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The Extension of the Bruton Rule at the Expense of Judicial Efficiency in Gray v. Maryland

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CASENOTES

THE EXTENSION OF THE BRUTON RULE AT THE EXPENSE OF JUDICIAL EFFICIENCY IN *GRAY V. MARYLAND*

I. INTRODUCTION

"An argument broke out between [Kevin] and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran into Wildwood Parkway. Me, [Kevin], and a few other guys ran after Stacey . . . . We beat Stacey up."[1]

The preceding quotation is an excerpt from the confession Anthony Bell gave to the Baltimore City Police in 1993. Both Bell and Kevin Gray were tried jointly for the murder of Stacey Williams, who died as a result of the beating.[2] At trial, the police officer who read the confession into evidence, over the objection of Gray's counsel, said the word "deleted" wherever Gray's name appeared.[3] The jury was left to infer from the confession to whom the term "deleted" referred. Subsequently, the jury convicted both Bell and Gray of involuntary manslaughter.[4] Gray appealed his conviction, asserting that the introduction of Bell's confession at the joint trial was unconstitutional.[5]

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1. Gray v. Maryland, 118 S. Ct. 1151, 1158 (1998).
2. *See id.* at 1153.
3. *See id.*
4. *See* Gray v. Maryland, 667 A.2d 983, 984 (Md. Ct. Spec. App. 1995).
5. *See id.* at 985 (posing the question of "whether the introduction of a nontestifying codefendant's inculpatory statement . . . violates a defendant's rights under the Confrontation Clause of the Sixth Amendment . . . .").

The use of joint trials in American criminal procedure is widespread due to their efficiency and consistency.[6] A problem develops, however, when one co-defendant has confessed and the others have not. In many instances, that confession inculpates the other co-defendants. These co-defendants are unable to cross-examine the confessor or to challenge the veracity of the confession due to the confessor's right against self-incrimination.[7] This denies the non-confessing defendants their confrontation rights guaranteed by the Sixth Amendment.[8] As a result, the confession is inadmissible as evidence against non-confessing co-defendants. The confession may only be used against the confessor, and the presiding judge must instruct the jury to that effect.[9]

In *Bruton v. United States*,[10] however, the Supreme Court ruled that in some instances the admission of a confession at trial may constitute reversible error, despite any limiting instructions to the jury.[11] The admission of the confession may have such a prejudicial effect upon the jury, with regard to the non-confessing co-defendants' cases, that a limiting instruction would have little effect.[12] In *Gray v. Maryland*,[13] the Court considered whether an edited confession, which removed the names of the co-defendants and inserted symbols or signs of deletion, had a similarly prejudicial effect.[14] The Court ruled that such deletions had substantially the same impact upon a jury and that those confessions should not be allowed in a joint trial.[15]

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6. *See* Judith L. Ritter, *The X Files: Joint Trials, Redacted Confessions and Thirty Years of Sidestepping* Bruton, 42 VILL. L. REV. 855, 919 (1997) (citing Justice Scalia's opinion in Richardson v. Marsh, 481 U.S. 200, 209-10 (1987)).

7. *See* U.S. CONST. amend. V ("No person . . . shall be compelled in a criminal case to be a witness against himself . . . ."); *see also* Alfredo Garcia, *The Winding Path of* Bruton v. United States: *A Case of Doctrinal Inconsistency*, 26 AM. CRIM. L. REV. 401, 403 (1988).

8. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him . . . .").

9. *See* Delli Paoli v. United States, 352 U.S. 232, 239 (1957).

10. 391 U.S. 123 (1968).

11. *See id.* at 137.

12. *See id.* at 129.

13. 118 S. Ct. 1151 (1998).

14. *See id.* at 1153.

15. *See id.* at 1155, 1157 (holding that such deletions fall "within the class or statements to which *Bruton's* protections apply").

This casenote traces the history, meaning, and future ramifications of *Gray v. Maryland.* Part I examines the precedential course that the Supreme Court has taken with co-defendant confession cases. Part II scrutinizes the procedural and substantive history of *Gray v. Maryland,* following its course from the Maryland Circuit Court to the Supreme Court of the United States. Part III analyzes the consistency of the *Gray* decision with prior precedent, especially in terms of placing expectations upon juries and public policy efficiency concerns. Finally, Part IV addresses the options which the *Gray* decision leaves open to lower courts and prosecutors in trying co-defendant confession cases.

II. THE ESTABLISHMENT AND INTERPRETATION OF THE BRUTON RULE

The Supreme Court has taken a meandering route in its interpretation and application of the Sixth Amendment Confrontation Clause to co-defendant confessions in joint trials. In *Delli Paoli v. United States,*[16] the Court first tackled the subject of prejudicial confessions at joint trials. The case involved the introduction of impermissible hearsay against a defendant in the form of a confession made by a co-defendant, which implicated the defendant.[17] Because the defendant could not cross-examine the confessor, due to the Fifth Amendment privilege against self-incrimination,[18] he argued that the jury instructions would not provide him sufficient protection against the hearsay evidence.[19] The prosecutor stated he intended that the confession only be used against the confessor and not against the defendant.[20] The Court held that where a co-defendant's confession is introduced into evidence, a limiting instruction to the jury is sufficient to ameliorate any prejudicial effect that the confession had on the defendant's case.[21]

16. 352 U.S. 232 (1957).

17. *See id.* at 233.

18. *See* U.S. CONST. amend. V; *supra* note 7 and accompanying text.

19. *See* Delli Paoli v. United States, 352 U.S. 232, 239 (1957) (contending that the admission of a co-defendant's confession constituted reversible error, despite limiting instructions from the trial judge).

20. *See id.* at 241 n.7.

21. *See id.* at 242 ("Unless we proceed on the basis that the jury will follow the

The Court later reconsidered and overruled *Delli Paoli* in the landmark case of *Bruton v. United States*.[22] In *Bruton*, the confession of a co-defendant was introduced into evidence during a joint trial with the instruction that it be considered only with regard to the confessor's case.[23] The Court held that the hearsay evidence was so threatening to the non-confessing defendant's case that a jury could not reasonably be expected to disregard it.[24] The prejudicial effect upon the jury, combined with the non-confessing defendant's inability to effectively cross-examine the confessor, was too great to be effectively discharged by a limiting instruction.[25]

Justice White, in his dissent, stated that the application of the holding in *Bruton* would mandate severance in joint trials where the confession of one defendant may implicate another defendant.[26] White lamented this result because it would curtail the efficiency and consistency of joint trials.[27] Rather, cumbersome individual trials would ensue, with the resulting burden upon witnesses, prosecutors, and the court.[28] The only other option that Justice White foresaw was the non-use of co-defendant confessions at trial.[29] This option, he warned, may be impracticable because in many cases, the confession of the defendant is the linchpin of the prosecutor's case.[30]

In a creative attempt to comply with the requirements of *Bruton*, prosecutors began to redact the confessions of co-defendants in joint trials so as to exclude the names or, in some cases, any reference to the existence of other defendants.[31] In

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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.").

22. 391 U.S. 123, 126 (1968).

23. *See id.* at 123-24.

24. *See id.* at 137.

25. *See id.*

26. *See id.* at 143-44 (White, J., dissenting) (noting that the only other alternative would be not to use the confession in the trial at all).

27. *See id.* at 143.

28. *See id.*

29. *See id.*

30. *See id.* ("[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.").

31. *See* Ritter, *supra* note 6, at 873-74.

