The Future of Codefendant Confessions

Benjamin E. Rosenberg [*]

"*Bruton*," like "*Miranda*"[1] or "*Kastigar*,"[2] has an exalted status in the criminal law lexicon. Each term is part of the name of a United States Supreme Court case and is the eponym for a constitutional right. Similar to "*Miranda*" and "*Kastigar*," to say that someone has a "*Bruton* right" or a "right under *Bruton*" more often raises questions than provides answers. In *Bruton v. United States*,[3] the Court identified a right crucial to all criminal defendants — the right that the state not use a nontestifying codefendant's confession against anyone but the confessor himself.[4] In the years since *Bruton*, numerous cases have refined, explained, and, often, severely limited this right.

Two recent United States Supreme Court cases, however, have opened the door for significant developments and clarifications of the "*Bruton* right." In *Gray v. Maryland*,[5] the first case, the Supreme Court reversed a conviction on the grounds that the trial court improperly admitted into evidence a codefendant's confession that was redacted in a manner consistent with then-extant Supreme Court authority.[6] This

---

[*] Partner, Swidler Berlin Shereff Friedman, LLP. B.A. *magna cum laude*, Harvard University, 1981; J.D. *magna cum laude*, Harvard University School of Law, 1985. Mr. Rosenberg was an Assistant United States Attorney for the Southern District of New York from 1990 through 1994.

[1] In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court held that a person placed in custody by state authorities cannot be questioned until he is informed of certain rights that he can waive by consenting to questioning. The future of *Miranda* is uncertain, and will be affected by the Supreme Court's ultimate assessment of *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999), *cert. granted* No. 99-5525, 1999 U.S. LEXIS 8199, at *1 (U.S. Dec. 6, 1999), in which the Fourth Circuit held that *Miranda* had been overruled in 1985 by federal statute.

[2] *Kastigar v. United States*, 406 U.S. 441 (1972), provides that a witness afforded "use immunity" pursuant to 18 U.S.C. § 6002 can be compelled to testify, and that the government bears the burden of showing that none of the post-testimony evidence that it collected derived from that compelled testimony. "*Kastigar*" hearings are held to identify the government's evidence that is the "fruit of the tree" of the compelled testimony, such evidence being inadmissible.

[3] 391 U.S. 123 (1968).

[4] *See id.* at 126.

[5] 523 U.S. 185 (1998).

[6] *See id.* at 188.

decision expanded the criminal defendant's *Bruton* right by making it harder for the prosecution to get admitted into evidence the confession of a nontestifying codefendant. *Gray*, however, did not set forth clear guidelines for the development of *Bruton* rights. Consequently, the lower courts appear confused about *Gray*'s significance and appear unable to discern a clear answer to the questions of whether and how, in a criminal trial against *A*, the prosecution can use the confession of nontestifying codefendant *B*.

In *Lilly v. Virginia*,[7] the second decision, a plurality of the Supreme Court found that the Confrontation Clause of the Sixth Amendment, from which the *Bruton* right derives, barred the admission into evidence of extra-judicial statements against penal interest where the declarant was unavailable for cross-examination.[8] The *Lilly* Court emphatically rejected the approach of the majority of the circuit courts of appeals that statements against penal interest are presumptively reliable, and thus admissible, without regard to the defendant's rights under the Confrontation Clause. Although *Lilly* did not involve a *Bruton* situation — the statement against penal interest at issue in *Lilly* was not made by a nontestifying codefendant, but rather by an alleged accomplice who was not on trial with the defendant[9] — *Lilly* may have a significant effect on the development of the *Bruton* doctrine. The *Lilly* decision may make courts extremely wary, in *Bruton* situations, of allowing a nontestifying codefendant's confession to be admitted into evidence when there is a reasonable risk that such a confession will be used improperly against anyone except the declarant.

This Article examines the *Gray* and *Lilly* decisions and assesses the impact that they may have on the use of the confessions of nontestifying defendants in multiple-defendant trials. Part I outlines the Supreme Court's treatment of codefendant confessions from the first case addressing that issue, *Delli Paoli v. United States*,[10] through the most recent decision, *Gray v. Maryland*. Part II assesses the impact that *Gray* will have on the use of codefendant confessions and considers its interpretations by the lower courts.

Part III discusses the Supreme Court's analysis of the Confrontation Clause in non-*Bruton* situations, with special emphasis on the Court's treatment of whether, and under what circumstances, statements against penal interest satisfy Confrontation Clause scrutiny. Until *Lilly*, the Supreme Court cases followed a trend that aligned the Confrontation Clause with the Federal Rules of Evidence: If a statement was not barred

---

[7] 119 S. Ct. 1887 (1999).
[8] *See id.* at 1901.
[9] *See id.* at 1892.
[10] 352 U.S. 232 (1957).

by the hearsay provisions of the Federal Rules of Evidence, then it would also pass muster under Confrontation Clause scrutiny. That trend made courts extremely lax in protecting against the dangers posed for defendants by the confessions of their codefendants. Although it is too early to say with certainty, Part IV suggests that *Lilly* may re-awaken the courts to the dangers against which *Bruton* rights were intended to protect.

I. FROM *DELLI PAOLI V. UNITED STATES* TO *GRAY V. MARYLAND*: THE UNSUCCESSFUL SEARCH FOR A WORKABLE RULE

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]"[11] Although the Confrontation Clause has engendered much litigation and controversy, the Clause means at least this: The statement of person *A* cannot be used in a criminal prosecution against person *B*, unless person *A* is available for cross-examination by person *B*. The real question is: What should a tribunal do when *A* and *B* are tried together, and the prosecution seeks to admit *A*'s statement only against *A*? The Supreme Court has answered that question four times from 1957 through 1998, but differently each time.

A. Delli Paoli v. United States

The *Delli Paoli* case arose out of the conviction of Orlando Delli Paoli for conspiring to transport and possess alcohol.[12] Delli Paoli was tried jointly with his alleged coconspirators.[13] One of the pieces of evidence introduced at the trial was the confession of one of Delli Paoli's codefendants, Whitley.[14] That confession described the conspiracy generally, and described the roles of several of its members, including Delli Paoli.[15] The confession identified Delli Paoli by name and nickname, and it described how Whitley ordered and received unlawful alcohol from Delli Paoli.[16] The confession was admitted into evidence at the close of the trial, along with a clear instruction from the court:

> 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.[17]

---

11 U.S. CONST. amend. VI.

12 *See Delli Paoli*, 352 U.S. at 233.

13 *See id.*

14 *See id.* at 233-34.

15 *See id.* at 243-46 (app.).

16 *See id.* at 245-46 (app.).

17 *Id.* at 239-40.

On appeal, Delli Paoli argued that the trial court should not have admitted Whitley's confession into evidence at Delli Paoli's trial because, notwithstanding the limiting instructions, the jury considered the confession when evaluating the case against him.[18] The Supreme Court rejected the argument, relying on the clarity of the instruction (which Delli Paoli did not contest) and the long-standing presumption that juries follow courts' instructions.[19] The *Delli Paoli* Court cited substantial authority for the "long-standing recognition that possible prejudice against other defendants may be overcome by clear instructions limiting the jury's consideration of a post-conspiracy declaration solely to the determination of the guilt of the declarant."[20] The dissent did not challenge the precedent on which the majority relied, but instead relied on the "psychological" fact that juries cannot always limit their consideration of a person's confession so as not to take that confession into account in considering the guilt or innocence of a nondeclarant.[21]

B. Bruton v. United States

The position of the *Delli Paoli* dissenters prevailed ten years later in the *Bruton* decision, in which the Court overruled *Delli Paoli*.[22] In *Bruton*, George William Bruton and a codefendant, Evans, were jointly tried for an armed postal robbery.[23] Prior to trial, Evans orally confessed to a postal inspector that he and Bruton committed the armed robbery.[24] The postal inspector testified to the confession during the trial, and, accordingly, the trial court instructed the jury — consistent with the Supreme Court's teaching in *Delli Paoli* — that the jury should consider the confession only against Evans, not against Bruton.[25] Evans and Bruton were convicted, but the Eighth Circuit overturned Evans's conviction because police had not given Evans *Miranda* warnings.[26] Relying on *Delli Paoli*, the intermediate

---

[18] *See Delli Paoli*, 352 U.S. at 233. It was clear that Whitley's statement was admissible against Whitley.

[19] *See id.* at 239-42. *But see infra* note 109 and accompanying text.

[20] *Delli Paoli*, 352 U.S. at 239 n.5.

[21] *See id.* at 247 (Frankfurter, J., dissenting). Dissenting, Justice Frankfurter stated that

> [t]he fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell.

Id.

[22] *See* Bruton v. United States, 391 U.S. 123, 126 (1968).

[23] *See id.* at 124.

[24] *See id.*

[25] *See id.* at 125 & n.2.

