

No Substitution for Justice: Solving the *Bruton* Problem Through Per Se Trial Severance

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I. INTRODUCTION

Imagine you have been charged with a crime. After pleading not guilty, your case proceeds to trial. Seated next to you at the defense counsel table is another person indicted for the same crime. He also pleaded not guilty, but, unlike you, he confessed to the police that you both committed the crime together. Your defense attorney motioned to sever the joint trial, but the presiding judge denied the motion. Instead, before admitting your codefendant's confession into evidence, the judge redacted your name and replaced it with the words "someone else." The judge also instructed the jury that the confession must only be used in assessing your codefendant's guilt or innocence, and not yours. Can you trust the jury not to apply your codefendant's confession against you? Are you capable of receiving a fair trial?

Individuals unlikely to find themselves on the wrong side of the criminal justice system are often willing to sacrifice seemingly minor constitutional liberties in favor of administrative efficiency. "This is because our system will tolerate the risk of unfairness so long as careful efforts are made to ensure that the inequities are kept in check."¹ But, when those "careful efforts" are based on illogical assumptions that create systemic unfairness, the cost of inequity is too high.² Unfortunately, this loss of liberty is all too frequently borne by those in the most vulnerable position in our society: the criminally accused. While the last fifty years of criminal procedure jurisprudence have been trending in a positive direction, much can still be achieved. This Article focuses on securing criminal defendants' Confrontation Clause rights through per se trial severance when their non-testifying codefendant's confession will be admitted as evidence.

1. *United States v. McLaurin*, 557 F.2d 1064, 1074 (5th Cir. 1977).

2. *Bruton v. United States*, 391 U.S. 123, 134–35 (1968) ("We still adhere to the rule that an accused is entitled to confrontation of the witnesses against him and the right to cross examine them We destroy the age-old rule which in the past has been regarded as a fundamental principle of our jurisprudence by a legalistic formula, required of the judge, that the jury may not consider any admissions against any party who did not join in them. We secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high." (quoting *People v. Fisher*, 164 N.E. 336, 341 (1928) (Lehman, J., dissenting))).

Defendants involved in the same crime are usually tried together.³ When one defendant confesses to the police and proceeds to trial, the prosecution will generally attempt to admit the out-of-court confession as evidence against the confessing defendant, even when the confession implicates other codefendants.⁴ If admitted, the judge will provide a limiting instruction to the jury, directing the jury to consider the confession in assessing the confessor's guilt, but not the guilt of the other codefendants.⁵ The fates of the other codefendants are left to the jurors' ability to correctly apply this instruction in their decision-making process.

The judiciary often assumes that a properly instructed jury is capable of ignoring references in a defendant's confession implicating the guilt of a non-confessing codefendant.⁶ This approach is, of course, widely understood to be a "naive assumption" which "all practicing lawyers know to be unmitigated fiction."⁷ Nevertheless, courts regularly rely on jurors to properly follow limiting instructions. If jurors apply the confession evidence from a non-testifying defendant against

3. *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 YALE L.J. 553, 553 (1965) ("The traditional rationale for permissive joinder is savings of time and money by the prosecution, the defendant, and the judicial system.").

4. Paul Marcus, *The Confrontation Clause and Co-defendant Confessions: The Drift from Bruton to Parker v. Randolph*, 1979 U. OF ILL. L. F. 559, 560 ("*Bruton* did not deter the use of confessions in joint defendant trials. Instead, prosecutors have been encouraged by a steady erosion of the *Bruton* rule . . .").

5. *See Bruton*, 391 U.S. at 125 n.2.

6. *See id.* at 129 (challenging the premise "that a properly instructed jury [can] ignore [a] confessor's inculcation of the non-confessor in determining the latter's guilt") (citing *Delli Paoli v. United States*, 352 U.S. 232, 247 (1957) (Frankfurter, J., dissenting))). The term "non-confessing codefendant" is used frequently in this Article and requires further explanation. The term is used simply to distinguish the two codefendants from one another in terms of one single piece of confession evidence; the confessing codefendant uttered this specific statement to police officers, while the non-confessing codefendant did not. This does not necessarily mean that codefendant noted as the non-confessing codefendant does not have her own, personal confession evidence, but the admissibility of that evidence is a separate, albeit similar, issue apart from that to which my use of the term "non-confessing codefendant" refers.

7. *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

any of the other codefendants, those codefendants are denied their constitutional right to confront the witness against them.⁸ Per se trial severance is the only solution, among the many proposed,⁹ that guarantees a criminal defendant's Sixth Amendment right to confront the witnesses against him.¹⁰

Part II of this Article examines the rules of procedure and evidence which have created the *Bruton* problem.¹¹ Part III analyzes Supreme Court case law, beginning with a brief overview, followed by its seminal analyses in *Delli Paoli v. United States*,¹² *Bruton v. United States*,¹³ *Richardson v. Marsh*,¹⁴ and *Gray v. Maryland*.¹⁵ Next, Part IV dissects why limiting instructions are inherently impossible for jurors to successfully follow. Then, Part V scrutinizes the judiciary's dissatisfaction with a per se trial severance rule. This part further con-

8. See U.S. CONST. amend. VI.

9. See Margaret Dodson, Note, *Bruton on Balance: Standardizing Redacted Codefendant Confessions Through Federal Rule of Evidence 403*, 69 VAND. L. REV. 803, 834–37 (2016) (advocating for a “reverse Rule 403 analysis” requiring the probative value of the confession to substantially outweigh the prejudicial value of the confession in order to be admitted); Judith L. Ritter, *The X Files: Joint Trials, Redacted Confessions and Thirty Years of Sidestepping Bruton*, 42 VILL. L. REV. 855, 917–20 (1997) (arguing that neither neutral pronouns nor symbols replacing redacted codefendants' names are sufficient to protect criminal defendants' Sixth Amendment rights); Peter Rosenthal, “*He Said, She Said*”: *Partially Redacted Confessions and the State of Bruton After Gray v. Maryland*, 1998 ANN. SURV. AM. L. 103, 123–25 (1998) (advising a fact-based totality of the circumstances approach to avoid codefendants' Confrontation Clause rights from being violated when confessions are properly redacted).

10. See U.S. CONST. amend. VI.

11. The issue has come to be known as the *Bruton* problem by many practitioners. See, e.g., Larry Cunningham, *Bruton Problem*, N.Y. CRIM. L. & PROC. (Nov. 21, 2008), <http://www.nycrimblog.com/nycrim/2008/11/bruton-problem.html> (discussing a case which highlights the *Bruton* problem). This Article applies a broader definition to the *Bruton* problem by incorporating every joint trial involving a codefendant's out-of-court confession in which the confessor does not testify, as opposed to those which only involve confessions incriminating other codefendants.

12. 352 U.S. 232 (1957).

13. 391 U.S. 123 (1968).

14. 481 U.S. 200 (1987).

15. 523 U.S. 185 (1998).

tends that Justice Scalia's prolonged analysis advocating for joint trials¹⁶ greatly exaggerates the inefficiencies of trial severance, ignores the efficiencies gained through severance, and overlooks the supreme importance of upholding constitutional rights for the criminally accused. Finally, Part VI of this Article advocates that per se trial severance is the best alternative to limiting instructions because it is administratively efficient, requires no speculation, and best guarantees criminal defendants' Confrontation Clause rights.

II. Background

Criminal defendants are protected by federal and state rules of criminal procedure and evidence. Although these protections are sufficient to ensure the fairness of criminal trials in many respects, they fail to guarantee the Sixth Amendment's fundamental guarantee for criminal defendants tried jointly with a non-testifying, confessing codefendant. The following sub-sections illustrate how confessions are admitted as evidence and why they are subject to Sixth Amendment scrutiny, the problem created by the judiciary's frequent use of joint trials, and how limiting instructions have been used—ineffectively—to remedy that problem.

A. Confronting Confessions

An aggregate of case studies estimates that roughly 65% of criminal suspects fully or partially confess to the crimes of which they are accused.¹⁷ The vast majority of these criminal suspects plead guilty

16. See *Richardson*, 481 U.S. at 209–10 (“One might say, of course, that a certain way of assuring compliance would be to try defendants separately whenever an incriminating statement of one of them is sought to be used. That is not as facile or as just a remedy as might seem.”).

17. See Allison D. Redlich et al., *Comparing True and False Confessions Among Persons with Serious Mental Illness*, 17 PSYCHOL. PUB. POL'Y & L. 394, 395 (2011), https://works.bepress.com/allison_redlich/6/. For the purposes of this Article, confessions are defined as out-of-court statements recorded by law enforcement prior to trial and offered by the prosecution for the truth of the matter asserted. Cf. Edmund M. Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 355, 355 (1921) (“Is an extra-judicial verbal admission by a party to an action receivable in evidence as an exception to the hearsay rule? That rule generally excludes extra-judi-

and forgo trial.¹⁸ Some defendants, however, confess and still proceed to trial.¹⁹

Studies testing the impact of various pieces of evidence (*e.g.*, confessions, eyewitness statements, character evidence, etc.) have unanimously found confessions to have the most significant impact on a jury's determination of guilt.²⁰ "[Confessions also impact] the willingness to accept a plea and the size of the plea discount."²¹ Consequently, non-confessing codefendants are likely to bear the burden of confession evidence through guilt by association.²²

Although confessions qualify as hearsay because they are out-of-court statements offered for the truth of the matter asserted, a variety of exceptions within the Federal Rules of Evidence apply which allow them to be admitted into evidence over the general bar to hearsay.²³ These exceptions, which are applied in federal courts and adopted in most state courts,²⁴ produce conflict with the Sixth Amendment's Confrontation Clause.²⁵ The Confrontation Clause provides a fundamental right: "[T]he accused shall enjoy the right . . . to be confronted with

cial statements when offered to prove the truth of the matter therein asserted. If admissions are received for any other purpose, or if they are received not as evidence, but as substitutes for proof, the query should be answered in the negative.").

18. Jed S. Rakoff, *Why Innocent People Plead Guilty*, THE N.Y. REV. OF BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> (detailing that the current federal guilty plea rate for criminal defendants is over 95%).

19. Allison D. Redlich et al., *The Influence of Confessions on Guilty Pleas and Plea Discounts*, 24 PSYCHOL. PUB. POL'Y & L. 147, 148 (2018). Defendants who fully confess and proceed to trial are essentially recanting their confessions. *Id.*

20. *Id.* (discussing the results of a variety of studies assessing juror's weight of specific pieces of evidence).

21. *Id.* at 156.

22. *See infra* Section II.B.

23. *See* FED. R. EVID. 801, 803–04. The Federal Rules of Evidence's exceptions recognize situations in which the court can more confidently rely on the accuracy of a statement. DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE FROM THE FEDERAL RULES TO THE COURTROOM* 427 (3d ed. 2015) (detailing the four concerns regarding the accuracy of hearsay evidence: perception, memory, clarity, and sincerity).

24. MERRITT & SIMMONS, *supra* note 23, at 25 (detailing the adoption of state codes very similar to the Federal Rules of Evidence in more than forty states).