Richardson v. Marsh,[32] the prosecutor deleted any references to the existence of the defendant in the confession of a co-defendant.[33] Circumstantial evidence, however, linked the defendant to elements of the crime as detailed in the confession.[34] For example, the prosecutor introduced testimony that the defendant was in the same automobile at the same time as the confessor.[35] The confession stated that during this time, the confessor plotted his crime.[36] The defendant alleged that because she was present in the car, this could lead a jury to assume that she had conspired with the confessor, or at least had knowledge of the planned crime.[37]

The Supreme Court held that because the confession made no reference to the existence of the defendant, it was not barred by *Bruton*.[38] The circumstantial evidence which linked the defendant to the confession was not as compelling as an explicit mention of the defendant within the body of the confession.[39] Accordingly, the Court expressed confidence that a properly instructed jury would be able to disregard the confession with reference to the non-confessing defendant.[40] The Court declined to rule, however, about whether the substitution of a neutral pronoun or symbol for the defendant's name within a confession would satisfy *Bruton*.[41] The Court limited its ruling to the redaction of co-defendant confessions which eliminate any reference to the defendant's existence.[42]

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32. 481 U.S. 200 (1987).

33. *See id.* at 203.

34. *See id.* at 204.

35. *See id.*

36. *See id.* at 203 n.1 ("I got in the car and Kareem told me he was going to stick up this crib, told me the place was a numbers house.").

37. *See id.* at 206.

38. *See id.* at 207-08.

39. *See id.* at 208 (holding that "[w]here the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence").

40. *See id.* at 208-09.

41. *See id.* at 211 n.5 ("We 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.").

42. *See id.* at 211.

III. *GRAY V. MARYLAND*

In *Gray v. Maryland*,[43] the Court revisited the issue left open by *Richardson*. The Court was asked to rule upon the admissibility at a joint trial of a co-defendant's redacted confession, in which the defendant's name had been replaced with the word "deleted" or a similar symbol.[44] The Court considered extending the Bruton rule to situations where the non-confessing defendant is not specifically named in the confession of a co-defendant, but his existence is easily inferred.[45]

Petitioner Gray was convicted of the involuntary manslaughter of Stacey Williams after a joint trial in the Circuit Court of Baltimore.[46] The trial court found that Gray and six other group members, including his co-defendant Anthony Bell, participated in beating Williams.[47] Bell confessed to authorities that he, Gray, and another individual beat Williams to death.[48] At trial, the prosecutor introduced this confession as evidence against Bell.[49]

The trial judge permitted this inclusion with the stipulation that the confession be redacted to remove any mention of Gray.[50] The prosecutor revised the confession and had the confession read aloud in open court.[51] Wherever Gray's name had previously appeared in the confession, the word "deleted"[52] was

43. 118 S. Ct. 1151 (1998).

44. *See id.* at 1153 (noting that *Gray* "differs from *Bruton* in that the prosecution . . . redacted the co-defendant's confession by substituting for the defendant's name in the confession a blank space or the word 'deleted'").

45. *See id.* at 1157.

46. *See* Gray v. Maryland, 667 A.2d 983, 984 (Md. Ct. Spec. App. 1995).

47. *See id.* at 984.

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.*

52. *See id.* (noting also that a copy of the confession was introduced into evidence with white spaces or blanks marking the spaces where Gray's name had been removed).

inserted. The jury convicted both defendants of involuntary manslaughter.[53]

The Maryland Court of Special Appeals overturned Gray's conviction.[54] The court held that the Bruton rule prohibits the inclusion of a co-defendant's confession, where the confession implicates the non-confessing defendant.[55] According to the court, the jury could easily infer that the word "deleted" referred to Gray.[56] Because Gray had no opportunity to cross-examine the confessor, he was denied his Sixth Amendment Confrontation Clause privileges.[57] Despite the fact that the Gray's name was removed, the confession still impermissibly prejudiced the jury.[58]

The Maryland Court of Appeals reversed this holding and reinstated Gray's manslaughter conviction.[59] The court relied upon the language of *Richardson*, in which the Supreme Court stated that *Bruton* was a "narrow" holding.[60] The court held that a Bruton rule violation occurs only "when a co-defendant's confession, either facially, or by compelling and inevitable inference, inculpates a non[-]confessing defendant."[61] It was also decided that a jury may infer that "deleted" referred to Gray but that the inference was neither compelled nor inevitable.[62] Accordingly, a jury instruction to ignore the confession with regard to Gray's verdict constituted sufficient protection.[63]

The Supreme Court of the United States granted certiorari and reversed the holding of the Maryland Court of Appeals.[64]

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53. *See id.* at 985.

54. *See id.* at 992.

55. *See id.* at 990 (stating that the "mere deletion of appellant's . . . name did not effectively make Bell's statement non-incriminating as to appellant").

56. *See id.*

57. *See* U.S. CONST. amend. VI; *supra* notes 5, 7 and accompanying text.

58. *See* Gray v. Maryland, 667 A.2d at 990-92 (holding that admitting the confession was not a harmless error, but rather a reversible error).

59. *See* Maryland v. Gray, 687 A.2d 660, 661 (Md. 1997).

60. *Id.* at 664 (quoting Richardson v. Marsh, 481 U.S. 200, 207 (1987)).

61. *Id.* at 668.

62. *See id.* at 668-69.

63. *See id.* at 669. "The jury was instructed not to use Bell's confession as evidence against Gray, and, in light of the strong presumption that the jury followed those instructions, Gray's Sixth Amendment confrontation right was adequately protected." *Id.*

64. *See* Gray v. Maryland, 118 S. Ct. 1151, 1151 (1998).

The Court held that the Bruton protective rule applied to confessions in which the proper name of the defendant was replaced with a blank, symbol, or some other sign of modification or deletion.[65] Although not all revisions will invariably lead a jury to identify the defendant, the Court ruled that, as a class, such confessions are inadmissible.[66] The Court refused to apply the *Richardson* qualifications to the Bruton rule because, despite the revised confession, the existence of the defendant could still be inferred even if his exact identity was not obvious.[67]

The Court reasoned that replacing the proper name of the defendant with a symbol or sign of deletion would call particular attention to that part of the confession.[68] As a result, the Court concluded that these redacted confessions, "[b]y encouraging the jury to speculate about the reference . . . may overemphasize the importance of the confession's accusation."[69] Redacted confessions similar to the one used in *Gray* not only fail to protect the identity of the defendant, but rather invite the jury to exaggerate the importance of the deletion. Thus, the deletion is directly accusatory because the jury may reasonably identify the defendant even without any circumstantial evidence linking him to the contents of the confession.[70]

The dissenting opinion, written by Justice Scalia, criticized the conclusion of the majority that the redacted confession was directly accusatory.[71] The dissent reasoned that nowhere in the "four corners" of the confession was Gray's name ever mentioned.[72] Thus, the jury had to infer his identity from the deletions in the confession. Inferences such as these have a far less inculpatory effect upon the defendant than having his proper

65. *See id.* at 1157.

66. *See id.* at 1156. "[W]e believe that, considered as a class, redactions that replace a proper name with an obvious blank, the word 'delete,' a symbol, or similarly notify the jury that a name has been deleted are similar enough to Bruton's unredacted confessions as to warrant the same legal results." *Id.*

67. *See id.*

68. *See id.* at 1155-56.

69. *Id.* at 1155.

70. *See id.* (comparing the redacted confession grammatically to other Bruton rule confessions).

71. *See id.* at 1159 (Scalia, J., dissenting).