[26] *See id.* at 124 & n.1. Evans was retried and acquitted. *See id.* at n.1.

court affirmed Bruton's conviction.[27]

The Supreme Court reversed, relying on four related arguments. First, the Court noted that it had decided companion cases involving the Confrontation Clause since *Delli Paoli*: *Pointer v. Texas*[28] and *Douglas v. Alabama*.[29] According to the *Bruton* Court, both cases emphasized the importance of cross-examination for the defendant in a criminal trial,[30] and the *Pointer* Court identified the right to cross-examination as "'a major reason underlying the constitutional confrontation rule.'"[31]

Second, the *Bruton* Court suggested that *Pointer* and *Douglas* alone did not undermine *Delli Paoli*.[32] The Court explained that the fundamental premise of *Delli Paoli* is that the jury would *not consider* a nontestifying defendant's confession against a codefendant; thus, if *Delli Paoli* is correct, then *Pointer* and *Douglas* are moot because there would be no need for the codefendant to cross-examine the confessing defendant.[33] The Supreme Court observed, however, that *Jackson v. Denno*[34] effectively repudiated the *Delli Paoli* premise.[35] The *Jackson* Court, in considering a Fifth Amendment issue, held that a court, not a jury, should decide the voluntariness of a confession before a confession is presented to a jury.[36] The relevance of *Jackson* for the *Bruton* Court was that *Jackson* "expressly rejected the proposition that a jury, when determining the confessor's guilt, could be relied on to ignore his confession of guilt should it find the confession involuntary."[37] The point was especially significant for the *Bruton* Court because not only had *Jackson* rejected the type of mental effort that *Delli Paoli* required, but it had done so by relying, in part, on the dissenting opinion in *Delli Paoli*.[38]

Third, the *Bruton* Court found that the 1966 amendment to Rule Fourteen of the Federal Rules of Criminal Procedure also evidenced the Court's repudiation of *Delli Paoli*'s premise.[39] Rule Fourteen allowed for severance of trials when a joint trial would prejudice some defendants.[40]

---

[27] *See id.* at 124-25.
[28] 380 U.S. 400 (1965).
[29] 380 U.S. 415 (1965).
[30] *See Bruton*, 391 U.S. at 126-27.
[31] *Id.* at 126 (quoting *Pointer*, 380 U.S. at 406-07).
[32] *See id.* at 126-27.
[33] *See id.* at 126.
[34] 378 U.S. 368 (1964).
[35] *See Bruton*, 391 U.S. at 128.
[36] *See Jackson*, 378 U.S. at 376-77.
[37] *Bruton*, 391 U.S. at 129.
[38] *See id.*
[39] *See id.* at 131.
[40] *See id.*

Finally, the Court noted that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."[41] The Court stated that such a context was presented in the case at bar, "where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial."[42] The Court refused to accept limiting instructions as a substitute for the nondeclarant's constitutional right of cross-examination, because the effect of limiting instructions is tantamount to no instructions at all.[43]

C. Richardson v. Marsh

The Supreme Court next visited the issue of the admissibility of codefendant confessions in *Richardson v. Marsh*.[44] The evidence in *Richardson* demonstrated that three people — Clarissa Marsh, Kareem Martin and Benjamin Williams — went to the home of Ollie Scott and demanded money from her.[45] Scott gave the money to Martin and Williams, who then directed Scott, Scott's niece, and the niece's son to the basement of the house, where Martin shot all three of them.[46] Only the niece survived, and she testified at the joint trial of Marsh and Williams.[47]

In addition to the niece's testimony, the government introduced (over Marsh's objection) Williams's confession.[48] The confession described the events in Scott's house and the perpetrators' car ride to Scott's house, during which, according to the confession, Martin and Williams discussed their plan to rob Scott, and Martin said that he intended to kill the victims following the robbery.[49] The confession was redacted so that it did not mention the fact that Marsh was in the car with Martin and Williams, and the confession did not refer to Marsh at any point.[50] The trial court repeatedly instructed the jury that it should use the confession *only* against Williams, not against Marsh.[51] Also, Marsh took the stand and testified that she had traveled to Scott's house with Martin and Williams to borrow

41 *Id.* at 135.
42 *Id.* at 135-36.
43 *See Bruton*, 391 U.S. at 137.
44 481 U.S. 200 (1987).
45 *See id.* at 202.
46 *See id.*
47 *See id.* "Martin was a fugitive at the time of trial." *Id.*
48 *See id.* at 203 & n.1.
49 *See id.*
50 *See Richardson*, 481 U.S. at 203 n.1.
51 *See id.* at 204.

money from Scott, and that although she was present at the robbery, she was surprised by and did not take part in either the robbery or murder.[52]

The jury apparently did not believe Marsh's testimony because it found her guilty of "two counts of felony murder in the perpetration of an armed robbery and one count of assault with intent to commit murder."[53] Her appeal failed, and Marsh filed a petition for a writ of habeas corpus, arguing that the admission of Williams's confession violated her constitutional rights under the Confrontation Clause.[54] The district court denied her petition, but the Sixth Circuit reversed.[55] According to the circuit court, the *Bruton* doctrine required the reversal of Marsh's conviction because the admission of Williams's confession violated Marsh's Confrontation Clause rights.[56]

The Supreme Court granted certiorari to resolve a conflict among the circuit courts of appeals as to whether *Bruton* barred the admission of a nontestifying codefendant's confession if (a) the confession *taken in conjunction with all of the other evidence at the trial* inculpates the defendant (the "contextual implication" or "evidentiary linkage" approach) or only if (b) the confession *on its face* inculpates the defendant.[57] The Court phrased the issue presented to it as follows:

> In *Bruton v. United States*, . . . we held that a defendant is deprived of his rights under the Confrontation Clause when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. Today we consider whether *Bruton* requires the same result when the codefendant's confession is redacted to omit any reference to the defendant, but the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial.[58]

The Court answered the question in the negative: *Bruton* did not require the exclusion of a codefendant's confession as long as that confession did

[52] *See id.*
[53] *Id.* at 205.
[54] *See id.*
[55] *See id.*
[56] *See Richardson*, 481 U.S. at 205-06.
[57] *See id.* at 206. *Compare, e.g.*, United States v. Belle, 593 F.2d 487, 493 (3d Cir. 1979) (stating that *Bruton* bars a confession only if the confession on its face inculpates the defendant: "When a co-defendant's extrajudicial statement does not directly implicate the defendant, however, the *Bruton* rule does not come into play") *with* Clark v. Maggio, 737 F.2d 471, 477 (5th Cir. 1984) *and* English v. United States, 620 F.2d 150, 152 (7th Cir. 1980) ("The introduction of a confession from which the names of co-defendants have been excised may violate the *Bruton* rule if *in context* the statement is clearly inculpating of a co-defendant, and vitally important to the Government's case.") (emphasis added).
[58] *Richardson*, 481 U.S. at 201-02.

not *facially* implicate the defendant.[59]

The *Richardson* Court began its analysis by identifying two premises. First, the Court observed that the Confrontation Clause requires that "where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand."[60] Second, the Court stated that the law generally presumes that jurors follow their instructions and, thus, if they are instructed to disregard certain evidence against one defendant, they are presumed to have followed that instruction.[61] The Court then explained that *Bruton* acknowledged a *narrow* exception to the second premise: When a codefendant's confession is "powerfully incriminating," the presumption that jurors follow instructions is not applicable.[62] As the *Richardson* Court understood *Bruton*, however, nontestifying codefendants' confessions were so "powerfully incriminating" as to justify exclusion *only if* they facially incriminated the defendant; confessions that incriminated through "linkage" to other evidence were not excludable.[63]

The Court offered two reasons for its narrow reading of *Bruton.* First, the Court asserted that, while a jury could not be expected with any degree of confidence to ignore a facially incriminatory piece of evidence even if instructed to do so, a jury could be expected to ignore a piece of evidence that is not facially incriminatory but, rather, incriminates only through evidentiary linkage.[64]

Second, the *Richardson* Court emphasized that *Bruton* must be read narrowly for practical reasons.[65] The Court explained that if *Bruton* is limited to excluding confessions that are facially incriminatory, then "*Bruton* can be complied with by redaction."[66] The Court conjectured that if confessions that inculpate a codefendant through linkage are barred, then (a) the confession could not be made admissible by redaction, and significant evidence against the confessing codefendant would be lost, and

---

59 *See id.* at 211.

60 *Id.* at 206.

61 *See id.*

62 *See id.* at 207.

63 *See id.* at 208.

64 *See Richardson*, 481 U.S. at 208. According to the Court,

> [w]here the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that "the defendant helped me commit the crime" is more vivid than inferential incrimination, and hence more difficult to thrust out of mind.

Id.

