “[t]rial courts are presumed to consider only properly admitted and relevant evidence in rendering its decision and to give no weight to improper testimonial evidence, which is taken under objection.”²²⁶

Later finding that the *Bruton* doctrine was inapplicable to bench trials, the Third Circuit noted that it was “agree[ing] with every United States Court of Appeals that has considered the question.”²²⁷

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ No. 04-CV-40199-FL, 2006 WL 508652, at *3 (E.D. Mich. Feb. 28, 2006). As in *Lee*, however, the court found that there was evidence that the trial judge relied on Coleman’s confession to find West guilty. *Id.* at *4. Because this meant that the trial judge in effect allowed for the admission of Coleman’s testimonial confession as evidence against West, the Court found a Confrontation Clause violation, but not under the *Bruton* doctrine. *Id.* at *3-4. Finding this violation to be harmless error, the court denied West’s petition. *Id.* at *7.

²²⁷ *Johnson v. Tennis*, 549 F.3d 296, 298 (3d Cir. 2008).

B. *The Bruton Doctrine and the Neutral Pronoun Solution*

1. *Pre-Crawford Precedent*

As noted, the *Richardson v. Marsh* Court found that the redaction of a defendant's confession to remove all references to codefendants satisfied the *Bruton* doctrine and the Confrontation Clause.²²⁸ Later, in *Gray v. Maryland*, the Court found that redactions of codefendant confessions that simply replace names with obvious blank spaces, words such as "deleted," symbols, or other similarly obvious indications of alteration do violate the *Bruton* doctrine and the Confrontation Clause.²²⁹ In *Marsh*, the Court left open the question of whether defendant confessions can be redacted to replace the names of other codefendants with neutral pronouns consistent with the Confrontation Clause.²³⁰ In *Gray*, the Court did not explicitly approve of this practice, but it did strongly imply that it found this practice permissible. As noted, the *Gray* Court found that a codefendant's confession that "[Me], Kevin Gray, and Jacquin 'Tank' Vanlandingham" were in the group that beat up the victim could not be redacted to read, "Me, deleted, deleted, and a few other guys."²³¹ Later, however, the majority wondered why the codefendant's confession could not have been altered to read, "Me and a few other guys."²³²

Before *Crawford*, courts consistently concluded that the *Bruton* doctrine does not apply when codefendant confessions are redacted to replace other defendants' names with neutral pronouns.²³³ For instance, in *United States v. Logan*, after a joint jury trial, Benjamin Logan was convicted of several crimes, including robbery.²³⁴ Logan's codefendant, Zachary Roan, confessed to a detective that he planned and committed the robbery with Logan.²³⁵ At their joint trial, Roan did not testify, so the prosecution called the detective who testified

²²⁸ See *supra* notes 126-36 and accompanying text.

²²⁹ See *supra* notes 152-61 and accompanying text.

²³⁰ *Richardson v. Marsh*, 481 U.S. 200, 211 n.5 (1987) ("We express no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun.").

²³¹ See *supra* note 159 and accompanying text.

²³² See *supra* note 161 and accompanying text.

²³³ See, e.g., *United States v. Winston*, 55 F. App'x 289, 294 (6th Cir. 2003) (noting that "several of our sister circuits have noted that a *Bruton* violation can be avoided by replacing the co-defendant's name with a neutral pronoun or other generalized phrase").

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

²³⁵ *Id.*

that Roan confessed that he planned and committed the subject robbery with “another individual.”²³⁶

In finding that the admission of Roan’s redacted confession complied with the *Bruton* doctrine and the Confrontation Clause, the Eighth Circuit noted in 2000 that the *Marsh* Court left open the question of whether courts could replace the names of other defendants with neutral pronouns.²³⁷ That said, the court found that “the principles on which *Marsh* was decided provide[d] clear guidance on how to resolve the instant difficulty.”²³⁸ According to the Eighth Circuit, *Marsh* held that the *Bruton* doctrine only precludes the admission of codefendant confessions that facially incriminate other defendants, and confessions redacted to replace other defendants’ names with neutral pronouns do not facially incriminate other defendants.²³⁹ To reach this conclusion, the court found that it was “simply adher[ing] to a view that several of our cases have long since adopted.”²⁴⁰

2. Post-*Crawford* Precedent

After *Crawford* and its progeny, courts categorically continue to conclude that the admission of a codefendant confession redacted to replace the names of other defendants with neutral pronouns does not violate the *Bruton* doctrine. For instance, in *United States v. Akefe*, Aderemi J. Akefe and Na-Heem Tokumbo Alade were charged with conspiracy to import heroin into the United States and conspiracy to distribute heroin.²⁴¹ The two were given a joint jury trial, and Alade did not testify.²⁴² At trial, the prosecution called Special Agent Michael Galu to testify. Galu conducted Alade’s post-arrest interview, and the prosecutor engaged him in the following colloquy during trial:

Q. Other than this post-arrest interview, did Mr. Alade make any other statements to you?

A. He did.

Q. When did he make those statements?

²³⁶ *Id.*

²³⁷ *Id.* at 822.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ No. 09 CR 196(RPP), 2010 WL 2899805, at *1 (S.D.N.Y. July 21, 2010).

²⁴² *Id.*

A. When, later that evening, I had transported Mr. Alade to the Wayne County jail and as I was escorting Mr. Alade from my vehicle to the jail processing center, he stated that, he said, oh man, I didn't know you guys got him too, man, I can help you out, I can help you out.

Q. Who was he referring to?

A. Another person arrested in this case.²⁴³

Alade in fact had referred to Akefe, and the trial court permitted Galu to answer this last question with the neutral pronoun "another person" rather than with Akefe's name to prevent a *Bruton* doctrine violation.²⁴⁴ After this testimony by Galu, the court instructed jurors only to use Alade's statement as evidence of his guilt and not as evidence of Akefe's guilt.²⁴⁵

After he was convicted, Akefe appealed, claiming that Alade's statements to Galu were "testimonial" and thus inadmissible under *Crawford*.²⁴⁶ The court disagreed, finding that Alade's reliance on *Crawford* "in attacking the Government's use of Alade's *Brutonized* statement [wa]s misplaced because *Crawford* held that testimonial hearsay offered against a criminal defendant is unconstitutional under the confrontation clause and therefore inadmissible."²⁴⁷ According to the court, *Crawford* was irrelevant because "the challenged testimony was offered only against Alade and the jury was instructed accordingly."²⁴⁸ The court thus concluded that "*Crawford* is inapplicable and Alade's *Brutonized* post-arrest statement admitted solely against Alade is only violative of Akefe's confrontation clause rights if it violates the rules set out in *Bruton v. United States*, . . . *Richardson v. Marsh*, . . . and their progeny."²⁴⁹

The court then failed to find such a violation, initially noting that "[t]he Second Circuit has been clear that statements made by defendants are admissible against the speaker where the statement is redacted to replace the names of co-defendants with neutral pronouns and the statement on its face does not connect co-defendants to the crimes."²⁵⁰ The

²⁴³ *Id.* at *25.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

court then asserted that Alade's statement fell "squarely within Second Circuit precedent because Akefe's name was replaced with a neutral pronoun, and the statement, standing alone, did not implicate Akefe."²⁵¹ The Second Circuit is not alone in this regard. Instead, as the United States District Court for the District of Columbia noted in its 2011 opinion *United States v. Clarke*, "[t]he use of neutral pronouns or other general identifiers, such as 'other guys,' has been recognized by several circuits as a type of redaction that satisfies *Bruton*."²⁵²