72. *See id.* at 1160.

name included in the confession.[73] The dissent advocated the use of the exception to the Bruton rule found in *Richardson* because jury inferences are not as prejudicial as facially discriminatory confessions.[74] Accordingly, a jury instruction to disregard the confession with respect to the defendant's case should be sufficient.[75]

IV. THE CONSISTENCY OF *GRAY V. MARYLAND* WITH PRIOR PRECEDENT

A. *The Expectations Upon Juries*

In *Gray,* the Supreme Court again examined the competing interests at stake in Sixth Amendment Confrontation Clause cases.[76] Since *Delli Paoli*,[77] the Court has endeavored to determine the extent to which a jury may reasonably be expected to follow instructions. The Court recognized that there are limitations to evidence which a jury may reasonably be expected to disregard.[78] Evidence which directly inculpates a defendant is often the most difficult to disregard pursuant to instructions from a judge.[79] Inferentially incriminating evidence is not usually as difficult to ignore.[80] Courts, however, have recognized that some inferential evidence may be so prejudicial as to warrant its complete exclusion at trial.[81] *Gray v. Maryland* represents the Supreme Court's latest attempt to determine the permissibility of inferential evidence accompanied by jury instructions.

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73. *See id.*

74. *See id.* at 1159-60.

75. *See id.* at 1161 (suggesting that a limiting instruction to the jury in cases where the defendant's proper name is removed satisfies both the constitutional rights of the accused and the need for judicial and administrative efficiency).

76. *See* U.S. CONST. amend. VI; *see also supra* note 8 and accompanying text.

77. 352 U.S. 232 (1957); *see* discussion *supra* notes 9-15 and accompanying text.

78. *See* Garcia, *supra* note 7, at 402.

79. *See* Bruton v. United States, 391 U.S. 123, 135-36 (1968) (establishing the "powerfully incriminating" standard).

80. *See* Richardson v. Marsh, 481 U.S. 200, 208 (1987). "[W]ith regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget." *Id.*

81. *See* Gray v. Maryland, 118 S. Ct. 1151, 1157 (1998). "*Richardson* must depend in significant part upon the kind of, not the simple fact of, inference." *Id.*

1. Jury Instructions

As a general rule, juries are expected to follow the instructions of the presiding judge.[82] Without such an expectation, the jury system would make little sense.[83] This extends to witness' testimony introduced at a joint trial. The testimony of a witness at a joint trial is not assumed to be "against" a defendant if the jury is instructed to only consider the evidence against a co-defendant.[84] Thus, despite the fact that the witness may also inculpate the defendant, the evidence will be admissible, provided there is a proper limiting jury instruction.

In some cases, the prejudicial effect of inadmissible evidence against a defendant is so great that a jury instruction cannot cure the impact.[85] This was first recognized in *Jackson v. Denno*,[86] in which the Court determined that the reading of an inadmissible coerced confession prejudiced the jury too severely for a limiting instruction to correct.[87] This decision paved the way for the Bruton rule. The *Bruton* Court held that a confession of one co-defendant which inculpates the other defendant is too prejudicial, despite any corrective jury instructions.[88]

The Court limited the *Bruton* ruling, however, in *Richardson v. Marsh*.[89] According to the holding in *Richardson,* a jury may be trusted to follow limiting instructions where the confession of the co-defendant has been redacted to exclude any reference to the existence of the defendant.[90] If circumstantial evidence is introduced linking the defendant with the confession, then the jury is only inferring that the defendant's actions were tied to those outlined in the confession. This inference does not

82. *See Richardson*, 481 U.S. at 206; *see also* Harris v. New York, 401 U.S. 222 (1971) (stating that proper jury instructions may remedy the inclusion of normally inadmissible evidence at trial).

83. *See* Delli Paoli v. United States, 352 U.S. 232, 242 (1957); *see also supra* note 21 and accompanying text.

84. *See Richardson*, 481 U.S. at 206.

85. *See* Garcia, *supra* note 7, at 402.

86. 378 U.S. 368 (1964).

87. *See id.* at 382-83.

88. *See* Bruton v. United States, 391 U.S. 123, 137 (1968); *see also supra* notes 22-23 and accompanying text.

89. 481 U.S. 200, 211 (1987).

90. *See id.*

prejudice the jury to such an extent that a remedial instruction by the presiding judge would fail to cure its effect.[91]

In *Gray*,[92] the Court considered the effect of a redacted confession which deleted the proper name of a non-confessing co-defendant.[93] The Court held that a jury would almost invariably link the redaction directly to the non-confessing co-defendant.[94] Further, the Court held that this association would unduly prejudice the co-defendant, despite any limiting instructions.[95] The Court assumed that a jury would be less apt to forget evidence which was directly or obviously linked to the defendant.[96] Thus, where the confession of a co-defendant directly or obviously refers to a non-confessing co-defendant, the Bruton rule will apply and limiting instructions will fail.[97] Where a link to the non-confessing co-defendant is not obvious, as in *Richardson*, the Court, however, will not apply the limited ruling in *Bruton,* and jury instructions will be sufficient.

2. Degree of Inference v. Invitation to Speculate

The degree to which a jury may associate a redacted confession with a non-confessing co-defendant is of tantamount importance to any consideration of the reasonable expectations to place upon juries. Prior to *Gray*, the federal appellate circuits were split on the issue of how to classify inferences arising out of the use of co-defendant confessions at joint trial. In order to determine whether an inference impermissibly prejudiced a non-confessing co-defendant, the circuits developed two distinct tests: (1) the "degree of inference," and (2) the "invitation to speculate."[98]

Under the "degree of inference" test, the court must determine, on a case-by-case basis, the likelihood that a jury will

91. *See id.* at 208. "In short, while it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so . . . ." *Id.*

92. 118 S. Ct. 1151 (1998); *see supra* notes 64-75 and accompanying text.

93. *See Gray*, 118 S. Ct. at 1155.

94. *See id.*

95. *See id.* at 1156.

96. *See id.* at 1157.

97. *See id.*

98. *See* Ritter, *supra* note 6, at 899.

link the redacted confession to the non-confessing co-defendant.[99] The court's determination must be performed before the confession is introduced and may include a consideration of all the other evidence in the case.[100] Thus, the court will consider whether circumstantial or extrinsic evidence would aid the jury in linking the confession to the non-confessing co-defendant. In measuring the risk of linkage, trial courts are to "consider the degree of the inference the jury must make to connect the defendant to the statement and the degree of risk that the jury will make that linkage despite a limiting instruction."[101]

The "degree of inference" test is quite unwieldy. The test requires the court to consider the impact evidence may have on a jury before that evidence is even offered by litigants.[102] Further, by determining the admissibility of confessions on a case-by-case basis, no clear precedent may be established which would guide future prosecutorial redactions.[103] Although the "degree of inference" test offers some degree of flexibility, it is cumbersome in application.

The "invitation to speculate" test, on the other hand, deals exclusively with the redaction itself. The court must determine whether the redaction impermissibly informs the jury that the proper names of co-conspirators have been intentionally redacted from the confession.[104] The court will not consider the effect which circumstantial evidence may have upon jury linkage.[105] Rather, the court will look only to the four corners of the confession to determine whether it would alert the jury to the changes made by the prosecutors.[106]

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99. *See id.* The author cites to the test first formulated in *Foster v. United States* which the court found was mandated by *Bruton v. United States*. *See id.* (citing Foster v. United States, 548 A.2d 1370, 1379 (D.C. 1988)); *see also infra* text accompanying note 101.

100. *See* Ritter, *supra* note 6, at 907 (questioning whether the "degree of inference" test is workable).

101. *Foster*, 548 A.2d at 1379.

