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INTRODUCTION

Joint criminal trials are a relatively common practice in the American criminal justice system. When multiple criminal defendants are charged in a single crime—especially in conspiracy cases—courts and prosecutors alike favor joint trials because of their comparable efficiency to individual trials. However, joint trials can raise significant procedural and constitutional concerns for codefendants. One such issue arises when the government seeks to introduce the confession of a non-testifying defendant (hereinafter a "declarant-defendant") that inculpates other codefendants.

When introduced, such confessions raise potential Sixth Amendment issues under *Bruton v. United States*. A *Bruton* violation occurs in a joint trial when a confession of a declarant-defendant refusing to testify under the Fifth Amendment is introduced at trial and inculpates another codefendant, therefore violating the non-confessing codefendant's Sixth Amendment right to confront all witnesses presented against him.[1] In 1968, the Supreme Court held in *Bruton v. United States* that these inculpatory declarant-defendant confessions were so potentially damaging to non-confessing codefendants that courts could not rely on juries to heed limiting instructions when such statements were admitted wholesale.[2] Therefore, the Court categorically banned confessions of non-testifying declarant-defendants that inculpated another codefendant.[3]

In the decades that followed, the Court grappled with whether redacted confessions raised the same issues as the complete confession in *Bruton*. In both *Richardson v. Marsh*[4] and *Gray v. Maryland*,[5] the Court reviewed whether redacted codefendant confessions violated *Bruton*, reaching somewhat conflicting holdings. In *Richardson*, the Court held that redacted codefendant confessions that do not reference another codefendant and are thereby only inferentially incriminating to another codefendant do not violate the non-confessing codefendant's constitutional rights.[6] Eleven years later, the Court's holding in *Gray* suggested that some redacted confessions that still referenced a non-

1. U.S. CONST. amend. VI.
2. Bruton v. United States, 391 U.S. 123, 124–26 (1968).
3. *Id.*
4. 481 U.S. 200 (1987).
5. 523 U.S. 185 (1998).
6. *Richardson*, 481 U.S. at 211.

confessing codefendant may be constitutionally permissible.[7] The Court's attempt to reconcile *Richardson* with its holding in the *Gray* opinion has left lower courts struggling to determine the law on redacted codefendant confessions in joint criminal trials.[8]

To elucidate this unclear area of the law, this Note traces the evolution of the *Bruton* doctrine, specifically regarding redacted codefendant confessions. Part I of this Note traces the Supreme Court's jurisprudence concerning redacted codefendant confessions, beginning with the Court's 1957 decision in *Delli Paoli v. United States* (which *Bruton* overturned) and continuing through the Court's most recent decision in *Gray* concerning redacted confessions. Part II of this Note examines redactions in recent practice, highlighting the approaches taken by the Seventh and Eighth Circuits in the years after *Gray* that attempt to reconcile the Supreme Court's somewhat conflicting holdings in *Richardson* and *Gray*.

Finally, Part III of this Note introduces a way to reconcile the issues created by the Supreme Court's conflicting holdings in *Bruton* cases: Federal Rule of Evidence 403. Rule 403 provides courts with a balancing test to determine whether to admit evidence that is admissible at trial for one purpose but inadmissible for another. Finally, this Part argues that courts should apply a Reverse Rule 403 balancing test—which requires that the probative value of the proffered confession substantially outweigh any unfair prejudice to the non-confessing codefendant—to determine whether such redacted codefendant confessions are constitutionally admissible. This solution will standardize how courts address *Bruton* redactions while keeping with the Supreme Court's policies underlying *Bruton* and its subsequent decisions in *Richardson* and *Gray*.

I. THE CONFRONTATION CLAUSE & *BRUTON*

The Sixth Amendment lies at the core of all *Bruton* issues. The Sixth Amendment's Confrontation Clause guarantees criminal defendants the right to confront—meaning cross-examine—all witnesses offered against them.[9] In joint criminal trials, evidence

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7. *Gray*, 523 U.S. at 196 (suggesting "Me and a few other guys" was a preferable, and perhaps permissible, response to the question "Who is the group that beat Stacey?" while the response "Me, deleted, deleted, and a few other guys" violated *Bruton*).

8. *See infra* Part II.

9. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with all witnesses against him."); *see also* Pointer v. Texas, 380 U.S. 400, 404 (1965) ("[T]he right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him.").

could be admissible against one codefendant, inadmissible against another, and read to the jury at trial. A defendant's Confrontation Clause rights are threatened when one codefendant's confession that implicates multiple codefendants is admissible against the declarant-defendant[10] but is inadmissible against the other codefendants. Because the declarant-defendant can raise Fifth Amendment protections against self-incrimination,[11] the non-testifying codefendant is unable to cross-examine the declarant-defendant regarding the inculpatory confession. Therefore, wholesale admission of the declarant-defendant's confession would violate the non-confessing codefendant's Confrontation Clause rights.[12]

However, the declarant-defendant's statement is always admissible against him,[13] and it is usually critical to the prosecution's case. Completely excluding such confessions would likely spell the end of joint criminal trials. These joint trials are incredibly important in the modern criminal justice system: joint trials help to mitigate court costs, alleviate issues stemming from increasingly overburdened court dockets, and, from a defendant's perspective, can insure against inconsistent verdicts. Therefore, in joint trials where a declarant-defendant's confession implicates multiple codefendants, trial courts must determine how to admit the confession without violating other codefendants' constitutional right to confrontation. If this were strictly an evidentiary question, the trial court would resort to Federal Rule of Evidence 403. This rule governs whether courts should allow the jury to hear potentially prejudicial evidence that is otherwise admissible.[14] Rule 403 requires judges to determine whether the unfair prejudice of the evidence substantially outweighs its probative value.[15] If the evidentiary value of the evidence is so unfairly prejudicial, the judge will refuse to admit that evidence.

However, Confrontation Clause violations require more than an evidentiary analysis. A defendant's right to confront witnesses against him is an immutable constitutional right. As a practical matter, joint trials are commonplace, and therefore, courts must strike a balance between the efficiency of joint trials and the constitutional rights of the accused. Courts at every level have grappled with this balancing act, beginning before the Supreme Court ruled in *Bruton*.

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10. *See* FED. R. EVID. 801(d)(2)(A) (permitting the admission of statements by a party opponent against the declarant).

11. U.S. CONST. amend. V.

12. Bruton v. United States, 391 U.S. 123, 126 (1968).

13. FED. R. EVID. 801(d)(2)(A).

14. FED. R. EVID. 403.

15. *Id.*

Tracing this discussion back to the Supreme Court's holding pre-*Bruton* and understanding the evolution of the Court's jurisprudence on this issue is critical to demonstrating that the Court is doing just that—balancing.

A. Delli Paoli *and the Limiting Instruction*

In the days before *Bruton*, the admission of one codefendant's confession that implicated another defendant operated much like other areas of the evidence law where a piece of evidence is admissible for one purpose but inadmissible for another: when introduced at trial, the confession was accompanied by a limiting instruction informing jurors that the confession is only to be considered against the declarant.[16] In the 1957 case *Delli Paoli v. United States*, the Court considered whether limiting instructions provided sufficient protection to non-confessing codefendants in cases involving incriminating codefendant confessions.[17]

In *Delli Paoli*, five codefendants were jointly tried and convicted of conspiring to avoid federal alcohol taxes.[18] At trial, the court admitted a confession of one codefendant,[19] Whitley, that specifically mentioned Delli Paoli.[20] Instead of redacting Delli Paoli's name, the trial court instructed the jury that the confession was only admissible in considering Whitley's guilt and was not admissible against Delli Paoli and the other defendants.[21] Delli Paoli appealed his subsequent conviction, arguing that the limiting instruction insufficiently protected him from the potential the jury used Whitley's inculpatory confession against him.[22]

In a 5-4 decision, the Supreme Court held that admitting Whitley's confession with a limiting instruction did not violate Delli

16. *See, e.g.*, Delli Paoli v. United States, 352 U.S. 232, 240–241 (1957) (relying on the limiting instruction to inform jurors that the declarant-defendant's confession was inadmissible against other codefendants inculpated therein).

17. *Id.* at 238–43.

18. *Id.* at 233.

19. Importantly, the confession was made after the conspiracy had terminated, rendering the codefendant's confession inadmissible against Delli Paoli. Federal Rule of Evidence 801(d)(2)(E) permits admittance of co-conspirator statements made during and in furtherance of the conspiracy against other co-conspirators at trial. The policy behind this rule is that "the declarant is the agent of the other [conspirator], and the admissions of one are admissible against both under a standard exception to the hearsay rule applicable to the statements of a party." *Id.* at 237 (quoting Clune v. United States, 159 U.S. 590, 593 (1895)).

20. *Id.* at 233.

21. *Id.*

22. *Id.*

Paoli's Confrontation Clause rights.[23] The Court determined the limiting instruction clearly laid out the proper use of Whitley's confession, as the instructions explained that the confession constituted inadmissible hearsay against Delli Paoli and the other codefendants.[24] The trial judge repeated this admonition several times during trial and made "a final warning to the same effect . . . in the court's charge to the jury."[25]

The *Delli Paoli* majority relied heavily on what it deemed the "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."[26] The Court relied on the belief that juries understand and follow clear court instructions, stating that belief to be central to the validity of the jury system.[27] Despite noting the potential for "practical limitations" to circumstances where a jury should be left to follow court instructions, the Court held this did not present such a case.[28] The Court favored a case-by-case analysis of the sufficiency of limiting instructions—with discretion largely in the hands of the trial court—over a categorical rule concerning the admissibility (or inadmissibility) of codefendant confessions. Thus, the Court held the admission in *Delli Paoli* was properly accompanied by an effective limiting instruction.[29]

Even in *Delli Paoli*, however, a sizable portion of the Court seemed poised to challenge the majority's unwavering belief in the jury system, recognizing that the potential harm to admitting a declarant-defendant's confession against non-confessing codefendants outweighs any potential benefits gained through accuracy and efficacy. Justice Frankfurter's dissenting opinion—joined by Justices Black, Douglas, and Brennan—recognized the potential dangers of the majority's holding. The dissent stated: "[W]here the conspirator's statement is so damning to another against whom it is inadmissible, as is true in this case, the difficulty of introducing it against the declarant without inevitable harm to the co-conspirator . . . is not

23. *Id.* at 240–41 ("Nothing could have been more clear than these limiting instructions. Petitioner, who made no objection to these instructions at trial, concedes their clarity.").

24. *Id.* at 239–40.

25. *Id.* at 240.

26. *Id.* at 242.

27. *See id.* ("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.").

28. *Id.* at 243.

29. *Id.*

justification for causing such harm."[30] The dissenting Justices recognized that a codefendant's incriminating confession "cannot be wiped from the brains of the jurors," and in such cases limiting instructions fail to provide adequate legal protection to non-confessing codefendants.[31] This deep division among the Court signaled that this doctrine would soon be challenged, examined, and refined in cases to come.