C. *The Bruton Doctrine and Noncustodial/Nontestimonial Hearsay*

1. Pre-*Crawford* Precedent

Before the Supreme Court's opinion in *Crawford*, the vast majority of courts held that codefendants' statements that were noncustodial (and would now be considered nontestimonial) were covered by the *Bruton* doctrine. For instance, in *State v. Swafford*, Artis Swafford, Jan Anthony, and Joel Butler were jointly tried before a jury on charges of felony murder and aggravated robbery.²⁵³ Previously, Anthony unwittingly made statements to confidential informant Lamar Williams that also implicated Swafford and Butler.²⁵⁴ At trial, Anthony did not testify, and the prosecution introduced a typed transcript of these statements, with the names "Swafford" and "Butler" deleted, "but blank spaces with underlining were left."²⁵⁵ After he was convicted, Swafford appealed, claiming that the admission of the transcript violated the *Bruton* doctrine.²⁵⁶ The Supreme Court of Kansas agreed, concluding that "[w]hile the conversation between Lamar Williams and Anthony is not a typical post-arrest confession, *Bruton* applies to any extrajudicial statement by a nontestifying codefendant."²⁵⁷ Moreover, the court found that "*Bruton* applies to a statement made in a noncustodial setting as well to a statement made to other conspirators if, as in this case, such

²⁵¹ *Id.* at *26. According to the court, "[t]here was no evidence that the two defendants on trial were the only individuals arrested in the investigation." *Id.*

²⁵² 767 F. Supp. 2d 12, 31 (D.D.C. 2011).

²⁵³ 913 P.2d 196, 198 (Kan. 1996).

²⁵⁴ *Id.* at 200.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 199.

²⁵⁷ *Id.* at 201.

statement is not made during the life of, and in furtherance of, the conspiracy.”²⁵⁸ Courts also consistently found that the *Bruton* doctrine was violated by the admission of similar noncustodial statements made to mothers,²⁵⁹ brothers,²⁶⁰ lovers,²⁶¹ and other friends and family members.²⁶²

There were a few opinions before *Crawford* which held that noncustodial statements were beyond the scope of the *Bruton* doctrine, but these were the exceptions to the rule and often based upon mistaken reasoning more than anything else. For instance, in *Brown v. State*, the Supreme Court of Georgia found that the admission of a codefendant’s noncustodial statements that qualified as coconspirator admissions did not violate the *Bruton* doctrine.²⁶³ This was not a controversial conclusion, as the Court in *Delli Paoli* pointed out that the introduction of coconspirator admission presents no problems under the Confrontation Clause.²⁶⁴ Later, however, Georgia courts began citing *Brown* and its progeny to support the proposition that noncustodial statements made after the completion of conspiracies were beyond the scope of the *Bruton* doctrine. These opinions read more as mistaken interpretations of prior precedent rather than the courts consciously limiting the scope of the *Bruton* doctrine.²⁶⁵

²⁵⁸ *Id.*

²⁵⁹ See, e.g., *People v. Jimenez*, No. C038273, 2002 WL 1486571, at *1-3 (Cal. Ct. App. July 11, 2002) (finding a violation of the *Bruton* doctrine—but harmless error—based upon the admission of a nontestifying codefendant’s incriminatory statement to his mother).

²⁶⁰ See, e.g., *United States v. Ruff*, 717 F.2d 855, 857-58 (3d Cir. 1983) (finding a violation of the *Bruton* doctrine—but harmless error—based upon the admission of a nontestifying codefendant’s incriminatory statements to several family members, including statements to his brother and brother-in law).

²⁶¹ See, e.g., *Holland v. Att’y Gen.*, 777 F.2d 150, 152 (3d Cir. 1985) (finding a violation of the *Bruton* doctrine based upon the admission of a nontestifying codefendant’s incriminatory statement to his wife).

²⁶² See, e.g., *Vincent v. Parke*, 942 F.2d 989, 991-92 (6th Cir. 1991) (finding a violation of the *Bruton* doctrine based upon the admission of a nontestifying codefendant’s incriminatory statement to his sister); *Monachelli v. Warden, SCI Graterford*, 884 F.2d 749, 753 (3d Cir. 1989) (noting “that the *Bruton* rule is applicable where the statements of the non-testifying co-defendant were made in a non-custodial setting to family and friends”).

²⁶³ 416 S.E.2d 508, 509-10 (Ga. 1992).

²⁶⁴ See *Delli Paoli v. United States*, 352 U.S. 232, 237 (1957).

²⁶⁵ For instance, in *Johnson v. State*, the Supreme Court of Georgia found that a codefendant’s noncustodial statement made after the completion of the charged conspiracy was beyond the scope of the *Bruton* doctrine. 571 S.E.2d 782, 784 (Ga. 2002). In reaching this conclusion, the court simply cited its prior opinion in *Reid v. State*, 437 S.E.2d 646 (Ga. 1993) for the proposition that “*Bruton* is not applicable to a statement which ‘is not the custodial confession of a non-testifying accomplice which details the criminal participation of a co-defendant.’” *Id.* (quoting *Reid*, 437 S.E.2d 646). In *Reid*, however, the court had found that a codefendant confession did not

2. Post-*Crawford* Precedent

After *Crawford*, the tables have largely turned, with the vast majority of courts finding that codefendants statements that are nontestimonial (and would have been considered noncustodial) are beyond the scope of the *Bruton* doctrine. Many of these opinions concluding that nontestimonial hearsay is beyond the scope of the *Bruton* doctrine were handed down in 2010, such as the Eighth Circuit's opinion in *United States v. Dale*,²⁶⁶ which was issued on July 30, 2010. In *Dale*, police found the bodies of Anthony Rios and Olivia Raya as well as several bricks of marijuana and cocaine at the couple's Kansas City home.²⁶⁷ During their investigation of these murders, law enforcement officials convinced inmate Anthony Smith to wear a wire and talk with Michael Dale, a suspect in the murders and an inmate at the same facility as Smith.²⁶⁸ Smith eventually recorded a conversation with Dale in which Dale incriminated Dyshawn Johnson and himself in the murders.²⁶⁹ Dale and Johnson were later jointly tried before a jury on charges of first-degree murder and conspiracy to distribute cocaine, and Dale did not testify at trial.²⁷⁰ At trial, the prosecution played the recording of Dale's confession to jurors and instructed them that the tape-recorded conversation was not admissible against Johnson.²⁷¹

After he was convicted, Johnson appealed, claiming that the admission of Dale's statements violated the *Bruton* doctrine.²⁷² The Eighth Circuit disagreed, finding that Dale's statements were nontestimonial and that after *Davis v. Washington* and *Whorton v. Bockting*, "[i]t is now clear that the Confrontation Clause does not apply to non-testimonial statements by an out-of-court declarant."²⁷³ Therefore, the court concluded that under its "present understanding of the confrontation right, governed by *Crawford*, the introduction of

violate the *Bruton* doctrine not simply because it was noncustodial but because it "was admissible against all defendants as the statement of a co-conspirator made prior to the termination of the conspiracy." 437 S.E.2d at 650.

²⁶⁶ 614 F.3d 942 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

²⁶⁷ *Id.* at 948.

²⁶⁸ *Id.* at 949.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 949-50.