25. *Id.* at 701 ("The Supreme Court has struggled for more than thirty years to articulate the line dividing these [regulations].").

the witnesses against him[.]”²⁶ The Supreme Court interprets this fundamental right to include the right to cross-examine any witnesses against the defendant.²⁷ Therefore, the Sixth Amendment bestows criminal defendants with an essential aspect of freedom—standing face-to-face with their accusers—which, like other constitutional guarantees, provides a “safeguard[] . . . upon government—to guarantee that government shall remain the servant and not the master of us all.”²⁸

Confrontation Clause scrutiny is triggered when a witness’s testimonial statement is admitted into evidence.²⁹ Whether a statement is testimonial in nature is governed by the Supreme Court’s opinion in *Crawford v. Washington*,³⁰ but remains subject to great debate.³¹ The Court held that a statement is testimonial when “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”³² Indisputably, confessions made to law enforcement after apprehension and outside of a courtroom are testimonial statements.³³ Therefore, if one codefendant’s confession incriminates another codefendant, the non-confessing codefendant is guaranteed the right to cross-examine the confessing codefendant if the confession is admitted as evidence against the non-confessing codefendant.³⁴

26. U.S. CONST. amend. VI.

27. See *Pointer v. Texas*, 380 U.S. 400, 404–05 (1965).

28. William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L. REV. 279, 280 (explaining that safeguards for the accused were provided by the Framers of the Constitution, not to be “soft on criminals,” but to ensure a free society).

29. See *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004).

30. *Id.* at 68–69.

31. See *Michigan v. Bryant*, 562 U.S. 344, 377–78 (2011) (finding that a victim’s responses to police shortly after a shooting to be non-testimonial because of the fluidity of the situation and need to locate an active shooter).

32. *Crawford*, 541 U.S. at 52 (quoting Brief of Amici Curiae the National Ass’n of Criminal Defense Lawyers et al. in Support of Petitioner, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21754961, at *3).

33. See Richard A. Leo, *Police Interrogations, False Confessions, and Alleged Child Abuse Cases*, 50 U. MICH. J. L. REFORM 693, 721 (2017).

34. MERRITT & SIMMONS, *supra* note 23, at 657–58. A few exceptions to the hearsay rule allow admission of codefendants’ confessions to law enforcement into evidence against other codefendants, such as the statement against interest exception.

Courts have routinely advised that non-confessing codefendants are not prejudiced by a confession's incriminating nature if the confessing codefendant takes the stand and is available to be cross-examined.³⁵ Issues arise when the confessing defendant refuses to testify by invoking her Fifth Amendment privilege against self-incrimination.³⁶ Using a non-testifying codefendant's confession to determine the guilt of any other codefendants while preventing them from exercising their right to cross examine the confessor violates the Confrontation Clause.³⁷ Severing the confessing and non-confessing codefendants' trials, thereby allowing the confession to be admitted in the confessing codefendant's trial, but not in the other codefendants' trials seems to be an obvious solution. Unfortunately, the judiciary has long favored the use of joint trials.³⁸

B. Joint Trials and Severance Rights

Joint criminal trials are commonplace in the American judicial system and are presumed to be more efficient than separate trials.³⁹ The Federal Rules of Criminal Procedure provide guidelines for the application of joint trials: Generally, two or more criminal defendants may be tried jointly if they participated in the same offense or offenses.⁴⁰ Trial courts are granted significant discretion in deciding whether defendants charged for the commission of the same crime are tried jointly

FED. R. EVID. 804(b)(3). Confessions often meet 804(b)(3) because a confession almost always includes a statement exposing "the declarant to . . . criminal liability." As long as there are some "corroborating circumstances that clearly indicate its trustworthiness" and "it is offered in a criminal case," there would be no viable hearsay objection to admitting one defendant's confession implicating his codefendant(s). *Id.*

35. See e.g., *Nelson v. O'Neil*, 402 U.S. 622, 626–27 (1971).

36. See generally John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL L. STUD. 477, 489 (2008) ("The available evidence thus indicates that approximately one half [sic] of all criminal defendants testify at their trials.").

37. See MERRITT & SIMMONS, *supra* note 23, at 657.

38. See *Richardson v. Marsh*, 481 U.S. 200, 209–10 (1987).

39. See *Dodson*, *supra* note 9, at 804.

40. See FED. R. CRIM. P. 8(b). On December 10, 2019, changes were made to the Federal Rules of Criminal Procedure, and the language in the text more closely reflects what the Rule stated before those changes. The Rule now does not have the same language but reflects the same premise.

or separately.⁴¹ “[Courts often] adhere to the general principle that when defendants are indicted together, they should be tried together.”⁴²

The court may, upon a party’s motion or sua sponte, sever a joint trial if the court believes joinder will prejudice a defendant or the government.⁴³ The criminal defendant bears the burden of demonstrating that the prejudice caused by a joint trial is sufficient to warrant severance.⁴⁴ Most criminal defendants cannot overcome this often steep burden.⁴⁵ Defendants whose motions are denied face another uphill battle on appeal because appellate review of the denial of a motion for severance is governed by an abuse of discretion standard, meaning the appellate court may not overturn the trial court’s denial unless it was unreasonable, erroneous, or arbitrary.⁴⁶

Usually, criminal defendants move the court for severance before commencement of the trial.⁴⁷ Because of the nature of the timing, trial courts making this determination have limited information at their

41. M. O. Regensteiner, Annotation, *Right to Severance Where Codefendant Has Incriminated Himself*, 54 A.L.R.2d 830 § 2.

42. *United States v. Dinkins*, 691 F.3d 358, 368 (4th Cir. 2012) (citing *United States v. Singh*, 518 F.3d 236, 255 (4th Cir. 2008)).

43. FED. R. CRIM. P. 14(a).

44. *United States v. Adoma*, No. 3:14-cr-00229-MOC, 2017 U.S. Dist. LEXIS 6793, at *6 (W.D.N.C. Jan. 18, 2017) (“In order to warrant severance, the moving defendant must satisfy the burden of showing prejudice which will interfere with such defendant’s constitutional right to a fair trial. Conclusory allegations that a defendant will be unduly prejudiced will not suffice; the burden is on the defendant to show that joinder will *probably* result in undue prejudice meriting severance.” (citations omitted)).

45. *See Cataneo v. United States*, 167 F.2d 820, 823 (4th Cir. 1948) (detailing the balance that must be struck between potential prejudice or an unfair trial with the “speed, efficiency and convenience in the functioning of the federal judicial machinery” offered by joint trials).

46. *See United States v. Johnson*, 478 F.2d 1129, 1131 (5th Cir. 1973) (“[A] defendant has an extremely difficult burden of showing on appeal that the lower court’s action was an abuse of discretion.” (citing *Tillman v. United States*, 406 F.2d 930, 935 (5th Cir. 1969))).

47. *See Regensteiner, supra* note 41, § 2. A severance motion can also be during trial “upon a finding of manifest necessity . . . to achieve a fair determination of the guilt or innocence of one or more defendants.” *Criminal Justice Section Standards Joinder and Severance*, AM. BAR ASS’N, https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_join-sev_blk/ (last visited Apr. 22, 2020).

disposal to make a ruling. At this early stage, the judge knows little about the evidence that will be presented at trial, the identities of the witnesses, or the parties' strategies, so the full extent of the prejudicial impact of joinder is unknown.⁴⁸ Similarly, without knowing the prosecutor's trial tactics, defense attorneys are unable to properly advocate for severance.⁴⁹

Conversely, appellate courts are able to weigh the entire disposition of the trial when evaluating whether the trial court abused its discretion.⁵⁰ They can analyze both the information available to the trial court at the time of the defendant's motion for severance and whether the defendant suffered any substantial injustice as a result of the joint trial. Although appellate courts often find that defendants are prejudiced as a result of joinder, that prejudice is rarely deemed to rise above harmless error, unworthy of reversing a defendant's conviction and granting a new, separate trial.⁵¹

Conviction rates are significantly higher in joint trials than in single-defendant trials, regardless of whether a confession has been admitted into evidence.⁵² Guilt by association may play a part:

A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, codefendants can be prodded

48. See Robert O. Dawson, *Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices*, 77 MICH. L. REV. 1379, 1410–11 (1979).

49. *Id.*

50. Regensteiner, *supra* note 41, § 2 (citing the differences between appellate courts' and trial courts' analyses of severance motions).

51. See Dawson, *supra* note 48, at 1412.

52. See Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 VAND. L. REV. 349, 368 (2006) (conducting a study examining conviction rates in federal criminal trials from 1999 to 2003 where defendants are joined at trial). The conviction rates are based on the finding of guilt as to the most severe count when a defendant was tried on multiple counts. *Id.* at 367.

into accusing or contradicting each other, they convict each other.⁵³

Statistical testing, however, has worked to dispel this myth, finding that when other variables are removed, “prejudicial impact seems directly tied to the evidence, not to the appearances of a multi-defendant trial.”⁵⁴ While there is no disparity on average, the data does not necessarily indicate that all codefendants are unprejudiced by joint trials. It is likely that some defendants fare better in a joint trial than they otherwise would be if tried individually, and vice versa. For example, a confessing defendant may face better outcomes when tried jointly with non-confessors, and non-confessing defendants may fare worse when tried jointly with a confessor.⁵⁵

C. *Instructing the Jury on Limited Admissibility*

When a trial proceeds jointly despite one codefendant’s confession, the prosecutor can admit the confession into evidence for the jury to use in assessing the guilt of the confessing codefendant,⁵⁶ but not any other codefendants.⁵⁷ Trial courts are frequently faced with such dilemmas, and the doctrine of limited admissibility offers judges the seemingly attractive option of admitting evidence for one purpose but not for another.⁵⁸ Federal Rule of Evidence 105 provides a mechanism to admit limited admissibility evidence.⁵⁹ The only requirements are

53. *Krulewitch v. United States*, 336 U.S. 440, 454 (1949) (Jackson, J., concurring).

54. *Leipold & Abbasi*, *supra* note 52, at 371 (analyzing the effects of joinder on federal criminal trials).

55. *Id.* at 400 (“[O]ur statistical conclusions that show no impact of adding defendants may show nothing more than that there is no effect on average. Our analysis might mask the fact that half of the defendants (the less culpable half) could be better off because of joinder, while the more culpable half is worse off.”).

56. *See* FED. R. EVID. 801(d)(2)(A) (excluding statements of a party-opponent from the traditional bar to hearsay evidence).

57. *See* MERRITT & SIMMONS, *supra* note 23, at 657.

58. *See* Lisa Dufraimont, *Limited Admissibility and Its Limits*, 46 U. OF BRIT. COLUM. L. REV. 241, 246–47 (2013).

59. *See* FED. R. EVID. 105 (“If the court admits evidence that is admissible against a party or 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.”).

that evidence must be limited to its proper scope, and the jury must be instructed as to its limited nature.⁶⁰ Thus, absent Confrontation Clause issues or other substantial prejudices, trial judges are able to admit one defendant's confession against himself, while simultaneously limiting the jury from applying the confession to the other codefendants.