B. Moving Towards Bruton

Delli Paoli was not on the books long before the Court began chipping away at its basic premise that a limiting instruction sufficiently protected a non-confessing codefendant inculpated by a codefendant's confession. The first strike came in 1965 with *Pointer v. Texas*.[32] In *Pointer*, the Court concluded that a defendant's Confrontation Clause right, including the right to cross-examine witnesses presented against him, is a "fundamental right" applicable to state criminal cases under the Fourteenth Amendment's substantive due process requirement.[33]

Next came *Douglas v. Alabama*,[34] where the Court extended *Pointer* a step further.[35] In *Douglas,* two men—Loyd and Douglas—were accused of assault with intent to commit murder. The men were tried separately.[36] Loyd had purportedly confessed to the crime, and his confession implicated Douglas as well.[37] Loyd was tried and convicted first, and the prosecution subsequently called him as a witness in Douglas's trial. Because Loyd sought to appeal his conviction, he invoked his Fifth Amendment right against self-incrimination at Douglas's trial and refused to answer any questions. After Loyd invoked this right, the prosecution read in Loyd's purported confession that inculpated Douglas in the crime charged.[38]

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30. *Id.* at 247–48 (Frankfurter, J., dissenting).

31. *Id.* at 247.

32. 380 U.S. 400 (1965).

33. *Id.* at 403–04 ("The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution.").

34. 380 U.S. 415 (1965).

35. *See id.* at 418–19 ("Our cases construing [the Confrontation Clause] hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation.").

36. *Id.* at 416.

37. *Id.* at 416–17.

38. *Id.* at 417.

The Supreme Court reversed Douglas's conviction, finding that the prosecution's introduction of Loyd's inculpatory statement violated Douglas's Confrontation Clause rights, as Douglas was unable to cross-examine the declarant, Loyd, given Loyd's decision to invoke his Fifth Amendment rights.[39] Even though the state's reading of Loyd's statements was "not technically testimony," the Court found the potential prejudice against Douglas was too great because the jury may have equated the assertions offered by the state as actual, true statements made by Loyd.[40]

The *Douglas* holding marked a jurisprudential shift away from *Delli Paoli*'s reliance on the limiting instruction to protect codefendants, at least when codefendants were tried separately. This holding further begged the question as to whether the Court would afford codefendants tried jointly the same level of protection. Thus, the stage was set for another Supreme Court Confrontation Clause showdown, which came just three short years later in the landmark case of *Bruton v. United States.*

C. Et tu, Bruton*?: Rejecting Wholesale Confessions as Confrontation Clause Violations*

In *Bruton*, the Supreme Court first laid out what is now known as the *Bruton* rule: a non-testifying declarant-defendant's confession incriminating another codefendant is inadmissible at a joint trial because it violates the Sixth Amendment.[41] In *Bruton*, the petitioner and his codefendant, Evans, were convicted in a joint trial for armed postal robbery.[42] Evans did not testify, but the government at trial introduced a postal inspector who testified that Evans confessed that he and Bruton committed the armed robbery.[43] The judge provided the jury with a limiting instruction that Evans's alleged confession was admissible only against Evans as the declarant but was inadmissible hearsay against Bruton, and therefore had to be disregarded in determining Bruton's guilt.[44] Overturning its decision in *Delli Paoli*, the Supreme Court held that limiting instructions are categorically

39. *Id.* at 419.

40. *Id.*

41. *See* Bruton v. United States, 391 U.S. 123, 137 (1968) ("Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating 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.").

42. *Id.* at 124.

43. *Id.*

44. *Id.* at 124–25.

insufficient to mitigate prejudice from a confession incriminating another codefendant when the codefendant is not able to confront the declarant-defendant.[45]

Relying heavily on Justice Frankfurter's dissenting opinion in *Delli Paoli*,[46] the Court in a 7-2 decision rejected each of the *Delli Paoli* majority's contentions that supported the use of limiting instructions in *Bruton* cases. The efficacy and resourcefulness of joint trials do not supersede "the fundamental principles of constitutional liberty" that a criminal defendant should have the right to confront witnesses testifying against him.[47] The Court further repudiated arguments that limiting instructions, with their potential flaws, assist the jury in reaching a more accurate result with respect to the confessing codefendant.[48] The Court stated that instead of relying on limiting instructions in joint criminal cases, "[w]here viable alternatives do exist, it is deceptive to rely on the pursuit of truth to defend *a clearly harmful practice*."[49]

The Court's decision reined in *Delli Paoli*'s unqualified trust in jury instructions, stating "a jury cannot segregate information into intellectual boxes."[50] Acknowledging that "instances occur in almost every trial where inadmissible evidence creeps in," the Court stated "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."[51] Indeed, the Confrontation Clause itself was designed precisely to protect against such threats to a fair trial. [52]

The *Bruton* Court thus chose to favor the constitutional rights of a non-confessing codefendant over efficacy, administrability, and even accuracy (i.e., putting all probative information before a jury), based on the considerable potential harm associated with admitting

45. *Id.* at 126.

46. *See* Delli Paoli v. United States, 352 U.S. 232, 247–48 (1957) (Frankfurter, J., dissenting).

47. *Bruton*, 391 U.S. at 135 (quoting People v. Fisher, 164 N.E. 336, 341 (N.Y. 1928) (Lehman, J., dissenting)).

48. *Id.* at 132–33.

49. *Id.* at 134 (emphasis added).

50. *Id.* at 131 (internal quotation marks omitted) (quoting People v. Aranda, 407 P.2d 265, 272 (Cal. 1965) (en banc)).

51. *Id.* at 135.

52. *Id.* at 136.

such confessions at a joint trial.[53] The next line of cases on the subject test how far the doctrine extends—or, the extent to which the Court would prioritize insulating codefendants from potential harm over accuracy and reliability.

D. Bruton *and the Wonder of Pronouns*

Almost twenty years after the *Bruton* decision, the Supreme Court decided a pair of similar cases presenting *Bruton* issues. The first, *Cruz v. New York*, concerned whether a declarant-defendant's confession that incriminates his codefendant is admissible if there is also an "interlocking confession"[54] by that codefendant.[55] The second, *Richardson v. Marsh*, involved a codefendant's redacted confession in a joint criminal trial.[56] In reaching differing conclusions in the two cases, the Court largely focused on the original harm *Bruton* intended to rectify, without deciding to extend *Bruton* to cover codefendant confessions that were only inferentially incriminating.[57]

In *Cruz*, the Court reinforced *Bruton*'s categorical ban on the introduction of codefendant confessions that directly name another codefendant, even when that codefendant had likewise confessed to the crime charged.[58] At trial, the government introduced a witness who testified that the respondent-defendant had confessed to the murder charged.[59] Additionally, the government produced a videotaped confession of the respondent's codefendant, which specifically named the respondent as a participant in the charged

53. *See id.* at 133–36 ("[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.").

54. Defendants' confessions "interlock" when each codefendant's confession inculpates the other confessing codefendant(s). *See* Cruz v. New York, 481 U.S. 186, 190–91 (1987).

55. In 1979, the Court decided *Parker v. Randolph*, 442 U.S. 62, 72 (1979), *abrogated by Cruz*, 481 U.S. at 191, a similar case involving interlocking confessions. In the plurality opinion in *Parker*, the Court noted that "the prejudicial impact of a codefendant's confession upon an incriminated defendant who has, insofar as the jury is concerned, maintained his innocence" does not necessarily extend to a defendant whose confession is properly introduced at trial. "The right protected by *Bruton* . . . has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence." *Id.* Justice Blackmun concurred with the plurality but specifically declined to join the plurality's interlocking confession exception to *Bruton*, instead arguing interlocking confessions do pose a *Bruton* problem. *Id.* at 77–81 (Blackmun, J., concurring). Less than a decade later, a majority of the Court joined his line of reasoning in *Cruz*. 481 U.S. at 191.

56. 481 U.S. 200, 202 (1987).

57. *See id.* at 209–11; *Cruz*, 481 U.S. at 191–93.

58. 481 U.S. at 191–92.

59. *Id.* at 189.

murder.[60] The trial court held—and state appellate courts affirmed—that because the codefendant's inculpatory videotaped confession interlocked with the witness's account of the respondent-defendant's confession, the evidence did not violate the Confrontation Clause. The trial court further stated that introducing the codefendant confession did not subject the respondent-defendant to the potentially devastating effects *Bruton* addressed because he had also confessed to the crime.[61]

The Supreme Court reversed, holding *Bruton* is a categorical ban on otherwise inadmissible codefendant confessions that name another defendant in a crime.[62] Rejecting the argument that interlocking confessions rendered inculpatory codefendant confessions less "devastating," Justice Scalia's majority opinion noted that " 'devastating' practical effect[s were] one of the facts that *Bruton* considered," but *Bruton* "did not suggest that the existence of such an effect should be assessed on a case-by-case basis."[63] Additionally, codefendant confessions could, in effect, be more damaging when the defendant's own interlocking confession is admitted, as the codefendant confession could "confirm, in all essential respects, the defendant's alleged confession" that he is seeking to avoid.[64] As with *Bruton*, the Court in *Cruz* emphasized the potential harm to the defendant and the risk to his constitutional rights over putting all probative information before the jury.[65]

The same year as its decision in *Cruz,* the Court declined to extend *Bruton* to bar inferentially incriminating codefendant confessions, thereby limiting *Bruton* to apply only to "facially incriminating" confessions.[66] In *Richardson v. Marsh*, the respondent, Clarissa Marsh, argued the court violated her Confrontation Clause

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60. *Id.*

61. *See id.* (noting that the New York Court of Appeals adopted the plurality opinion of *Parker v. Randolph*, 442 U.S. 62 (1979)).

62. *See id.* at 191.

63. *Id.*

64. *Id.* at 192–93. Justice Scalia further stated:

> [I]t seems to us illogical . . . to believe that codefendant confessions are less likely to be taken into account by the jury the more they are corroborated by the defendant's own admissions; or that they are less likely to be harmful when they confirm the validity of the defendant's alleged confession.

Id. at 194.

65. *See id.*; Bruton v. United States, 391 U.S. 123, 133–36 (1968). However, the Court seems to articulate this policy preference somewhat unwillingly in *Cruz*. *See* 481 U.S. at 193 ("The law cannot command respect if such an inexplicable exception to *supposed* constitutional imperative is adopted. Having decided *Bruton*, we must face the honest consequences of what it holds." (emphasis added)).

66. Richardson v. Marsh, 481 U.S. 200, 211 (1987).

rights by admitting her codefendant's redacted confession at trial.[67] Marsh and her codefendant, Benjamin Williams, were tried jointly and Marsh was convicted of felony murder and assault with intent to commit murder.[68] At trial, the prosecution introduced Williams's confession, which had been redacted to remove any mention of Marsh.[69] The confession described a conversation between Williams and another accomplice, Martin, that took place in a car en route to the eventual crime scene.[70] Marsh's own subsequent testimony placed her in the car with Martin and Williams.[71] While the confession did not implicate Marsh directly, Marsh argued that based on other evidence produced at trial (including her own testimony), the jury would be able to infer that she was implicated in the confession.[72] The confession itself was central to the prosecution's case: in addition to directly incriminating Williams, the confession largely corroborated the testimony of the one surviving victim in the attack.[73] The confession was accompanied by a limiting jury instruction that it should not be used against Marsh.[74]

The Supreme Court found no Confrontation Clause violation, rejecting the Sixth Circuit's theory that the confession was inadmissible at the joint trial based on "evidentiary linkage."[75] According to the Court, unlike the confession in *Bruton*, the confession in *Richardson* was not facially incriminating based on the generous redaction.[76] Furthermore, the Court found such "inferential incrimination" less harmful to codefendants than facial incrimination and thus easier to cabin through limiting instructions.[77] Extending *Bruton* to cover inferentially incriminating redacted confessions, the Court said, would prove nearly impossible to administer.[78] Furthermore, extending *Bruton* to cover inferentially incriminating

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67. *See id.* at 203.