²⁷¹ *Id.* at 952.

²⁷² *Id.* at 954-55.

²⁷³ *Id.* at 955.

Dale's out of court statements did not violate Johnson's confrontation right."²⁷⁴

Nine days before *Dale*, on July 21, 2010, the Sixth Circuit found that a codefendant's statement to a confidential informant that implicated another defendant could not violate the *Bruton* doctrine because it was nontestimonial.²⁷⁵ Two weeks before *Dale*, the First Circuit found that a codefendant's similar statement to his mother also was beyond the scope of the *Bruton* doctrine because it was nontestimonial.²⁷⁶ And, two months before *Dale*, the Tenth Circuit concluded in *United States v. Smalls* that a codefendant's statements to a confidential informant were properly admitted at a joint jury trial because "the *Bruton* rule, like the Confrontation Clause upon which it is premised, does not apply to nontestimonial hearsay statements."²⁷⁷ Finally, in 2008, the Second Circuit applied the same reasoning to a codefendant's confession to a fellow inmate.²⁷⁸

To this point, the only federal circuit court to find that nontestimonial codefendant statements can violate the *Bruton* doctrine after *Crawford* is the Third Circuit.²⁷⁹ Similarly, most federal district courts have found after *Crawford* that nontestimonial hearsay is beyond the scope of the *Bruton* doctrine, but a couple of federal district courts have reached contrary conclusions.²⁸⁰

V. THE *BRUTON* DOCTRINE SHOULD STILL COVER NONTTESTIMONIAL HEARSAY

This section asserts that there are two possible interpretations of the scope of the *Bruton* doctrine in the wake of *Crawford* and its progeny—and that each should preclude

²⁷⁴ *Id.* at 956.

²⁷⁵ *United States v. Sutton*, 387 F. App'x 595, 602-03 (6th Cir. 2010).

²⁷⁶ *United States v. Figueroa-Cartagena*, 612 F.3d 69, 85 (1st Cir. 2010).

²⁷⁷ 605 F.3d 765, 768 n.2 (10th Cir. 2010).

²⁷⁸ *See United States v. Pike*, 292 F. App'x 108, 112-13 (2d Cir. 2008) (holding that a codefendant's incriminatory statement to a fellow inmate could not violate the *Bruton* doctrine because it was nontestimonial).

²⁷⁹ *See, e.g., United States v. Jones*, 381 F. App'x 148, 151 (3d Cir. 2010) ("We have interpreted *Bruton's* rule broadly, applying it not only to custodial confessions but also to informal statements such as Gwen's.").

²⁸⁰ *Compare United States v. Koning*, No. 4:09CR3031, 2010 WL 3984739, at *6 (D. Neb. Sept. 10, 2010) ("However, *Bruton* is not applicable to the McWha documents. As very recently explained by the Eighth Circuit, '[t]he Confrontation Clause does not apply to non-testimonial statements by an out-of-court declarant.'"), *with United States v. Williams*, No. 1:09cr414 (JCC), 2010 WL 3909480, at *4 (E.D. Va. Sept. 23, 2010) (finding that "*Bruton* can apply to non-confessional statements").

the admission of nontestimonial codefendant confessions. The first is that *Crawford*, like its predecessor, had nothing to say about the inadmissibility of codefendant confessions under the *Bruton* doctrine, meaning that courts should find that even nontestimonial codefendant statements can violate the doctrine. The second is that *Crawford* deconstitutionalized the *Bruton* doctrine, meaning that nontestimonial codefendant statements do not violate the Confrontation Clause. In this case, however, courts should readily find that such nontestimonial codefendant statements violate Federal Rule of Evidence 403 and are therefore inadmissible anyway.

A. *Crawford's Testimonial/Nontestimonial Dichotomy Should Have Had No Effect on the Bruton Doctrine*

The first interpretation of *Crawford v. Washington* and its progeny is that they should have no effect on *Bruton* doctrine cases. If this interpretation is correct, the question of whether hearsay is “testimonial” or “nontestimonial” is irrelevant to the *Bruton* doctrine, and the vast majority of courts have erred in finding nontestimonial hearsay beyond *Bruton's* scope. There are several reasons to believe that *Crawford* is as irrelevant as its predecessor—*Ohio v. Roberts*—to the *Bruton* doctrine.²⁸¹

The first reason is that the *Bruton* opinion itself dealt with the inadmissibility of Evans's confession under the rules of evidence, not its constitutional (un)reliability. When the Supreme Court decided *Bruton* in 1968, the Court had not yet addressed the question of when the prosecution's introduction of hearsay violates the Confrontation Clause because it is constitutionally unreliable. The Court did not address this question until its 1970 opinion in *California v. Green*,²⁸² and it did not clearly resolve it until its 1980 opinion in *Ohio v. Roberts*.²⁸³ The question for the *Bruton* Court thus was not whether Evans's confession was constitutionally unreliable. Rather, the Court found that the confession “was clearly

²⁸¹ See *supra* notes 106-13 and accompanying text.

²⁸² 399 U.S. 149 (1970); see Anthony Bocchino & David Sonenshein, *Rule 804(b)(6)—The Illegitimate Child of the Failed Liaison Between the Hearsay Rule and Confrontation Clause*, 73 MO. L. REV. 41, 56 (2008) (noting that *Green* was the Court's “first opinion explicitly addressing the interplay of the Confrontation Clause and the law of hearsay”).

²⁸³ 448 U.S. 56 (1980).

inadmissible against him under traditional rules of evidence.”²⁸⁴ Evans’s confession was inadmissible against Bruton, and the prosecution’s introduction of the confession violated the Confrontation Clause because Evans did not testify and the confession was sufficiently *harmful* to Evans.²⁸⁵ The *Bruton* Court simply could not trust the jury to use Evans’s confession solely as evidence of his guilt; the confession’s admission had a devastating practical effect on Bruton’s defense.²⁸⁶

Indeed, the Court later recognized that because Evans’s confession was inadmissible against Bruton, it did not need to resolve the issue of whether the confession was constitutionally unreliable. According to the Court, “[t]here is not before us . . . any recognized exception to the hearsay rule insofar as [Bruton] is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause.”²⁸⁷ This question of whether hearsay violates the Confrontation Clause because it is constitutionally unreliable was the question later resolved by the Court in *Roberts* and *Crawford*, and, as the *Bruton* Court made clear, it is a question unrelated to the doctrine it was creating.²⁸⁸

Second, *Crawford* along with its pronounced testimonial-nontestimonial dichotomy is also irrelevant to the *Bruton* doctrine because *Cruz* made clear that the *Roberts* test of constitutional (un)reliability had no effect on the *Bruton* doctrine. As noted, in *Cruz*, it was evident that Benjamin Cruz’s confession was inadmissible against Eulogio Cruz at their joint jury trial under the rules of evidence.²⁸⁹ But, according to the State, because Eulogio Cruz gave an interlocking confession, Benjamin Cruz’s confession had adequate indicia of reliability to satisfy the *Roberts* test, which would mean no Confrontation Clause problem.²⁹⁰ The Court forcefully rejected this argument, finding that *Roberts* declared that certain hearsay that is *admissible* under an exception to the rule against hearsay nonetheless violates the Confrontation Clause because it is constitutionally *unreliable*.²⁹¹ Conversely, the *Bruton* doctrine declares that certain hearsay that is

²⁸⁴ *Bruton v. United States*, 391 U.S. 123, 128 n.3 (1968).