The trial judge reads the limiting instruction to the jury before they hear the confession, directing the jury how they can and cannot apply the evidence in their assessments of guilt to each defendant. Limiting instructions are typically straightforward:

A confession made outside of court by one defendant may not be considered as evidence against the other defendant, who was not present and in no way a party to the confession. Therefore, if you find that a confession was in fact voluntarily and intentionally made by [] defendant [A], you should consider it as evidence in the case against [defendant A], but you must not consider it, and should disregard it, in considering the evidence in the case against [] defendant [B] It is your duty to give separate, personal consideration to the cause of each individual defendant. When you do so, you should analyze what the evidence shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant. Each defendant is entitled to have his case determined from his own acts and statements and the other evidence in the case which may be applicable to him.⁶¹

If the jurors are unable to correctly abide by the judge's instruction, and instead use the confession in assessing the non-confessing codefendants' guilt, the non-confessing codefendants will have been unfairly prejudiced, and given the strength of confession evidence, stand much greater chances of conviction.⁶² Unlike judge-made error, which is

60. *See id.*

61. *Bruton v. United States*, 391 U.S. 123, 125 n.2 (1968).

62. *See* Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*, 21 L. & HUM. BEHAV. 27, 42-43 (1997) (finding that jurors supply higher conviction rates when confessions are involved, even when the judge has instructed the jury that the confession is inadmissible).

usually grounds for an appeal, the jury's interpretation of instructions and use of evidence are not subject to review.⁶³ Whether the jury in a particular case is capable of properly adhering to the limiting instructions is left entirely to the discretion of the trial judge.

III. SUPREME COURT CASE LAW

Before the Supreme Court's seminal holding on the admissibility of confessions in joint trials, lower courts lacked guidance as to the degree of prejudice necessary to grant a criminal defendant's severance motion. In its absence, they developed factors to assess the prejudice faced by non-confessing defendants:

[T]he weight and sufficiency of competent evidence of the movant's guilt; the existence, or lack, of antagonism between the positions taken by the movant and his codefendant or codefendants; the fact that under the circumstances it is difficult (or not) for the jury, notwithstanding the court's cautionary remarks, to consider only the evidence competent against each defendant in determining his innocence or guilt; the fact that the movant has himself confessed the commission of the crime; the fact that the codefendant, instead of repudiating his confession or other self-incriminating statement, gives testimony to the same effect upon the trial; and the fact that the statement of the codefendant was not used at the trial or that the codefendant was not in fact tried with the movant.⁶⁴

Initially, the Supreme Court took a rather skeptical view of the prejudicial dangers involved in these situations and, given this incredulous outlook, analysis of the aforementioned factors rarely resulted in severance.⁶⁵ Over the latter half of the twentieth century, however, the high court finally addressed the prejudicial impact of one codefendant's confession on another. Although the following four cases do not offer definitive guidance, they do provide insight to trial courts on how to best handle *Bruton* problems under the current state of the law.

63. Dufraimont, *supra* note 58, at 252.

64. Regensteiner, *supra* note 41, § 2.

65. *See, e.g., Delli Paoli v. United States*, 352 U.S. 232, 241–43 (1957).

*A. Delli Paoli v. United States*⁶⁶

In 1956, the Court, for the first time, addressed a defendant's incriminating statement which directly implicated his codefendant.⁶⁷ Orlando Delli Paoli and his four codefendants were convicted of conspiring in the unlawful sale of alcohol.⁶⁸ The trial court admitted Delli Paoli's codefendant's confession into evidence and instructed the jury that the confession, which implicated Delli Paoli in the crime, could only be considered as evidence against his codefendant and not against Delli Paoli.⁶⁹ Before reaching the Supreme Court, a divided Second Circuit affirmed Delli Paoli's conviction.⁷⁰ In his dissenting opinion, Judge Jerome Frank offered a remedy aimed at alleviating the potential prejudices involved:

When several defendants are on trial for criminal conspiracy, if the government seeks to put in evidence an out-of-court statement by one defendant which is hearsay as to the others (i.e., an out-of-court statement made after the conspiracy has terminated), then (a) unless all references to the other defendants can be effectively deleted (so that the statement will contain no hint of the others' guilt) and unless those references are deleted, (b) the trial

66. 352 U.S. 232 (1957).

67. *See id.* at 239.

68. *See id.* at 233.

69. *Id.* at 233, 239–40 (following the admission of the confession, the trial court recited this jury instruction: “The proof of the Government has now been completed except for the testimony of the witness Greenberg as to the alleged statement or affidavit of the defendant Whitley. This affidavit or admission will be considered by you solely in connection with your determination of the guilt or innocence of the defendant Whitley. It is not to be considered as proof in connection with the guilt or innocence of any of the other defendants. The reason for this distinction is this: An admission by defendant after his arrest of participation in alleged crime may be considered as evidence by the jury against him, together with other evidence, because it is, as the law describes it, an admission against interest which a person ordinarily would not make. However, if such defendant after his arrest implicates other defendants in such an admission it is not evidence against those defendants because as to them it is nothing more than hearsay evidence.”)

70. *See United States v. Delli Paoli*, 229 F.2d 319, 321–22 (2d Cir. 1956).

judge must (1) refuse to admit the statement or (2) sever the trial of those other defendants.⁷¹

Despite Judge Frank's compelling dissent, the Supreme Court affirmed Delli Paoli's conviction, holding that he was not prejudiced because it was reasonable to believe that the jury abided by the trial judge's instructions.⁷² The Court took note of many factors leading to its belief that the jury was able to obey the trial court's instructions:⁷³ the substance of the limiting instructions,⁷⁴ the minimal amount of instructions fixed upon the jury,⁷⁵ the distinctness of each codefendant's interest,⁷⁶ and the redundancy of the confession with respect to the prosecution's established case.⁷⁷

Notably, the Court's analysis did not reach the Confrontation Clause,⁷⁸ likely because its status as the guarantor of the right of the criminally accused to cross-examine the witnesses against him was not solidified for another eight years.⁷⁹ Following that holding in *Pointer v. Texas*,⁸⁰ the time was ripe for the Court to revisit its decision in *Delli Paoli*.

71. *Id.* at 324 (Frank, J., dissenting).

72. *See Delli Paoli*, 352 U.S. at 241–43.

73. *See id.* at 241–42.

74. *See id.* at 239–40.

75. *See id.* at 240–41.

76. *See id.* at 241.

77. *See id.* at 242.

78. *See* David E. Seidelson, *The Confrontation Clause and the Supreme Court: Some Good News and Some Bad News*, 17 HOFSTRA L. REV. 51, 54 (1988) (discussing the absence of Confrontation Clause analysis from the Court's opinion in *Delli Paoli*). At the time, the Confrontation Clause had not yet been interpreted through the lens of cross-examination. *See* Ritter, *supra* note 9, at 864 n.59 (examining the history of the Court's jurisprudence on the right to cross examination and its previous ties to the Fifth Amendment).

79. *See Pointer v. Texas*, 380 U.S. 400, 404 (1965).

80. *See id.* at 404–05.

B. *Bruton v. United States*⁸¹

In *Bruton v. United States*, the Court was faced with an evidentiary and procedural posture nearly identical to *Delli Paoli*.⁸² George Bruton and his codefendant were convicted of armed postal robbery.⁸³ Bruton's codefendant's confession implicated Bruton in the crime and was admitted into evidence against the codefendant.⁸⁴ The Eighth Circuit affirmed Bruton's conviction because it found that the trial judge had properly instructed the jury as to the evidence's limited use pursuant to *Delli Paoli*.⁸⁵ The Supreme Court, reversing the Eighth Circuit, held that the limiting instruction given to the jury failed to alleviate the prejudicial impact of Bruton's codefendant's confession, thus violating his Confrontation Clause right.⁸⁶ In doing so, the Court explicitly overruled its holding in *Delli Paoli*.⁸⁷

81. 391 U.S. 123 (1968).

82. *See id.* at 123–25.

83. *Id.* at 124.

84. *See id.*

85. *Evans v. United States*, 375 F.2d 355, 362–63 (8th Cir. 1967); *see also Bruton*, 391 U.S. at 125 n.2 (“The instructions to the jury included the following: ‘A confession made outside of court by one defendant may not be considered as evidence against the other defendant, who was not present and in no way a party to the confession. Therefore, if you find that a confession was in fact voluntarily and intentionally made by the defendant Evans, you should consider it as evidence in the case against Evans, but you must not consider it, and should disregard it, in considering the evidence in the case against the defendant Bruton. . . . It is your duty to give separate, personal consideration to the cause of each individual defendant. When you do so, you should analyze what the evidence shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant. Each defendant is entitled to have his case determined from his own acts and statements and the other evidence in the case which may be applicable to him.’”).

86. *See Bruton*, 391 U.S. at 126 (“We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evan's confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.”).

87. *Id.*

The Court quoted sizeable portions of Justice Frankfurter's dissent in *Delli Paoli*,⁸⁸ Justice Jackson's concurring opinion in *Krulwitch v. United States*,⁸⁹ and Justice Traynor in *People v. Aranda*⁹⁰ to dispel the myth that juries are capable of compartmentalizing the application of a confession when assessing each codefendants' guilt.⁹¹ "[The jury] cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A."⁹² Additionally, the Court held that, despite the judicial system's need to trust jurors to follow a trial judge's instructions, some situations present prospects of prejudice so untenable that they cannot be left to the whims of the jury.⁹³ "[T]he consequences of failure [are] so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."⁹⁴

The Court went on to acknowledge that constitutional rights cannot be sacrificed for the sake of efficient dockets.⁹⁵ Moreover, the Court recognized alternative methods to constitutionally admit a defendant's confession in a joint trial.⁹⁶ The Court cited several cases in which trial courts had redacted confessions of all references to non-confessing codefendants⁹⁷ but was careful to note the legal community's skepticism regarding the effectiveness of redaction in combatting prejudice.⁹⁸ The Court's silence with respect to the constitutionality of redacted confessions meant it would once again be forced to confront the issue.

88. *Id.* at 129 (citing *Delli Paoli v. United States*, 352 U.S. 232, 247–48 (1957) (Frankfurter, J., dissenting)).

89. *Id.* (citing *Krulwitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)).

90. *Id.* at 130 (citing *People v. Aranda*, 407 P.2d 265, 271–72 (Cal. 1965)).

91. *See Bruton*, 391 U.S. at 129–31.

92. *Id.* at 131 (quoting *Aranda*, 407 P.2d at 272).

93. *See id.* at 135.

94. *Id.*

95. *See id.* at 134–35 (quoting *People v. Fischer*, 164 N.E. 336, 341 (N.Y. 1928)).

96. *See id.* at 134 (“Where viable alternatives do exist, it is deceptive to rely on the pursuit of truth to defend a clearly harmful practice.”).

97. *See id.* at 134 n.10.