65 *See id.*

66 *Id.* at 209. The *Richardson* Court noted that *Bruton* had suggested that possibility. *See id.*

(b) it would be impossible to foresee prior to trial whether the confession would be admissible because it would be impossible to predict with confidence the presence or strength of the other "linking" evidence.[67]

The Court recognized that any *Bruton*-related problems could be avoided by having separate trials for confessing defendants.[68] That was too high a price to pay, according to the Court, because joint trials are an integral part of the criminal justice system.[69] Further, the Court pointed out that severance would impair the fairness and efficiency of the system of criminal justice by forcing prosecutors to bring separate proceedings, to present identical evidence repeatedly, and by requiring witnesses and victims to repeat the trauma and inconvenience of testifying.[70]

Thus, the Court held that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence."[71] The Court did not express an opinion "on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun."[72]

D. Gray v. Maryland

Gray, like *Richardson*, involved a codefendant's redacted confession.[73] Unlike *Richardson*, however, the confession referred to the defendant's existence, but did not mention the defendant by name.[74] *Gray* thus presented exactly the question left open by *Richardson*: What result when the defendant's name is replaced by a neutral pronoun or symbol?

Gray arose out of the murder trial of two men, Kevin D. Gray and Anthony Bell, who were accused of beating to death a man named Stacey Williams.[75] At trial, a statement that Bell gave to police at the time of his arrest was read to the jury, along with instructions that the jury consider the confession only against Bell, and not against Gray.[76] When the police officer read the statement to the jury, he replaced the name "Gray" with "deleted."[77] The confession itself was redacted so that a blank space

---

67 *See id.*
68 *See id.*
69 *See id.*
70 *See Richardson*, 481 U.S. at 210.
71 *Id.* at 211.
72 *Id.* at 211 n.5.
73 *See* Gray v. Maryland, 523 U.S. 185, 188 (1998).
74 *See id.*
75 *See id.*
76 *See id.* at 188-89.
77 *See id.* at 188.

replaced Gray's name throughout.[78] The confession read, in relevant part, as follows:

> (Q) What can you tell me about the beating of Stacey Williams that occurred on 10 November 1993
>
> (A) An argument broke out between [deleted] and Stacey in the 500 blk of Louden Ave[.] Stacey got smacked and then ran into Wildwood Parkway. Me [deleted], [deleted] and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up.
>
> . . . .
>
> (Q) Who was in the group that beat Stacey
>
> (A) Me, [deleted], [deleted] and a few other guys
>
> (Q) Do you have the other guys names
>
> (A) [Deleted], [deleted] and me, I don't remember who was out there
>
> . . . .
>
> (Q) Do you have a black jacket with Park Heights written on the back
>
> (A) Yeh
>
> (Q) Who else has these jacket[s].
>
> (A) [deleted], [deleted][79]

Immediately after the police officer read the confession as redacted, he testified that upon receiving the confession from Bell, the police were able to arrest Gray for the murder.[80] The inference was clear that Gray's name had been redacted from the confession.

Gray was convicted, and the intermediate appellate court reversed his conviction on the grounds that the admission of Bell's statement violated the holding of *Bruton*.[81] The Maryland Supreme Court reversed the decision of the appellate court and reinstated the conviction.[82] The United States Supreme Court granted certiorari to consider "*Bruton*'s application to a redaction that replaces a name with an obvious blank space or symbol or word such as 'deleted,'"[83] and reversed.

In its decision, the Supreme Court emphasized that there was no difference, as a practical matter, between a codefendant's confession including a defendant's name — plainly violative of *Bruton* — and the same confession with the defendant's name replaced by "an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious

[78] *See id.* at 198-200 (app.).
[79] *Gray*, 523 U.S. at 198-99 (app.).
[80] *See id.* at 188-89.
[81] *See id.* at 189.
[82] *See id.*
[83] *Id.*

indication[] of alteration."[84] In either instance, the Court surmised, the jury would know that the codefendant's confession implicates the defendant.[85]

Indeed, the *Gray* Court emphasized that redaction might be harmful to the defendant because the obvious deletion may call the jurors' attention directly to the removed name.[86] The Court asserted that "[b]y encouraging the jury to speculate about the reference, the redaction may overemphasize the importance of the confession's accusation — once the jurors work out the reference."[87] The Court pointed out that blanks and the word "delete" act just like names.[88] They are referents, the *Gray* Court explained, and, although blanks and the word "delete" may be less obvious referents than names, "considered as a class, redactions that replace a proper name with an obvious blank, the word 'delete,' a symbol, or similarly notify the jury that a name has been deleted are similar enough to *Bruton*'s unredacted confessions as to warrant the same legal results."[89]

Although a simple replacement of a defendant's name with the word "delete," a blank space, or symbol would not satisfy *Bruton*, the *Gray* Court contended that most codefendant confessions can be redacted in such a way that they can be used.[90] The Court gave as an example a portion of Bell's confession:

> Question: Who was in the group that beat Stacey?
>
> Answer: Me, deleted, deleted, and a few other guys.[91]

The Court asked why the witness could not, instead, have said:

> Question: Who was in the group that beat Stacey?
>
> Answer: Me and a few other guys.[92]

The *Gray* Court conceded that it was blurring the distinction on which *Richardson* rested between confessions that were facially incriminatory and those that were incriminatory "only" by inference.[93] The Supreme Court reasoned, however, that

---

[84] *Id.* at 192.

[85] *Gray*, 523 U.S. at 193. The *Gray* Court stated that

> a jury will often react similarly to an unredacted confession and a confession redacted in this way, for the jury will often realize that the confession refers specifically to the defendant. This is true even when the State does not blatantly link the defendant to the deleted name, as it did in this case . . . .

Id.

[86] *See id.*

[87] *Id.*

[88] *See id.* at 195.

[89] *Id.* at 195.

[90] *See id.* at 196.

[91] *Gray*, 523 U.S. at 196.

[92] *Id.*

[93] *See id.* at 195.

> inference pure and simple cannot make the critical difference, for if it did, then *Richardson* would also place outside *Bruton*'s scope confessions that use shortened first names, nicknames, descriptions as unique as the "red-haired, bearded, one-eyed man-with-a-limp," and perhaps even full names of defendants who are always known by a nickname. This Court has assumed, however, that nicknames and specific descriptions fall inside, not outside, *Bruton*'s protection . . . .
>
> That being so, *Richardson* must depend . . . upon the *kind* of, not the simple *fact* of, inference. *Richardson*'s inferences involved statements that did not refer directly to the defendant himself and which became incriminating "only when linked with evidence introduced later at trial." The inferences at issue here involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial.[94]

II. CODEFENDANT CONFESSIONS AFTER *GRAY V. MARYLAND*

Gray is a significant case because it corrects an obvious failure in the application of the *Bruton* rule in criminal prosecutions. Numerous courts following *Bruton* and *Richardson* had permitted a nontestifying defendant's statement to be read to the jury with blanks or redactions in the statement, even when the blanks or redactions obviously referred to a codefendant. Precisely the harm that *Bruton* identified and purportedly safeguarded against — the incrimination of a codefendant by evidence that he could not impeach — was realized. The instruction that the jury should not consider the confession against the codefendant was transparently fictive. *Gray* is therefore welcome, at the least, because it eliminates a source of cynicism and unreality from criminal trials. *Gray*, however, leaves several difficult questions in its wake.

A. *What Inferences Are Permissible?*

The Court's observation in *Gray* that it is the type and not the fact of inference that matters is opaque, and the Court did not elaborate on what types of inferences are and are not permissible. The Court stated that nicknames are impermissible, but nicknames incriminate only inferentially. A person's nickname becomes meaningful only after the jury has some way, by the evidence presented at a trial, to connect the nickname to a defendant. Similarly, descriptions of how a person walks, talks, or otherwise presents himself can be incriminating only after a jury has heard some evidence that links the description to a defendant. In either situation,

94 *Id.* at 195-96 (citations omitted).

the confession incriminates inferentially. If the inferences implicated by physical descriptions or nicknames are impermissible, what distinguishes them from permissible inferences?

Gray observed that the confession that the Court was considering "involve[d] inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial."[95] This observation, however, is puzzling. The jury cannot draw inferences if the confession were the first piece of evidence because the jury would have nothing from which to draw inferences. The only exception would be if the jury could draw inferences based on the parties' opening statements, but there is no indication that this was so in *Gray* or that this is what the Court meant.

Perhaps because the distinction between permissible and impermissible inferences is not clear, several lower federal courts have ignored *Gray*'s distinction and have held that confessions that incriminate inferentially are not objectionable. For example, in *United States v. Wilson*,[96] the court noted that "the Court in *Gray* revisited *Bruton* and *Richardson* to clarify that statements that incriminate only inferentially are outside the scope of *Bruton*."[97] The *Wilson* court ruled that the confession at issue in *Wilson* incriminated the nonconfessing defendant "only when it was linked with other evidence at trial[,]" and was therefore not objectionable.[98] This reading of *Gray* is not persuasive because it ignores the *Gray* Court's statement that it is "the *kind* of, not the simple *fact* of, inference" that matters, and it ignores the *Gray* Court's square rejection of the notion that, as long as a confession incriminates "only inferentially," it is nonobjectionable.

Similarly, in *United States v. Edwards*,[99] the Eighth Circuit found that a confession was admissible as long as the nontestifying codefendant's name was replaced by a "pronoun or similarly neutral word," and the confession did not "facially incriminate or lead the jury directly to a nontestifying declarant's codefendant."[100] It is unclear whether a

---

[95] *Id.* at 196.