68. *Id.* at 200.

69. *Id.* The redacted confession did name one accomplice, "Martin," who was not on trial with Williams and Marsh. However, any reference that would have implicated Marsh in the confession was completely removed.

70. *Id.*

71. *Id.* at 204.

72. *See id.* at 202–05.

73. *See id.*

74. *Id.* at 205.

75. *See id.* at 206. The theory of "evidentiary linkage" (also termed "contextual implication") suggested confessions are inadmissible under *Bruton* when, viewed in context with other evidence, the confessions are incriminatory. *See id.*

76. *See id.* at 208–09.

77. *See id.*

78. *See id.* at 209–11 (extending *Bruton* "to confessions incriminating by connection" would make it impossible "to predict the admissibility of a confession in advance of trial").

redactions like those in *Richardson* could spell the end of joint trials with any codefendant confession, as neither the prosecutor nor judges could predict whether the redaction would be barred under *Bruton* until all evidence in the case had been presented, and only then could they determine whether the confession was inferentially incriminating.[79]

As such, *Richardson* limited *Bruton* for largely practical purposes. At its core, *Richardson* addressed instances where further redaction of inferentially incriminating confessions is impossible.[80] According to the Court, statements that incriminate a codefendant—but do not name, or even allude to the existence of, that codefendant in particular—do not rise to the level of potential harm considered by the majorities in *Bruton* and *Cruz*. The Court refused to accept the argument that courts should bar inferentially incriminating confessions, even though in practice it is likely that a prosecutor would do everything in her power to link the non-confessing codefendant to the declarant-defendant's inferentially incriminating confession by highlighting the additional evidence that makes the confession incriminatory toward the non-confessing codefendant.[81] According to the *Richardson* Court, reaching an alternative conclusion would "impair both the efficiency and the fairness of the criminal justice system" without remedying any prejudice of corresponding magnitude against the defendant.[82] While the Court's holding in *Richardson* settled the issue of inferentially incriminating codefendant confessions, it gave rise to a whole new host of questions—namely, whether prosecutors could redact confessions to comply with *Richardson*, and, if so, how much redaction was enough to pass muster under the Confrontation Clause.

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79. *See id.* at 209 ("If extended to confessions incriminating by connection, . . . it is not even possible to predict the admissibility of a confession in advance of trial.").

80. *See, e.g.*, *id.* at 200 (noting that the codefendant's confession was redacted to omit all reference to anyone other than the codefendant and an unknown third accomplice). The Court, however, specifically declined to consider whether any redaction that did not eliminate any mention of the nonconfessing codefendant would satisfy *Bruton*, stating "[w]e express no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or a neutral pronoun." *Id.* at 211 n.5.

81. *Gray* provides an excellent example of such a prosecutorial strategy. *See infra* note 102 and accompanying text.

82. *See Richardson*, 481 U.S. at 210. Specifically, the Court found that an alternative holding would impair efficiency by requiring "prosecutors [to] bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying," and would impact fairness by "randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts." *Id.*

E. How Much Redaction Is Enough: Blank Spaces and Obvious Deletions

The Supreme Court's decision in *Richardson v. Marsh* left lower courts to grapple with what amount of redaction sufficiently satisfied the non-confessing codefendant's Sixth Amendment Confrontation Clause rights. As the Court declined to hold whether some lesser redactions would satisfy *Bruton*,[83] lower courts tried—quite literally—to fill in the blank. While some courts refused to accept anything less than complete redactions akin to that in *Richardson*,[84] others replaced codefendants' names with symbols[85] or pronouns.[86] Two competing modes of analysis emerged to determine whether a redacted confession rose to the "powerfully incriminating" *Bruton* standard: the "degree of inference test"[87] and the "invitation to speculate test."[88]

The "degree of inference test" required courts to determine, against all other admitted evidence, whether the jury would be able to draw the inference that the redaction implicated a non-confessing codefendant.[89] This test was largely unworkable, mainly for the reasons anticipated by *Richardson*: courts could not determine whether a confession was admissible in advance of trial because it needed all of the evidence to make this determination.[90] Alternatively, appellate courts adopting the "invitation to speculate test" generally favored redaction and admissibility.[91] These courts were less concerned that the defendants might be linked to redactions through

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83. *See supra* note 80.

84. *See, e.g.*, State v. Littlejohn, 459 S.E.2d 629, 632 (N.C. 1995) ("[B]efore a confession of a nontestifying defendant is admitted into evidence, all portions of the confession which implicate a codefendant must be deleted.").

85. *See, e.g.*, Commonwealth v. Lee, 662 A.2d 645, 651–52 (Pa. 1995) (permitting the use of "X" in place of codefendant's name).

86. *See, e.g.*, United States v. Williams, 936 F.2d 698, 700 (2d Cir. 1991) ("another guy"); United States v. Vogt, 910 F.2d 1184, 1192 (4th Cir. 1990) ("client"); United States v. Garcia, 836 F.2d 385, 389–90 (8th Cir. 1987) ("someone").

87. *See* Judith L. Ritter, *The X Files: Joint Trials, Redacted Confessions and Thirty Years of Sidestepping* Bruton, 42 VILL. L. REV. 855, 899 (1997) (requiring courts to consider against all admitted evidence whether the jury is likely to infer the codefendant is the party implicated when his or her name is redacted and replaced with a pronoun or symbol). Labels for the "degree of inference test" and the "invitation to speculate test" differ. *See id.* at 899–900.

88. *See id.* ("[P]rohibit[ing] redaction efforts when the form of the redaction invites the jury to speculate about the identity of anonymously mentioned accomplices.").

89. *See supra* note 87.

90. *See* Richardson v. Marsh, 481 U.S. 200, 209 (1986).

91. Ritter, *supra* note 87, at 910. The Eighth, Second, and Ninth Circuits all employed versions of the "invitation to speculate test." *Id.* at 910–11.

other admissible evidence.[92] Under this test, jury speculation was permissible, so redacted codefendant confessions were likewise permissible. The only real protection afforded defendants under this test came in cases where redacted confessions "entice[d] the jury 'to try to solve the mystery.' "[93] Thus, while creating "a per se rule regarding the use of neutral terms as substitutes for the names of other defendants," the test's effectiveness was extremely limited in scope.[94] Redactions only potentially worked when juries were unaware that any alteration in the statement had occurred,[95] and defendants in those trials were still left without adequate constitutional protection.[96]

In the wake of lower court confusion surrounding the correct standard under *Richardson,* the Court in 1998 again addressed inferentially incriminating redactions, this time holding that even redacted statements can be directly accusatory when the redaction involves an obvious deletion.[97] In *Gray v. Maryland,* Kevin Gray's codefendant, Anthony Bell, confessed that he, along with Gray and another man, Jacquin Vanlandingham,[98] murdered Stacy Williams.[99] Gray and Bell were tried jointly for the murder.[100] At trial, the judge permitted the state to introduce a redacted version of Bell's confession. Instead of mentioning Gray or Vanlandingham by name, the police officer reading the confession said "deleted" or "deletion" whenever either name appeared in the confession.[101] Immediately thereafter, the prosecutor asked, "[A]fter he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?"[102] Additionally, the state produced Bell's written confession, with Gray and Vanlandingham's names whited out but separated by commas.[103] The trial judge subsequently instructed the jury that the confession was only to be used as evidence against Bell, not against Gray.[104]

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92. *Id.* at 910.

93. *Id.*

94. *Id.* at 912.

95. *See id.*

96. *See id.* ("Defendants who are otherwise linked to the anonymous references in their co-defendant's confessions are denied the right to confront their accusers when these redacted confessions are admitted at joint trials.").

97. *See* Gray v. Maryland, 523 U.S. 185, 194 (1998).

98. The third man implicated in the confession died before the state brought charges against Bell and Gray. *Id.* at 188.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 188–89; *see also supra* note 81 and accompanying text.

103. *Id.*

104. *Id.* at 189.

In holding that such redactions violated *Bruton*, the majority opinion noted "[r]edactions that simply replace a name with an obvious blank space of a word such as 'deleted' . . . 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."[105] Juries can easily infer that a blank space or blatant omission refers to the remaining codefendant.[106] In fact, alterations may specifically call jurors' attention to the removed name, "overemphasiz[ing] the importance of the accusation."[107]

The majority in *Gray* also recognized that the potential prejudice associated with redactions is less pronounced than that associated with a typical *Bruton* confession.[108] Noting that the state in this case eliminated any doubt as to whether the word "deleted" referred to Gray, the Court admitted "[t]he reference might not be transparent in other cases in which a confession, like the present confession, uses two (or more) blanks, even though only one other defendant appears at trial, and in which the trial indicates that there are more participants than the confession has named."[109] As such, the majority opinion in *Gray* left open the question of whether *Bruton* extended to more generalized redactions and narrowly tailored its holding to the facts at hand, where an obvious deletion replaces a proper name.[110]

Perhaps the most confusing part of the Court's opinion in *Gray* is where it attempted to differentiate the inferential steps taken in *Richardson v. Marsh*—which did not lead to a *Bruton* violation—with the inferences necessary to connect the redacted statement in *Gray* with the defendant.[111] Acknowledging that the connection between the deletion and the defendant in *Gray* requires some inferential steps, the Court distinguished *Richardson* based "in significant part upon the *kind* of, not the simple *fact* of, inference."[112] The confession in *Richardson* made no mention of Clarissa Marsh; it only became incriminating when linked with Marsh's own testimony, which placed

105. *Id.* at 192.

106. *See id.* at 193 (discussing jury reactions to different redaction methods).

107. *Id.*

108. *See id.* at 194 (discussing differences between obvious accusatory blank space with indirectly accusatory statements in *Richardson*).

109. *Id.* at 194–95.

110. *See id.* at 195 (discussing similarity of *Gray*'s redaction to the unredacted confession in *Bruton*).

111. *See id.* at 195–97 (discussing inferences necessary to implicate defendant in *Richardson*).

112. *Id.* at 195.

her in the car described in her codefendant's confession.[113] While *Richardson* required an inferential step that only became incriminating when linked with other evidenced introduced at trial, the redacted confession in *Gray immediately* and *directly* implicated *someone*—there, the defendant.[114] As such, the confession was directly incriminating. The Court therefore refused to extend *Richardson* to encompass any inferential step, as such a rule would place the use of nicknames and particular descriptions outside the scope of *Bruton*, rendering the rule effectively meaningless.[115]

Justice Scalia's dissenting opinion warned of the complicated and conflicting results the Court's holding in *Gray* would yield. The dissent argued redactions that maintained some notation of omission were often preferable to the "total redaction" standard that deleted any reference to the defendant altogether (like the *Richardson* redaction).[116] Redacting any mention of a codefendant from a confession could change the meaning of the original confession, or impede conspiracy cases where it is integral to connect one codefendant to another.[117] Noting that "[t]he United States Constitution guarantees, not a perfect system of criminal justice . . . but a minimum standard of fairness," Justice Scalia argued the *Gray* redaction sufficiently satisfied *Richardson*'s facial incrimination standard.[118] Since there was some question as to whom the redaction referred, the Court should have been admitted the confession under *Richardson* with a limiting instruction, thereby providing the most "reasonable practical accommodating of the interests of the state and the defendant in the criminal justice process."[119]

As Justice Scalia predicted, the landscape for *Bruton* redactions post-*Gray* has become particularly murky. Redactions made to remove any incriminating reference to the defendant are permissible (as in *Richardson*),[120] but obvious deletions pointing

113. *See* Richardson v. Marsh, 481 U.S. 200, 203–04 (1986).