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ See *supra* notes 80-83 and accompanying text.

²⁸⁹ See *supra* note 140 and accompanying text.

²⁹⁰ See *supra* note 141 and accompanying text.

²⁹¹ See *supra* notes 145-51 and accompanying text.

inadmissible under the rules of evidence violates the Confrontation Clause at joint jury trials because it is *harmful*.²⁹²

Thus, it was irrelevant to the *Cruz* Court that Eulogio gave an interlocking confession:

Quite obviously, what the “interlocking” nature of the codefendant’s confession pertains to is not its *harmfulness* but rather its *reliability*: If it confirms essentially the same facts as the defendant’s own confession it is more likely to be true. Its reliability . . . may be relevant to whether the confession should (despite the lack of opportunity for cross-examination) be *admitted as evidence* against the defendant . . . but cannot conceivably be relevant to whether, assuming it cannot be admitted, the jury is likely to obey the instruction to disregard it, or the jury’s failure to obey is likely to be inconsequential.²⁹³

The *Cruz* Court’s holding is unmistakable: The admission at a joint jury trial of a nontestifying codefendant’s confession that facially incriminates other defendants—but is inadmissible against them under the rules of evidence—violates the *Bruton* doctrine and the Confrontation Clause.²⁹⁴ The fact that such a confession was potentially “reliable” under *Roberts* was irrelevant to the *Bruton* doctrine if the confession was inadmissible against other defendants under the rules of evidence.²⁹⁵ Indeed, the *Cruz* Court noted that reliable confessions are often more harmful than unreliable confessions, implying that constitutionally reliable confessions under *Roberts* can be more violative of the *Bruton* doctrine than constitutionally unreliable confessions.²⁹⁶

In fact, the *Cruz* Court came close to chastising the State for arguing that inadmissible but constitutionally reliable hearsay satisfied the *Bruton* doctrine, concluding that “[t]he law cannot command respect if such an inexplicable exception to a supposed constitutional imperative is adopted. Having

²⁹² See *supra* note 83 and accompanying text.

²⁹³ *Cruz v. New York*, 481 U.S. 186, 192-93 (1987).

²⁹⁴ See *supra* notes 145-51 and accompanying text.

²⁹⁵ See *supra* notes 144-51 and accompanying text. In its later opinion in *Idaho v. Wright*, 497 U.S. 805 (1990), the Supreme Court concluded that “[t]o be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.” 497 U.S. at 822. If the Court had applied this analysis in *Cruz*, it would not have found Benjamin Cruz’s confession reliable based upon the mere fact that Eulogio Cruz gave an interlocking confession. The whole point of *Cruz*, though, is that the Court did not need to resolve the issue of whether Benjamin’s confession was reliable because reliability was irrelevant to its decision. See *supra* notes 145-51 and accompanying text.

²⁹⁶ See *supra* note 144 and accompanying text.

decided *Bruton*, we must face the honest consequences of what it holds.”²⁹⁷ And, as noted, for the *Cruz* Court, the honest consequence was that the case before it was “indistinguishable from *Bruton* with respect to those factors the Court has deemed relevant in this area: the likelihood that the instruction will be disregarded, . . . the probability that such disregard will have a devastating effect, . . . and the determinability of these factors in advance of trial.”²⁹⁸

The third reason why *Crawford* can be read as having no effect on *Bruton* doctrine cases is that the *Crawford* opinion itself implies that the Court did not intend for its testimonial/nontestimonial dichotomy to have any effect on the *Bruton* doctrine. *Crawford* claimed that the *Roberts* “test stray[ed] from the original meaning of the Confrontation Clause and urge[d the Court] to reconsider it.”²⁹⁹ The *Crawford* Court thus found that “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”³⁰⁰ The Court later confirmed in both *Davis* and *Bockting* that *Crawford* overruled *Roberts*.³⁰¹

If all the Court did in *Crawford* was overrule *Roberts*, it is clear that the Court’s opinion had no effect on the *Bruton* doctrine because the *Roberts* test for constitutional reliability had no effect on the *Bruton* doctrine,³⁰² which is solely concerned with constitutional *harmfulness*, so there is no reason to believe that *Crawford*’s replacement test for constitutional reliability should be any different. Indeed, the *Crawford* Court acknowledged that it was not affirmatively reaching the conclusion that the Sixth Amendment is only concerned with testimonial hearsay,³⁰³ so it would be difficult to argue that *Crawford* itself found nontestimonial hearsay beyond the scope of the *Bruton* doctrine.

That said, the *Crawford* Court did conduct a historical analysis of the Confrontation Clause, finding that it supported two inferences: the clause (1) covers both live testimony in court and “testimonial” statements and (2) does not allow for the admission of “testimonial” statements unless the declarant

²⁹⁷ *Cruz*, 481 U.S. at 193.

²⁹⁸ *Id.*

²⁹⁹ *Crawford v. Washington*, 541 U.S. 36, 42 (2004).

³⁰⁰ *Id.* at 68-69.

³⁰¹ See *supra* notes 209-11 and accompanying text.

³⁰² See *supra* Part I.J.

³⁰³ See *supra* note 184 and accompanying text.

is “unavailable” at trial and the defendant previously had the chance to cross-examine him.³⁰⁴ The Court then found that its “case law ha[d] been largely consistent with these two principles.”³⁰⁵ The Court in *Davis* later used this historical analysis to conclude that the Confrontation Clause is only concerned with testimonial hearsay.³⁰⁶ The argument could be made, then, that regardless of the actual grounds of its prior Confrontation Clause precedent, going forward, only testimonial hearsay can violate the Confrontation Clause.

There are, however, two separate portions of *Crawford* that contradict the reading that the testimonial/nontestimonial dichotomy applies to, and hence limits, the *Bruton* doctrine. First, in its historical analysis, *Crawford* addressed an important argument by the State. The State had argued that the admission of Sylvia Crawford’s statement to the police did not violate the Confrontation Clause despite the fact that she refused to testify because her statement interlocked with Michael Crawford’s own statement.³⁰⁷ The State began by noting that “[i]n *Parker v. Randolph*, a plurality of this Court determined that the ‘interlocking confessions’ of jointly tried co-defendants were sufficiently reliable to satisfy the Confrontation Clause.”³⁰⁸ The State did acknowledge that this opinion was later “[a]brogated by *Cruz v. New York*.”³⁰⁹

This, however, still left the State with the Court’s opinion in *Lee v. Illinois*, which the Court later noted was the only decision arguably in tension with established precedent. As noted, the *Lee* Court found that the case before it was not a *Bruton* case because it did not involve the effectiveness of a limiting jury instruction; instead, *Lee* was a bench trial, and the judge acknowledged that he used the codefendant’s confession as evidence of the other defendant’s guilt.³¹⁰ Therefore, the Court had to decide whether the confession had indicia of reliability sufficient to satisfy *Roberts*.³¹¹

The *Lee* Court noted that the other defendant gave a confession that partially interlocked with the codefendant’s

³⁰⁴ See *supra* notes 174-83 and accompanying text.

³⁰⁵ *Crawford*, 541 U.S. at 57.

³⁰⁶ See *supra* notes 209-10 and accompanying text.

³⁰⁷ Brief for Respondent at 8, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 22228001, at *8-9.

³⁰⁸ *Id.* at *5.

³⁰⁹ *Id.* at *5 n.1.