[96] 160 F.3d 732 (D.C. Cir. 1998), *cert. denied*, 120 S. Ct. 81 (1999).

[97] *Id.* at 740 n.5.

[98] *Id.*; *see also* United States v. Walker, 148 F.3d 518, 522 (5th Cir. 1998) (holding, post-*Gray*, that "[w]here the reference to the defendant is indirect and the jury can only complete the inference by relying on other evidence in the trial, *Bruton* will not apply"); United States v. Valdez, 146 F.3d 547, 552 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 355 (1998) (holding, post-*Gray*, that a confession was admissible because it "does not itself" implicate the confessing codefendant). Curiously, *Walker* contained a citation to *Gray* preceded by "but see." *See Walker*, 148 F.3d at 522.

[99] 159 F.3d 1117 (8th Cir. 1998), *cert. denied*, 120 S. Ct. 310 (1999).

[100] *Id.* at 1125.

confession that leads to a codefendant inferentially but not "directly" would be barred under the holding in *Edwards*. Similar to the *Wilson* decision, the *Edwards* court may be criticized for not giving enough weight to *Gray*'s admittedly elusive suggestion that not all inferentially incriminating confessions are alike.

In light of *Gray*, it is uncertain how a court should evaluate the following hypothetical, which is fictitious but not extraordinary. Suppose that two defendants, *A* and *B*, are being jointly tried for robbing a store and murdering the cashier by stabbing her with a knife. Suppose further that an eyewitness, *W*, testifies that she saw *A* and *B* enter the store and that *A* was carrying a green-handled knife. The attorneys for *A* and *B* attack *W*'s credibility on cross-examination by noting, for example, that she was drunk when she allegedly saw *A* and *B*, that she has poor eyesight, and that she had a grudge against either of them. The prosecutor then calls a police officer to testify that when he arrested *B*, the police officer took a self-incriminatory statement in which *B* admitted that he went with *A* to the store and that he saw *A* carrying a green-handled knife. Obviously, the statement is devastating to *A* because even if *A*'s name is redacted from the statement, the fact that the confession corroborates a key detail of *W*'s story — the green-handled knife — bolsters *W*'s testimony against *A* in all respects. Yet, under the *Wilson* and *Edward*s court's reading of *Gray*, there would be no Confrontation Clause problem, simply because the inference, though potentially devastating, operates "only when linked with other evidence at the trial." Such a result is highly problematic, for although it may generally be true, as *Richardson* stated, that "inferential incrimination" is easier for a jury to "thrust out of mind," that is certainly not true in all circumstances.[101] In the example given, the inferential incrimination may be critical evidence against *A*, which *A* would have no way to combat through cross-examination.[102]

B. *The Obviousness of Deletions and the Problem of Pronouns*

As noted above, the *Gray* Court observed that the obviousness of a deletion would only draw attention to the deletion, and thereby would lead

[101] *See* Richardson v. Marsh, 481 U.S. 200, 207 (1987).

[102] *See also* United States v. Gilliam, 167 F.3d 628, 636 (D.C. Cir. 1999), *cert. denied*, 120 S. Ct. 118 (1999) (finding that defendant's Confrontation Clause challenge failed because declarant's statement did not expressly implicate defendant); United States v. Mejia, 165 F.3d 919, 1998 WL 895380, at *3 (9th Cir. Dec. 17, 1998) (finding that the admission into evidence of taped transcripts did not violate the rights of defendant under the Confrontation Clause because "[t]he transcripts only inferentially incriminated [defendant], [defendant's] name was redacted from the transcripts, and the district court gave the jury a proper limiting instruction").

the jury to speculate about whose name was deleted and why.[103] Such speculation often would be harmful to the nontestifying codefendant on whose behalf the deletion was purportedly made. *Gray* was concerned with the obviousness of the redactions in the confession that the Court considered, and regarded the obviousness as a significant factor in finding that the confession was impermissible.

Does this mean that as long as a confession is redacted subtly — if, for example, instead of the deletion being marked by the words "deleted" or "name omitted," a proper name is replaced with a pronoun — then the confession may be admitted? Some courts have answered the question in the affirmative. The *Edwards* court, for example, relied on the distinction between obvious redactions and "neutral pronouns" and insisted that the redaction be made with "a pronoun or similarly neutral word."[104] Also, in *United States v. Vejar-Urias*,[105] the Fifth Circuit held that "where a defendant's name is replaced by a neutral pronoun, as long as identification of the defendant is clear or inculpatory only by reference to evidence other than the redacted confession, and a limiting instruction is given to the jury, there is no *Bruton* violation."[106]

There is much force to the suggestion that confessions in which names are redacted with "neutral pronouns" are preferable to confessions marked with "obvious deletions." But even neutral pronouns may be problematic. The precise definition of a "neutral" pronoun is unclear. If it suggests "not facially incriminating," then it is meaningless because no pronouns are "facially incriminating." All pronouns require additional evidence to link them inferentially to the defendant. In this respect, pronouns are no different from nicknames or descriptions because they can incriminate inferentially. How, then, are pronouns less injurious than are nicknames?

There may be instances in which pronouns severely prejudice the nonconfessing defendant. If the case involves violence, for example, the use of pronouns rather than names may lead jurors to believe that the confessor was afraid to name the person referred to only by pronouns. The Ninth Circuit acknowledged as much in *United States v. Peterson*,[107] in which the court held that "*Gray* clarifies that the substitution of a neutral

---

[103] *See supra* notes 84-89 and accompanying text (explaining that a jury will react similarly to both redacted and unredacted confessions).

[104] United States v. Edwards, 159 F.3d 1117, 1125 (8th Cir. 1998), *cert. denied*, 120 S. Ct. 310 (1999).

[105] 165 F.3d 337 (5th Cir. 1999).

[106] *Id.* at 340; *see also* United States v. Tisdale, No. 98-1362(L), 98-1363, 1999 WL 1024661, at *1 (2d Cir. Nov. 3 1999) (The Second Circuit upheld the propriety of introducing a codefendant confession that "did not contain any 'obvious indication of deletion.'" The Author was appellate counsel for the defendant.).

[107] 140 F.3d 819 (9th Cir. 1998).

pronoun or symbol in place of the defendant's name is not permissible if it is obvious that an alteration has occurred to protect the identity of a specific person."[108]

The emphasis on "neutral pronouns" may be unnecessarily formalistic. It is certainly possible that a declaration may implicate people other than declarants even if it has only neutral pronouns. Consider the following hypothetical derived from the *Richardson* case. Suppose that defendants *A* and *B* are being tried together for the murder of *V*, and *B*'s defense is that, although he was with *A* for most of the evening in question, when *A* went into *V*'s house (and, apparently, killed her), *B* remained in the car. Further, suppose that *A* made a confession to the police in which he stated "*B* and I went into the house and killed *V*." Finally, suppose that the government wants to redact the statement with a neutral pronoun to read: "*We* went into the house, and killed *V*."

Any person would have to doubt whether relating such a confession to the jury, even with a limiting instruction, would adequately protect *B*. The jury would hear "*we* went into the house" and would know from all of the other evidence that the only people who could possibly constitute the "we" are *A* and *B*. It would defy the abilities of most people to disregard that evidence when assessing whether *B* went into the house with *A* to kill *V*. Jury studies tend to support the proposition that many jurors would likely not be able to disregard such evidence,[109] and the use of confessions with neutral pronouns may, depending on the circumstances, be so incriminating to the nonconfessing codefendants that "the practical and human limitations of the jury system cannot be ignored."[110] Moreover, defendants who fear that they will be prejudiced by a codefendant's confession will typically be unable to obtain a severance on that ground. In fact, since the *Bruton* decision, courts rarely have granted such severances, and the Supreme Court has expressed a "preference in the federal system for joint trials of defendants who are indicted together."[111]

Finally, a blanket rule that "redaction by neutral pronouns is *per se*

---

[108] *Id.* at 822.

[109] *See* Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 175-78 (1989) (discussing studies on curative instructions and noting that "[t]he empirical research demonstrates that jurors are deeply affected by prejudicial comments and evidence and that curative instructions tend to increase the prejudice rather than decrease it. Moreover, the research shows that the impact is much greater in weak cases than in strong ones."); *see also* Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962) ("[O]ne 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound . . . .'").

[110] Bruton v. United States, 391 U.S. 123, 135 (1968).

[111] Zafiro v. United States, 506 U.S. 534, 537 (1993); *see also, e.g.*, United States v. Delpitt, 94 F.3d 1134, 1143 (8th Cir. 1996) ("The presumption against severing properly joined cases is strong.").

acceptable" would be too expansive a reading of *Gray*. Suppose a confession reveals a crime committed by the confessor and another person, referred to only as "he" or "a guy," and also notes that the other unnamed person lives in a certain apartment. Suppose further that there is evidence introduced at trial that a nonconfessing defendant lives in that apartment. The inference that the nonconfessing codefendant is the "guy" referred to in the confession is obvious; the address is as much of an identifier as a nickname or a physical description. The *Gray* decision indicates that nicknames and physical descriptions may render confessions inadmissible in joint trials. It is uncertain whether there is a principled distinction that can be drawn between nicknames and physical descriptions on the one hand, and neutral pronouns with addresses on the other.