114. *See Gray*, 523 U.S. at 196 (discussing indirectly of statements in *Richardson*).

115. *Id.* at 195.

116. *See id.* at 203–04 (Scalia, J., dissenting) ("The risk to the integrity of our system (not to mention the increase in its complexity) posed by the approval of such free-lance editing seems to me infinitely greater than the risk posed by the honest reproduction that the Court disapproves.").

117. *See id.* (discussing problems with redaction with respect to a singular defendant).

118. *Id.* at 204–05.

119. *Id.* at 205 (quoting Richardson v. Marsh, 481 U.S. 200, 211 (1987)).

120. *See Richardson*, 481 U.S. at 209 (discussing impracticalities of excluding confessions that incriminate only by connection).

specifically to the non-confessing defendant are not.[121] Redactions can allow for some level of inference but cannot involve any direct implications.[122] Tucked nicely into the fact patterns of *Richardson* and *Gray*, these guidelines arguably worked. But beyond the fact patterns of these two cases lay an infinite number of scenarios involving redactions—some of which the *Gray* majority itself contemplated.[123] Despite its original classification as a "categorical" ban, *Bruton* continued to become increasingly difficult to apply.

II. IT'S MORE LIKE THIS THAN THAT: REDACTIONS IN RECENT PRACTICE

In the years following *Gray*, lower courts' treatment of *Bruton* has required lengthy and fact-specific analyses, with courts analogizing to both *Richardson* and *Gray* in reaching their respective holdings. Keeping with the redaction in *Richardson*, which only implicated the defendant when linked with other evidence at trial, a majority of appellate courts generally agree that "there is no [Confrontation Clause] violation where the confession implicates the defendant only when linked to other evidence."[124] Absent total redaction, however, a court is still faced with a fact-intensive inquiry that often involves analyzing the policy objectives underlying *Bruton*, in addition to the principle objectives supporting the Supreme Court's more recent holdings in *Richardson* and *Gray*. Post-*Gray*, a declarant-defendant's redacted confession that does not obviously implicate a codefendant may be admitted. However, making a determination as to what "obviously" implicates a codefendant requires a court to "focus[ ] on the minutiae of the substituted word or phrase in surrounding context," which becomes increasingly difficult when the defendant's identity can be established through other evidence offered at trial.[125]

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121. *See Gray*, 523 U.S. at 195 (noting similarities between certain redactions and the unredacted confession in *Bruton*).

122. *See id.* at 196 (discussing differences between indirect and direct implications in confessions).

123. *See id.* (suggesting "Me and a few other guys" was a preferable, and perhaps permissible, response to the question "Who is the group that beat Stacey?" while the response "Me, deleted, deleted, and a few other guys" violated *Bruton*); *see also supra* text accompanying note 109.

124. United States v. Logan, 210 F.3d 820, 822 (8th Cir. 2000) (en banc) (quoting United States v. Jones, 101 F.3d 1263, 1270 (8th Cir. 1996)); *see, e.g.*, United States v. Verduzco-Martinez, 186 F.3d 1208, 1212–15 (10th Cir. 1999); United States v. Lage, 183 F.3d 374, 387–88 (5th. Cir. 1999). The Second, Fourth, Sixth, and Ninth Circuits all adopted similar rules prior to the Supreme Court's holding in *Gray v. Maryland*. *See Logan*, 210 F.3d at 822.

125. United States v. Green, 648 F.3d 569, 575 (7th Cir. 2011).

Such "delicate determination requires case-by-case consideration rather than a brightline rule."[126]

A. Neutral Nouns as Constitutionally Permissible Redactions

One of the most frequent issues facing appellate courts post-*Gray* is whether the use of gender-neutral nouns in place of a defendant's name in a confession satisfies *Bruton*. While a number of circuits have permitted singular neutral noun redactions,[127] the Eighth Circuit case *United States v. Logan*[128] is illustrative. In *Logan*, the defendant (Matt Logan) contended that the trial court erred in admitting his codefendant's (Zachary Roan) redacted confession, arguing this redaction inevitably led the jury to infer the redacted statement implicated him in the confession.[129] Two confessions by Logan's codefendant were introduced: in the first, Roan refused to name his accomplice, whereas in the second, Logan's name was replaced with "another individual."[130] Unlike the redaction in *Richardson*, which removed any reference to the non-confessing codefendant, Logan argued that Roan's second confession referencing "another individual" would lead the jury to infer that the confession was redacted and thereby implicated Logan.[131]

The Eighth Circuit, sitting en banc, found Logan's argument unpersuasive, holding that the redacted confession using "another individual" was entirely consistent with Roan's earlier refusal to name his accomplice.[132] Relying on the underlying principles of *Richardson*,

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126. *See id.*

127. The Fourth, Fifth, Eighth and Tenth Circuits all allow singular neutral description redaction. *See* United States v. Verduzco-Martinez, 186 F.3d 1208, 1213–1214 (10th Cir. 1999) ("another person"); United States v. Akinkoye, 174 F. 3d 451, 457 (4th Cir. 1999) ("another person" and "another individual"), *superseded by* United States v. Akinkoye, 185 F.3d 192 (4th Cir. 1999); United States v. Smith, No. 98-4151, 1999 WL 25560, at *2 (4th Cir. Jan. 22, 1999) ("associates"); United States v. Vejar-Urias, 165 F.3d 337, 340 (5th Cir. 1999) (allowing neutral pronoun redaction). For a discussion of appellate, district, and state courts permitting singular and plural gender-specific pronoun redactions in the early years following *Gray*, see generally Bryant M. Richardson, *Casting Light on a Gray Area: An Analysis of the Use of Neutral Pronouns in Non-Testifying Codefendant Redacted Confessions Under* Bruton, Richardson, *and* Gray, 55 U. MIAMI. L. REV. 826 (2001). Richardson notes that the Fifth and Ninth Circuits have held that the use of singular neutral pronouns in redacted confessions violates *Bruton*. *See id.* at 852 n.220.

128. 210 F.3d 820 (8th Cir. 2000).

129. *Id.* at 821.

130. *Id.*

131. *See id.* at 821–22 (discussing defendant's contention on suggestiveness of the redaction). And, once the jury knew the confession was redacted, it would understand the confession had implicated Logan directly before redaction. *See* Gray v. Maryland, 523 U.S. 185, 193 (1998) (discussing assumptions of jurors about redactions).

132. *Logan*, 210 F.3d at 822.

the court found the redaction was not "facially incriminating," and as such did not violate Logan's right to confrontation.[133] Furthermore, the Eighth Circuit expressed no reservations concerning the jury's ability to heed a limiting instruction when Roan's confession did not directly implicate Logan.[134] Finally, the court distinguished *Gray* on "the matter of degree," noting that *Gray* involved an obvious redaction, whereas no such obvious redaction existed in Logan's case.[135]

Under the *Logan* majority's analysis, the issue (and holding) in *Logan* seems relatively straightforward. *Richardson* is satisfied, as the redacted confession was not facially incriminating. And, based on a narrow reading of *Gray*, *Gray's* holding is distinguishable because there was no obvious redaction in this case (and thus no obvious inference from any redaction).[136] However, four judges on the en banc panel dissented, arguing the majority incorrectly interpreted the holding in *Gray*, which should control the outcome in *Logan* based on its analogous fact pattern and date of decision.[137] The dissent criticized the majority for essentially adopting a four-corners test explicitly rejected in *Gray*. Quoting *Gray*, the dissent noted that "inference pure and simple cannot make the critical difference" as to whether a confession is sufficiently redacted.[138] Furthermore, the dissent believed "there was an abundance of evidence linking Logan to Roan's redacted confession," as the jury had been informed about the nature of the indictments, and Roan and Logan were the only individuals charged in this specific robbery.[139] According to the dissent, the facts of the case and the nature of the redaction itself failed to satisfy *Bruton* as interpreted in *Gray*.[140]

The use of plural gender-neutral nouns in redacted codefendant confessions is similarly problematic. As argued by Justice Scalia in his *Gray* dissent, completely removing any mention of codefendants in redacted statements can alter the meaning of the confession

133. *Id.*

134. *Id.*

135. *Id.* at 823.

136. *See id.* (discussing obviousness of redactions).

137. *Id.* at 825 (Heaney, J., dissenting) (arguing the majority's "four corners," facial incrimination test adopts too strict a standard and ignores the Supreme Court's more recent decision in *Gray*).

138. *Id.* (quoting *Gray*, 523 U.S. at 195).

139. *Id.*

140. *See id.* at 825–26 (discussing similarities with *Gray*). The dissent went on to differentiate its preferred holding in *Logan* with redactions the Eighth Circuit had previously upheld, which replaced codefendant names with plural pronouns such as "we" and "they." The dissent deemed these terms "more ambiguous" than terms like "another individual." *Id.*

altogether.[141] Courts have relied on similar reasoning in upholding redacted statements that include references like "we," "they," and "others."[142] For example, in *United States v. Edwards*, the Eighth Circuit similarly upheld a redaction that replaced inculpatory references to the declarant-defendant's codefendant with plural, gender-neutral pronouns.[143] The Eighth Circuit held that unlike the redaction in *Gray*, which specifically drew the jury's attention to the redaction by inserting the word "deleted," the present redaction provided no such red flag.[144] Furthermore, the court noted that based on the joint nature of the activity, further redaction was not possible without altering the nature of the declarant-defendant's original confession.[145] Invoking *Richardson*'s language noting the importance of joint criminal trials, the court recognized the use of plural, gender-neutral pronouns in redacted confessions as a "workable redaction standard[ ]."[146]

B. The One-to-One Rule

Not all redactions post-*Gray* have involved gender-neutral nouns. In cases where other descriptors are used, some circuits have adopted the "one-to-one" rule, which permits redacted confessions that do not implicate the defendant on a one-to-one basis.[147] In *United States v. Green*, the defendant, Alonzo Braziel, argued his codefendant Donald Thomas's redacted statement, which replaced Braziel's name with "straw buyer," failed to satisfy *Bruton*.[148] Based on the other evidence offered at trial, which directly named Braziel as the purchaser of the property in question, Braziel argued the jury could easily infer that he was the "straw buyer" implicated in Thomas's confession.[149]

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141. *See* Gray v. Maryland, 523 U.S. 185, 203–04 (1998) (Scalia, J., dissenting) (discussing risks of redaction to a singular defendant).

142. *See, e.g.*, United States v. Edwards, 159 F.3d 1117, 1125–26 (8th Cir. 1998).

143. *See id.*

144. *See id.* at 1226.

145. *See id.* ("In addition, this is not a situation, like the Court faced in *Gray*, in which additional redaction is normally possible. When an admission refers to joint activity, it is often impossible to eliminate all references to the existence of other people without distorting the declarant's statement.").

146. *Id.*

147. *See, e.g.*, United States v. Green, 648 F.3d 569, 575–76 (7th Cir. 2011) (finding no *Bruton* violation where the term "straw buyer" did not obviously reference the defendant because it avoided a one-to-one correspondence between the statement and defendant).

148. *Id.* at 575.