98. *See id.*

*C. Richardson v. Marsh*⁹⁹

Nearly twenty years after *Bruton*, the Court addressed the issue it previously neglected: whether a redacted confession, devoid of any reference to a codefendant, violates the Confrontation Clause if it nevertheless implicates a codefendant through supplementary evidence.¹⁰⁰ Clarissa Marsh and two others faced assault and murder charges relating to the assault of Cynthia Knighton and murder of her son and aunt.¹⁰¹ Marsh and her codefendant were tried jointly.¹⁰² Knighton testified that Marsh came to her aunt's home with two men and demanded money.¹⁰³ Knighton stated that Marsh acted as a lookout at the front door while the other participants searched the home for money before leading Knighton, her son, and her aunt down to the basement where they were shot.¹⁰⁴

In addition to Knighton's testimony about Marsh, the prosecution introduced Marsh's codefendant's confession.¹⁰⁵ The jury heard a redacted confession, absent any explicit reference to Marsh.¹⁰⁶ Although the confession did not directly implicate Marsh, it conflicted

99. 481 U.S. 200 (1987).

100. *See id.* at 201–02.

101. *See id.* at 202.

102. *Id.* The third person charged with the crime was a fugitive at the time of trial. *Id.*

103. *See id.*

104. *See id.* Knighton was the only one who survived the shooting. *Id.*

105. *See id.* at 203.

106. *Id.* at 203 n.1 (“The redacted confession in its entirety read: ‘On Sunday evening, October the 29th, 1978, at about 6:30 p.m., I was over to my girl friend’s house at 237 Moss, Highland Park, when I received a phone call from a friend of mine named Kareem Martin. He said he had been looking for me and James Coleman, who I call Tom. He asked me if I wanted to go on a robbery with him. I said okay. Then he said he’d be by and pick me up. About 15 or 20 minutes later Kareem came by in his black Monte Carlo car. 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. Kareem said there would be over \$ 5,000 or \$ 10,000 in the place. Kareem said he would have to take them out after the robbery. Kareem had a big silver gun. He gave me a long barrelled [sic] .22 revolver. We then drove over to this house and parked the car across the big street near the house. The plan was that I would wait in the car in front of the house and then I would move the car down across the big street because he didn’t want anybody to see the car. Okay, Kareem went up to the house and went inside. A couple of minutes later I moved the car and went up to the house. As I entered, Kareem and this

with Marsh's trial testimony. Furthermore, the prosecutor's closing argument linked Marsh to the confession as well.¹⁰⁷ Marsh testified that she was unaware of the plan to rob and murder the home's occupants because she was unable to hear the conversation between the two others charged for the crime over the sound of the car radio on their way to Knighton's aunt's house and never felt free to leave.¹⁰⁸ The prosecutor supplied evidence linking Marsh to her codefendant's confession, placing her as a passenger in the car on the way to Knighton's aunt's house.¹⁰⁹ At the close of the trial, the judge instructed the jury not to consider the codefendant's confession as evidence against Marsh when assessing her guilt.¹¹⁰ Marsh was nevertheless convicted.¹¹¹

After unsuccessfully challenging her conviction on direct appeal, Marsh filed a petition for a writ of habeas corpus, seeking release from her unlawful confinement, pursuant to 28 U.S.C. § 2254.¹¹² The district court denied her petition, but the Sixth Circuit reversed, holding

older lady were in the dining room, a little boy and another younger woman were sitting on the couch in the front room. I pulled my pistol and told the younger woman and the little boy to lay on the floor. Kareem took the older lady upstairs. He had a pistol, also. I stayed downstairs with the two people on the floor. After Kareem took the lady upstairs I went upstairs and the lady was laying on the bed in the room to the left as you get up the stairs. The lady had already given us two bags full of money before we ever got upstairs. Kareem had thought she had more money and that's why we had went upstairs. Me and Kareem started searching the rooms but I didn't find any money. I came downstairs and then Kareem came down with the lady. I said, "Let's go, let's go." Kareem said no. Kareem then took the two ladies and little boy down the basement and that's when I left to go to the car. I went to the car and got in the back seat. A couple of minutes later Kareem came to the car and said he thinks the girl was still living because she was still moving and he didn't have any more bullets. He asked me how come I didn't go down the basement and I said I wasn't doing no shit like that. He then dropped me back off at my girl's house in Highland Park and I was supposed to get together with him today, get my share of the robbery after he had counted the money. That's all." (citing *Marsh v. Richardson*, 781 F.2d 1201, 1202–03 (6th Cir. 1986)).

107. *See id.* at 205.

108. *See id.* at 204.

109. *See id.* at 205.

110. *See id.*

111. *See id.*

112. *See id.*

that Marsh was unfairly prejudiced by the linkage between her codefendant's confession and the evidence placing her at the scene.¹¹³ The Supreme Court granted certiorari and reversed the Sixth Circuit in a 6-3 decision.¹¹⁴ The majority opinion, authored by Justice Scalia, found no Confrontation Clause violation where redaction of a codefendant's confession leaves no reference to the existence of the defendant, despite the confession's connection to other evidence discrediting Marsh's testimony.¹¹⁵ The Court remanded the case back to the district court with respect to the prosecutor's questionable comments during closing arguments—linking Marsh to the codefendant's confession.¹¹⁶

In declining to find a Confrontation Clause violation, the Court instead focused on the narrowness of its holding in *Bruton*,¹¹⁷ relying on the long-held, but naive assumption that jurors can be trusted to follow limiting instructions.¹¹⁸ Additionally, the Court noted that the evidence linking Marsh to the confession was in fact her own testimony, which placed her in the car on the way to Knighton's aunt's house.¹¹⁹ Finally, the Court addressed the inefficiencies and impracticalities of

113. *See id.* at 205–06.

114. *See id.* at 206, 211.

115. *See id.* at 211.

116. *Id.* (“On remand, the court should consider whether, in light of respondent’s failure to object to the prosecutor’s comments, the error can serve as the basis for granting a writ of habeas corpus.”).

117. *See id.* at 208.

118. *Id.* at 206–07 (“This accords with the almost invariable assumption of the law that jurors follow their instructions, which we have applied in many varying contexts.” (citations omitted)).

119. *See id.* at 208.

alternative methods to introduce a codefendant's confession: the contextual implication doctrine,¹²⁰ pretrial hearings,¹²¹ and per se severance.¹²² In Justice Scalia's estimation, joint trials are not worth sacrificing for the assurances offered by separate trials or forgoing the admission of confession evidence.¹²³

Justice Stevens dissented, insisting that the majority applied the bounds of the Confrontation Clause too narrowly.¹²⁴ In circumstances such as these, he argued, mere jury instructions cannot "guarantee the level of certainty required by the Confrontation Clause."¹²⁵ He contended that the majority too easily dismissed the violation of constitutional rights at play in these situations: "On the scales of justice . . . considerations of fairness normally outweigh administrative concerns."¹²⁶ The balance between efficiency and fairness would, of course, come before the high court again.

120. *See id.* at 209 (finding that the Court of Appeals approach of waiting until the end of the trial to see if the confession was "so 'powerfully incriminating' that a new, separate trial is required for the defendant" would "lend[] itself to manipulation by the defense").

121. *See id.* (reasoning that a pretrial hearing requiring both prosecution and defense to reveal all their planned evidence to the judge is unlikely to be feasible under the Federal Rules of Criminal Procedure, as well as time-consuming and prone to error).

122. *See id.* at 209–10; *see also infra* Part V (addressing Justice Scalia's concerns regarding per se severance when a non-testifying codefendant's confession will be admitted into evidence).

123. *See Richardson*, 481 U.S. at 210.

124. *Id.* at 213 (Stevens, J., dissenting) ("I do not read *Bruton* to require the exclusion of *all* codefendant confessions that do not mention the defendant.").

125. *Id.* at 214.

126. *Id.* at 217; *see also infra* Part V (discussing the flaws in sacrificing constitutional liberties for administrative efficiency).

*D. Gray v. Maryland*¹²⁷

With little guidance from the Supreme Court on how to apply its holdings in *Bruton* and *Richardson*, lower courts developed a variety of methods to reduce the prejudicial impact of confessions,¹²⁸ resulting in uncertainty as to the extent of defendants' Sixth Amendment protections depending on which court and before which judge they found themselves. Nearly thirty years after *Bruton*, the Court reached another conflicted decision in *Gray v. Maryland* regarding the admissibility of a redacted confession with substitutions.¹²⁹ Justice Breyer, writing for a five justice majority, addressed the most common method being employed by trial courts: simple redaction through removal of the defendant's name from the confession,¹³⁰ with the redacted name replaced with a blank space, an "X," or the word "deleted."¹³¹

A Maryland trial court convicted Kevin Gray and his codefendant, Anthony Bell, for the murder of Stacy Williams.¹³² Bell confessed to the police that he, Gray, and another man¹³³ participated in beating Williams to death, but Gray denied his involvement.¹³⁴ The trial court judge denied Gray's motion to sever his trial from his codefendants',¹³⁵ and ordered that Bell's confession could be admitted if Gray's name

127. 523 U.S. 185 (1998).

128. A large subset of Illinois-based cases suggest that per se severance is applicable when the confession of a codefendant implicates another defendant unless the prosecution decides not to admit the confession into evidence. *See, e.g.*, *People v. Mutter*, 37 N.E.2d 790, 795–96 (Ill. 1941); *People v. Fisher*, 172 N.E. 743, 749 (Ill. 1930). Connecticut courts have similarly viewed severance as an entitlement but only upon a showing of fact that the non-confessing codefendants will suffer a substantial injustice. *See, e.g.*, *State v. McCarthy*, 49 A.2d 594, 596–97 (Conn. 1946); *State v. Castelli*, 101 A. 476, 479 (Conn. 1917). Additionally, several state courts have found redaction to be an unsuitable method to deal with a *Bruton* problem. *See, e.g.*, *People v. Stallworth*, 80 Cal. Rptr. 3d 347, 360–61 (Cal. Ct. App. 2008); *People v. Wheeler*, 466 N.E.2d 846, 847 (N.Y. 1984). *See generally* Regensteiner, *supra* note 41 (presenting a comprehensive overview of state court proceedings before and after *Bruton*).

129. *Gray*, 523 U.S. at 188.

130. *See id.*

131. *Id.*

132. *See id.* at 188–89.

133. The other man passed away before the trial took place. *See id.* at 188.

134. *See id.* at 188–89.

135. *See id.* at 188.

was completely redacted.¹³⁶ At trial, a police detective read the confession aloud to the jury and replaced each instance of Gray's name with the words "deleted" or "deletion."¹³⁷ Following the reading, the detective confirmed for the prosecutor that he arrested Gray based on the information supplied in Bell's confession, thereby linking Gray to the confession.¹³⁸ The jury convicted Gray despite the redaction of his name from Bell's confession.¹³⁹

On review, the Supreme Court first held that simple redactions, such as those presented in Bell's confession, fell within the narrow construction of *Bruton*, and thus were violations of the Confrontation Clause.¹⁴⁰ The Court stated that redactions that only replace the defendant's name with a blank or symbol "so closely resemble *Bruton*'s unredacted statements that, in our view, the law must require the same result."¹⁴¹

The Court then expressed that the omission of Gray's name from the confession failed to prevent the jury from realizing that the redactions referred to Gray.¹⁴² Jurors would be able to see through the trial court's efforts to shield their eyes from the truth. First, an uninformed juror would simply identify that there was an additional defendant seated at the defense counsel table and assume that the deletions referred to him.¹⁴³ Second, a juror somewhat familiar with the law would surely reach the logical conclusion that the redacted portion must refer to the codefendant.¹⁴⁴ Finally, a sophisticated juror would probably wonder how the confession could refer to anyone other than the codefendant for the prosecution to find it reliable.¹⁴⁵ Moreover, simple re-

136. *See id.*

137. *Id.*

138. *Id.* at 188–89 ("Immediately after the police detective read the redacted confession to the jury, the prosecutor asked, 'after he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?' The officer responded, 'That's correct.'" (citation omitted)).