³¹⁰ See *supra* note 121 and accompanying text.

³¹¹ See *supra* notes 123-25 and accompanying text.

confession but ultimately found that the codefendant's confession lacked such indicia because there were discrepancies between the two confessions that were neither irrelevant nor trivial.³¹² Accordingly, the Court found that there was a Confrontation Clause violation under *Roberts* because "when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted."³¹³

According to the State in *Crawford*, "The logical inference of this statement is that when the discrepancies between the statements *are* insignificant, then the codefendant's statement *may* be admitted" consistent with *Roberts*.³¹⁴ Under this reading of *Lee*, if the codefendant's confession in *Lee* completely interlocked with the other defendant's confession, the admission of the codefendant's confession would not have violated the Confrontation Clause at the joint bench trial because the confession would have had adequate indicia of reliability to satisfy *Roberts*.³¹⁵

The *Crawford* Court acknowledged that this was a "possible inference" from the *Lee* opinion but found that it was not an "inevitable one" and declined to draw it.³¹⁶ Rather, the *Crawford* Court concluded that "[i]f *Lee* had meant authoritatively to announce an exception—previously unknown to this Court's jurisprudence—for interlocking confessions, it would not have done so in such an oblique manner."³¹⁷ The Court then immediately followed this conclusion with the following disclaimer: "Our only precedent on interlocking confessions had addressed the entirely different question whether a limiting instruction cured prejudice to codefendants from admitting a defendant's *own* confession against him in a joint trial. *See Parker v. Randolph* . . . (plurality opinion), abrogated by *Cruz v. New York*."³¹⁸ Having rejected this argument, the Court was then able to conclude in the next sentence of its opinion that its "cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where

³¹² See *supra* note 124 and accompanying text.

³¹³ *Lee v. Illinois*, 476 U.S. 530, 545 (1986).

³¹⁴ Brief for Respondent, *supra* note 307, at *6.

³¹⁵ *Id.* at *4-5.

³¹⁶ *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

³¹⁷ *Id.*

³¹⁸ *Id.*

the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”³¹⁹

According to the Court, then, *Lee* (which was not a *Bruton* doctrine case) was relevant to the question of whether its cases had remained faithful to the principle that testimonial hearsay can only be admitted if the declarant is unavailable and the defendant previously had the opportunity to cross-examine him.³²⁰ Conversely, *Randolph* and *Cruz*, which were *Bruton* doctrine cases, were not relevant to this question but instead were relevant to “the entirely different question whether a limiting instruction cured prejudice to codefendants from admitting a defendant’s own confession against him in a joint trial.”³²¹ The *Lee* Court itself had distinguished the case before it from *Bruton*: *Lee* was “not . . . concerned with the effectiveness of limiting instructions in preventing spill-over prejudice to a defendant when his codefendant’s confession is admitted against the codefendant at a joint trial.”³²²

Indeed, the Court had to reach this conclusion; otherwise, it would have been necessary for the Court to cite *Randolph* as a case that was inconsistent with the Framers’ understanding of the Confrontation Clause (even though *Randolph* was only plurality opinion).³²³ As noted, in *Randolph*, several defendants were jointly tried before a jury, and none of the defendants testified at trial.³²⁴ Nonetheless, the Supreme Court found the admission of each defendant’s confession to police officers admissible, despite the fact that there was no prior opportunity for confrontation.³²⁵ Clearly, each of these confessions was “testimonial”—meaning that *Randolph* was inconsistent with the Framers’ understanding if the Court presented the *Bruton* doctrine as an alternative means of

³¹⁹ *Id.*

³²⁰ *See id.*

³²¹ *Id.* (first emphasis added).

³²² *Lee v. Illinois*, 476 U.S. 530, 542 (1986).

³²³ In the pre-*Crawford* Confrontation Clause case, *Lilly v. Virginia*, 527 U.S. 116 (1999), the Supreme Court categorized three separate categories of declarations against penal interest. The Court placed in one category voluntary admissions offered against the defendant himself such as confessions covered by the *Bruton* doctrine. *Id.* at 127-28. In another category, the Court considered confessions made by a declarant offered against a separate criminal defendant at trial. With regard to confessions falling into this category, the Court concluded that it had issued an “unbroken line of cases” deeming such confessions inherently unreliable. *Id.* at 132 & n.2. In a footnote, the *Lilly* Court then indicated that its plurality opinion in *Dutton v. Evans* was “[t]he only arguable exception to this unbroken line of cases.” *Id.* at 132 n.2.

³²⁴ *See supra* note 94 and accompanying text.

³²⁵ *See supra* notes 97-99.

determining constitutional reliability. But the reason why the *Randolph* Court found the confessions admissible was not because they were reliable; it was because they were insufficiently harmful. After all, each defendant had himself confessed and devastated his own case.³²⁶ *Randolph* and the Court's later opinion in *Cruz* make clear that the *Bruton* doctrine is not an alternative means of determining constitutional reliability, but rather a test for determining constitutional harmfulness.³²⁷

This leads to the second relevant portion of *Crawford*. Earlier in its opinion, in explaining why it disposed of the adequate indicia of reliability test, the *Crawford* Court gave the following explanation and disclaimer:

The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.³²⁸

As this analysis makes clear, it is equally clear that the *Bruton* doctrine does not purport to be an alternative means of determining reliability. The *Cruz* Court even noted that a codefendant's incriminatory statement can become more harmful as it becomes more reliable.³²⁹

In *Davis* and *Bockting*, the Court did later conclude that the Confrontation Clause is only concerned with testimonial hearsay.³³⁰ But neither of these cases involved joint jury trials or cited a *Bruton* doctrine case. Therefore, these holdings are not directly applicable to the *Bruton* doctrine.³³¹ Moreover, the *Davis* Court reiterated its finding in *Crawford* that the testimonial/nontestimonial dichotomy does not apply to the

³²⁶ See *supra* notes 97-99.

³²⁷ See *supra* notes 97-99, 102-05; see also *supra* notes 142-51 and accompanying text.

³²⁸ *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

³²⁹ See *supra* notes 144-51 and accompanying text.

³³⁰ See *supra* notes 199-205, 211 and accompanying text.

³³¹ See, e.g., *United States v. Williams*, No. 1:09cr414 (JCC), 2010 WL 3909480, at *3-4 (E.D. Va. Sept. 23, 2010) (noting that a statement by the Court that the Confrontation Clause only covers testimonial hearsay was dicta in relation to the *Bruton* doctrine).

doctrine of forfeiture by wrongdoing.³³² Instead, as the Court found in *Giles v. California* (after both *Davis* and *Bockting*), if a defendant intends to and does cause a potential witness against him to be unavailable at his trial, the prosecution can admit that witness's testimonial hearsay without violating the Confrontation Clause.³³³ This proposition makes clear that, despite the Court's absolutist language in *Davis* and *Bockting*, *Crawford's* testimonial/nontestimonial dichotomy applies only to Confrontation Clause cases that hinge on the constitutional (un)reliability of hearsay. Conversely, in cases such as forfeiture by wrongdoing—and, by implication, *Bruton* doctrine cases—which hinge on entirely different questions, *Crawford* should have no effect.