149. *Id.*

While admitting that Thomas's confession "came very close to the *Bruton* line," the Seventh Circuit nonetheless found the redacted confession did not violate Braziel's Confrontation Clause rights.[150] In reaching its opinion, the court laid out the string of *Bruton* cases it had decided post-*Gray*, suggesting redactions must imply a one-to-one correspondence to the defendant to violate *Bruton*.[151] For example, the government's redacted use of the open-ended reference "inner circle" in one case did not violate *Bruton*, despite other evidence introduced at trial that linked the non-confessing codefendants as members of that inner circle.[152] Conversely, redactions that acted like an alias or pseudonym constituted *Bruton* violations.[153]

In *Green*, the Seventh Circuit found "straw buyer" to be closer to an anonymous reference like "another individual" than a pseudonym or alias.[154] The Seventh Circuit held the redaction was not so facially incriminating as to rise to the direct inference like, for example, "incarcerated leader" in *United States v. Hoover* (which violated *Bruton*), as the statement taken alone did not suggest Braziel was the straw buyer.[155] Furthermore, the additional evidence introduced at trial implicating Braziel as the straw buyer did not alter the court's opinion, as the court found that the evidence required for the jury to draw that connection "was farther removed from the redacted statement than the clear correspondences present in *Gray* and *Hoover*."[156]

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150. *See id.* at 576. Braziel's appeal maintained that the district court erred in denying his motion for mistrial, which he offered almost immediately after Thomas's confession was admitted at trial. While the appellate court reviews the denial of a mistrial for abuse of discretion, it reviews a trial court's *Bruton* ruling de novo. The Seventh Circuit's final holding on the issue states: "Though the case came very close to the *Bruton* line, the district court did not run afoul of *Bruton* by admitting the statement and did not abuse its discretion by denying a mistrial." *Id.* at 574, 576.

151. *See id.* at 575 (distinguishing between statements that obviously refer to the defendant, and those that provide mere open-ended references).

152. *See id.* (citing United States v. Stockheimer, 157 F.3d 1082, 1086–87 (7th Cir. 1998)) (finding no *Bruton* violation where the term "inner circle" was an open-ended reference); *see also* United States v. Souffront, 338 F.3d 809, 829 (7th Cir. 2003) (finding no *Bruton* violation existed absent a one-to-one correspondence between the defendant and the redacted statement).

153. *Green*, 648 F.3d at 569.

154. *Id.* at 576; *see also* United States v. Hoover, 246 F.3d 1054, 1059 (7th Cir. 2001) (holding the government's substitution of codefendants' names with "incarcerated leader" and "unincarcerated leader" did violate *Bruton*, as the substitutions served as "obvious stand-ins" for the codefendants' names).

155. *Id.* at 575–76.

156. *Id.* at 576.

C. Thinly Masked: Richardson *in Disguise*

Gender-neutral pronoun redaction and redactions involving the one-to-one rule arguably raise different issues for non-confessing codefendants. However, in practice, courts analyzing *Bruton* redactions in both instances employ fact-intensive comparisons that end up all but ignoring the Supreme Court's most recent holding in *Gray*. While giving lip service to the *Gray* holding, courts essentially continue to apply the cleaner four-corners, "facially incriminating" test set forth in *Richardson* and explicitly rejected in *Gray*.[157] Relying heavily on dicta in *Gray* that the redaction "[m]e and a few other guys" might satisfy *Bruton* (whereas the actual *Gray* redaction of "[m]e, deleted, deleted, and a few other guys" did not), these courts all suggest that redacted confessions can acknowledge the existence of additional parties, so long as the confession does not directly implicate the defendant.[158]

In practice, the Seventh Circuit's one-to-one test looks incredibly similar to the Eighth Circuit's redaction with neutral pronouns.[159] The Seventh Circuit in *Green* relied heavily on whether or not the confessing defendant's statement is facially incriminating irrespective of the other evidence in the case.[160] While the court suggested "straw buyer" was not as incriminating as "buyer" or "person," this is a weak argument, especially since the term "straw buyer" usually denotes some illicit activity.[161] Any description replacing the defendant's name with descriptors more specific than "person" is always more incriminating, as it matches the defendant to a narrower universe of people. As demonstrated by the Seventh Circuit's decision in *Green*, the more cases a court decides on *Bruton* violations, the murkier the line between *Bruton* violations and proper redactions becomes. Instead of clarifying the case law, additional

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157. Gray v. Maryland, 523 U.S. 185, 192 (1998).

158. *See, e.g.*, United States v. Jass, 569 F.3d 47, 57 (2d. Cir. 2009) ("In *Gray* itself, the Supreme Court suggested that the identified Confrontation Clause violation could have been avoided by substituting 'a few other guys' . . . for the names of the defendants." (quoting *Gray*, 523 U.S. at 192)).

159. *See supra* notes 129–140 and accompanying text. Indeed, the Seventh Circuit analogizes to the permissive use of "another individual" in redactions. *See Green*, 648 F.3d at 575 (noting that the terms "another person" or "an individual" are anonymous references, and therefore not facially incriminating).

160. *See Green*, 648 F.3d at 576 (indicating that while other trial evidence could lead a reasonable jury to conclude that "straw buyer" referred to the defendant, "the evidence required to make that connection was farther removed from the redacted statement than the clear correspondences present in *Gray* and *Hoover*").

161. *See id.* The court did concede that "straw buyer" connotes illicit activity, but stated, "the substituted word or phrase need not be neutral." *Id.*

Bruton decisions simply require more analogizing based on the fact-intensive nature of the inquiries.

When faced with a close call concerning a probative confession, the Seventh Circuit in *Green* defaulted to the "facially incriminating" test first announced in *Richardson*.[162] However, as noted by the dissent in *Logan*, such an approach largely discounts the Supreme Court's most recent holding in *Gray*, which cautioned against admitting statements that led the jury to draw inherent inferences between the redacted statement and the codefendant.[163] While the Seventh Circuit acknowledged *Gray* in its holding, in practice it seems *Richardson*'s facial incrimination test—untempered by the Court's more recent holding in *Gray*—still carries the most weight in *Bruton* cases.[164]

As a whole, lower courts lack a uniform method to determine whether redacted codefendant confessions are admissible. Furthermore, courts are apparently all but ignoring the Court's holding in *Gray*, cabining it to obvious redactions and defaulting to the "facially incriminating" *Richardson* standard, which *Gray* explicitly rejected. In *Bruton*, the Supreme Court made clear that a non-testifying declarant-defendant's confession directly naming another codefendant violates the latter's Confrontation Clause rights. But taken together, *Richardson* and *Gray* are much less clear. Despite its potentially confusing analysis, *Gray* is an important case for codefendants' constitutional rights, meaning courts should do more than pay lip service to its holding. The question, then, is how to make sense of the confusion post-*Bruton* and standardize how courts determine whether codefendant confessions are sufficiently redacted to protect other codefendants' constitutional right to confrontation.

III. *BRUTON* REDACTIONS & REVERSE RULE 403 BALANCING

Despite the high probative value of a declarant-defendant's confession specifically naming his accomplice, such statements are categorically banned under *Bruton* because they violate a

162. *See id.* The court noted that "[t]he statement was highly incriminating to Thomas, but his statement was not used to show that Braziel was the buyer. More important for our analysis, the use of 'straw buyer' did not facially incriminate Braziel as clearly as the terms . . . did in *Hoover*." *Id.*

163. United States v. Logan, 210 F.3d 820, 825 (8th Cir. 2000) (Heaney, J., dissenting) (citing Gray v. Maryland, 523 U.S. 185, 195–97 (1998)).

164. *See, e.g.*, *Green*, 648 F.3d at 569 (distinguishing the facts of *Gray* from the present case); *Logan*, 210 F.3d at 825.

codefendant's constitutional right to confront his accusers.[165] However, the Supreme Court refused to extend *Bruton* to cover any inferentially incriminating confession, specifically citing administrability issues and the need to preserve joint criminal trials.[166]

As such, *Bruton* serves as a categorical ban on codefendant confessions that *name* another codefendant. However, the categorical ban stops there—post-*Gray*, courts can admit certain redacted codefendant confessions or, as seen in *Richardson*, confessions that are only inferentially incriminating. Courts' remaining struggle with *Bruton* lies in the areas *Gray* left open to interpretation: namely, what to do with redacted confessions that still refer, at least in part, to codefendants through neutral pronouns or other descriptors.

This Note posits that the answer lies in existing evidence law: courts should apply a "Reverse Rule 403" analysis—examining whether the probative value of the declarant-defendant's confession *substantially outweighs* the potential prejudice to the implicated codefendant—to determine whether the confession is admissible. This analysis is derived from Federal Rule of Evidence 403, which in regular operation requires the opponent of the proffered evidence to demonstrate that the evidence's unfair prejudice substantially outweighs its probative value. Before moving into how a Reverse Rule 403 analysis would work in cases presenting *Bruton* issues, this Part describes how Rule 403 operates in practice and why a *regular* Rule 403 analysis provides insufficient protection to a codefendant's Confrontation Clause rights.

A. Rule 403 in Practice

Irrespective of Confrontation Clause analysis, evidence law already has a tool for courts to handle potentially prejudicial evidence that is admissible for one purpose and inadmissible for another. Federal Rule of Evidence 403 governs "Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons."[167] Under this rule, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative

165. *See Green*, 648 F.3d at 575 (insisting that even a redacted confession, when it "obviously" refers to the defendant, may be a *Bruton* violation).

166. Richardson v. Marsh, 481 U.S. 200, 209–10 (1987).

167. FED. R. EVID. 403.

evidence."[168] In its notes accompanying Rule 403, the Federal Rules of Evidence Advisory Committee states "[t]he case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance."[169] In such cases, evidence law resorts to Rule 403 balancing to determine the admissibility of evidence that is probative but that may be otherwise inadmissible.[170] The Advisory Committee Notes similarly observe that the rule "is designed as a guide for the handling of situations for which no specific rules have been formulated."[171] Rule 403 further envisions that trial courts will consider the potential effect of an accompanying limiting instruction in making Rule 403 determinations.[172] Finally, if a judge determines that the proffered evidence is admissible under Rule 403 (i.e., that the probability that the jury will use the evidence for an impermissible purpose does not substantially outweigh its probative value), the judge (if requested) will provide the jury with a limiting instruction that the evidence should only be used for its permissible purpose.[173]

Rule 403 is a pervasive tool in evidence law, demonstrated by how it operates in practice. For example, Federal Rule of Evidence 404(b) bars prosecutors from admitting a defendant's prior criminal acts to show the defendant acted in accordance with his prior convictions.[174] However, the prosecutor can offer the same "character evidence," or evidence of past convictions, to illustrate "another purpose" such as motive, intent, plan, or lack of accident.[175] Once the prosecutor has sufficiently established that a past conviction is being offered for a permissible purpose, the court still must conduct a Rule 403 balancing test before the evidence is admitted.[176] Rule 403 therefore serves as the final backstop in determining whether Rule 404(b) evidence actually will be used for a permissible purpose.

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168. *Id.* (emphasis added). For the remainder of the note, the discussion concerning Rule 403 will focus on probative value's relationship to undue prejudice. The Advisory Committee Notes define unfair prejudice as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.* advisory committee's notes to the 1972 proposed rules.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *See* FED. R. EVID. 105 ("If the court admits evidence that is admissible against a party of for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.").

174. FED. R. EVID. 404(a)(1).

175. FED. R. EVID. 404(b).

176. FED. R. EVID. 403; *see, e.g.*, Old Chief v. United States, 519 U.S. 172, 180–85 (1997) (performing the Rule 403 balancing test by weighing the defendant's past conviction (unfair prejudice) against the narrative need for this evidence (probative value)).