139. *See id.* at 189.

140. *See id.* at 192.

141. *Id.*

142. *Id.* at 193.

143. *See id.*

144. *See id.*

145. *See id.*

dactions, such as the one used here, are likely to draw even more attention to the removed name, encouraging the type of speculation the process is designed to avoid.¹⁴⁶

Importantly, the Court stated that issues regarding the admissibility of confessions at joint trials are not fertile grounds for a bright-line rule.¹⁴⁷ In doing so, the Court declined to adopt a per se severance rule.¹⁴⁸ The Court noted that, although there is always the possibility of prejudice based upon jurors' improper inferences, only redacted confessions which create a certain level of unfairness violate the Confrontation Clause.¹⁴⁹ Finally, the Court offered a few redaction methods that would not violate Gray's Confrontation Clause rights, such as replacing the phrase "[m]e, deleted, deleted, and a few other guys" with "[m]e and a few other guys."¹⁵⁰ In *Gray*, trial courts finally received some quantum of guidance as to how to address *Bruton* problems.

After *Gray*, almost all state courts continue to allow redaction as a solution to the *Bruton* problem,¹⁵¹ and no federal circuits have

146. *See id.*

147. *See generally id.* at 194–96 (explaining the factual differences between *Bruton* and *Richardson* that make a bright-line rule unworkable).

148. *See id.* at 195–97.

149. *See id.* at 192.

150. *Id.* at 196.

151. Thomas Rubinson, *MCLE: Bruton Rule in a Post-Crawford World*, DAILY JOURNAL (Mar. 23, 2015), <https://www.dailyjournal.com/mcle/193-bruton-rule-in-a-post-crawford-world> (describing redactions as the most popular method to address *Bruton* problems because they allow the continued use of joint trials). Many courts continue to allow prosecutors to admit confessions with minimalistic redactions because they are unlikely to be scrutinized under appellate review. *Id.* (“Redacting the statement to omit any reference to the non-declarant defendant, or even to his existence, will almost always suffice.”). Some courts, however, have gone beyond *Gray*, finding the use of identifying language substituted in place of a codefendant's name to be in violation of the Confrontation Clause. These courts have found that substitutions of neutral pronouns are acceptable, with substitution of a gender reference as sufficiently neutral (e.g., “he” replacing a male defendant's name), so long as it is non-obvious. *See e.g.*, *United States v. Jass*, 569 F.3d 47, 56 n.5, 63 (2d Cir. 2009); *United States v. Ashburn*, No. 11-CR-0303 (NGG), 2015 U.S. Dist. LEXIS 16656, at *94–96 (E.D.N.Y. Feb. 11, 2015); *Virgin Islands v. Bryan*, 334 F. Supp. 2d 822, 829–30 (V.I. 2001). Courts are also using the correct number of defendants (e.g., “the four of us” replacing a list of names when there are three other codefendants). *See Robinson v. Shannon*, No. 08-1074, 2009 U.S. Dist. LEXIS 70634, at *15–17 (E.D. Pa. Aug. 10,

adopted a per se severance rule. Because of this rejection, the fate of many criminal defendants remains tied to the effectiveness of limiting instructions.

IV. THE FAILURE OF LIMITING INSTRUCTIONS

Proponents of maintaining a steep barrier to trial severance believe, or at least pretend to believe, in the power of limiting instructions to solve limited admissibility problems.¹⁵² In a perfect world, where jurors could be trusted to follow every instruction as it is read to them, they would be right. Unfortunately, we know they cannot.¹⁵³

There is near unanimous agreement in the psychology community that limiting instructions task jurors with an impossible feat of mental gymnastics.¹⁵⁴ Instructions provided to jurors in joint trials facing a *Bruton* problem require jurors to compartmentalize their analysis of a defendant's confession in an unnatural way—using the evidence to assess the guilt of one codefendant while simultaneously suppressing the same information when assessing the guilt of another.

Our minds are incapable of operating in this manner.¹⁵⁵ Fully suppressing information in these circumstances requires jurors to mon-

2009); *United States v. Evangelista*, 813 F. Supp. 294, 300 (D.N.J. 1993). These methods are extremely prejudicial.

152. *Richardson*, 481 U.S. 200, 211 (1987) (“The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.”).

153. *See Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (referring to the judiciary's belief in the ability of the jury to follow limiting instructions as an “unmitigated fiction”).

154. J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 79 (1990) (“Several researchers have investigated whether jurors understand charging instructions on the substantive law, evidence, and burdens of proof. They all reach the same conclusion: typical pattern jury instructions, drafted by lawyers in an effort to be *legally* precise, are incomprehensible to jurors.”).

155. *See Daniel M. Wegner, When the Antidote is the Poison: Ironic Mental Control Processes*, 8 PSYCHOL. SCI. 148, 148 (1997).

itor their thoughts for the very information they are attempting to suppress.¹⁵⁶ “Monitoring ensures that the information remains present at some level of consciousness and may render it more accessible than it would be had no attempt to forget it been made.”¹⁵⁷ This phenomenon, known as the “backfire effect,”¹⁵⁸ specifically calls more attention to limited use evidence in the minds of the jurors who will often increase their focus and reliance on it.¹⁵⁹

Belief perseverance may similarly impede jurors’ ability to correctly apply limiting instructions.¹⁶⁰ When people are confronted with new information that does not conform with their beliefs, they often find ways to discredit it instead of adjusting their understanding of the issue.¹⁶¹ There is no mechanism in place to prevent jurors from unilaterally deciding to discredit a judge’s limiting instruction if they find the confessing codefendant’s confession to be credible and indicative of the guilt of other codefendants.¹⁶²

Finally, perhaps the strongest explanation for a juror’s inability to follow a limiting instruction can be explained by reactance theory.¹⁶³ Reactance theory is based on the idea that when an individual’s liberty to process information is restricted, through a limiting instruction or otherwise, they feel threatened and become “psychologically

156. *Id.* (explaining the act of suppression as composed of a conscious state of mind attempting to follow instruction and unconscious state of mind searching for failure to heed instruction).

157. Linda J. Demaine, *In Search of an Anti-Elephant: Confronting the Human Inability to Forget Inadmissible Evidence*, 16 GEO. MASON L. REV. 99, 107 (2008); see also C. Neil Macrae et al., *Out of Mind but Back in Sight: Stereotypes on the Rebound*, 67 J. PERSONALITY & SOC. PSYCHOL. 808, 809–15 (1994) (finding that the process of suppression is an inherently difficult or even impossible task).

158. M. Cox & S. Tanford, *Effects of Evidence and Instructions in Civil Trials: An Experimental Investigation of Admissibility*, 1989 SOC. BEHAV. 4, 31–55.

159. See Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PYSCHOL. PUB. POL’Y. & L. 677, 689–91 (2000).

160. See *id.* at 691–92.

161. See *id.*

162. See, e.g., *id.*

163. See *id.* at 693–97.

aroused.”¹⁶⁴ People consider their unbridled freedom to process information necessary in their search for truth and therefore feel threatened when artificial limits are imposed.¹⁶⁵ Avoiding this thought process may be possible through internal motivations to be a “‘good’ juror” and strictly adhere to the judge’s instructions, but that is more likely the exception than the rule.¹⁶⁶

Given the number of psychological pitfalls, it is naive to rely on limiting instructions to achieve their purported goals.¹⁶⁷ While many judges understand the ineffectiveness of limiting instructions, they are still widely used because of the lack of viable alternatives.¹⁶⁸ When faced with a *Bruton* problem, however, per se trial severance is an effective alternative to limiting instructions at a minimal cost to administrative efficiency.

V. DEBUNKING TRIAL SEVERANCE’S ASSUMED INEFFICIENCIES

Despite the well-known failure of limiting instructions, proponents of joinder are still reluctant to adjust the judicial system’s conservative use of trial severance. While legal scholars often delve into the debate on broad terms,¹⁶⁹ Justice Scalia’s assessment of per se trial severance is perhaps the most comprehensive as applied to the *Bruton* problem.¹⁷⁰ In *Richardson v. Marsh*, Justice Scalia penned a laundry list of impracticalities inherent in a per se severance rule:

164. JACK W. BREHM, A THEORY OF PSYCHOLOGICAL REACTANCE 693 (Leon Festinger & Stanley Schachter eds., 1966). *See generally id.* (explaining reactance theory and how the human mind responds when presented with restrictions on its search for information).

165. Lieberman & Arndt, *supra* note 159, at 694–95.

166. *See id.* at 697.

167. *See id.*; Cox & Tanford, *supra* note 158, at 79.

168. *See Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

169. *See generally* Leipold & Abbasi, *supra* note 52 (analyzing the impact of trial joinder on the conviction rates of federal criminal defendants); *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, *supra* note 3 (addressing the varied treatment of criminal defendants in joint and single trials through the Federal Rules of Criminal Procedure).

170. *See Richardson*, 481 U.S. at 209–10.

One might say, of course, that a certain way of assuring compliance would be to try defendants separately whenever an incriminating statement of one of them is sought to be used. That is not as facile or as just a remedy as might seem. Joint trials play a vital role in the criminal justice system, accounting for almost one-third of federal criminal trials in the past five years. Many joint trials—for example, those involving large conspiracies to import and distribute illegal drugs—involve a dozen or more codefendants. Confessions by one or more of the defendants are commonplace—and indeed the probability of confession increases with the number of participants, since each has reduced assurance that he will be protected by his own silence. It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and 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 and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts. The other way of assuring compliance with an expansive *Bruton* rule would be to forgo use of codefendant confessions. That price also is too high, since confessions “are more than merely ‘desirable’; they are essential to society’s compelling interest in finding, convicting, and punishing those who violate the law.”¹⁷¹

This assessment has two problems. First, justice and fairness are not worth sacrificing no matter how slight the infringement. Upholding the

171. *Id.* (citations omitted).

foundational rights of the Constitution, including the Sixth Amendment's Confrontation Clause, should be the judiciary's highest priority. Second, the efficiency of joint trials espoused by Justice Scalia and others has been profoundly exaggerated. In fact, in many situations, severed trials are more efficient than joint trials.¹⁷²

The following sections address each of Justice Scalia's reservations regarding the effect of per se trial severance as applied to the *Bruton* problem. Justice Scalia is surely correct that severance of joint trials can cause some loss of administrative efficiencies.¹⁷³ On the other hand, his claims of turmoil within the criminal justice system are monumentally overstated,¹⁷⁴ and his assertions of unfairness are unsubstantiated.¹⁷⁵

A. Burden on Court Dockets

Much of the hostility projected at per se severance is based on the assumption that it would cause a massive increase in the number of trials, overburdening already inflated dockets.¹⁷⁶ This fear is unsupported because the actual increase would be nominal at most.