This conclusion is corroborated by the previously mentioned *Bruton* doctrine cases decided by lower courts before *Crawford*. As noted, courts consistently held that the *Bruton* doctrine did not apply to bench trials.³³⁴ And, as noted, courts continue to reach this conclusion after *Crawford*, even if a codefendant's confession is testimonial.³³⁵ For instance, in *West v. Jones*, the United States District Court for the Eastern District of Michigan found that the *Bruton* doctrine does not apply to bench trials in the wake of *Crawford* because a “[t]rial court[] [is] presumed to consider only properly admitted and relevant evidence in rendering its decision and to give no weight to improper testimonial evidence, which is taken under objection.”³³⁶ Conversely, the *Bruton* doctrine continues to preclude the admission of certain testimonial hearsay by codefendants at joint jury trials after *Crawford*.³³⁷

This dichotomy cannot be explained in terms of constitutional reliability, but it can be explained in terms of constitutional harmfulness. Obviously, the fact that Herman Coleman and Anthony West were subjected to a joint bench trial rather than a joint jury trial did not make Coleman's prior confessions to police that West and he committed the crimes any less testimonial or any more reliable. Therefore, if *Crawford's* testimonial/nontestimonial dichotomy applied,

³³² See *supra* notes 206-10 and accompanying text.

³³³ See *Giles v. California*, 554 U.S. 353, 358 (2008).

³³⁴ See *supra* notes 215-25 and accompanying text.

³³⁵ See *supra* notes 226-27 and accompanying text.

³³⁶ No. 04-CV-40199-FL., 2006 WL 508652, at *3 (E.D. Mich. Feb. 28, 2006).

³³⁷ See, e.g., *State v. Johnson*, 703 S.E.2d 217, 220 (S.C. 2010) (finding that the admission of a nontestifying codefendant's testimonial confession to an investigator violated the *Bruton* doctrine).

Coleman's confession could not have been introduced at their joint bench trial because West did not have the opportunity to cross-examine him.³³⁸

Crawford did not apply, though, because the prosecution offered Coleman's confession only against him.³³⁹ Therefore, the admission of Coleman's confession could only violate the Confrontation Clause if it violated the *Bruton* doctrine. And Coleman's confession could only violate the *Bruton* doctrine if it was constitutionally harmful—that is, if Coleman in effect became a witness against West because the trier of fact could not be trusted to use Coleman's confession only as evidence of Coleman's guilt.³⁴⁰ Because, however unrealistically,³⁴¹ courts trust judges more than jurors in this regard, the admission of codefendant confessions at joint bench trials do not violate the Confrontation Clause, but not because they are constitutionally reliable under *Crawford*.³⁴²

Second, as noted,³⁴³ courts before *Crawford* held that prosecutors could admit confessions by nontestifying codefendants as long as the names of other defendants were replaced with neutral pronouns.³⁴⁴ Also as noted,³⁴⁵ courts continue to allow this practice post-*Crawford*, even when codefendant confessions are testimonial.³⁴⁶ Meanwhile, prosecutors still cannot admit unredacted codefendant confessions that facially incriminate other defendants without violating the *Bruton* doctrine.³⁴⁷ Once again, this dichotomy cannot be explained in terms of constitutional reliability, but it can be explained in terms of constitutional harmfulness.

³³⁸ See *Bruton v. United States*, 391 U.S. 123, 127-28 (1968) (“Plainly, the introduction of Evans’ confession added substantial, perhaps even critical, weight to the Government’s case in a form not subject to cross-examination, since Evans did not take the stand. Petitioner thus was denied his constitutional right of confrontation.”).

³³⁹ *Jones*, 2006 WL 2017673, at *3-4.

³⁴⁰ See *Bruton*, 391 U.S. at 137 (“Here the introduction of Evans’ confession posed a substantial threat to petitioner’s right to confront the witnesses against him, and this is a hazard we cannot ignore.”).

³⁴¹ As noted, the judges in both *Lee* and *Jones* improperly used codefendants’ confessions as evidence of other defendants’ guilt. See *supra* note 118 and accompanying text.

³⁴² In *Rogers v. McMackin*, 884 F.2d 252, 255-57 (6th Cir. 1989), the Sixth Circuit noted that the Court in *Lee* considered whether a codefendant’s confession was reliable while the Court in *Randolph* considered whether a codefendant’s confession was devastating.

³⁴³ See *supra* notes 228-40 and accompanying text.

³⁴⁴ See *supra* notes 237-40 and accompanying text.

³⁴⁵ See *supra* notes 241-52 and accompanying text.

³⁴⁶ See *supra* notes 246-49 and accompanying text.

³⁴⁷ See *supra* notes 158-61 and accompanying text.

A codefendant's confession redacted to replace the other defendants' names with neutral pronouns is no less testimonial and no more reliable than a confession admitted in its original form. Indeed, in a certain sense, such a confession is less reliable: it is not the actual confession given by the codefendant but rather an altered version created by the court.³⁴⁸ But according to courts, jurors are more likely to respect a jury instruction to use a redacted confession as evidence of only the confessor's guilt.³⁴⁹ In its opinion in *Cruz*, the Court found that the case before it, which involved interlocking confessions, was "indistinguishable from *Bruton* with respect to those factors the Court has deemed relevant in this area: the likelihood that the instruction will be disregarded, . . . the probability that such disregard will have a devastating effect, . . . and the determinability of these facts in advance of trial."³⁵⁰ Conversely, courts have found that cases involving sufficiently redacted confessions are distinguishable from *Bruton* because there is less likelihood that jurors will disregard limiting instructions.³⁵¹

On the other hand, cases with nontestimonial codefendant confessions are indistinguishable from *Bruton* with respect to the factors that are relevant to the *Bruton* doctrine. As noted, in *Bruton*, Evans confessed to a postal inspector that Bruton and he committed armed robbery.³⁵² The *Bruton* Court found that the admission of Evans's confession along with an instruction telling jurors only to use the confession as evidence of his guilt violated the Confrontation Clause because of the likelihood that the jury would disregard the jury instruction, creating a devastating effect to Bruton's defense.³⁵³ Moreover, unlike with a nonfacially incriminatory confession,³⁵⁴ the Court could reach this conclusion in advance of trial without wondering about what evidence might be presented at trial.

If Evans had made this same confession to his mother, brother, lover, or acquaintance, this analysis would not change. This is because, "[w]hether or not it is testimonial, a

³⁴⁸ As Justice Scalia noted in his dissenting opinion in *Gray v. Maryland*, 523 U.S. 185, 203-04 (1998) (Scalia, J., dissenting), "such freelance editing seems to me infinitely greater than the risk posed by the entirely honest reproduction that the Court disapproves."

³⁴⁹ See *supra* notes 131-33 and accompanying text.

³⁵⁰ *Cruz v. New York*, 481 U.S. 186, 193 (1987).

³⁵¹ See *supra* note 147 and accompanying text.

³⁵² See *supra* note 56 and accompanying text.

³⁵³ See *supra* notes 79-80 and accompanying text.

³⁵⁴ See *supra* notes 75-82 and accompanying text.

defendant's extrajudicial statement directly implicating a co-defendant is equally susceptible to improper use by the jury against that co-defendant."³⁵⁵ And if the codefendant's statement is facially incriminatory, the court should equally be able to determine these issues before trial.³⁵⁶ Therefore, there is no sound reason for courts to find that nontestimonial statements fall outside the scope of the *Bruton* doctrine.