In cases involving character evidence specifically, Rule 403 guards against the potential that the jury will "generaliz[e] a defendant's earlier bad act into bad character," believing he has a greater propensity to have committed the crime charged.[177] Thus, Rule 403 provides a tool for judges to weigh the probative value of an admissible piece of evidence—for example, introducing a defendant's prior conviction to show motive—against the unfair prejudice that the jury will convict the defendant for an impermissible purpose—for example, that he "did it once, so he did it again," or more generally, that the defendant is a bad person and should be convicted irrespective of his guilt in the present case.[178]

In joint trials, Rule 403 is similarly used to determine whether to admit evidence that is admissible against one codefendant but inadmissible against another.[179] Consider *United States v. Gonzalez*, a recent case in the Eastern District of Michigan where two codefendants—Gonzalez and Juarez—were jointly tried on conspiracy charges to distribute cocaine.[180] At trial, Gonzalez claimed he would suffer undue prejudice (through guilt by association with another criminal) if the court admitted evidence of Juarez's October 24, 2013, arrest, which was not charged as part of the codefendants' conspiracy.[181]

In its opinion, the court in *Gonzalez* laid out Rule 403's two-part application in a joint trial. First, the court conducts Rule 403 balancing in terms of only the defendant against whom the evidence is being admitted (in this case, Juarez).[182] If admissible under step one, the court must then perform Rule 403 balancing again with respect to the other defendant.[183] If the unfair prejudice to the other defendant is substantial, the "prosecution must be put to a choice of forgoing either the evidence or the joint trial."[184] Such situations have rarely arisen,

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177. *Old Chief*, 519 U.S. at 180.

178. *See, e.g.*, *id.* at 180–81 (explaining "unfair prejudice" as evidence suggesting the defendant's tendency to do a bad act because he has done it before); *see also* FED. R. EVID. 403.

179. *See, e.g.*, United States v. Kenny, 462 F.2d 1205, 1218 (3d Cir. 1972) ("The prospect that certain evidence will be admissible against one defendant but not against another is a feature of all joint trials.").

180. United States v. Gonzalez, No. 13-CR-20813, 2014 WL 6606590, at *1 (E.D. Mich. Nov. 19, 2014).

181. *Id.* at *5. For purposes of trial, the conspiracy ended October 6, 2013. Gonzalez was in jail at the time of Juarez's arrest. *See id.* at *5–6 (noting that Gonzalez feared that even with limiting instructions, a joint trial would prevent the jury from properly compartmentalizing evidence incriminating him).

182. *Id.* at *7.

183. *Id.*

184. *Id.* (quoting United States v. Figueroa, 618 F.2d 934, 945 (2d Cir. 1980)).

however, as the applicability of such evidence can almost always be cabined by an effective limiting instruction.[185] Since Gonzalez could not establish that the introduction of Juarez's unrelated arrest unfairly prejudiced him in the present case, the court held that an effective limiting instruction obviated any potential risk that the jury would infer guilt by mere association.[186]

While Rule 403 is used prevalently in making admissibility determinations, a regular Rule 403 analysis presents certain problems when courts must also account for other competing considerations. The burden of proof associated with a regular Rule 403 analysis provides a pertinent example. Rule 403's burden of proof requires the *opponent* of the proffered evidence to demonstrate that the evidence's potential unfair prejudice substantially outweighs its probative value. In cases presenting *Bruton* issues, this would require the non-confessing codefendant to prove that the unfair prejudice of a redacted confession substantially outweighs the confession's probative value. Given that *Bruton* deals with a criminal defendant's constitutional right to confront the witnesses presented against him, it seems improper to require the non-confessing codefendant to prove that the unfair prejudice substantially outweighs the probative value of a confession. Furthermore, Rule 403 sets a high bar—confessions (even redacted ones) have very high probative value, and requiring codefendants to prove that the unfair prejudice of the redacted confession *substantially outweighs* that high probative value would be extremely difficult, if not impossible. As such, employing a regular Rule 403 analysis in *Bruton* cases involving a redacted codefendant confession would trend toward admitting any redacted confession and therefore inadequately protect defendants' Confrontation Clause rights.

B. Reverse Rule 403

To remedy the limitations presented by a regular Rule 403 analysis to situations with special evidentiary considerations, in certain areas of evidence law, Congress has authorized courts to employ a "Reverse Rule 403" analysis in place of a traditional Rule

185. *Id.* (quoting United States v. Figueroa, 618 F.2d 934, 946 (2d Cir. 1980)):

> The situations that have been found unfair enough to force such an election by the government are limited. Where, as here, other crimes, wrongs, or acts are concerned the Court must weigh "the likely effectiveness of the cautionary instruction that tries to eliminate prejudice to the co-defendant by limiting the jury's consideration of the evidence to the defendant against whom it is offered."

186. *See id.* (noting that there was little risk of unfair prejudice towards Gonzalez because the charges were "neatly segregated").

403 analysis to determine whether to admit potentially prejudicial evidence. This analysis shifts the burden of a traditional Rule 403 analysis and requires the proponent of the evidence (in *Bruton* cases, the government) to prove that the probative value of the proffered evidence substantially outweighs any unfair prejudice to the opponent of the evidence.[187] For example, Federal Rule of Evidence 609 governs whether a party can impeach a witness's character for truthfulness by introducing evidence of a past criminal conviction.[188] For "stale" crimes that occurred over ten years prior to the current trial, Rule 609(b) states that evidence of a witness's previous conviction is only admissible if "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect."[189] Additionally, in civil sexual assault cases, a party can introduce the alleged victim's past sexual behavior or sexual predispositions "if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."[190] The Advisory Committee Notes to 412 specifically state that this test differs from a traditional Rule 403 analysis by "shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence" and by "rais[ing] the threshold for admission by requiring that the probative value of the evidence *substantially* outweigh the specified dangers."[191] Further, unlike the traditional rule, Reverse Rule 403 as applied in Rule 412(b)(2) "puts 'harm to the victim' on the scale in addition to prejudice to the parties."[192] Here, Congress expressly decided to apply Reverse Rule 403 balancing to protect alleged sexual assault victims against privacy invasions and sexual stereotyping that could "lead to improper inferences or confuse the issues."[193]

Reverse Rule 403 would similarly be an appropriate standard to analyze redacted codefendant confessions. This standard would require the government to demonstrate that the probative value of the declarant-defendant's redacted confession substantially outweighs the unfair prejudice that the jury would use the confession to convict the non-confessing codefendant, even if the confession is accompanied by a

187. *See, e.g.*, FED. R. EVID. 412 advisory committee's note to 1994 amendment.

188. FED. R. EVID. 609(b).

189. FED. R. EVID. 609(b)(1).

190. FED. R. EVID. 412(b)(2).

191. FED. R. EVID. 412 advisory committee's note to 1994 amendment.

192. *Id.*

193. Jane H. Aiken, *Protecting Plaintiffs' Sexual Pasts: Coping with Preconceptions Through Discretion*, 51 EMORY L.J. 559, 596 (2002). The Advisory Committee notes that Rule 412 "aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping . . . ." FED. R. EVID. 412 advisory committee's note to 1994 amendment.

limiting instruction. Just as Congress determined that an alleged victim's past sexual behavior would lead to stereotyping (and thus prejudice or confusion of the issues), the threat of unfair prejudice is always high with an incriminatory codefendant confession.[194] As with Rule 412, under a Reverse Rule 403 analysis the government when seeking to introduce incriminatory codefendant confessions would have to greatly redact the statement to satisfy this burden. This standard would certainly trend toward exclusion, which better protects defendants' Confrontation Clause rights. Furthermore, it properly allocates the burden of proof in a criminal case—it is the responsibility of the government, not the accused, to present the state's case constitutionally.

C. Discounted Probative Value

Notably, courts conducting a Rule 403 (or Reverse Rule 403) analysis do not consider the probative value of the proffered evidence in a vacuum. Instead, when a court determines a piece of evidence raises the danger of unfair prejudice, the judge can subsequently evaluate the degrees of probative value and unfair prejudice not only for the specific evidence objected to, but also for any available substitutes.[195] "If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice," the probative value of the proffered evidence becomes *discounted* and should be "excluded if its discounted probative value were substantially outweighed by" unfair prejudice.[196] This "discounted probative value" tips the scale in favor of excluding the evidence, as the unfair prejudice to the opposing party remains unchanged.[197]

Therefore, looking at the entire body of evidence in a case, judges may favor "less risky alternative proof going to the same point" as the potentially prejudicial evidence.[198] To illustrate the effect of discounted probative value in practice, consider the facts of *United States v. Gotti*, which involved the trial of a key figure of the infamous

194. *See supra* note 193 and accompanying text.

195. Old Chief v. United States, 519 U.S. 172, 182–83 (1997).

196. *Id.*

197. *See id.* (discussing two possible analytical approaches to a Rule 403 balancing test).

198. *Id.* at 184–85:

> Thus the [Advisory Committee] notes leave no question that when Rule 403 confers discretion by providing that evidence "may" be excluded, the discretionary judgment may be informed not only by assessing an evidentiary item's twin tendencies, but by placing the result of that assessment alongside similar assessments of evidentiary alternatives.

Gambino crime family.[199] The defendant, Michael Yannotti, was charged with conducting the affairs of a criminal enterprise, and conspiring to participate in that enterprise, in violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act.[200] In conjunction with those charges, the government alleged that Yannotti committed four predicate acts, including two murders, one attempted murder, one kidnapping and attempted murder, and loan-sharking.[201] At trial, the government attempted to introduce testimony that Yannotti was involved in the separate, uncharged murder of Todd Alvino.[202] The government argued the Alvino murder was "probative of (1) the means and methods employed by the Gambino Family enterprise, [and] (2) the defendant Yannotti's role with that enterprise."[203] Conversely, Yannotti argued that admitting evidence of the uncharged murder would be unfairly prejudicial, as the jury might impermissibly use the evidence to convict Yannotti for Alvino's death and not for the charges in the present case.[204]

The trial court conducted a Rule 403 analysis to determine the evidence connecting Yannotti to Alvino's murder was ultimately inadmissible. Previously at Yannotti's trial, a government witness had testified "at length" to the Gambino enterprise's use of murder and violent crimes in its operations.[205] Noting that the probative value of Alvino's murder was "undercut" by similar, less prejudicial evidence, the court held "it will be amply clear—nor is it seriously disputed—that murder is one of the 'means and methods' employed by the Gambino family."[206] Thus, while evidence of Alvino's murder was probative of the "means and methods" employed by the Gambino enterprise, its probative value was discounted by the availability of other, less prejudicial evidence, and ultimately excluded on the basis

199. United States v. Gotti, 399 F. Supp. 2d 417, 418 (2005).

200. *Id.*

201. *Id.*

202. *Id.* The "enterprise proof" involved demonstrating Yannotti and members of the Gambino enterprise sought out and murdered the decedent (Alvino) in retaliation for a murder Alvino committed against one of their crew members. The government's witness was set to testify that Yannotti had later admitted to murdering Alvino. *See id.* at 417–19.