C. The Problem of Fabricating Evidence

The dissent in *Gray* correctly noted that one concern about the majority's proposed revision of the confession is that it might implicate the trial court in fabricating evidence.[112] That concern, however, may be overstated. In most instances, the problem could be avoided by directed questioning by the prosecutor and by introducing into evidence not the confession itself, but testimony about the confession given by the law enforcement officer who was present when the confession was taken. For example, in *Gray* the testimony might have been elicited as follows:

Confession as Presented to Jury	**Confession as Proposed by *Gray* Majority**	**Proposed Revision of Confession**
Q: Who was in the group that beat Stacey?	Q: Who was in the group that beat Stacey?	Q: Did Bell tell you who beat Stacey?
A: Me, deleted, deleted, and a few other guys.	A: Me and a few other guys.	A: Yes.
		Q: Did he say that he had taken part in the beating?
		A: Yes.
		Q: Did he say that he had done so alone or with others?

[112] *See* Gray v. Maryland, 523 U.S. 185, 203-04 (1998) (Scalia, J., dissenting) ("In the present case, [the majority] asks, why could the police officer not have testified that Bell's answer was 'Me and a few other guys'? The answer, it seems obvious to me, is because that is not what Bell said.") (citation omitted).

A: He said that he had done so with others.

It is likely that in the vast majority of cases it would be possible to paraphrase a declarant's statement so that the probative value of the statement against the declarant is preserved, the prejudice to the nondeclarant codefendant is minimized, and the government or the trial judge is not subject to a charge of fabricating evidence. If the declarant's statement is not written, for example, but is simply recounted by a testifying witness (typically an agent or police officer who took the statement), then it would be quite simple for the testifying witness to make clear that he is merely paraphrasing the declarant's statement and not recounting it verbatim. In *Old Chief v. United States*,[113] the Supreme Court acknowledged (albeit in a different context) the appropriateness of redacting records, or even requiring a stipulation, to accommodate both the government's right to prove its case and the defendant's right to avoid undue prejudice.[114] Similarly, in most cases it is possible to protect the essential integrity of the declarant's statement without causing a fetishistic aversion to any of the alterations.

Paraphrasing or limited rewriting should also be allowed in order to avoid inferences that the jury might not be able to disregard notwithstanding an instruction to do so. In the green-handled knife hypothetical,[115] for example, it might be appropriate to redact the reference in *B*'s confession to the knife's green handle on the grounds that the particularity of the reference makes the inferential strength of *B*'s confession against *A* irresistible to the jury. Such a redaction would have to be done in a nonobvious manner. As the *Gray* Court observed, an obvious redaction does little good, and may do much harm, to the defendant whose rights the redaction supposedly protects. Courts routinely suppress unfairly inflammatory portions of documentary evidence while allowing the remaining, probative portion of the document to be admitted into evidence.[116] A nonobvious redaction or paraphrase of certain details in a confession, therefore, would not be unprecedented.

A prosecutor might argue that redaction of the reference to the green-

[113] 519 U.S. 172 (1997).

[114] *See id.* at 191 n.10.

[115] *See supra* II.A.

[116] For example, courts may not allow particularly gruesome portions of crime scene photographs into evidence, and they routinely redact the particulars of criminal records in trials in which the defendant's status as a felon is an element of the offense. *See generally* Old Chief v. United States, 519 U.S. 172 (1997).

handled knife is unfair to the government's case because the particularity and precision of *B*'s confession and its neat dovetailing with the eyewitness's testimony make *B*'s confession more reliable and more probative of *B*'s guilt. Thus, the prosecutor might argue that the government should not be required to forego probative evidence against confessor *B* just to protect the rights of codefendant *A*. Furthermore, the prosecutor might contend that allowing the redaction of the reference in *B*'s confession to the knife's green handle is but the first step down a slippery slope: If the reference to the green handle is redacted, then why not the reference to the knife itself? And if that, then why not the reference to any other details that might incriminate *A* inferentially?

The prosecutor's argument has some force, but it does not lead to the conclusion that redaction or paraphrasing of a confession to avoid powerful inferences against the confessor's codefendants is never justified. The strength of the impermissible inferences that a jury may be tempted to draw from a confession will vary depending upon the particular circumstances of the case. Some judgment must be applied to determine the likelihood that a jury could abide by the court's instruction not to consider a confession against any defendant other than the confessor. The jury surely could follow the judge's instructions in most instances. If the inferences would be particularly difficult for a jury to banish from its collective mind, however, the judge could give the prosecution a choice: Either (a) agree to the redaction or paraphrase to protect the rights of the confessor's codefendants or (b) sever the trial of the confessor from that of his codefendants.

III. THE RELIABILITY THEORY OF THE CONFRONTATION CLAUSE AND THE PROBLEM OF STATEMENTS AGAINST PENAL INTEREST

Although the cases from *Delli Paoli* through *Gray* have differed, they have shared and relied upon a common premise: The use of the confession of a nontestifying codefendant against any defendant other than the confessor would violate the nonconfessor's Sixth Amendment right to confront the witnesses against him. The question that has occupied the Court from *Delli Paoli* through *Gray* has been how to protect the nonconfessor's right of confrontation without requiring separate trials. The premise, however, was undermined in a series of Supreme Court cases that were decided during the same time period as *Delli Paoli* through *Gray*. The premise was on the brink of extinction until *Lilly*.

A. The Reliability Theory of the Confrontation Clause and the Constitutionalization of the Hearsay Rules

The words of the confrontation clause — "[i]n all criminal

prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"[117] — are clear and unexceptionable and would appear to require all witnesses against a defendant to appear in court and face the defendant when giving testimony against him. The Supreme Court, however, has not interpreted the Confrontation Clause literally; rather, the Court has identified an underlying purpose of the Confrontation Clause and has interpreted the Confrontation Clause in light of that purpose. In the course of interpreting the Clause in this fashion, the Court has turned the Confrontation Clause into little more than a rule against hearsay that mimics the Federal Rules of Evidence. That is, if a piece of evidence would not be barred by the rules against hearsay as set forth in the Federal Rules of Evidence, then it will not be barred by the Confrontation Clause; if the Federal Rules of Evidence bar such evidence, then the Confrontation Clause similarly bars such evidence.

The Supreme Court has stated often that the "mission of the Confrontation Clause" is to promote the accuracy of evidence in criminal trials.[118] To further that "mission," in *Ohio v. Roberts*[119] the Supreme Court established a two-step test, according to which an out-of-court statement could be admitted without violating the Confrontation Clause only if two conditions are satisfied:

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.[120]

The first point to note about this Confrontation Clause test is its breadth — it applies to all out-of-court statements. This suggests that the phrase "witnesses against him" in the Confrontation Clause means persons making statements, outside of court, which statements the prosecution may wish to put into evidence. It is by no means clear that the scope of the Sixth Amendment should be interpreted so broadly.

In any event, since *Roberts*, the Supreme Court relaxed the first condition (the unavailability of the declarant) in *United States v. Inadi*[121]

---

[117] U.S. CONST. amend. VI.

[118] Maryland v. Craig, 497 U.S. 836, 846 (1990); Bourjaily v. United States, 483 U.S. 171, 200 (1987) (Blackmun, J., dissenting); United States v. Inadi, 475 U.S. 387, 396 (1986); Dutton v. Evans, 400 U.S. 74, 89 (1970).

[119] 448 U.S. 56 (1980).

[120] *Id.* at 66.

[121] 475 U.S. 387 (1986).

and *White v. Illinois*.[122] In *Inadi*, the government was permitted to introduce an alleged coconspirator's statement made in furtherance of a conspiracy, notwithstanding that the prosecution made no showing that the coconspirator was unavailable to testify.[123] The *White* Court permitted hearsay testimony about the excited utterances of a four-year-old girl who accused the defendant of having sexually abused her.[124] The future of the unavailability requirement is well summarized by Professor Richard Friedman:

> The emerging pattern is not hard to spot: follow the Federal Rules. Notwithstanding *Inadi* and *White*, it would not be surprising were the Court to hold — if a proper case arose — that the Confrontation Clause's unavailability requirement is not strictly limited to prior testimony. It likely applies to statements offered under any of the other hearsay exceptions — most prominently declarations against interest — for which the Federal Rules of Evidence require unavailability.[125]

The "sufficient indicia of trustworthiness" prong of the *Roberts* Confrontation Clause test also conforms the Confrontation Clause to the Federal Rules of Evidence on account of the proviso that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."[126] Firmly rooted hearsay exceptions are, by and large, those set forth in the Federal Rules of Evidence; thus, once again, if an out-of-court statement satisfies one of the exceptions to the rule against hearsay set forth in the Federal Rules of Evidence, chances are it will also satisfy the constitutional requirements of the Confrontation Clause.