102. *See* Ritter, *supra* note 6, at 907.

103. *See, e.g.*, United States v. Vasquez, 874 F.2d 1515 (11th Cir. 1989); People v. Fletcher, 917 P.2d 187 (Cal. 1996); People v. Cruz, 521 N.E.2d 18 (Ill. 1988); People v. Banks, 475 N.W.2d 769 (Mich. 1991).

104. *See* Ritter, *supra* note 6, at 908.

105. *See id.* at 908-10.

106. *See* United States v. Jones, 101 F.3d 1263, 1270 (8th Cir. 1996).

The "invitation to speculate" test is easier to apply than the "degree of inference" test. Under the "invitation to speculate" test, the court may make per se rules regarding the use of specific types of redacted confessions.[107] Certain verbiage may be categorically banned from co-defendant confessions, and other language may be deemed admissible.[108] Unfortunately, this approach does not offer the flexibility inherent within a case-by-case analysis. By considering only the four corners of the document, the court extends no degree of protection to defendants who are circumstantially implicated in the confession of a co-defendant.[109] Thus, the "invitation to speculate" test, although more efficient and workable, fails to provide a safeguard for circumstantially inculpated defendants.

In *Gray*, the Supreme Court utilized the "invitation to speculate" test to determine whether the redacted confession was impermissibly prejudicial. The Court found that "[t]he inferences at issue here involve statements that, despite redaction, refer clearly and directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial."[110] In essence, the holding states that revised confessions in which the proper name of a defendant is replaced with a deletion or symbol are, as a class, substantially prejudicial.[111] This per se prohibition of symbols, which alert the jury to a redaction, is consistent with the elements and methodology of the "invitation to speculate" test because it considers only the effect of the redaction itself.

Indirectly, the Court dealt a crippling blow to the "degree of inference" test. In *Gray*, the Court conceded "that the jury must use inference to connect the statement in [a] redacted confes-

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107. *See* Ritter, *supra* note 6, at 912.

108. *See id.*

109. *See id.* (arguing that the "invitation to speculate" test offers no protection to defendants who are linked circumstantially to the redacted confession or when the jury is not told of a redaction).

110. Gray v. Maryland, 118 S. Ct. 1151, 1157 (1998).

111. *See id.* at 1155. "Redactions that simply replace a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration . . . leave statements that, considered as a class, so closely resemble Bruton's unredacted statements that . . . the law must require the same result." *Id.*

sion with [a] defendant."[112] The Court, however, held that the confession in *Gray* calls for a direct inference, based on the wording of the confession itself. By contrast, the confession in *Richardson* "became incriminating 'only when linked with evidence introduced later at trial.'"[113] Because the *Richardson* Court admitted the confession, despite the fact that circumstantial evidence linked it to the defendant, the *Gray* decision implies that *Richardson* utilized the "invitation to speculate" test.[114] Had the Court used the "degree of inference" test, the confession in *Richardson* would not have been admitted because it became incriminating in light of the other evidence introduced at trial. The *Gray* decision effectively asserts that the Court is following a clear precedent of looking only to inferences that may be drawn from the confession itself.[115]

B. *The Balancing of Efficiency and Fundamental Fairness*

The Supreme Court has not based its holdings in co-defendant confession cases exclusively on the prejudicial impact upon juries. Rather, the Court has sought to balance the competing interests of trial efficiency and fundamental fairness to defendants in light of the prejudicial impact of inadmissible evidence.[116] The Court has recognized the compelling state interest in joint trials and has endeavored to weigh that interest against the defendant's constitutional rights.[117] *Gray v. Maryland* tips the scales back toward the protection of defendants to the detriment of judicial efficiency.

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112. *Id.* at 1156.

113. *Id.* at 1157 (quoting in part Richardson v. Marsh, 481 U.S. 200, 208 (1987)).

114. *See id.* (stating that the confession "'facially incriminat[es]' the codefendant").

115. *See id.*

116. *See* James R. Lucas, *Criminal Joinder and Severance*, 57 INTER ALIA 17, 17 (1991).

117. *See Richardson*, 481 U.S. at 210 (noting that confessions are essential in realizing society's interest or convicting those who violate the law); Christiane Elyn Cargill, People v. Fletcher, 24 PEPP. L. REV. 1127, 1130-31 (1997) (discussing the efficiency of joint trials versus the protection of a defendant's right under the Confrontation Clause).

1. The Administrative and Prosecutorial Efficacy of Joint Trials

Public policy adamantly favors joint trials. Both from an administrative and prosecutorial perspective, joint trials ensure efficiency.[118] Because of the tactical, social, and economic advantages of utilizing this adjudicatory method, joint trials are enjoying immense popularity both at federal and state levels.[119] Although some scholars have argued that the efficiency justifications for joint trials are merely illusory,[120] there is no denying that the joinder of criminal proceedings has become deeply rooted within the modern American justice system.[121]

Joint trials are a highly favored tactical weapon of prosecutors. Rather than subscribing to the military rule of "divide and conquer," prosecutors have realized that the rule of the courtroom is "combine and conquer."[122] At trial, multiple defendants will attempt to exculpate themselves, often by prejudicing the cases of their co-defendants.[123] In most cases, there is no defense team, rather, each defendant retains individual counsel. Whereas the prosecution has the luxury of organizing a coordinated attack, the defense is subject to infighting and disorganization.[124]

Further, the verdicts in joint trials are more apt to be consistent because one jury is deciding the cases of two or more defendants.[125] In separate trials, different juries will consider

118. *See* United States v. O'Bryant, 998 F.2d 21, 25 (1st Cir. 1993) (stating that joint trials prevent inconsistent verdicts and conserve judicial and prosecutorial resources).

119. *See* Lucas, *supra* note 116, at 17.

120. *See* Robert O. Dawson, *Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices*, 77 MICH. L. REV. 1379 (1979) (arguing that the efficiency of joint trials is illusory and significantly outweighed by the prejudice done to co-defendants); *see also* United States v. Baker, 10 F.3d 1374, 1389 (9th Cir. 1993) (concluding that "where trials of [great] magnitude are involved, judicial economy [would] often be better served by severance").

121. *See* William G. Dickett, *Sixth Amendment—Limiting the Scope of* Bruton, 78 J. OF CRIM. L. & CRIMINOLOGY 984, 992 (1988) (noting that "joint trials have been utilized in almost one-third of the federal criminal trials in the past five years.").

122. *See* Lucas, *supra* note 116, at 17.

123. *See* Dawson, *supra* note 120, at 1422-38 (discussing conflicting trial strategies and antagonistic defenses among co-defendants at a joint trial).

124. *See id.* at 1430.

125. *See* Richardson v. Marsh, 481 U.S. 200, 210 (1987).

discrete evidence and thus may arrive at totally incongruous results.[126] Sharp contrasts in verdicts or sentencing, especially when the defendants are known compatriots, are embarrassing both to the prosecution and to the court.[127] From a policy perspective, it is difficult to explain to the public why two juries arrived at different conclusions from substantially similar facts. Joint trials help to obviate that risk by assuring that only one jury will hear all the relevant facts related to the multiple defendants.[128]

Joint trials are also easier on witnesses who would otherwise be called to testify at multiple trials, depending upon the number of defendants involved.[129] Often, prosecutors have the unenviable task of compelling reluctant or hostile witnesses to testify at just one trial.[130] The burden of guaranteeing the attendance of such witnesses at multiple trials is an almost insurmountable task. Foregoing the use of joint trials will impose a duty upon the prosecution to account for the whereabouts of required witnesses for a longer duration of time. Separate trials may take years to complete, and, during this time, the prosecution must keep track of and be able to compel necessary witnesses to testify at trial.[131]

Even an obliging witness would face considerable hardship absent the utilization of joint trials. Between travel, time away from work, and extensive preparation involved in testifying, the use of separate trials will impose a great burden upon required

126. *See id.* "Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit." *Id.*

127. *See* United States v. Bruton, 391 U.S. 123, 143 (1968) (White, J., dissenting). "The unfairness of this is confirmed by the common prosecutorial experience of seeing co-defendants who are tried separately strenuously jockeying for position with regard to who should be the first to be tried." *Id.*

128. *See* United States v. Cardascia, 951 F.2d 474, 482-83 (2d Cir. 1991).