203. *Id.* at 419. The government further asserted that the murder was probative of Yannotti's status as "first among equals" in the enterprise. That assertion is not illustrative of the court's use of discounted probative value. *See id.*

204. *Id.*

205. *Id.*

206. *Id.* at 419–20 (quoting United States v. Nachamie, 101 F. Supp. 2d 134, 142 (S.D.N.Y. 2000)) ("[A] judge applying Rule 403 could reasonably apply some discount to the probative value of an item of evidence when faced with less risky alternative proof going to the same point."); *see also supra* notes 179–186 and accompanying text (discussing the admissibility codefendant testimony in the context of joint trials).

that its low probative value was significantly outweighed by the potential that the jury would use the evidence to convict Yannotti for reasons other than the crimes charged.[207]

As demonstrated in the *Gotti* case, discounted probative value is a useful tool within the Rule 403 balancing test. Rule 403—whether used in a traditional or a Reverse Rule 403 analysis—assists trial courts in determining whether to admit prejudicial evidence that is admissible for one purpose but inadmissible for another.[208] If a piece of evidence borders on presenting an unfair prejudice—especially to a criminal defendant—judges look to the case's entire body of evidence to determine whether some less prejudicial alternative with a similar evidentiary function exists.[209] If such an alternative exists, in a regular Rule 403 analysis, exclusion is *more* likely but not assured—the defendant must still demonstrate that the unfair prejudice *substantially* outweighs the discounted probative value. [210] However, discounted evidence subject to a Reverse Rule 403 analysis trends toward exclusion, as the proponent would have to prove that the discounted probative value of the proffered evidence substantially outweighs any potential unfair prejudice to the opponent.

To date, courts have not extended Reverse Rule 403 to apply to *Bruton* cases, probably because *Bruton* extends beyond traditional evidence law to protect defendants' constitutional rights. The next section addresses why a Reverse Rule 403 should be adopted in *Bruton* cases—whether through congressional action or by the Supreme Court *sua sponte* as a constitutional matter—as a standard method for evaluating whether redacted confessions are admissible or, alternatively, violate a codefendant's Confrontation Clause rights.

D. The Case for Balancing Bruton *Redactions with Reverse Rule 403*

As discussed in Part II, lower courts have continually struggled to properly apply *Bruton* as amended by *Richardson* and *Gray*.[211] Applying Reverse Rule 403 balancing to *Bruton* cases would provide trial courts with a familiar tool to standardize the analysis of *Bruton* redactions while upholding the policy objectives advanced by the Supreme Court in *Bruton*, *Richardson,* and *Gray*.

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207. *See id.* (highlighting and discussing the importance of the availability of other, less prejudicial evidence).

208. *E.g.*, FED. R. EVID. 403.

209. Old Chief v. United States, 519 U.S. 172, 182–83 (1997).

210. *E.g.*, *Gotti*, 399 F. Supp. 2d at 419–20.

211. *See infra* Part III (specifying numerous issues lower courts have dealt with in trying to apply *Bruton* in the wake of *Richardson* and *Gray*).

At its core, *Bruton* is about a defendant's constitutional rights, and the harm those rights are designed to protect against.[212] In setting forth the categorical ban against directly accusatory codefendant confessions, the *Bruton* Court noted that in some instances, the risk that a jury will not follow a limiting instruction—that instead the jury will use evidence presented for an impermissible purpose and in effect violate the defendant's Confrontation Clause rights—is so potentially "devastating to a defendant" that "the practical and human limitations of the jury system cannot be ignored."[213] Even in the confusion following *Richardson* and *Gray*, courts unanimously understand that a non-testifying codefendant's confession cannot directly, or by alias or pseudonym, name another codefendant in a joint trial.[214]

A Reverse Rule 403 analysis would enable courts to determine whether a confession is sufficiently redacted to adequately protect a non-confessing codefendant from the potential that a jury will impermissibly consider a declarant-defendant's confession against him. In conducting a Reverse Rule 403 balancing test for a redacted confession, courts should use the entire body of evidence at trial to determine whether the probative value of the redacted statement should be discounted, which would tilt the scales in favor of further redaction or inadmissibility. Conversely, when the confession is sufficiently redacted to limit the unfair prejudice to a non-confessing codefendant (for example, as in *Richardson*), it is unlikely that other admissible evidence will be able to serve as a viable substitute for the defendant-declarant's redacted confession, which would tilt the scales in favor of admission.[215]

If a court decides Reverse Rule 403 balancing supports admitting the redacted confession, the confession should be accompanied by a limiting instruction informing the jury it should only be used for its permissible purpose (i.e., against the defendant-

212. *See* Bruton v. United States, 391 U.S. 123, 132–34 (1968).

213. *Id.* at 135–36.

214. *See, e.g.*, United States v. Green, 648 F.3d 569, 575 (7th Cir. 2011) ("[Since *Gray* and *Richardson*] it is [now] clear that a redacted confession of a nontestifying co-defendant may be admitted as long as the redaction does not 'obviously' refer to the defendant.").

215. Arguably, redacting declarant-defendant confessions will reduce the overall probative value of the confession in the first place, presenting a potential Rule 401 issue. Combined with the potential risk of unfair prejudice that the declarant-defendant's confession implicates the codefendant, redacted confessions could in theory end up favoring exclusion, not admission. However, this threat is relatively low. As discussed above, a regular Rule 403 analysis requires that the unfair prejudice *substantially* outweigh the probative value of the redacted confession, and it is unlikely that the threat of inferential incrimination for a codefendant would substantially outweigh a declarant-defendant's own confession to the crime charged.

declarant.) Applying Reverse Rule 403 to *Bruton* cases—where the Court specifically rejected the efficacy of the limiting instruction—may seem ill-conceived given Rule 403's own reliance on the limiting instruction. However, as stated above, the Supreme Court's *Bruton* holding found limiting instructions to be inadequate when a declarant-defendant's incriminating confession is admitted wholesale. In later cases involving *redacted* declarant-defendant confessions, the Supreme Court has admitted those confessions with a limiting instruction.[216]

Admittedly, the constitutional rights of criminal defendants are not typically subject to balancing. However, a Reverse Rule 403 analysis (accompanied by a limiting instruction) can, and should, actually be considered as an evidentiary defense to protect defendants' constitutional rights once a confession has been redacted. The Supreme Court's jurisprudence post-*Bruton* certainly envisioned that limiting instructions would play some role in adjudicating *Bruton* disputes over redacted confessions.[217] Additionally, in other areas of the law, courts have determined that Rule 403 actually acts as a safeguard to defendants' constitutional rights. For example, in *United States v. Mound*,[218] the Eighth Circuit held that Federal Rule of Evidence 413—which permits courts to admit evidence of defendants' past sexual offenses subject to Rule 403 balancing—does not violate due process.[219] The Tenth Circuit reached the same conclusion in *United States v. Enjady*, holding that but for the safeguards provided defendants by Rule 403 (that courts must exclude prior offenses if the evidence fails regular Rule 403 balancing), it would have held Rule 413 to unconstitutionally violate defendants' due process rights.[220]

As previously discussed, applying a Reverse Rule 403 analysis to a redacted confession provides considerable protection to codefendants implicated by a declarant-defendant's confession. First and foremost, the Reverse Rule 403 analysis is an even more favorable "safeguard" to defendants than a regular Rule 403 analysis: before admitting any redacted confession, the prosecution must prove that the redacted confession's probative value substantially outweighs potential prejudice to the implicated codefendant (whereas with a

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216. Richardson v. Marsh, 481 U.S. 200, 211 (1987).

217. *See id.* at 208 (discussing the ability of a jury instruction to prevent express inferences of guilt from a codefendant's confession); *see also* Gray v. Maryland, 523 U.S. 185, 202–05 (1998) (Scalia, J., dissenting) (balancing the rights of criminal defendants against state objectives).

218. United States v. Mound, 149 F.3d 799 (1998), *cert. denied*, 525 U.S. 1089 (1999).

219. *Id.* at 800–01; *see also* United States v. Enjady, 134 F.3d 1427 (10th Cir. 1998) (holding that Rule 413, subject to the protections of Rule 403, did not violate the Due Process Clause).

220. *Enjady*, 134 F.3d at 1433.

regular 403 analysis, the *defendant* must demonstrate the unfair prejudice substantially outweighs the probative value).[221] This includes considering whether limiting instructions will be effective with potentially prejudicial evidence; Reverse Rule 403 does not require courts to admit prejudicial evidence wholesale with a limiting instruction.[222] With a Reverse Rule 403 analysis, the burdens are properly allocated to ensure that the prosecution retains the burden of proving that a redacted confession should be admitted, and the court will only do so if it finds that the confession's probative value far outweighs any potential harm to the implicated codefendant.[223] Thus, reliance on Reverse Rule 403's limiting instruction in cases with redacted codefendant confessions actually tracks well with *Bruton*'s policies.[224]

Having covered how applying a Reverse Rule 403 analysis to redacted codefendant confessions would work in practice, the next Section evaluates the compatibility of employing a Reverse analysis with the legal and policy concerns of *Bruton* and its progeny.

E. Reverse Rule 403 in Bruton, Richardson *and* Gray

The Supreme Court obviously did not employ a Reverse Rule 403 analysis (at least explicitly) in *Bruton*, *Richardson*, or *Gray*. However, the Supreme Court's policy considerations *Bruton*, *Richardson*, and *Gray* support applying Reverse Rule 403 balancing to redacted codefendant confessions, thereby clarifying the methodology lower courts should employ in determining whether redacted confessions are constitutionally admissible.

1. Reverse Rule 403 Balancing in *Bruton*

In *Bruton*, the Supreme Court specifically considered whether Evans' confession made such an explicit accusation against Bruton

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221. *See supra* Part III.B.

222. FED. R. EVID. 403 advisory committee's note to 1972 proposed rules.

223. *See, e.g.*, FED. R. EVID. 412 advisory committee's note to 1994 amendment. As a note about procedure, it is conceivable that future defendants' cases might be impaired by the deference appellate courts afford trial courts on Reverse Rule 403 rulings. However, appellate courts' review of *Bruton* issues analyzed under Reverse Rule 403 would operate similarly to other *Bruton* challenges. Currently, appellate courts review all *Bruton* challenges—which are rulings of law—de novo, while accompanying challenges of a trial court's denial of a mistrial (or a similar motion or evidentiary ruling) are reviewed for abuse of discretion. *Bruton* issues analyzed under Reverse Rule 403 would operate in the same fashion, thus still providing criminal defendants a line of defense in *Bruton* challenges.

224. *See Richardson*, 481 U.S. at 208 (stating that limiting instructions can prevent codefendant's confession from functioning as testimony against defendant); Bruton v. United States, 391 U.S. 123, 137 (1968) (seeking to prevent threats to the right to confront witnesses).

that the latter's Confrontation Clause rights were violated. In determining that admitting the confession wholesale violated Bruton's right to confrontation, the majority relied heavily on the potential that the jury would use Evans' confession for the impermissible purpose of convicting Bruton.[225] Based on the potential harm, or prejudice, a codefendant's confession could have on a non-confessing codefendant in the eyes of the jury, the *Bruton* Court specifically rejected the idea that a limiting instruction could properly shield a non-confessing codefendant from the harm envisioned.[226] While not explicitly engaging in a Reverse Rule 403 analysis, we see the Supreme Court applying a similar analysis to Reverse Rule 403 balancing in *Bruton* itself.