B. Nontestimonial Hearsay Should Still Be Held to Violate a Deconstitutionalized Version of the Bruton Doctrine

This article asserts that lower courts have erred in applying *Bruton* through a *Crawford* lens. These courts have held that the admission at a joint jury trial of a nontestifying codefendant's nontestimonial statement that facially incriminates another defendant no longer violates the Confrontation Clause and likely does not violate any other constitutional provision.³⁵⁷ Such an interpretation, however, only resolves the Confrontation Clause issue, not the issue of whether the admission of such a nontestimonial statement violates the rules of evidence.

Federal Rule of Evidence 403, along with most state counterparts, provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues,

³⁵⁵ *Thomas v. United States*, 978 A.2d 1211, 1225 (D.C. 2009).

³⁵⁶ *See id.*

³⁵⁷ Some have argued that courts should find that the admission of codefendant confessions at joint jury trials can violate the Due Process Clause based upon the likelihood that jurors would ignore limiting instructions. *See, e.g.*, James B. Haddad, *Post-Bruton Developments: A Reconsideration of the Confrontation Rationale, and a Proposal for a Due Process Evaluation of Limiting Instructions*, 18 AM. CRIM. L. REV. 1 (1980). This position makes a certain amount of sense because the *Bruton* Court cited the opinion of the Supreme Court of California in *People v. Aranda* for the proposition that

"[i]f 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."

See supra note 69 and accompanying text. However, while the Supreme Court has hinted that it might reframe *Bruton* doctrine violations as Due Process violations, it has only done so with regard to confessions that would be deemed testimonial. *See Dutton v. Evans*, 400 U.S. 74, 98 (1970) (Harlan, J., concurring) ("Alternatively, I would be prepared to hold as a matter of due process that a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused, absent some circumstance indicating authorization or adoption.").

misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”³⁵⁸ Meanwhile, Federal Rule of Evidence 105 and most state counterparts³⁵⁹ provide that “[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.”³⁶⁰ Moreover, the Advisory Committee Note to Rule 403 indicates that “[i]n reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.”³⁶¹ Finally, Federal Rule of Criminal Procedure 14 states, “If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants’ trials, or provide any other relief that justice requires.”³⁶²

Under these Rules, it is well established that the introduction of evidence against a codefendant at a joint jury trial can violate the rules of evidence if it is inadmissible against other defendants.³⁶³ In such cases, the court needs to decide whether jurors would adhere to an instruction to use the evidence only against the codefendant and whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the other defendants.³⁶⁴

The Second Circuit’s opinion in *United States v. Figueroa*³⁶⁵ is instructive on this issue and strikingly similar to the Supreme Court’s seminal opinion in *Bruton*. In *Figueroa*, in 1979, Jose Figueroa, Angel Lebron, and Ralph Acosta were convicted after a joint jury trial of conspiracy to possess heroin and possession of heroin.³⁶⁶ At trial, the prosecution had presented evidence of Acosta’s 1968 conviction for selling heroin, and the judge issued a specific limiting instruction that told jurors to use the conviction only as evidence of Acosta’s

³⁵⁸ FED. R. EVID. 403.

³⁵⁹ See, e.g., ALA. R. EVID. 105.

³⁶⁰ FED. R. EVID. 105.

³⁶¹ FED. R. EVID. 403 (Notes of Advisory Committee on Proposed Rules).

³⁶² FED. R. CRIM. P. 14.

³⁶³ See *supra* note 357 and accompanying text.

³⁶⁴ See *id.*

³⁶⁵ 618 F.2d 934 (2d Cir. 1980).

³⁶⁶ *Id.* at 938.

guilt.³⁶⁷ The Second Circuit subsequently determined that this conviction was inadmissible and reversed Acosta's conviction.³⁶⁸

This left the Second Circuit with the question of whether it also needed to reverse the convictions of Figueroa and Lebron. According to the court, "[w]hen evidence is offered against one defendant in a joint trial, determination of admissibility against that defendant resolves only the Rule 403 balancing as to him, i.e., that the probative value of the evidence in *his* 'case' is not substantially outweighed by unfair prejudice to *him*."³⁶⁹ When that evidence also "creates a significant risk of prejudice to the co-defendants, a further issue arises as to whether the evidence is admissible *in a joint trial*, even though limited by cautionary instructions to the 'case' of a single defendant."³⁷⁰

The court then noted that in some cases, "the evidence is admitted against one defendant, leaving the issue as to the co-defendants to be resolved solely under the severance standards of Fed.R.Crim.P. 14."³⁷¹ Conversely, "other cases have viewed the issue solely in terms of admissibility, i.e., admissibility in a joint trial."³⁷² Because the district court allowed for the admission of Acosta's conviction at the joint trial, the Second Circuit had to decide whether the admission of that conviction violated Rule 403 and necessitated a new trial.³⁷³

According to the Second Circuit, there is a spectrum of harm that results from the introduction of evidence admissible against one codefendant but inadmissible against other defendants.³⁷⁴ At one extreme is the introduction of garden-variety, prior bad-act evidence against one codefendant, which the court deemed "far too tenuous to bar admissibility of evidence in a joint trial."³⁷⁵ Conversely, "[a]t the other extreme is the high risk of prejudice to co-defendants when evidence of a defendant's prior act, like a *Bruton* confession, tends to prove directly, or even by strong implication, that the co-defendants also participated in the prior act."³⁷⁶ The court found that "[u]nlike a *Bruton* confession, prior act evidence is not so

³⁶⁷ *Id.* at 948-49.

³⁶⁸ *Id.* at 944.

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.* at 945.

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.* at 946.

³⁷⁵ *Id.*

³⁷⁶ *Id.*

inevitably prejudicial to co-defendants that the worth of limiting instructions can be totally discounted.³⁷⁷ Nonetheless, the Second Circuit concluded that Acosta's conviction was closer to a *Bruton* confession than traditional prior bad-act evidence and reversed the convictions of Figueroa and Lebron.³⁷⁸ The Second Circuit is not alone in this conclusion. Courts across the country at both the federal³⁷⁹ and state³⁸⁰ levels have found that evidence admissible against one codefendant but inadmissible against other defendants at a joint trial violates Rule 403 or prompts the need for severance under Rule 14.

Bruton makes sense in connection with *Figueroa* and these other cases. Basically, the *Bruton* Court concluded that because codefendant confessions are at the top of the spectrum of harm, their admission at joint jury trials is not merely evidentiary error, but constitutional error if the codefendant does not testify at trial.³⁸¹ Even a finding that *Crawford* indeed places nontestimonial hearsay beyond the scope of the *Bruton* doctrine would merely resolve the constitutional issue, not the underlying evidentiary issue. That is, if the admission of nontestimonial, facially incriminatory confessions at joint jury trials by nontestifying codefendants no longer violates the Confrontation Clause, their admission still creates a high risk of prejudice to other defendants because they tend to prove directly that the other defendants committed the charged crime.³⁸² Such codefendant confession cases, then, are the paradigmatic cases in which courts should sever the defendants' trials or find that the nontestimonial confession cannot be admitted consistent with Rule 403.

Interestingly, however, litigants and courts seem to have missed this point in the wake of *Crawford*. Courts continue to hold that the introduction of less prejudicial evidence admissible against only one codefendant can violate Rule 403 based upon the spillover effect (i.e., the effect that

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 946-47.

³⁷⁹ *See, e.g.*, *United States v. Sampol*, 636 F.2d 621, 647 (D.C. Cir. 1980) ("Applying this standard to this case, we would find it unreasonable to expect that the jury succeeded in compartmentalizing the evidence adduced at this trial.")