B. *The Peculiar Problem of Statements Against Penal Interest: The Demise of the* Bruton-Gray *Prohibition?*

Of particular importance for present purposes is whether statements against penal interest, which fall within an exception to the rule against hearsay codified in Federal Rule of Evidence 804(b)(3),[127] "fall[] within a

---

[122] 502 U.S. 346 (1992).

[123] *See Inadi*, 475 U.S. at 400.

[124] *See White*, 502 U.S. at 348-49.

[125] Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1017 (1998) (footnote omitted).

[126] Ohio v. Roberts, 448 U.S. 56, 66 (1980).

[127] Federal Rule of Evidence 804(b)(3) provides that a statement against interest is

> [a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances

firmly rooted hearsay exception" or are supported by a "showing of particularized guarantees of trustworthiness."[128] Before *Lilly*, the Supreme Court twice avoided answering the question,[129] but the majority of the lower federal courts answered it in the affirmative, often without extensive analysis.[130]

The majority's answer is deeply problematic. If statements against penal interest are "firmly rooted" exceptions to the rule barring hearsay, then the entire line of cases from *Delli Paoli* through *Gray* is moot: The codefendant confessions should be admissible without any redactions or qualifications against the nontestifying defendants because those confessions (a) satisfy Rule 804(b)(3) and (b) inevitably, therefore, also pass scrutiny under the Confrontation Clause.

The problem is further illustrated by consideration of questions that the use of plea allocutions pose. When a person pleads guilty, he may implicate others, and thus the question arises whether and how the government can use the plea against other, nonpleading defendants. According to the reasoning of the *Bruton* line of cases, the answer would appear to be simple: If a confession cannot be offered to prove any part of the case against a nonconfessing defendant but is admissible only against the confessor himself (which is the premise of the *Delli Paoli-Gray* line of cases), then a plea allocution should not be admissible at all because the pleader is, by definition, not on trial: The *raison d'admission* is gone. Conversely, a guilty plea is a clear statement against penal interest — if statements against penal interest are firmly rooted exceptions to the rule barring hearsay and thus pass Confrontation Clause scrutiny, then the plea should be able to be admitted in full, without any redactions, against nonpleading defendants at trial.

Faced with this conundrum, the Second Circuit Court of Appeals took

---

clearly indicate the trustworthiness of the statement.

Fed. R. Evid. 804(b)(3).

[128] *See Roberts*, 448 U.S. at 66.

[129] *See* Williamson v. United States, 512 U.S. 594 (1994); Lee v. Illinois, 476 U.S. 530 (1986).

[130] *Compare* United States v. Moses, 148 F.3d 277, 281 (3d Cir. 1998), *cert. denied*, 119 S. Ct. 1047 (1999) (observing that the district court found that the exception is firmly rooted for Confrontation Clause purposes, but declining to address that issue); United States v. Keltner, 147 F.3d 662, 671 (8th Cir. 1998) (stating that the exception is firmly rooted for Confrontation Clause purposes); Neuman v. Rivers, 125 F.3d 315, 319-20 (6th Cir. 1997), *cert. denied*, 522 U.S. 1030 (1997) (same); United States v. Saccoccia, 58 F.3d 754, 779 (1st Cir. 1995), *cert. denied*, 517 U.S. 1105 (1996) (same); *and* United States v. York, 933 F.2d 1343, 1362 (7th Cir. 1991) (noting that the *Roberts* Court concluded "that no independent inquiry into reliability is required when 'the evidence falls within a firmly rooted hearsay exception'") (citation omitted) *with* United States v. Flores, 985 F.2d 770, 775-76 (5th Cir. 1993) (finding that the exception is not firmly rooted for Confrontation Clause purposes).

a position firmly in the middle. The Second Circuit permits the government to use plea allocutions in trials against nonpleading defendants who are implicated by the pleas as long as (a) the defendants' names are redacted, and (b) the jury is instructed that it is not to use the allocutions against the defendants directly, but only as evidence of, for example, the existence and scope of the alleged conspiracy.[131] The theory underlying the admissibility of the plea allocutions is that they are statements against penal interest and, therefore, they come under the hearsay exception afforded by Federal Rule of Evidence 804(b)(3).[132] But if plea allocutions are admissible against nonpleading defendants, then it is not clear why the same reasoning would not allow confessions to be used against nonconfessing defendants. Further, if confessions can be used consistent with the nonconfessor's rights under the Confrontation Clause, then the entire discussion that has consumed the Court's attention from *Delli Paoli* through *Gray* would appear to be moot.

C. Lilly v. Virginia

The confusion was resolved in *Lilly v. Virginia*.[133] Benjamin Lee Lilly, his brother, and a third person were charged with committing several crimes, including abduction, robbery, carjacking, murder, and possession and use of a firearm.[134] Lilly's brother Mark made a taped confession following their arrest.[135] The confession implicated Lilly, the third accomplice, and Mark, although it emphasized Lilly's role as the leader of the group and specifically identified Lilly as the person who had committed the murder.[136] Lilly was tried separately from the others, and when Mark refused to testify (and was thus unavailable), the prosecution moved into evidence the tape recording of the brother's confession against Lilly.[137]

[131] *See* United States v. Gallego, 191 F.3d 156 (2d Cir. 1999); United States v. Williams, 927 F.2d 95, 99 (2d Cir. 1991) (stating that confession of a coconspirator can be used to demonstrate the existence and scope of the conspiracy); United States v. Winley, 638 F.2d 560 (2d Cir. 1981); United States v. Medina-Rojas, 112 F.3d 506, 1996 WL 591328, at *2 (2d Cir. Oct. 15, 1996) (stating that a "plea allocution of a co-conspirator is properly admitted at trial as a statement against penal interest, and may be considered by the jury as evidence of the existence and scope of the conspiracy"); *see also* United States v. Wilson, No. 95 CR. 668(LMM), 1999 WL 126456, at *2-3 (S.D.N.Y. Mar. 9, 1999) (admitting plea allocutions pursuant to *United States v. Williams*).

[132] *See supra* note 127 (setting forth text of rule 804(b)(3)). Of course, other requirements must be satisfied — the pleader must be unavailable, which he usually is by virtue of the likely invocation of his Fifth Amendment right against self-incrimination. *See, e.g.*, *Williams*, 927 F.2d at 98-99.

[133] 119 S. Ct. 1887 (1999).

[134] *See* Lilly v. Virginia, 449 S.E.2d 522, 563 (Va. 1998).

[135] *See Lilly*, 119 S. Ct. at 1892.

[136] *See id.*

[137] *See id.* at 1892-93.

The trial court admitted the tape recording into evidence, and Lilly was convicted.[138] The Supreme Court of Virginia affirmed the conviction, rejecting Lilly's Confrontation Clause challenge to the admission of the taped confession on the grounds that the confession was a statement against penal interest, which is a firmly rooted hearsay exception, and thus satisfied the strictures of the Confrontation Clause.[139]

The United States Supreme Court, in a plurality opinion, reversed the decision of the Supreme Court of Virginia.[140] The Court found that statements against penal interest are offered into evidence in "three principal situations": (1) when the prosecutor offers the statements into evidence against the declarant himself; (2) when a defendant (not the declarant) offers the statements into evidence because they tend to exculpate the defendant by indicating that the declarant, not the defendant, committed the crime charged; and (3) when the prosecutor offers the statements into evidence to establish the guilt of the defendant as an accomplice of the declarant.[141] The first two situations did not raise any constitutional concerns,[142] but the third, which was the situation confronting the Court in *Lilly*, was, according to the plurality, exactly what the Confrontation Clause was intended to forbid.[143] Notwithstanding that the brother's statement was against his penal interest (and was thus "inherently reliable" according to the majority of the circuit courts of appeals), the Court found that the statements did not satisfy the demands of the Confrontation Clause because it, and all statements in the third category, were "inherently unreliable."[144] Further, the plurality stated that confessions made by accomplices that inculpate a criminal defendant do not fall into "a firmly rooted exception to the hearsay rule" as defined in the Court's Confrontation Clause jurisprudence.[145]

The plurality opinion allowed for the possibility that even though an accomplice's confession could not satisfy Confrontation Clause scrutiny by virtue of being a "firmly rooted hearsay exception," such a confession might do so if it satisfies the second prong of the *Roberts* test — that is, if it

[138] *See id.* at 1893.
[139] *See id.*
[140] *See id.* at 1901. Justice Stevens authored the plurality opinion, in which Justices Souter, Ginsberg, and Breyer joined. *See id.* at 1892.
[141] *See Lilly*, 119 S. Ct. at 1895.
[142] *See id.* at 1895-96.
[143] *See id.* at 1899.
[144] *See id.* at 1897.
[145] *Id.* at 1899. The Court cited *Bruton* and *Gray*, among other cases, noting that they were "premised, explicitly or implicitly, on the principle that accomplice confessions that inculpate a criminal defendant are not *per se* admissible (and thus necessarily fall outside a firmly rooted hearsay exception)." *Id.* at n.5.

contains "'particularized guarantees of trustworthiness.'"[146] Still, the plurality was skeptical and expressed its concern in two ways. First, the plurality indicated that an appellate court should apply a particularly harsh, de novo standard of review to a lower court's determination of trustworthiness.[147] Second, the plurality strongly doubted that statements against penal interest could satisfy the particularized guarantees of the trustworthiness standard, at least when the government is involved in eliciting the statements, as in guilty pleas or confessions to identified state officials.[148]

Justice Breyer, who joined in the plurality opinion, also wrote a separate concurring opinion.[149] The Justice noted that the reliability theory of the Confrontation Clause, which was accepted by the plurality opinion, had recently come under fierce attack from Justice Thomas in his concurring opinion in *White v. Illinois*,[150] and from numerous scholars.[151] Although Justice Breyer noted the criticisms and the evidentiary weaknesses of the reliability theory, he declined to reexamine the connection between the hearsay rule and the Confrontation Clause in the

---

[146] *Id.* at 1899 (quoting *Roberts*, 448 U.S. at 66).