Just as Reverse Rule 403 requires trial courts to consider whether an accompanying limiting instruction will effectively shield a defendant from unfair prejudice, the Court's opinion in *Bruton* made a similar determination by instituting a categorical ban.[227] By determining that the unfair prejudice to a non-confessing codefendant is simply too high to admit a declarant-defendant's incriminatory confession, the Supreme Court has already done the Reverse Rule 403 balancing for cases as "devastating" as the confession in *Bruton* where the codefendant is named specifically.[228] The declarant-defendant's confession in *Bruton* was highly probative: Evans confessed that both he and Bruton were guilty of the crime charged. But the Court held that the potential harm to Bruton—that the jury would use Evans's confession as evidence of Bruton's guilt even with a limiting instruction—was simply too great to admit the confession wholesale, and that doing so would violate Bruton's Confrontation Clause rights.

2. Reverse Rule 403 Balancing in *Richardson*

Unlike the *Bruton* confession, the *Richardson* confession was redacted, thus presenting the first opportunity in the line of *Bruton* cases to examine whether a Reverse Rule 403 analysis would operate consistently with the Supreme Court's own reasoning. In the *Richardson* confession, Marsh, the non-confessing codefendant, was

225. *Bruton*, 391 U.S. at 132–34.

226. *See id.* (determining that under the circumstances limiting instructions would be insufficient).

227. *See id.* ("Where viable alternatives do exist, it is deceptive to rely on the pursuit of truth to defend a clearly harmful practice.").

228. *Id.* at 136. Of course, this Note is focused on standardizing redacted declarant-defendant confessions, not on *Bruton* violations more generally. Nevertheless, the underlying point here is important.

not named, nor was her existence even suggested.[229] The confession, however, had substantial probative value, certainly against the defendant-declarant and inferentially against Marsh, whose own later testimony placed her in the car named in the defendant-declarant's confession. In addition, the Supreme Court noted the statement largely corroborated the testimony of the one surviving victim in the case.[230] Undertaking the two-step analysis outlined in the Michigan case *United States v. Gonzalez* above, (1) the confession's probative value against the defendant-declarant was high, and the statement corroborated the testimony of the one surviving victim; and (2) the unfair prejudice to Marsh was low—her existence was not even implicated in the confession. The Court thus decided that a limiting instruction could properly inform the jury of the confession's proper use, and the risk that the jury would ignore that instruction was low.[231]

A Reverse Rule 403 analysis comports with that of the Supreme Court's. *Richardson* dealt with a confession that could not be further redacted without altering the nature of the confession.[232] In terms of Reverse Rule 403, even if the confession was potentially unfairly prejudicial to Marsh based on later inferences that could be drawn at trial, it was unlikely that the probative value of the confession itself as it pertained to the declarant-defendant could be established through other evidence at trial (indeed, that is what the trial is all about—the defendant's guilt). Assuming Marsh's codefendant had only confessed once, the probative value of that confession against the defendant-declarant was extremely high, and no similar, less prejudicial confession existed.[233] Under this Reverse Rule 403 analysis, the confession in *Richardson* was properly admitted accompanied by a limiting instruction.

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229. Richardson v. Marsh, 481 U.S. 200, 203 (1987).

230. *Id.* at 203–04.

231. *See id.* at 208 ("[W]hile it may not always be simple for [jurors] to obey the instruction that they disregard an incriminating inference, there does not exist [in this case] the overwhelming probability of their inability to do so that is the foundation of *Bruton* 's exception to the general rule.").

232. *See* Gray v. Maryland, 523 U.S. 185, 196 (1998) ("*Richardson* expressed concern lest application of *Bruton's* rule apply where 'redaction' of confessions, particularly 'confessions incriminating by connection,' would often 'not [be] possible,' thereby forcing prosecutors too often to abandon use either of the confession or joint trial.").

233. *See* Old Chief v. United States, 519 U.S. 172, 182–83 (1997) (discussing the availability of alternative, less prejudicial evidence and its significance in this context).

3. Reverse Rule 403 Balancing in *Gray*

Gray v. Maryland similarly supports the use of Reverse Rule 403 to determine admissibility. Unlike the confession in *Richardson*, which made no mention of Marsh's existence, the confession in *Gray* directly implicated the defendant by replacing his name with obvious blanks or the word "deleted."[234] As with *Bruton*, the potential unfair prejudice to the codefendant was high—the confession was obviously redacted and directly implicated Gray.[235] In Reverse Rule 403 terms, this risk of unfair prejudice substantially outweighed the redacted confession's probative value.

Unlike *Richardson*, where the confession could not be redacted further and no less prejudicial means of introducing the confession against the declarant existed absent severing the trials, in *Gray* additional redaction was possible.[236] As such, unlike the *Richardson* confession, which in Reverse Rule 403 terms was admissible especially given the absence of any less prejudicial means of admitting the confession, the unfair prejudice inherent in the confessions like the one in *Gray* "is easily identified prior to trial and does not depend, in any special way, upon the other evidence introduced in the case."[237]

As demonstrated above, the Supreme Court's decisions in *Bruton* and its progeny support applying Reverse Rule 403 to redacted codefendant confessions.

F. Reevaluating Logan *and* Green *Under Reverse Rule 403*

In the absence of instruction from the Supreme Court as to how to address *Bruton* issues falling between the facts of *Richardson* and *Gray,* applying Reverse Rule 403 can help lower courts better adhere to the rulings of *Bruton*, *Richardson*, and *Gray*. Similarly, knowing any redacted confession will be subject to a Reverse Rule 403 analysis will help both parties structure their arguments around a familiar test that should eliminate some uncertainty as to the use of redactions and the outcome of *Bruton* challenges.

Consider again *United States v. Logan*, in which the Eighth Circuit upheld the government's use of a redacted codefendant statement referring to Logan as "another individual" as permissible under *Bruton*.[238] In its opinion, the majority relied heavily on the

234. *See Gray*, 523 U.S. at 196.

235. *See id.* at 193–94.

236. *Id.* at 196.

237. *Id.* at 197.

238. United States v. Logan, 210 F.3d 820, 821–22 (8th Cir. 2000).

Richardson "facially incriminating" standard to find the redacted confession constitutional.[239] The dissent, in contrast, argued the redaction constituted a *Bruton* violation based on the jury's knowledge of the nature of the indictment—in which only Logan and his confessing codefendant were charged—and the significant additional evidence linking Logan to the confession.[240]

In terms of a Reverse Rule 403 analysis, the dissent got *Logan* right. As only two people were charged in the case, Roan's statement seems, at least potentially, to create unfair prejudice against Logan. Furthermore, given the other evidence linking Logan to the confession, the value of naming "another individual" would become highly discounted. As with Alvino's murder in *United States v. Gotti*, the other evidence linking Logan to the confession should discount the value of admitting the statement in the form offered.[241] Under Reverse Rule 403, the highly discounted probative value of the redacted confession should not substantially outweigh the unfair prejudice to Logan.

United States v. Green leads to a similar result. There, the redacted term of choice, "straw buyer," replaced the codefendant's name in the declarant-defendant's confession.[242] While the Seventh Circuit held the redaction did not violate Braziel's Confrontation Clause rights, a Reverse Rule 403 analysis would suggest, as it did in *Logan*, that the statement should be further redacted. As with *Logan*, the court noted additional evidence linked Braziel to the crime charged, discounting the value of the term "straw buyer."[243] And, indubitably, the term "straw buyer," which is specific enough to limit substantially the universe of people the redaction could implicate, could be redacted further.

In both *Logan* and *Green*, it seems applying a Reverse Rule 403 analysis to the cases would trend in favor of further redaction, especially considering any other evidence that would discount the probative value of the declarant-defendant's confession as to the non-confessing codefendant. However, this is consistent with the Supreme Court's jurisprudence on *Bruton* issues. Justice Frankfurter's influential dissenting opinion in *Delli Paoli*—which laid the groundwork for the Court's majority opinion in *Bruton*—envisioned a

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239. *Id.* at 822.

240. *Id.* at 825 (Heaney, J., dissenting).

241. *See* United States v. Gotti, 399 F. Supp. 2d 417, 419–20 (S.D.N.Y. 2005) (discussing how using the fact of Alvino's murder would be cumulative under the circumstances).

242. United States v. Green, 648 F.3d 569, 574 (7th Cir. 2011).

243. *See id.* (discussing the events which transpired during trial further linking Braziel to the underlying crime).

method of analysis similar to that employed in applying Reverse Rule 403 to *Logan* and *Green* above.[244] Frankfurter's reasoning explicitly laid out how other evidence discounts the value of a confession against a defendant, leaving the confession with minimal probative value to stand against the monumental unfair prejudice of having a confession introduced that implicitly condemns the codefendant.[245] The majority opinion in *Gray* similarly seemed to caution against admissibility in holding that any obvious redactions, or redactions that could directly implicate the non-confessing codefendant, are impermissible.[246] Indeed, if Reverse Rule 403 is applied to *Bruton* redactions, such situations seem ripe for a discounted probative value analysis.[247]

CONCLUSION

Bruton violations occupy a unique area at the crossroads of constitutional rights and evidence law. Though the Supreme Court categorically banned codefendant confessions directly inculpating another defendant in *Bruton v. United States*, the Court's later decisions in *Richardson v. Marsh* and *Gray v. Maryland* demonstrated that some redacted codefendant confessions do not violate other defendants' Sixth Amendment right to confrontation. However, in the wake of *Gray,* lower courts have struggled to determine whether certain redactions are admissible under the evolving *Bruton* rule.

Federal Rule of Evidence 403—used pervasively in all other areas of evidence law[248]—is instructive. However, a regular Rule 403 analysis, which would require the implicated codefendant to demonstrate that the unfair prejudice of introducing the redacted confession substantially outweighs the confession's probative value, fails to adequately protect the codefendant's constitutional rights. A Reverse Rule 403 analysis would reallocate the burden of proof, requiring the government to demonstrate that the probative value of a redacted confession substantially outweighs the potential unfair prejudice that the redacted confession will violate the Confrontation

244. Delli Paoli v. United States, 352 U.S. 232, 248 (1957) (Frankfurter, J., dissenting).

245. *Id.* ("It is no answer to suggest that here the petitioner-defendant's guilt is amply demonstrated by the uninfected testimony against him. That is the best of reasons for trying him freed from the inevitable unfairness of being affected by testimony not admissible against him.").

246. *See* Gray v. Maryland, 523 U.S. 185, 192–93 (1998); *see also* United States v. Green, 648 F.3d 569, 576 (7th Cir. 2011) (discussing *Gray*).

247. *See, e.g.*, Old Chief v. United States, 519 U.S. 172, 185 (1997) ("The probative worth of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence on the same point." (quoting 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5250 (1st ed. 1978))).

248. FED. R. EVID. 609(a)(2) notwithstanding.

Clause. Furthermore, the Reverse Rule 403 balancing test tracks with the Supreme Court's policy analysis in *Bruton* and its subsequent decisions. When analyzing redactions, Reverse Rule 403 adequately protects a non-confessing codefendant's constitutional rights, erring in favor of excluding redacted confessions (or requiring additional redaction to reduce the unfair prejudice). This is especially so when other evidence connects the defendant to the confession and the confession could be construed as directly implicating the defendant.

Applying Reverse Rule 403 to *Bruton* redactions would provide trial courts with a familiar tool to analyze potential *Bruton* violations. Similarly, using Reverse Rule 403 in *Bruton* situations would insulate codefendants from the harm warned of in *Bruton* while preserving joint criminal trials. Marrying *Bruton* and Reverse Rule 403 would provide an effective, efficient, and standardized tool to evaluate *Bruton* issues moving forward.

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