129. *See Bruton*, 391 U.S. at 143 (White, J., dissenting); *see also Richardson*, 481 U.S. at 210 (discussing the inequity of "requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying" in separate trials).

130. *See* Ohio v. Roberts, 448 U.S. 56, 75 (1980) (discussing a prosecutor's unsuccessful attempt to secure a witness after issuing five subpoenas and conducting a voir dire in hopes of acquiring the location of the witness).

131. *See id.* at 71 (stating that the prosecution must make reasonable efforts to locate witnesses).

witnesses.[132] This hardship is particularly compelling when one considers that, in many cases, these witnesses are the victims of the defendants, and these victims must testify repeatedly to painful prior events.[133] Traditionally, the protection and accommodation of innocent witnesses has been of tantamount importance to the courts and offers one of the most compelling justifications for the preservation of joint trials.[134]

Finally, joint trials conserve judicial and economic resources by clearing multiple cases from the courts' dockets in utilizing one adjudicatory hearing.[135] From a public policy perspective, this may be the most important reason of all. Not only do cases move more efficiently through the criminal justice process, but public tax dollars are saved when there is a joinder of separate trials. A joint trial conserves the funds spent on witness and juror reimbursement, court reporter fees, document reproduction, and a myriad of other trial related expenses.[136] Furthermore, joint trials free prosecutors and judges, both on governmental payrolls, to try other cases.[137] This conserves resources and reduces the need to enlarge staffs.

2. Attempts at Equilibrium: Efficiency and Fundamental Fairness Prior to *Gray v. Maryland*

Recognizing their own stake in the continued utilization of joint trials, prosecutors have attempted to avoid situations which mandate severance. When prosecutors choose to use a co-defendant confession, they must skate a thin line between man-

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132. *See* Dawson, *supra* note 120, at 1384.

133. *See* State v. Duncan, 250 N.W.2d 189, 192-93 (Minn. 1977) (emphasizing the trauma created by requiring certain witnesses to testify at multiple trials).

134. *See* Dawson, *supra* note 120, at 1384 & n.20 (citing Parker v. United States, 404 F.2d 1193 (9th Cir. 1968)).

135. *See id.* at 1385; *see also* Richardson v. Marsh, 481 U.S. 200, 210 (1987) (emphasizing the efficiency and fairness of joint trials).

136. *See* United States v. Johnson, 820 F.2d 1065, 1070 (9th Cir. 1987) (stating that judicial economy is the court's dominant concern); United States v. Buljubasic, 808 F.2d 1260, 1263 (7th Cir. 1987) (holding that joint trials "reduce the expenditure of judicial and prosecutorial time.").

137. *See* United States v. Coleman, 22 F.3d 126, 132 (7th Cir. 1994) (holding that "judicial economy and convenience are the chief virtues of joint trials—i.e., joinder often avoids expensive and duplicative multiple trials"). *But see* Dawson, *supra* note 120, at 1385-87 (arguing that the judicial economy of joint trials is illusory).

dated severance and the permissible introduction of evidence at a joint trial. To ensure the continued use of joint trials, prosecutors have developed creative formats for introducing co-defendant confessions.[138] In response to these attempts, courts have struggled to find an effective balance between the public policy arguments promulgated by the prosecution and the concern for fundamental fairness to the accused.[139]

First, prosecutors attempted to admit co-defendant confessions by proposing that judges issue appropriate jury instructions. These instructions included a mandate that the jury forbear the use of the confession in determining the guilt of the non-confessing co-defendant. In *Delli Paoli,* the Court recognized that juries would often have a difficult time disregarding evidence pursuant to instructions from a judge.[140] Judge Learned Hand, who had affirmed Delli Paoli's conviction upon his appeal to the Second Circuit Court of Appeals, conceded that a limiting instruction is a "'recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's.'"[141] Nonetheless, Judge Hand, and later the Supreme Court, affirmed the conviction, implying that sometimes public policy overrides individual liberty.

Later, the Supreme Court reversed itself in *Bruton v. United States,* holding that jury instructions are insufficient to countermand the prejudice done to non-confessing co-defendants.[142] The *Bruton* Court undermined efficiency interests by favoring a staunch protection of constitutional privileges. The Court considered constitutional fairness more important than administra-

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138. *See* Ritter, *supra* note 6, at 857-59 (discussing redaction, omission of co-defendant confessions, and severance).

139. *See* Dickett, *supra* note 121, at 1008 (balancing judicial economy and fundamental fairness for the accused).

140. *See* 352 U.S. 232, 243 (1956) (stating that "[t]here may be practical limitations to the circumstances under which a jury should be left to follow instructions"); *see also supra* notes 19-21 and accompanying text.

141. *Id.* at 247 (Frankfurter, J., dissenting) (quoting Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932)).

142. *See* Bruton v. United States, 391 U.S. 123, 135 (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." *Id.* at 137.

tive concerns.[143] The effect of the inadmissible evidence against Bruton was so damaging that, despite any administrative practicalities, he was entitled to a reversal of his conviction.[144] The resulting judicial and administrative inefficiency was simply the cost of providing "'fundamental principles of constitutional liberty.'"[145]

Justice White, in his dissent, warned of the burdens which the implementation of the Bruton rule would have upon American courts.[146] He stated that, pursuant to the Bruton rule, prosecutors would have to try multiple defendants separately or forego the use of confessions at trial.[147] In an attempt to ameliorate this harsh result, the Court in *Richardson* allowed certain redacted confessions to be allowed at trial without risking a reversible error.[148] These confessions, which were redacted so as to make no mention of the existence of the other co-defendants, were deemed to be less prejudicial to the interests of those co-defendants.[149] Thus, the interest in judicial efficiency outweighed the lesser prejudice exerted upon individual constitutional privileges. The result comports with the familiar maxim that "'[a] defendant is entitled to a fair trial, but not a perfect one.'"[150] Where the nature and extent of the prejudice does not violate fundamental notions of fairness, the Court will consider administrative concerns.

3. *Gray v. Maryland:* A Tentative Step Towards Fundamental Fairness

In *Gray v. Maryland*, the Supreme Court had to determine whether to expand the efficiency protections set forth in *Richardson* or to retreat back to a stricter interpretation of

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143. *See id.* at 134-35.

144. *See id.* at 136.

145. *Id.* at 135 (quoting People v. Fisher, 164 N.E. 336, 341 (N.Y. 1928)).

146. *See id.* at 143 (White, J., dissenting).

147. *See id.* "If deletion is not feasible, then the Government will have to choose either not to use the confession at all or to try the defendants separately." *Id.*

148. *See Richardson*, 481 U.S. at 211.

149. *See id.* at 208 (discussing the implications of a confession incriminating on its face and confessions requiring evidential linkage to become incriminating).