[147] *See Lilly*, 119 S. Ct. at 1900. The Court explained that

> [n]othing in our prior opinions, however, suggests that appellate courts should defer to lower courts' determinations regarding whether a hearsay statement has particularized guarantees of trustworthiness. To the contrary, those opinions indicate that we have assumed, as with other fact-intensive, mixed questions of constitutional law, that "independent review is . . . necessary . . . to maintain control of, and to clarify, the legal principles" governing the factual circumstances necessary to satisfy the protections of the Bill of Rights.

Id. (partial alteration in original) (quoting Ornelas v. United States, 517 U.S. 690, 697 (1996)).

[148] *See id.* The Court asserted that

> [i]t is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old *ex parte* affidavit practice — that is, when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing.

Id. The Court also held that appellate courts should "independently review whether the government's proffered guarantees of trustworthiness satisfy the demands of the [Confrontation] Clause." *Id.*

[149] *See id.* at 1902 (Breyer, J., concurring).

[150] 502 U.S. 346, 358 (1992) (Thomas, J., concurring in part and concurring in the judgment).

[151] *See Lilly*, 119 S. Ct. at 1902 (Breyer, J., concurring). Justice Breyer cited the following works: Friedman, *supra* note 125; AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE (1997); Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557 (1992).

Lilly decision because the statements at issue contravened the Confrontation Clause in any event.[152] Instead, Justice Breyer left the possibility of reevaluation open for another day.[153]

Justice Scalia, concurring in part and concurring in the judgment, stated simply that the admission into evidence of the brother's tape-recorded confession was a "paradigmatic Confrontation Clause violation."[154] Justice Scalia cited with approval a passage from Justice Thomas's concurrence in *White*, which Justice Breyer also had cited.[155] In that passage, Justice Thomas stated that "'[t]he federal constitutional right of confrontation extends to any witness who actually testifies at trial'" and to "'extrajudicial statements only insofar as they are contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions.'"[156]

Justice Thomas, concurring in part and concurring in the judgment, also cited to his concurrence in *White*.[157] Justice Thomas added a qualification, however, noting that the Confrontation Clause did not impose a moratorium on the prosecution's use of accomplices' statements that incriminate defendants.[158] Justice Thomas did not expand on this observation, however, so it is unclear how to identify exceptions to the ban. Also, Justice Thomas objected to the plurality's assertion that the taped confession did not have adequate indicia of reliability to satisfy Confrontation Clause scrutiny.[159] The Justice suggested that the plurality inappropriately addressed this issue — an issue upon which the lower courts did not pass.[160]

The final concurring opinion was authored by Chief Justice Rehnquist and joined by Justices O'Connor and Kennedy.[161] Chief Justice Rehnquist took the position that the plurality's entire opinion was misguided because the tape-recorded confession was, in large part, "simply not [a] 'declaration[] against penal interest.'"[162] The Chief Justice pointed out that the portions of the confession that inculpated Lilly were certainly not at all

---

152 *See Lilly*, 119 S. Ct. at 1903 (Breyer, J., concurring).

153 *See id.*

154 *Id.* at 1903 (Scalia, J., concurring in part and concurring in the judgment).

155 *See id.*

156 *Id.* (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment)).

157 *See id.* at 1903 (Thomas, J., concurring in part and concurring in the judgment).

158 *See Lilly*, 119 S. Ct. at 1903 (Thomas, J., concurring in part and concurring in the judgment).

159 *See id.*

160 *See id.*

161 *See id.* at 1903 (Rehnquist, C.J., concurring in the judgment).

162 *Id.* at 1904 (Rehnquist, C.J., concurring in the judgment).

against the declarant's penal interest.[163] Accordingly, Chief Justice Rehnquist did not state clearly whether he believed that statements against penal interest fell within the firmly rooted hearsay exception set forth in *Roberts.* The Chief Justice stated, however, that he had no reason to rule out the possibility that statements against penal interest, including those statements that inculpate a codefendant, could fall under a firmly rooted hearsay exception.[164]

Like Justice Thomas, the Chief Justice also objected to the plurality's consideration of whether the declarant's confession bore sufficient indicia of reliability because that issue had not been considered by the lower courts.[165] Further, the Chief Justice suggested that, rather than applying the de novo standard that the plurality had applied to the "indicia of reliability" inquiry, a reviewing court should "defer[] to trial judges who undertake the second prong of the *Roberts* inquiry" because trial judges "are better able to evaluate whether a particular statement given in a particular setting is sufficiently reliable that cross-examination would add little to its trustworthiness."[166]

IV. CODEFENDANT CONFESSIONS AFTER *LILLY V. VIRGINIA*

Because *Lilly* was a plurality opinion, its consequences are difficult to assess. There are reasons to believe, however, that *Lilly* will inspire state courts and lower federal courts to be especially protective of defendants' rights in *Bruton* situations.

A. The Reassertion of the Confrontation Clause

As discussed, the *Bruton-Gray* line of cases proceeds on the premise that the nondeclarant defendant has a right, established by the Confrontation Clause, that the declarant's statement not be used against him. This line of cases is concerned with the protection of that right. The right, however, as defined and limited by the reliability theory of the Confrontation Clause, has grown weaker and weaker, riddled with exceptions. As a result, the need for protection of the nondeclarant had become less urgent than it might otherwise have been.

The *Lilly* plurality opinion indicates that several members of the Court may be prepared to read the Confrontation Clause more strongly. The plurality's express skepticism about the admissibility into evidence of statements that were produced with governmental involvement — e.g.,

[163] *See id.*
[164] *See Lilly*, 119 S. Ct. at 1905 (Rehnquist, C.J., concurring in the judgment).
[165] *See id.*
[166] *Id.* at 1906 (Rehnquist, C.J., concurring in the judgment).

confessions and pleas — undermines the Second Circuit's holding about the use of guilty pleas[167] and those cases that permitted confessions to be admitted because they fell within the firmly rooted hearsay exception of Rule 804(b)(3).[168] Furthermore, the plurality's indication that it would apply a de novo standard of review to analysis of the "sufficient indicia of reliability" prong of the *Roberts* analysis is further evidence of the plurality's determination to protect the robust nature of the Confrontation Clause. A stronger reading of the Confrontation Clause would imply (naturally, though not logically) a clear acknowledgment of the importance of *Bruton.*

B. New Theory of the Confrontation Clause

Lilly may also indicate that the Court is not simply reading the Confrontation Clause with a new and welcome vigor, but may in fact be prepared to abandon the long-discredited reliability theory. Justice Breyer, in his concurrence in *Lilly*, expressly suggested a new theory along the lines of that suggested in Justice Thomas's concurrence in *White*, and also by, among others, Professor Akil Amar[169] and Professor Robert Friedman.[170] Although there are some differences among their versions of the theory, their basics are the same. For ease of presentation, this Article summarizes Professor Friedman's version of the theory.

The starting point of the theory is with the term "witness," as it appears in the Confrontation Clause. As set forth above, according to the Supreme Court's interpretation of the Confrontation Clause, the term "witness" means any person who makes a statement out of court. The Confrontation Clause thus has tremendous breadth; it applies to all declarants, but is riddled with exceptions.[171] According to Professor Friedman, however, the term "witness" means only those people who make statements to governmental authorities with the expectation that those statements will be used in the investigation or prosecution of a crime.[172]

[167] *See supra* notes 131-32 and accompanying text (explaining that coconspirator statements are admissible in trial).

[168] *See supra* note 130 (providing varying circuit-court holdings concerning the admissibility of statements against penal interest).

[169] *See* Akhil Reed Amar, *Twenty-Fifth Annual Review of Criminal Procedure ¾ Forward: Sixth Amendment First Principles*, 84 GEO. L.J. 641, 688-97 (1996).

[170] *See generally* Friedman, *supra* note 125.

[171] *See supra* III.A.