³⁸⁰ *See, e.g.*, *Hubbard v. State*, 909 A.2d 270, 282 (Md. 2006) ("The exclusion of Sabrina Rogers's testimony against Hubbard would have remedied the situation caused by the joint prosecution. Maryland Rule 5-403 states the general principal that evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.")

³⁸¹ *See supra* note 80 and accompanying text.

³⁸² *See supra* note 372 and accompanying text.

admission of evidence against one defendant can have on other defendants).³⁸³ But when presented with nontestimonial codefendant confessions—the most prejudicial codefendant evidence³⁸⁴—they now curtly conclude that these confessions are beyond the scope of the *Bruton* doctrine and fail to conduct a Rule 403 or Rule 14 analysis. Indeed, in none of the previous cases cited in this article finding a nontestimonial codefendant confession beyond the scope of the *Bruton* doctrine did the court address severability or admissibility under these Rules.³⁸⁵

In fact, the only court to address these Rules after finding that nontestimonial hearsay is beyond the scope of the *Bruton* doctrine was the District of Columbia Court of Appeals in its 2009 opinion *Thomas v. United States*.³⁸⁶ In *Thomas*, Keith Thomas and Ron Herndon were charged with “first-degree premeditated murder while armed [as well as in] possession of a firearm during a crime of violence” and jointly tried before a jury.³⁸⁷ During a break in trial, Thomas was placed in a holding cell with Danny Winston, who was charged with a different murder, and told him that he was with Ron when Ron shot the victim.³⁸⁸ Thomas did not testify at trial, but the prosecution called Winston to testify regarding Thomas’s confession, with Ron Herndon’s name replaced with the neutral pronoun “someone.”³⁸⁹

After he was convicted, Herndon appealed, claiming that the admission of Thomas’s confession violated the *Bruton* doctrine and the Washington, D.C., counterpart to Federal Rule of Criminal Procedure 14.³⁹⁰ The Court of Appeals for the D.C. Circuit disagreed with Herndon’s former argument, finding that “if a defendant’s extrajudicial statement inculcating a co-defendant is *not* testimonial, *Bruton* does not apply, because admission of the uncensored statement in evidence at a joint trial would not infringe the co-defendant’s Sixth Amendment rights, whether or not the statement fits within a hearsay exception.”³⁹¹

³⁸³ See *supra* notes 373-80 and accompanying text.

³⁸⁴ See *supra* note 368 and accompanying text.

³⁸⁵ See *supra* notes 259-71 and accompanying text.

³⁸⁶ 978 A.2d 1211 (D.C. 2009).

³⁸⁷ *Id.* at 1218.

³⁸⁸ *Id.* at 1221.

³⁸⁹ *Id.*

³⁹⁰ *Id.* at 1222.

³⁹¹ *Id.* at 1224-25.

With regard to Herndon's second argument, however, the court concluded that "[w]hether or not it is testimonial, a defendant's extrajudicial statement directly implicating a co-defendant is equally susceptible to improper use by the jury against that co-defendant."³⁹² Accordingly, the court found that "[a] defendant's non-testimonial out-of-court statement therefore remains a candidate for redaction (or other remedial measures) under Criminal Rule 14 unless it fits within a hearsay exception rendering it admissible against the non-declarant co-defendant."³⁹³ Therefore, if the trial court had not redacted Thomas's confession, its admission would have constituted potentially reversible error, but because the trial court replaced Herndon's name with a neutral pronoun, there was no such error.³⁹⁴ In other words, even if nontestimonial hearsay is beyond the scope of the *Bruton* doctrine after *Crawford*, courts can still find reversible error under Rule 14 or Rule 403 based upon "the same considerations-whether [the co-defendant]'s extrajudicial statements (with or without excisions) so 'powerfully' incriminated [the other defendants] as to create a 'substantial risk' that a reasonable jury would be unable to follow the court's limiting instruction and would consider those statements in deciding [the other defendants]' guilt."³⁹⁵ To the extent that defense attorneys are not arguing that the admission of nontestimonial codefendant confessions violates Rule 14 or Rule 403 as a fallback argument to the traditional *Bruton*/Confrontation Clause argument, they should now advance such arguments. And, as the D.C. Circuit's opinion in *Thomas* makes clear, courts should treat these rules-based arguments in the same way as they would *Bruton*-based constitutional arguments and find that the admission of facially incriminatory nontestimonial statements by codefendants constitutes evidentiary error unless they are sufficiently redacted.³⁹⁶

³⁹² *Id.* at 1225.

³⁹³ *Id.*

³⁹⁴ *Id.* at 1237-38.

³⁹⁵ *Id.* at 1233.

³⁹⁶ Of course, if *Crawford* did indeed deconstitutionalize *Bruton* with regard to nontestimonial hearsay, state courts, as opposed to federal courts, would no longer be bound by the Supreme Court's *Bruton* doctrine precedent in cases involving nontestimonial hearsay. See generally *Old Chief v. United States*, 519 U.S. 172 (1997). As the above analysis makes clear, however, state courts should easily be able to find that the admission of nontestimonial codefendant confessions violates Rule 14 and/or Rule 403.

CONCLUSION

In *Cruz v. New York*, the Supreme Court rejected the argument that interlocking confessions were beyond the scope of the *Bruton* doctrine because they had adequate indicia of reliability to satisfy the *Ohio v. Roberts* test.³⁹⁷ In rejecting this argument, the Court cautioned that “[t]he law cannot command respect if such an inexplicable exception to a supposed constitutional imperative is adopted. Having decided *Bruton*, we must face the honest consequences of what it holds.”³⁹⁸

By finding that nontestimonial hearsay is beyond the scope of the *Bruton* doctrine, courts have created such an inexplicable exception and failed to face the honest consequences of what *Bruton* holds. Like a case involving an interlocking confession, a case involving a nontestimonial confession is “indistinguishable from *Bruton* with respect to those factors the Court has deemed relevant in this area: the likelihood that the instruction will be disregarded, . . . the probability that such disregard will have a devastating effect, . . . and the determinability of these factors in advance of trial.”³⁹⁹ These factors do not depend to any extent on whether a codefendant confesses to a police officer, a confidential informant, a mother, a brother, a lover, or a friend. These latter, casual confessions are constitutionally reliable according to the test set forth in *Crawford*, but the *Bruton* doctrine does not depend upon the unreliability of codefendant confessions; it depends upon their constitutional harmfulness. It depends upon how much damage the admission of such a confession would cause to other defendants at trial, not upon whether the confessor thought that the statement would be available for use at a later trial.

Moreover, even if *Crawford* deconstitutionalized the *Bruton* doctrine with regard to nontestimonial hearsay because it is constitutionally reliable, “[w]hether or not it is testimonial, a defendant’s extrajudicial statement directly implicating a codefendant is equally susceptible to improper use by the jury against that co-defendant.”⁴⁰⁰ Therefore, even if such confessions are admissible despite the Confrontation Clause, courts should find that their admission violates the rules of evidence.

³⁹⁷ See *supra* note 142 and accompanying text.

³⁹⁸ *Cruz v. New York*, 481 U.S. 186, 193 (1987).

³⁹⁹ *Id.* at 193.

⁴⁰⁰ *Thomas v. United States*, 978 A.2d 1211, 1225 (D.C. 2009).