150. *Bruton*, 391 U.S. at 135 (quoting Lutwak v. United States, 344 U.S. 604, 619 (1953)).

Bruton.[151] The Court held that the policy considerations imbedded within the *Richardson* holding were not properly applicable.[152] Actually, Justice Breyer's majority opinion is most notable for what it does not contain: any discussion of the importance of judicial and administrative efficiency. Instead, the holding summarily dismisses efficiency considerations by stating, "[n]or are the policy reasons that *Richardson* provided in support of its conclusion applicable here."[153]

In *Gray*, the majority opinion focused on the prejudice done to a defendant when a co-defendant confession inculpating the non-confessing defendant is introduced at trial. Because the confession in *Gray* "facially incriminated" the non-confessing co-defendant, the Court ruled that, as a class, co-defendant confessions redacted to remove the name, but not the existence of a non-confessing co-defendant, are "powerfully incriminating."[154] The determination that such confessions, as a class, are "powerfully incriminating" entitles the non-confessing defendant to Bruton rule protection.[155]

Once the Court determines that a defendant's constitutional liberty has been invaded by "powerfully incriminating extrajudicial statements of a co-defendant," it will not employ a balancing test.[156] Thus, matters of judicial and administrative efficiency are necessarily subjugated to the Court's protection of fundamental fairness. This explains why the *Gray* decision is almost entirely devoid of any mention of efficiency interests. A finding that a confession is powerfully incriminating to a non-confessing co-defendant forecloses any implementation of a balancing test.[157]

In his dissent, Justice Scalia disagreed that a confession which was redacted to include the words "deleted" or obvious blank spaces was powerfully incriminating.[158] He asserted that

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151. *See* 118 S. Ct. 1151 (1998).
152. *See id.* at 1157.
153. *Id.*
154. *Id.* at 1156.
155. *See id.* at 1157. "[W]e hold that the confession here at issue, which substituted blanks and the word 'delete' for the respondent's proper name, falls within the class of statements to which *Bruton's* protections apply." *Id.*
156. Bruton v. United States, 391 U.S. 123, 135 (1968).
157. *See* Ritter, *supra* note 6, at 870-71.
158. *See Gray*, 118 S. Ct. at 1159-60 (Scalia, J., dissenting). "The Court should

such confessions incriminate only by inference similar to the confession in *Richardson*.[159] Despite the fact that the inference involved in *Gray* was easier for the jury to make than the one involved in *Richardson*, the confession itself was not facially incriminating.[160] Thus, petitioner Gray should not be entitled to Bruton rule protection, but rather he should be subject to the balancing test established in *Richardson*.[161]

Justice Scalia bemoaned the Court's extension of Bruton rule protection to name-redacted confessions, which he argued were not facially incriminating.[162] He warned that extending the Bruton rule "to name-redacted confessions 'as a class' will seriously compromise 'society's compelling interest in finding, convicting, and punishing those who violate the law.'"[163] Because the confession incriminates only by inference, its prejudicial effects must be weighed against society's interest in joint trials and the use of legally obtained confessions.[164] Citing his majority opinion in *Richardson*, Scalia cautioned that "'foregoing [the] use of co-defendant confessions or joint trials was 'too high' a price to insure that juries never disregard their instructions.'"[165]

Nonetheless, the *Gray* Court squarely aligned itself with the protection of the fundamental rights of the accused. Deciding that name-redacted confessions were, "as a class," substantially prejudicial silenced the horn of retreat which the Court had been sounding ever since the *Richardson* decision.[166] *Gray* rep-

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have stopped with its concession: the statement 'Me, deleted, deleted, and a few other guys' does not facially incriminate anyone but the speaker." *Id.* at 1159.

159. *See id.* Justice Scalia conceded that confessions which redact the defendant's name are more incriminating than those which omit any reference to his existence. However, he declined to find that name redactions were "powerfully incriminating." *See id.* at 1160.

160. *See id.*

161. *See id.* at 1161. "I do not understand the Court to disagree that the redaction itself left unclear to whom the blank referred. That being so, the rule set forth in *Richardson* applies, and the statement could constitutionally be admitted with [a] limiting instruction." *Id.* (footnote omitted) (citation omitted).

162. *See id.* at 1159.

163. *Id.* at 1160 (quoting Moran v. Burbine, 475 U.S. 412, 426 (1986) (citation omitted)).

164. *See id.* at 1160-61.

165. *Id.* at 1160 (quoting Richardson v. Marsh, 481 U.S. 200, 209-10 (1987)).

166. *Id.* at 1156.

resents a return to the concept of fundamental fairness to the accused. This return, however, to constitutional protectionism bears with it a resulting loss of administrative and judicial efficiency.[167]

V. THE ADMINISTRATIVE AND JUDICIAL RAMIFICATIONS OF *GRAY V. MARYLAND*

The ruling in *Gray v. Maryland* imposes a substantial burden upon trial courts and prosecutors. In order to assuage the prejudicial effects upon juries, prosecutors are now faced with four unappealing options. They may revise confessions to eliminate any mention of the existence of the co-defendants, utilize multiple juries or bifurcated trials, forego the use of co-defendant confessions at joint trials, or try each defendant separately.[168] Each of these options either severely complicates the trial process or weakens the case against the confessing defendant.

A. *Redaction*

In the wake of *Gray,* the first option open to prosecutors is to submit redacted confessions which comply with the ruling in *Richardson.*[169] The prosecutor must remove not only the proper name, but also any symbols or blanks which may alert the jury that the co-defendant's name has been redacted.[170] In *Gray*, for example, the answer to the question of who beat Stacey was: "[m]e, [deleted], [deleted], and a few other guys."[171] The Court concluded that this redaction was improper, but hinted in dicta that a redaction to "[m]e and a few other guys" would have adequately protected petitioner Gray.[172] Such a redaction would be fundamentally similar to the one in *Richardson v. Marsh.*[173]

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167. *See* David E. Seidelson, *The Confrontation Clause and the Supreme Court: Some Good News and Some Bad News*, 17 HOFSTRA L. REV. 51, 69-70 (1988).

168. *See* Garcia, *supra* note 7, at 412-15.

169. *See id.* at 415-21 (discussing the requirements of redaction after Richardson v. Marsh, 481 U.S. 200 (1987)).

170. *See Gray*, 118 S. Ct. at 1156.

171. *Id.* at 1158.

172. *See id.* at 1157.

173. *See id.* "*Richardson* itself provides a similar example of this kind of redaction.

Although the Court makes clear that a *Richardson* redaction was possible in *Gray,* the problem with this approach is that such revisions are not always possible. Written confessions are not often conveniently phrased to allow the redaction of the non-confessing co-defendant's name, while maintaining the fact that the confessor participated with others in the act.[174] For example, had the confession in *Gray* provided only "Gray and me beat Stacey," a redaction would read "Me beat Stacey." Thus, redactions are not always possible because confessions are sometimes and often written without considering the later need for redaction. The prior example demonstrates how awkward and unintelligible such redactions may be.

Certain crimes require the existence and participation of accomplices. Justice Scalia warned that for inchoate charges "redaction to delete all reference to a confederate would often render the confession nonsensical."[175] In conspiracy trials, for example, the removal of the existence of co-conspirators makes the confession entirely meaningless.[176] For many cases which rely upon written confessions, redaction is not a viable option.