Most criminal defendants never go to trial; plea bargain rates for criminal defendants are above 95% in federal courts and nearly every state court.¹⁷⁷ Of the federal criminal defendants whose cases do proceed to trial, roughly 33% are joined with other defendants.¹⁷⁸ The table below illustrates the total number of joint trials occurring in federal courts each year:¹⁷⁹

172. See Dawson, *supra* note 48, at 1389–91 (addressing the likelihood that the questions answered through the first trial's outcome will lead to the parties reaching a plea agreement, using less judicial resources than would the administration of a complete joint trial).

173. To read Justice Scalia's discussion of these inefficiencies, see *Richardson*, 481 U.S. at 209–10.

174. See discussion *infra* Sections V.A–C.

175. See discussion *infra* Section V.D.

176. See *Richardson*, 481 U.S. at 210.

177. Rakoff, *supra* note 18.

178. Leipold & Abbasi, *supra* note 52, at 351.

179. Over the five-year period from 1999 to 2003, 130,145 federal criminal defendants were joined with codefendants. *Id.* at 364. Only 4,662 of those defendants went to trial, an average of 932 per year. *Id.* at 366. At 5.3%, the percentage of single-trial criminal defendants who go to trial is significantly higher than the percentage of

Federal Criminal Defendants in Joint Trials	(1999–2003)	(2017 Estimates)
Two Defendants	2350 (1175 trials)	474 (237 trials)
Three Defendants	1068 (356 trials)	216 (72 trials)
Four Defendants	448 (112 trials)	90 (23 trials)
Five or More Defendants	796 (100 trials)	161 (20 trials)
Total	4662 (1743 trials)	941 (352 trials)

While the above data indicates the approximate number of joint criminal trials occurring in federal courts each year, a per se severance rule would only affect those involving confession evidence. “[T]he majority (about 65%) of suspects fully or partially confess to the police.”¹⁸⁰ Most suspects who confess, however, eventually accept plea

joined criminal defendants who go to trial, which is 3.6%. *Id.* at 366 n.62; *see id.* at 366 (providing the figures for the following calculation: (19,808 defendants who stood trial – 15,146 defendants who stood trial alone) ÷ (375,720 total federal criminal defendants – 245,575 single defendants) = (4,662 ÷ 130,145) = 0.0358215836182719 = 3.6%). The data set grouped all joint trials with five or more codefendants. For purposes of these calculations, the estimation for the total number of trials in this Section was reached by estimating the average number of codefendants in all trials of five or more codefendants as eight and applying that figure to the calculation. The number of federal criminal defendant filings has slightly increased from the years 1999 to 2003 (averaging 75,144 per year out of a total 375,720) to 75,861 in 2017, an increase of approximately 1%. *See Federal Judicial Caseload Statistics 2017*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2017> (last visited Apr. 26, 2020).

180. Redlich et al., *supra* note 17, at 395. False confessions are quite prevalent, often the product of lengthy police interrogations that exert an enormous amount of pressure on suspects. *See id.* at 395–96; *see also* Innocence Staff, *New Netflix Series Explores False Confessions*, INNOCENCE PROJECT (Sept. 12, 2017), <https://www.innocenceproject.org/new-netflix-documentary-series-explores-false-confessions/> (“The reasons why people falsely confess are complex and varied, but what they tend to have in common is a belief that cooperating with police will be more beneficial than continuing to maintain innocence.”). The Innocence Project has found that over 25% of the more than 290 wrongful convictions overturned by DNA evidence in the [United

bargains and do not take part in criminal trials.¹⁸¹ Unfortunately, very little data exists on plea bargain rates for confessing criminal defendants. One case study analyzed confession data in two New York State counties from 2005 and 2006.¹⁸² In the study of 502 criminal defendants, only nine went to trial, three of whom confessed prior to trial.¹⁸³ In other words, 33% of the nine criminal defendants who actually proceeded to trial had already confessed their guilt to the police prior to commencement of their trial.

Extrapolating the rate of confessing defendants that proceeded to trial (33%) across the 2017 estimate of 941 joint federal criminal defendants per year, yields a total of 314 federal criminal defendants per year who are in joint trials, confess, and go to trial.¹⁸⁴ Only half of these defendants would require trial severance because roughly 50% of criminal defendants testify at their trials,¹⁸⁵ making them available for cross-examination by their codefendants. A per se severance rule, therefore, would add approximately 157 new trials per year to the dock-

States] have involved some form of a confession. See Mark Wilson, *From the Archive: Why Do Innocent Suspects Confess? It's Pressure, Fatigue or Fear*, COURIER & PRESS (Feb. 2, 2018, 11:33 AM), <https://www.courierpress.com/story/news/local/2018/02/02/archive-why-do-innocent-suspects-confess-its-pressure-fatigue-fear/300923002/>. The Innocence Project works to exonerate wrongfully convicted individuals through the use of DNA evidence and reform unfair criminal justice practices. *Id.*

181. See Redlich et. al., *supra* note 19, at 153.

182. See *id.* at 151 (conducting a study of two counties in New York State with 243 and 259 criminal defendants respectively).

183. See *id.* Approximately 98.4% of the defendants who partially or fully confessed pled guilty. See *id.* at 153 (explaining that 100% of partial confessors pled guilty and 97% of full confessors pled guilty within the study). Dismissed defendants and unknown outcomes were removed. *Id.*

184. See *Federal Judicial Caseload Statistics 2017*, *supra* note 179. The data set of 502 New York State criminal defendants is admittedly quite small. See *id.* at 150. Larger data pools are necessary to ensure more accurate results. See Chris Deziel, *The Effects of a Small Sample Size Limitation*, SCIENCING (Mar. 13, 2018), <https://sciencing.com/effects-small-sample-size-limitation-8545371.html> (“[R]educing the sample size reduces the confidence level of the study, which is related to the Z-score. Decreasing the sample size also increases the margin of error.”).

185. Blume, *supra* note 36, at 489 (“The available evidence thus indicates that approximately one half of all criminal defendants testify at their trials.”).

ets of federal district courts. In 2017, the federal district courts completed 11,134 trials.¹⁸⁶ A per se severance rule would increase federal court dockets by, at most, 1.4%, adding one trial to each district court judge's caseload every eight years.¹⁸⁷

Although this increase in the estimated number of trials is minute, the actual burden placed on the judiciary is even less significant. First, severance does not always lead to one or more additional trials. Severance often brings about more efficient outcomes through the "domino effect": If the first severed trial ends in a conviction, remaining codefendants regularly decide to accept plea deals.¹⁸⁸ If it ends in the defendant's favor, the government may drop the charges or offer a more lenient deal to the remaining codefendants.¹⁸⁹ "To the extent a case goes to trial because of uncertainty about strength of proof, credibility of witnesses, and acceptability of different theories to a jury, answering some or all of these questions will often quickly lead to settlement of the remaining cases."¹⁹⁰

Second, severed trials will reduce the frequency of appeals aimed at attacking the prejudicial effect of a joint trial.¹⁹¹ The judiciary's uncertainty regarding the proper application of *Bruton* places

186. *U.S. District Courts – Judicial Business 2017*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2017> (last visited Mar. 14, 2018).

187. There are 1,200 active Article III district court judges. *Biographical Directory of Article III Federal Judges: Export*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/search/advanced-search> (last visited Mar. 14, 2018) (to get the current number of active district court judges, limit to "U.S. District Courts" under "Enter Search Criteria" and to "Active Judges" under "Limit to Sitting Judges"). Dividing the 1,200 Article III district court judges by the projected 157 additional trials per year yields an additional trial for each judge every 7.64 years. State trial courts would likely experience similar trial increases, although no data is available to show illustrate this.

188. See Dawson, *supra* note 48, at 1389–91 (citing Peter Langrock, *Joint Trials: A Short Lesson from Little Vermont*, 9 CRIM. L. BULL. 612 (1973) (detailing a 1973 study in Vermont, where criminal defendants charged with serious felonies had the right to separate trials, that resulted in prosecutors and judges coming to conclude that separate trials were more economical because the first trial tended to be the only trial—subsequent cases were usually either dropped or resolved through a plea deal)).

189. Dawson, *supra* note 48, at 1389–91 (explaining the effectiveness of severance leading to settlements after the first trial's conclusion).

190. *Id.* at 1389.

191. See *id.* at 1388.

most convicted defendants in a position to appeal the trial court's joiner decision in hopes that the appellate court will assess *Bruton* scenarios more forgivingly than the trial judge. Per se severance will increase the certainty of outcomes, leading to fewer appeals and a lighter appellate docket.¹⁹²

Finally, a per se severance rule would discourage the prosecution from attempting to admit confession evidence in the first place.¹⁹³ When a confession is partial or weak,¹⁹⁴ prosecutors may see a greater benefit in trying defendants jointly rather than admitting the confession against the confessing defendant in a separate trial. If the prosecution chooses the joint trial route, there will be no increase in the number of trials. This effect will lead to an increase in plea bargain rates as prosecutors are forced to choose between introduction of the confession or a joint trial.¹⁹⁵ An increase in plea bargain rates leads to fewer cases proceeding to trial.¹⁹⁶ As prosecutors' positions weaken, their bargaining power decreases, and they must adjust by offering defendants more favorable plea terms to combat the increased likelihood that defendants will want to proceed to trial.¹⁹⁷ The friendlier the plea offers from prosecutors, the more likely defendants are to forgo trial and accept them.

192. See *Nelson v. O'Neil*, 402 U.S. 622, 635 (1971) (Marshall, J., dissenting) (“[M]uch of the supposed savings [of time, money, and energy] is lost through protracted litigation that results from the impingement or near impingement on a codefendant's rights of confrontation and equal protection.”).

193. See Ritter, *supra* note 9, at 920 (describing the prosecutor's need to make a choice between using the confession or a joint trial).

194. Amendola & Slipka, *Guide for Using the Strength of Evidence Scale*, POLICE FOUND. (2009), <http://www.policefoundation.org/wp-content/uploads/2016/11/Police-Foundation-Strength-of-Evidence-Scale.pdf> (setting a scale for the strength of confessions).

195. Stuart S. Nagel & Marian Neef, *Plea Bargaining, Decision Theory, and Equilibrium Models: Part II*, 52 IND. L.J. 1, 1–2 (1976) (detailing the negotiations involved in the plea-bargaining model).