[172] *See* Friedman, *supra* note 125, at 1040 & n.125. Justice Thomas offers a similar definition. In his *White* concurrence, Justice Thomas argues that the Confrontation Clause applies to "formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions." White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment). Professor Amar also applies the Confrontation Clause to "videotapes, transcripts, depositions, and affidavits when prepared for court use and

Thus, according to Friedman, the Confrontation Clause regulates the use of confessions and pleas — both of which are made to governmental authorities with the expectation that they will be used in a criminal proceeding — but does not apply to, for example, coconspirator statements or excited utterances.[173] For those pieces of evidence, that do fall within the ambit of the Confrontation Clause, such as confessions and pleas, Professor Friedman proposes an almost ironclad rule of exclusion: Admission of such pieces of evidence violates the defendant's right to be confronted by the witnesses against him, and the confessor or pleader must be brought into court to give his testimony while confronting the witness, or else the confession or plea is inadmissible.[174]

The adoption by the Supreme Court of Professor Friedman's theory (or some variant of it) might have a significant impact on the development of the *Bruton-Gray* line of cases. Most declarations that the government seeks to introduce are confessions taken by police or other law enforcement officers. If the Court adopted a theory akin to Professor Friedman's, then there would be a blanket prohibition against the use of such declarations against anyone but the declarant. A court faced with the responsibility of redacting or modifying the declaration to protect the rights of the nondeclaring defendants would have no doubt that the use of the declaration against the nondeclarants would violate the nondeclarants' constitutional right. The fair inference is that the court would thus be extremely careful to safeguard the right by paraphrasing or thorough redaction.

C. *The Definition of Statements Against Penal Interest*

In his concurring opinion in *Lilly*, Chief Justice Rehnquist suggested an alternative method of handling confessions. The Chief Justice observed that the declaration at issue in *Lilly* was not a declaration against penal interest at all, but rather an attempt to shift blame from the declarant to the defendant.[175] For example, the Chief Justice noted, Mark's confession put him at the scene of the crime, but shifted the blame for the murder to Lilly.[176] The Chief Justice contended that if Mark's confession had in fact implicated Mark as well as Lilly, then it might have been admissible

introduced as testimony." Amar, *supra* note 169, at 693.

[173] That does not mean that coconspirator statements or excited utterances are automatically admitted into evidence. It only means that their admission *vel non* does present an issue under the Confrontation Clause. There may be evidentiary reasons, such as hearsay, authentication, and relevance that would require such statements to be excluded in any particular case.

[174] *See* Friedman, *supra* note 125, at 1013, 1043.

[175] *See Lilly*, 119 S. Ct. at 1904 (Rehnquist, C.J., concurring in the judgment).

[176] *See id.*

against Lilly.[177]

The Chief Justice's opinion is in tension with a case that it cited with approval, *Williamson v. United States*.[178] In *Williamson*, Reginald Harris was arrested with nineteen kilograms of cocaine in his car and made a confession (actually, a series of sometimes contradictory confessions) to the police.[179] The confessions indicated that both Harris and another person, Fredel Williamson, were members of a conspiracy to distribute cocaine.[180] Based on the confession and other evidence, Williamson was indicted for, among other things, conspiracy to distribute narcotics.[181] Harris refused to testify at Williamson's trial, and the government therefore called a Federal Bureau of Investigation agent to testify about Harris's confession.[182] Williamson was convicted, and the issue before the Supreme Court was (a) whether all of Harris's confession was admissible pursuant to Rule 804(b)(3) because it was all part of Harris's statement against his own penal interest, or (b) whether only those parts of Harris's confession that directly implicated him were admissible because only those parts were against his penal interest, with the remainder of the statement — the "collateral portions" — excluded.[183]

The Court held that Rule 804(b)(3) applied narrowly to only those portions of a statement that directly implicate the declarant.[184] The Court then explained, however, that its definition of a "self-inculpatory statement" was broad.[185] For example, noted the Court, "a declarant's squarely self-inculpatory confession — 'yes, I killed *X*' — would likely be admissible under Rule 804(b)(3) against accomplices of his who are being tried under a coconspirator liability theory."[186] The Court continued, "by showing that the declarant knew something, a self-inculpatory statement can in some situations help the jury infer that his confederates knew it as well."[187] The Court also noted that even information that "give[s] the police significant details about the crime may also, depending on the

[177] *See id.*
[178] 512 U.S. 594 (1994).
[179] *See id.* at 596-97.
[180] *See id.*
[181] *See id.* at 597.
[182] *See id.* at 597-98.
[183] *See id.* at 599-601.
[184] *See Williamson*, 512 U.S. at 599. The Court stated that "the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." *Id.* at 600-01.
[185] *See id.* at 603.
[186] *Id.*
[187] *Id.*

situation, be against the declarant's interest."[188]

Therefore, although the precise definition of "against self-interest" is not fixed and depends on the circumstances, following *Williamson*, there will usually be a good argument that the large part of most confessions will fall within the "against self-interest" exception to the rule against hearsay. Such confessions or pleas can therefore be used against not only the declarant, but also against anyone else, unless barred by the Sixth Amendment. Lower courts since *Williamson* have shown a willingness to review the circumstances in which a statement is made in order to determine whether it might conceivably be against the declarant's penal interest.[189]

The broad definition of "against self-interest" endorsed by *Williamson* and by the lower courts following it casts significant doubt on the Chief Justice's premise in *Lilly* that Mark's confession was not against his penal interest. Although the confession shifted blame to Lilly for the murderous act itself, it also inculpated Mark in at least the following ways: (a) The confession showed that he was present at the scene of the crime (thus eliminating any realistic possibility of an alibi defense); (b) The confession showed that he had agreed to go on the crime spree with the defendant (thus laying the groundwork for a felony-murder or *Pinkerton*[190] theory of liability); (c) The confession showed that Mark was aware of the facts and circumstances surrounding the murder, thus indicating that he was not mentally incapacitated and making it less likely that he could claim insanity. Proof that the confession inculpated Mark is provided by the following hypothetical: If Mark were on trial, would his lawyer attempt to have the statement suppressed if there was a good-faith basis to do so? The answer is surely "yes," and the reason is self-evident: The confession is harmful to Mark's interests because it incriminates him.

One defending the Chief Justice's approach in *Lilly* and the approach

---

[188] *Id.*

[189] *See, e.g.*, United States v. Wilson, 160 F.3d 732, 739 (D.C. Cir. 1998), *cert. denied*, 120 S. Ct. 81 (1999) (admitting statement pursuant to Rule 804(b)(3) and stating that the declarant's "statements that he had informed [the defendants] that [the victim] was in the area are, set alone, hardly incriminating. But their timing is key."); United States v. Moses, 148 F.3d 277, 280, 280-81 (3d Cir. 1998), *cert. denied*, 119 S. Ct. 1047 (1999) (admitting statement pursuant to Rule 804(b)(3) in a case involving tax fraud, when declarant stated that he was "'tak[ing] care' [of the defendant] 'moneywise'" and identified where he was meeting the defendant to make payments; the court observed that "by naming [the defendant] as well as the place where he was meeting [the defendant] to make payments, [declarant] provided self-inculpatory information that might have enabled the authorities to better investigate his wrongdoing").

[190] In *Pinkerton v. United States*, 328 U.S. 640 (1946), the Court held that a defendant may be held liable for crimes committed by his coconspirators if the crimes were in furtherance of the conspiracy and reasonably foreseeable to the defendant.

set forth in *Williamson* might note that people frequently confess to all or part of a crime, but still attempt to shift the blame to others. (Indeed, this is exactly what Mark did in *Lilly*.) In such circumstances, one might argue that the confessor is not really saying things "against his penal interest" because he *thinks* that he is shifting blame, i.e., inculpating another person and thereby exculpating himself. Such an analysis depends on certain assumptions about the declarant's thoughts when he made his statement: Did he realize that he was incriminating himself, or did he think (incorrectly, because of his lack of legal sophistication) that he was exculpating himself and blaming another person? The question is inherently difficult, if not impossible, to answer: How could a court determine, in most instances, what the declarant thought when he made his statement; with what mixture of calculation, aspiration, or desperation was the statement made?

CONCLUSION

All cases leave some questions unanswered, but *Gray* and *Lilly* are unusually open-ended. *Gray*'s observation that it is not the fact of, but the kind of, inferences that is important is opaque. Absent clarification, it will be impossible to say with confidence how to redact or revise a nontestifying defendant's confession so that it can be introduced at a joint trial without unfairly prejudicing the nonconfessing codefendants. *Lilly* was unable to muster a majority on the critical questions of whether statements against penal interest are "firmly rooted hearsay exceptions," and whether, even if they are not, they may have "sufficient indicia of reliability" to satisfy the Confrontation Clause. Depending upon how these questions are answered, *Bruton* and *Gray* may simply be moot. The concurring opinions of Justices Breyer, Scalia, and Thomas in *Lilly* indicate that several members of the Court may be ready to adopt a wholly new theory of the Confrontation Clause, but whether this will happen is also uncertain.

Notwithstanding their lack of clarity, *Gray* and *Lilly* are consistent in that they appear to point in the same general direction: Both cases overruled state-court decisions that had been insufficiently protective of criminal defendants' rights under the Confrontation Clause. Because both state courts had followed Supreme Court authority in reaching their decisions, *Gray* and *Lilly* indicate that the Court may be ready to breathe new life into criminal defendants' Confrontation Clause rights.