Even if the confession could be properly edited to exclude any allusion to the existence of a co-defendant, there is considerable debate over the propriety of such a redaction. The majority opinion, in dicta, hinted that a jury need not be informed that a confession has been edited.[177] The dissent stated, however, that the Court had "never before endorsed—and ought not endorse—the redaction of a statement by some means other than the deletion of certain words, with the fact of the deletion shown."[178] It remains to be seen whether the Court will require some indication to the jury that a particular confession

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The confession there at issue had been 'redacted to omit all reference to [the] respondent—indeed, to omit all indication that anyone other than Martin and Williams participated in the crime' . . . ." *Id.* (quoting Richardson v. Marsh, 481 U.S. 200, 203 (1987)).

174. *See* Ritter, *supra* note 6, at 914-17.

175. *Gray,* 118 S. Ct. at 1160 (Scalia, J., dissenting).

176. *See id.*

177. *See id.* at 1157. The Court noted that the confession in *Richardson* did not violate the fundamental rights of the co-defendants because it had been redacted to omit all reference to the non-confessing co-defendant and *"it did not indicate that it had been redacted." See id.* (emphasis added).

178. *Id.* at 1160 (footnote omitted).

has been redacted and to what extent that disclosure may prejudice a non-confessing co-defendant.

Oral confessions offer some degree of relief from the quandary. Oral confessions include all inculpatory statements made to investigating officers which are neither transcribed at the time they are spoken nor signed by the confessing party.[179] In confessions made to law enforcement personnel, the prosecutor will often call the officer who has taken the confession to the witness stand.[180] Without an exact transcript of the confession, the officer has more freedom to paraphrase or to answer carefully phrased questions which implicate only part of the confession.[181] Thus, a skilled prosecutor can dance around Bruton rule requirements and still preserve the efficacy of the confession against the confessing co-defendant.

A current trend in law enforcement is the utilization of video and audio tapes to record confessions.[182] These methods raise peculiar Bruton rule problems in the wake of the *Gray* decision. At trial, not only will the jury listen to what the confessing co-defendant says, but also how he says it. Thus, the editing of tapes to exclude reference to a non-confessing co-defendant will affect how the jury appraises the demeanor of the confessor.[183] This can affect the level of veracity and comprehensiveness which the jury ascribes to the confession.[184]

Not only do taped confessions face these peculiar problems, but they also raise the problems which plague the redaction of written confessions. For example, if a tape is edited, should the jury be made aware of the redaction or should the revised con-

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179. *But see* Miranda v. Arizona, 384 U.S. 436, 467 (1966) (establishing that oral confessions may be inadmissible if the confessor is not apprised of his right to remain silent).

180. *See* Heath S. Berger, *Let's Go to the Videotape: A Proposal to Legislate Videotaping of Confessions*, 3 ALB. L.J. SCI. & TECH. 165, 174 (1993).

181. *See id.* at 174-75 (commenting on the inaccuracies and discrepancies of oral confessions which are later transcribed).

182. *See* Gregory P. Joseph, *Video Tape Evidence in the Courts—1985*, 26 S. TEX. L.J. 453, 466 (1985).

183. *See* Benjamin V. Madison, III, Note, *Seeing Can Be Deceiving: Photographic Evidence in a Visual Age—How Much Weight Does it Deserve?*, 25 WM. & MARY L. REV. 705, 733 (1984) (proposing that videotapes do not always accurately depict the demeanor of a witness).

184. *See* Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 546 n.195 (1992).

fession be presented to the jury as complete and uncensored? All editing of tapes must be disclosed to the court, but whether that information is passed along to the jury is a matter of judicial discretion.[185] In his dissent, Justice Scalia cautions against the introduction of a revised confession without alerting the jury that it has been edited.[186] Thus, in the wake of *Gray*, it remains ambiguous whether the introduction of a redacted taped confession would require some general indication to the jury that the confession has been edited.

Where possible, the use of a redacted confession is the most effective option for prosecutors, but the *Gray* ruling limits its future utility. By requiring prosecutors to remove anything inferentially incriminating to a non-confessing co-defendant from a confession, the Court placed far-reaching restrictions on written and recorded confessions.[187] The unrecorded oral confession may be the best option available to law enforcement personnel, who may then paraphrase the words of the defendant in open court so as to exclude any inferences to a co-defendant.[188] In this sense, the Court rewards the use of unrecorded investigative techniques, which are inherently the least reliable sources of evidence and which ordinarily would be afforded the least amount of evidentiary weight.

B. *Multiple Juries and Bifurcated Trials*

The second option is the use of multiple juries or a bifurcated trial.[189] Under a multiple jury approach, separate juries would hear only the evidence which is relevant to the defendant whose culpability they will assess.[190] During the introduction of a co-defendant confession, the jury deciding the fate of the other defendant may be removed from the courtroom or prohibited from viewing a written or otherwise recorded confes-

185. *See* Joseph, *supra* note 182, at 468 (stating that the editing of any videotaped evidence must be disclosed to the court).

186. *See* Gray v. Maryland, 118 S. Ct. 1151, 1160 (1998) (Scalia, J., dissenting).

187. *See id.* at 1156.

188. *See* Berger, *supra* note 180, at 174-75.

189. *See* Garcia, *supra* note 7, at 414-15.

190. *See* Note, Richardson v. Marsh: *Co-defendant Confessions and the Demise of Conformation*, 101 HARV. L. REV. 1876, 1889 (1988).

sion.[191] In a bifurcated trial, the evidence against the non-confessing defendants is introduced first.[192] Then, the jury decides guilt or innocence based upon that evidence.[193] Only after the jury has delivered its verdict will the prosecutor enter the confession into evidence, to be used solely against the confessor.[194]

To date, very few jurisdictions have experimented with the use of multiple juries at joint trials. Where the approach has been used, it has met with approval upon appeal.[195] Although the United States Supreme Court has yet to make an affirmative ruling on the constitutionality of utilizing multiple juries, numerous federal circuits and state appellate courts have affirmed convictions resulting from this method.[196] The reviewing courts generally have required a showing that the accused was specifically prejudiced at trial due to the use of multiple juries.[197] Consequently, very few convictions arising out of the use of multiple juries have been overturned.[198]

The use of bifurcated trials in co-defendant cases has been narrowly upheld by the Sixth Circuit. In *United States v. Crane*, the court held that a confessing co-defendant was not prejudiced by the use of a bifurcated trial.[199] In that case, all the evidence except for Crane's confession was introduced, and the jury deliberated on the guilt or innocence of Crane's co-de-

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191. *See id.*

192. *See* Annotation, *Propriety of Use of Multiple Juries at Joint Trial of Multiple Defendants in Federal Criminal Case*, 72 A.L.R. FED. 875, 876 (1985) (defining bifurcated trials).

193. *See* Garcia, *supra* note 7, at 415.

194. *See id.*

195. *See* Note, *supra* note 190, at 1892. "Although there is no explicit statutory authorization for the multiple jury technique, no federal or state appellate court has found a trial court's use of this technique to be unconstitutional." *Id.*

196. *See, e.g.*, United States v. Lewis, 716 F.2d 16 (D.C. Cir. 1983); United States v. Hayes, 676 F.2d 1359 (11th Cir. 1982); People v. Wardlow, 118 Cal. App. 3d, 375 (1981); People v. Brooks, 285 N.W.2d 307 (Mich. Ct. App. 1979).

197. *See* Annotation, *supra* note 192, at 878; David Carl Minneman, Annotation, *Propriety of Use of Multiple Juries at Joint Trial of Multiple Defendants in State Criminal Prosecution*, 41 A.L.R. 4th 1189, 1190 (1986).

198. *But see* United States v. Sidman, 470 F.2d 1158 (9th Cir. 1972) (overturning a conviction where the improper jury heard inculpatory remarks from a government witness).