196. See *id.* at 2.

197. See *id.* at 5. Both defendants and prosecutors have other goals in mind during their plea-bargaining negotiations. *Id.* at 8 (“For example, a defendant will increase his limit for his litigation costs, including (1) the cost of imprisonment pending trial if the defendant cannot afford bail, (2) the cost of hiring an attorney if the defendant is not poor enough to receive a court appointed attorney, but is still unable to easily absorb expensive attorney fees, and (3) the cost to one's reputation where one is sensitive to adverse publicity. Likewise, the prosecutor's other goals tend to reduce his unadjusted LD. His litigation costs include (1) his limited budget, which

Even if there is an increase in trials, few additional resources will be necessary because the extra effort required of the police and prosecutors is minimal.¹⁹⁸ Police investigations are completed before decisions on joinder or prosecutorial involvement.¹⁹⁹ Prosecutors likely spend the same amount of time in pretrial preparation and plea bargaining regardless of joinder because they must thoroughly review each defendant's file independently.²⁰⁰ Additionally, pretrial hearings can be held together regardless of whether the trials are joined or severed.²⁰¹ While separate trials themselves would usurp more of the prosecutor's time, any extra preparation for multiple trials is negligible.²⁰² The combination of these factors will significantly limit the number of extra trials and expense of resources incurred by a per se severance rule.

B. Trial Delays

The delay caused by scheduling multiple trials after severance is another possible impediment to per se severance.²⁰³ Similar to many of the other proposed advantages of joint trials, the assumed delays of conducting severed trials are exaggerated. Joint trials are significantly harder to schedule than severed trials and often lead to longer trial delays because the increased number of participants (defendants, attorneys, witnesses, etc.) increases the likelihood of scheduling conflicts.²⁰⁴ Joint trials also take longer to conduct due to the amount of

prohibits taking all cases to trial, (2) the pressures to reduce court congestion, and (3) the pressures to build a record with a high percentage of convictions.”).

198. Dawson, *supra* note 48, at 1383.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 1383–84.

203. Albert J. Weatherhead III & Richard W. Weatherhead, *Joinder & Severance of Defendants*, 19:2 PUB. DEFENDER REP., at 6 (1997) (citing *State v. Dingleline*, 33 N.E.2d 660, 662–63 (Ohio Ct. App. 1939)) (“[S]eparate trials would cause delay which might deprive a defendant of a speedy trial are insufficient.”).

204. Dawson, *supra* note 48, at 1385; *see also id.* at 1385 n.23 (examining congressional recognition of the delays in joint trials noted in the Speedy Trial Act of 1974).

objections, tactical considerations from multiple defendants, and myriad other factors.²⁰⁵ At best severance leads to speedier resolutions for defendants, prosecutors, and the court system and, at worst, it causes inconsequential delays.

Even if there is some delay, most criminal defendants are surprisingly unbothered by, and sometimes even prefer, delayed trials.²⁰⁶ This is especially true if their chances of a fair outcome are substantially increased through severed trials.²⁰⁷ On the other hand, the passage of time can often harm the government's case because "witnesses die, move from the court's jurisdiction, and lose crisp memories; prosecutorial zeal wanes and public attention wanders."²⁰⁸ If prosecutors are worried that a delay will harm their case, they are free to forgo admitting the confession to conduct a joint trial.

C. Witness Trauma from Repeated Testimony

Opponents of trial severance fear that it will cause victims and witnesses to be forced to repeat their testimony.²⁰⁹ While it may be time-intensive and a burden for those involved, the larger worry is forcing victims to recall traumatizing events multiple times.²¹⁰ Per se severance, therefore, could even make some witnesses more hesitant to come forward.²¹¹

Most joint criminal trials that include confessions involve only one of the defendants confessing, meaning most only require two trials. This is true even for cases with more than two codefendants. Each defendant does not necessarily need an individual trial. Instead, the two trials would include one for the confessing codefendant where the

205. *See id.* at 1386–87.

206. *Id.* at 1394–95 (analyzing criminal defendants' preference for delayed trials).

207. *See id.* at 1395.

208. *Id.*

209. *See* Richardson v. Marsh, 481 U.S. 200, 210 (1987); State v. Druke, 564 P.2d 913, 916 (Ariz. Ct. App. 1977) (concluding that inconveniencing witnesses, such as victims of rape, through repetition of testimony may outweigh potential for prejudice to a defendant); *see also* Dawson, *supra* note 48, at 1384 (citing *Druke*, 564 P.2d at 916).

210. *See* Dawson, *supra* note 48, at 1384.

211. *Developments in the Law: Criminal Conspiracy*, 72 HARV. L. REV. 922, 983 (1959).

confession is introduced and one for all the other codefendants where it is not.²¹² Therefore, due to the infrequency of needing more than two trials as a result of severance, it would be unlikely for any victim to have to testify more than twice.

Additionally, most criminal witnesses offered by the prosecution are not lay witnesses or victims of crimes.²¹³ They are law enforcement, laboratory employees, and investigators who regularly testify in court because of their profession and are not burdened to do so.²¹⁴ Admittedly, a per se severance rule may negatively impact some crime victims, but the fear of witnesses having to recall traumatizing events is certainly outweighed by the extreme prejudices placed on non-confessing criminal defendants in joint trials.

D. Inconsistent and Asymmetrical Verdicts

Justice Scalia opined that severed trials increase the probability of inconsistent verdicts.²¹⁵ He understood joint trials to reflect “more accurate assessment[s] of relative culpability” for each criminal defendant.²¹⁶ He also noted that inconsistent verdicts cause “scandal and inequity.”²¹⁷ While it is true that inconsistent verdicts may seem like “capricious decisionmaking [sic],”²¹⁸ the American jury-based judicial system is specifically designed to produce verdicts which appear to be inconsistent.²¹⁹

Unlike internally inconsistent verdicts, differing verdicts in severed trials are not actually inconsistent. Truly inconsistent verdicts are the product of a single jury reaching a result that could not have been

212. See *Richardson*, 481 U.S. at 219 n.7 (Stevens, J., dissenting).

213. *Dawson*, *supra* note 48, at 1384–85.

214. *Id.*

215. *Richardson*, 481 U.S. at 210.

216. *Id.*

217. *Id.*

218. *Leipold & Abbasi*, *supra* note 52, at 354–55.

219. Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 777–78 (1998) (“Juries often produce curious verdicts.”).

attained without incorrectly following the judge's instructions.²²⁰ This means that a risk of inconsistent verdicts involving multiple criminal defendants only exists when criminal defendants are tried jointly.²²¹

In *Bruton* situations specifically, the evidence against each defendant is never identical; obviously differing evidence may, and often should, lead juries to reach different results.²²² For example, after two defendants trials are severed, one trial would involve a defendant who confessed to the charged crime while the other would involve a defendant who has not confessed. If the juries from each of these trials reached different verdicts based on the differences in confession and other evidence between the defendants, this difference is not inconsistent. Additionally, the differences in the competency of the defendants' attorneys may be enough to warrant dissimilar verdicts.²²³ Given the variances between the two defendants and their respective cases, differing outcomes are not only unsurprising but expected.

Furthermore, incorrect verdicts are far more scandalous and detrimental to the judicial system than the appearance of inconsistent verdicts.²²⁴ The likelihood of an incorrect verdict is greatly increased when codefendants are denied severance and forced to proceed in a joint trial despite the admission of one codefendant's confession.²²⁵ Regrettably, this injustice is often overlooked despite the asymmetry in gravity of result; the prosecution does not "feel the sting of the acquittal as sharply as the defendant feels the sting of the conviction."²²⁶ Thus, severance avoids the possibility of both truly inconsistent verdicts and

220. See Dawson, *supra* note 48, at 1391–94; see also Muller, *supra* note 219, at 812 (arguing for a more aggressive approach in ascertaining whether criminal defendants have been harmed by inconsistent verdicts). Courts routinely uphold jury verdicts that are truly inconsistent. See, e.g., *United States v. Dotterweich*, 320 U.S. 277, 279 (1943) (concluding that regardless of the jury's motives or beliefs, they may nevertheless reach an internally inconsistent verdict).

221. Muller, *supra* note 219, at 780 (noting this in the context of the crime of conspiracy).

222. See *id.* at 784–85 (examining the possible rationales of jurors who make inconsistent assessments of guilt for two similarly-situated codefendants).

223. See Dawson, *supra* note 48, at 1392 (explaining the flaws inherent in the argument against severed trials based on the possibility of inconsistent verdicts).

224. See *Leipold & Abbasi*, *supra* note 52, at 393.

225. See *id.*; see generally Kassin & Sukel, *supra* note 62 (testing the impact of confessions on juror conviction rates).

226. Muller, *supra* note 219, at 810.

incorrect verdicts, allowing for equal and just treatment of criminal defendants.

Although severed trials may provide an edge to all the defendants whose cases are not tried first, this advantage is minimal. When trials are severed, a likely result is that only the first tried defendant's case will actually proceed to trial.²²⁷ This is because of the predictive effect the first trial's outcome has on plea negotiations.²²⁸ Therefore, most of the tactical advantage lies in deciding whether to go to trial at all.²²⁹ Both the later-tried defendants and the prosecutor benefit from the knowledge of the first trial's disposition and are able to apply it to plea bargaining negotiations.

Later-tried defendants will be able to observe the trial strategy of the prosecution in each of the previously joined codefendants' trials and then adopt an optimal strategy based on this otherwise unobtainable information.²³⁰ The advantages associated with this added layer of discovery are, however, largely overstated. First, even though rules are in place allowing prosecutors to withhold much of their evidence from criminal defendants, prosecutors often disclose everything available to them to encourage defendants into accepting plea deals.²³¹ This negates most of the advantage defendants stand to gain by observing their codefendants' trials. Second, much witness testimony occurs in pre-trial hearings.²³² As a result, almost no advantage is gained because both parties are privy to the testimony prior to trial anyway.²³³

Despite such minimal opportunity to take advantage of severed trials, the judiciary has long feared the potential of criminal defendants

227. *See supra* Section V.A.

228. *See supra* note 188; Dawson, *supra* note 48, at 1396–97.

229. Dawson, *supra* note 48, at 1396–97.

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

231. *See* Dawson, *supra* note 48, at 1395; *see also* Grace Dana Runge, Comment, *Texas Criminal Discovery*, 47 TEX. L. REV. 1182, 1195 (1969) (stating that prosecutor's use of generous pretrial discovery may lead to guilty pleas as often "as it would [] any tactical advantage to the defense").

232. Dawson, *supra* note 48, at 1395.

233. *Id.* 1395–96.

gaming the system.²³⁴ Summarily, “[j]udges undervalue the defendants’ interests, in part because they may assume that defendants are trying to gain some tactical or unfair advantage from separate trials.”²³⁵ This fear is completely unwarranted and based on nothing more than paranoia,²³⁶ which has unfortunately led to unfair constraints impeding the true goal—accurate results.²³⁷ Severing trials serves “the public[’s] interest in the pure and just administration of the criminal law [and] is well worth the risks.”²³⁸

VI. THE NEED FOR A BRIGHT-LINE APPROACH

Per se trial severance may appear to be an extreme solution to the *Bruton* problem. Areas of law once governed by bright-line rules are now frequently adjudicated through case-by-case analysis governed by “reasonableness” and “foreseeability” standards.²³⁹ Bright-line rules are inflexible and prevent insightful judges from devising creative remedies to address each unique situation they face.²⁴⁰ The judiciary

234. See FED. R. CRIM. P. 11(d) (preventing withdrawal of a defendant’s guilty plea after sentencing); see *id.* at 12.2(a) (barring a defendant from raising an insanity defense without timely notice to the government).