199. 499 F.2d 1385 (6th Cir. 1974).

fendant, Brown.[200] After the jury found Brown not guilty, the prosecution introduced Crane's confession and asked that the jury deliberate upon all the evidence introduced at trial.[201] The jury did so and found Crane guilty.[202] The Sixth Circuit stated that since Brown was found not guilty, the jury's initial decision could not prejudice the subsequent verdict against Crane.[203] Had the jury convicted Brown, the court hinted that it would have unduly prejudiced their subsequent verdict with regard to Crane.[204] Following *United States v. Crane*, there is a valid concern that federal circuits will refuse to allow the bifurcation of joint trials.

The practical difficulties with both approaches are the same. Both are unwieldy and unpredictable.[205] It is difficult for prosecutors to refrain from inadvertently referencing evidence which one jury was not meant to hear or was not ready to hear.[206] Also, witnesses may be entirely unpredictable and allude to a confession without knowing the rules under which the court is operating.[207] Mistakes such as these may lead to reversible errors under *Gray*'s interpretation of the Bruton rule.[208] Further complicating matters is the physical layout of most American courtrooms. The majority of courts have only one jury box and one jury deliberation room. Given the importance of segregating juries and preventing interaction, judicial floor-plans often stifle the use of these approaches at trial.[209] As a result of both the practical and physical difficulties presented by these

200. *See id.* at 1387.

201. *See id.*

202. *See id.*

203. *See id.* at 1388. "Brown, whose case was tried first, was found not guilty. Consequently we do not believe that the jury drew an adverse inference from Brown's association with defendant as developed at trial." *Id.*

204. *See id.* "If a jury were to find one of the defendants guilty, there could be a serious question whether the same jury could later give his co-defendant the dispassionate and unprejudiced hearing required by due process and by the [S]ixth [A]mendment." *Id.*

205. *See* Garcia, *supra* note 7, at 414-15.

206. *See id.*

207. *See, e.g.*, United States v. Sidman, 470 F.2d 1158 (9th Cir. 1972).

208. *See* Garcia, *supra* note 7, at 414-15.

209. *See* Patrick Ingram, Note, *Censorship By Multiple Prosecution: "annihilation, by attrition if not conviction"*, 77 IOWA L. REV. 269, 305 (1991).

approaches, prosecutors and judges are very reluctant to utilize either a multiple jury technique or a bifurcated trial.[210]

C. *Foregoing the Use of Co-defendant Confessions at Trial*

The third option available to prosecutors is to forego the use of the co-defendant's confession at trial.[211] This approach may be used when other direct and circumstantial evidence incontrovertibly links the confessing co-defendant to the crime.[212] By foregoing the use of the confession, the co-defendants may be tried jointly in an efficient proceeding. Obviously, this is an effective approach only in cases where there is no need to rely upon the confession of the defendant.

The drawback of foregoing the use of a confession is readily apparent. Often, the confession is the single most compelling piece of evidence against a defendant.[213] To forego its use substantially weakens the case against the defendant, oftentimes making conviction impossible.[214] Thus, this option is only viable when a joint trial is adamantly desired and there is little prejudice done to the prosecution's case. Although this option will invariably protect against mistrials based upon the Bruton rule, the detriments of this option almost always outweigh its utility.

D. *Severance*

The final option left open by *Gray* is severance.[215] Severance simply means that the prosecutor foregoes utilizing a joint trial approach and tries each defendant separately.[216] In some

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210. *See* Garcia, *supra* note 7, at 414-15.

211. *See* Bruton v. United States, 391 U.S. 123, 143-44 (1968) (White, J., dissenting) (stating that where redaction is not possible, prosecutors must choose between severance and non-use of the confession).

212. *See* Garcia, *supra* note 7, at 413-14.

213. *See Bruton*, 391 U.S. at 139-40 (White, J., dissenting) (asserting that a defendant's confession is "probably the most probative and damaging evidence that can be admitted against him").

214. *See* Ritter, *supra* note 6, at 858 (asserting that foregoing the use of a defendant's confession is rarely a viable option).

215. *See* Garcia, *supra* note 7, at 412-13.

216. *See* FED. R. CRIM. P. 14.

cases, where one co-defendant may be prejudiced by evidence submitted against another co-defendant, a judge may mandate severance.[217] The Sixth Circuit has justified judicially imposed severance by stating, "[j]ustice, not judicial economy, is the first principle of our legal system. And under no circumstances may well-intentioned efforts to conserve judicial time be permitted to prejudice the fundamental right of a criminal defendant to a fair trial."[218]

Given the aforementioned advantages of joint trials, severance is utilized with great reluctance by prosecutors.[219] Separate trials often prove cumbersome for prosecutors, witnesses, and judges.[220] They are most often utilized where a confession is essential to the prosecution of one defendant but cannot be redacted to ameliorate the inculpatory effect on other defendants.[221] Though administratively inefficient, it is a useful vehicle for securing the constitutional rights of the accused.

Because the *Gray* decision imposes additional burdens upon the redaction of co-defendant confessions, there will be a corresponding increase in the amount of voluntary and judicially imposed severance. Although *Gray* certainly does not sound a death knell for the use of redaction, it will have a chilling effect upon the number of cases where redaction is a viable option. In many of those cases, severance, either voluntary or judicially imposed, will represent the only method available to the prosecutor.

VI. CONCLUSION

In *Gray v. Maryland*,[222] the Supreme Court further defined the requirements of the Bruton rule. The decision represents a hesitant step away from the strict interpretation of the rule that the Court expressed in *Richardson v. Marsh*.[223] Once again, the Court recognized that because some evidence is so

217. *See id.*
218. United States v. Crane, 499 F.2d 1385, 1388 (6th Cir. 1974).
219. *See* discussion *supra* footnotes 129-137 and accompanying text.
220. *See* Richardson v. Marsh, 481 U.S. 200, 210 (1987).
221. *See* Garcia, *supra* note 7, at 413.
222. 118 S. Ct. 1151 (1998).
223. 481 U.S. 200 (1987).

prejudicial to a co-defendant at a joint trial, remedial jury instructions are insufficient to protect the constitutional rights of the accused.[224] In *Gray*, however, this theory was applied to confessions which incriminate the non-confessing co-defendant only inferentially.[225] By recognizing that inferentially incriminating statements may be unduly prejudicial, the Court has placed the fundamental rights of the accused above public policy efficiency considerations.

Still, the *Gray* decision is limited in scope. The Court declined to extend Bruton rule protection to statements which are incriminating only in light of other evidence in the case. Rather, the statement itself has to be inferentially incriminating, irrespective of circumstantial and extrinsic evidence.[226] By adopting this "four corners" approach, the Court deprives the accused of protection from confessions which easily may be linked to him circumstantially. Although not stated within the *Gray* decision, the public policy efficiency concerns expressed in *Richardson* still influence the Court to the detriment of the accused.

Ultimately, the effects of *Gray* will be far-reaching, given the popularity of joint trials within both state and federal court systems.[227] In the wake of *Gray v. Maryland*, there will be an increase both in the number of redacted confessions presented to courts and in the amount of judicially-imposed severance. To avoid the repercussions of *Gray*, both trial courts and prosecutors will be far more amenable to the use of innovative trial formats, such as multiple juries and bifurcated trials. *Gray v. Maryland* tips the scales of justice away from judicial economy and towards the protection of the accused.

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224. *See Gray*, 118 S. Ct. at 1155.
225. *See id.* at 1157.
226. *See id.*
227. *See* discussion *supra* footnotes 116-37 and accompanying text.