235. Leipold & Abbasi, *supra* note 52, at 401.

236. See *id.* (explaining that the judicial fear of defendants strategizing against the system is “exaggerated,” and finding no identifiable “illegitimate reason why a defendant would seek severance”).

237. See *id.* at 388–89 (“Courts and legislatures routinely evaluate the accused’s interest in certain procedures far lower than defendants would like, but they do so because of a suspicion that what the defendant is really seeking is either illegitimate or highly susceptible to abuse. . . . [I]n many instances it could plausibly be argued that allowing the request would lead to more fair and accurate results.”).

238. Brennan, Jr., *supra* note 28, at 2995 (discussing the need for enhanced pre-trial discovery available to criminal defendants).

239. Jason Scott Johnston, *Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form*, 76 CORNELL L. REV. 341, 343 (1991).

240. Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 646 (2014) (“With rules, the Court can buy itself uniformity, predictability, and low decision costs, at the expense of rigidity, inflexibility, and arbitrary-seeming outcomes. With standards, it can buy itself nuance, flexibility, and case-specific deliberation, at the expense of uncertainty, variability, and high decision costs.”).

is wise to hesitate to incorporate bright-line rules when less drastic alternatives are available.²⁴¹ There are some circumstances, however, where bright-line rules are not merely viable but essential to the administration of justice and the protection of parties' rights.²⁴²

The *Bruton* problem is this type of circumstance. First, a bright-line rule provides an easy-to-follow guideline for criminal defendants, prosecutors, and judges.²⁴³ Second, bright-line rules are far more consistent with the rule of law than balancing tests because of their predictability and certainty.²⁴⁴ Third, while a bright-line rule certainly accords less attention to the specific concerns of individuals,²⁴⁵ the resulting increase in fairness should not overvalue such a result. Finally, and most importantly, per se trial severance is the only way to guarantee the Confrontation Clause rights of non-confessing codefendants.

Legal scholars have proposed many other methods that purport to remedy the issues presented by the *Bruton* problem, but each fails to ensure the Confrontation Clause's guarantee. One such proposal is for a reverse balancing test under Federal Rule of Evidence 403.²⁴⁶ A reverse Rule 403 test would shift the burden of admitting evidence from the defendant to the prosecution.²⁴⁷ The government would be required

241. See *Coolidge v. New Hampshire*, 403 U.S. 443, 499 (1971) (Black, J., dissenting) (contending that judicially created bright-line rules may seem to stand in line with precedent but instead often extend beyond what the law had originally envisioned).

242. See, e.g., *Arizona v. Gant*, 556 U.S. 332, 351 (2009) (requiring police to demonstrate "the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest"); *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (requiring an evidentiary hearing so that welfare recipients can confront and cross-examine government officials before losing their benefits); *Miranda v. Arizona*, 384 U.S. 436, 498–99 (1966) (requiring police to read criminal defendants their rights before seeking incriminating statements that would be admissible at trial).

243. Andrew McLetchie, Note, *The Case for Bright-Line Rules in Fourth Amendment Jurisprudence: Adopting the Tenth Circuit's Bright-Line Test for Determining the Voluntariness of Consent*, 30 HOFSTRA L. REV. 225, 228 (2001).

244. See Johnston, *supra* note 238, at 343–44.

245. Daniel T. Gillespie, *Bright-Line Rules: Development of the Law of Search and Seizure During Traffic Stops*, 31 LOY. U. CHI. L. J. 1, 6 (1999).

246. See Dodson, *supra* note 9, at 834–37.

247. See *id.* at 831–32.

to show that the probative value of the defendant's redacted confession substantially outweighs any prejudicial impact on the non-confessing defendants.²⁴⁸ The benefits of a reverse Rule 403 test are that incriminating statements with low prejudicial impact to the non-confessing defendant would usually be admitted in a joint trial,²⁴⁹ but those with higher prejudicial impact would not.²⁵⁰

Simply shifting the balance, however, will not solve the problem if the prejudice involved remains unrecognized. Judicial minimization of *Bruton* problems is caused by the judiciary's undervaluing of the prejudicial effect of confessions.²⁵¹ Moreover, constitutional rights are normally not subject to balancing tests,²⁵² nor should they be.

Another suggested solution is stricter confession redactions paired with carefully worded substitutions and proper limiting instructions.²⁵³ This method has already been tested in practice,²⁵⁴ but unfortunately it is woefully ineffective at limiting improper inferences by the jury. Jurors are still likely to develop the belief that the other individuals referred to in the confession are the codefendants seated at the defense table directly next to the confessor.²⁵⁵

A third resolution recommends redacting implicit references to non-confessing codefendants in the confession and limiting the prosecutor's commentary linking the codefendants to the confession.²⁵⁶ This would prevent prosecutors' circumvention of redacted confessions through clever pleas to the jury that seem proper but, in fact, work to link the non-confessing codefendants to times and places within the confession such that jurors, knowingly or subconsciously, will apply the confession against the non-confessing codefendants, disregarding

248. *See id.*

249. *See id.* at 835.

250. *See id.*

251. *See Richardson v. Marsh*, 481 U.S. 200, 213–16 (1987) (Stevens, J., dissenting) (discussing the prejudicial effect of the admission of the particular confession at issue on the non-confessing defendant).

252. Dodson, *supra* note 9, at 836.

253. *See Rosenthal*, *supra* note 9, at 129–31.

254. *See supra* note 151 and accompanying text.

255. *See Gray v. Maryland*, 523 U.S. 185, 193 (1998).

256. *See Jason Portwood Hipp*, Note, *Redacting the Constitution: Securing Bruton's Confrontation Protections for a Codefendant During Non-Evidentiary Counsel Commentary*, 44 COLUM. HUM. RTS. L. REV. 259, 307 (2012).

the judge's instructions to the contrary.²⁵⁷ Certainly this solution would offer a greater degree of protection to criminal defendants, but it provides no assistance in preventing juror inferences based solely upon the codefendant's confession. Like the stricter redaction solution, jurors would still be overly susceptible to improper inferences.²⁵⁸

Finally, trial bifurcation or multiple juries have been advocated as being as effective at alleviating Confrontation Clause issues as trial severance.²⁵⁹ This avenue frees courts from relying on limiting instructions while still maintaining some of the presumed administrative efficiencies of joint trials.²⁶⁰ A few courts have experimented with this,²⁶¹ but they have been largely ineffective because of the risk that information will pass from one jury to the other.²⁶² While neither method

257. See, e.g., *Richardson v. Marsh*, 481 U.S. 200, 205, 211 (1987).

258. *Gray*, 523 U.S. at 193 (detailing a more "sophisticated" juror could still speculate about the deletion, leading them to "overemphasize the importance of the confession's accusation").

259. See *Dawson*, *supra* note 48, at 1416–22 (discussing the possible solutions to the *Bruton* problem and the methods state and federal courts have used to combat the problem); *Ritter*, *supra* note 9, at 920–21 (discussing the viability of these alternatives in certain circumstances).

260. See *Dawson*, *supra* note 48, at 1416–22; *Ritter*, *supra* note 9, at 920–21.

261. See *United States v. Crane*, 499 F.2d 1385, 1388 (6th Cir. 1974) (approving the trial court's bifurcated trial method, which required the jury reach a verdict on the non-confessing defendants before the confession was admitted into evidence, but questioning its sustainability in solving the *Bruton* problem); *United States v. Sidman*, 470 F.2d 1158, 1170 (9th Cir. 1972) (affirming the use of two juries in a joint trial in which the jury for the non-confessing codefendant left the courtroom during the introduction of the other codefendant's confession); *State v. Johnson*, 285 N.E.2d 751, 755 (Ohio 1972) (approving simultaneous trials for three defendants, in three different courts, before three different juries where each codefendant's individual confession was admitted as evidence in only his trial).

262. The bifurcated trial method is particularly susceptible to injustice for subsequent defendants if the first tried defendant is found not guilty. Jurors are likely to feel as if they incorrectly found the first defendant not guilty upon hearing confession evidence from the second defendant and may seek to "right a wrong" by unjustly finding guilt in the second defendant. See *Crane*, 499 F.2d at 1388 (stating "serious doubts" that the trial court's bifurcated trial method was a sustainable solution to the *Bruton* problem because of the precarious position of the jury in deciding one criminal defendant's fate, hearing new evidence, and then deciding the fate of the next). Multiple juries can lead to confusion among the jurors and expend most of the efficiencies claimed by joint trials. See *Sidman*, 470 F.2d at 1170 (addressing the trial court's use

has proven to be effective in every situation,²⁶³ both show promise as formidable solutions if courts are able to develop effective rules governing their procedure.

While alternatives to per se severance may indeed limit the likelihood that a jury will make impermissible inferences when assessing the guilt of non-confessing codefendants, none is able to sufficiently diminish the potential for unconstitutional levels of prejudice.²⁶⁴ These alternatives attempt to chip away at an injustice that has already spread too deep. Per se severance, however, eradicates potential prejudice at the problem's source.²⁶⁵ Not only does it guarantee the Confrontation Clause rights of criminal defendants,²⁶⁶ but it also relieves trial courts and defendants of the burden of unpredictable case-by-case analysis.²⁶⁷

VII. CONCLUSION

Many assume that per se trial severance is unfeasible.²⁶⁸ Perhaps this is because of our nation's long history of joint trials at common law²⁶⁹ combined with a system that is hesitant to accept change. But sometimes radical change is the only means to solve a problem. The twenty-first century has seen movements in many fields in favor of long-term ideals of morality and fairness over short-term administrative efficiencies. There is no excuse for the judiciary not to be leading such endeavors in the name of justice. By admitting a codefendant's confession in a joint trial, non-confessing defendants are deprived of their constitutional right to confront the witnesses against them. We cannot forget that "many of our most precious guarantees of liberty and human dignity are at hazard in criminal procedures."²⁷⁰ A per se trial

of multiple juries to solve the *Bruton* problem); *see also* *People v. Williams*, 444 N.E.2d 136, 143 (Ill. 1982) (advising against the use of multiple juries).

263. *See* Ritter, *supra* note 9, at 920 n.377.

264. *See* *Gray v. Maryland*, 523 U.S. 185, 194–95 (1998).

265. *See* Ritter, *supra* note 9, at 916–17.

266. *See id.* at 915–16.

267. *See id.* at 907–08 (discussing why a case-by-case analysis when dealing with defendants' Confrontation Clause rights is unacceptable).

268. *See generally* *Richardson v. Marsh*, 481 U.S. 200, 210 (1987) (explaining the cons of trial severance and subsequently presenting the pros of joint trials).

269. *See* Regensteiner, *supra* note 41, § 2.

270. *See* Brennan, Jr., *supra* note 28, at 281.

severance rule is the only method to ensure that criminal defendants are guaranteed their constitutional rights when faced with the *Bruton* problem. For the criminally accused, no price is too high for justice.