NOTES

THE ADMISSION OF A CODEFENDANT'S CONFESSION AFTER *BRUTON V. UNITED STATES:* THE QUESTIONS AND A PROPOSAL FOR THEIR RESOLUTION

In *Bruton v. United States*[1] the United States Supreme Court overruled *Delli Paoli v. United States*[2] and held that due to the substantial risk that the jury did not follow the trial court's instructions to disregard certain inadmissible extrajudicial statements of an accused's nontestifying codefendant but, rather, considered the statements in determining the accused's guilt, there was a denial of the sixth amendment right of confrontation.[3] Bruton and Evans were jointly tried on a federal charge of armed postal robbery.[4] The prosecution's case consisted of the testimony of two eyewitnesses, both of whom could identify Evans but only one of whom could identify Bruton, and the confession of Evans which implicated both Evans and Bruton.[5] Neither Evans nor Bruton took the stand. When Evans' confession was introduced into evidence and again in the jury instructions, the jury was told by the trial court judge that the confession was admissible only against Evans and inadmissible hearsay as to Bruton.[6] Both Evans and Bruton were

1. 391 U.S. 123 (1968).

2. 352 U.S. 232 (1957).

3. 391 U.S. at 126.

4. The statute under which Bruton and Evans were charged is 18 U.S.C. § 2114 (1964). 391 U.S. at 124.

5. For the purposes of this discussion "extrajudicial statement" will be considered the equivalent of "confession," although this would not be true in all contexts.

For a more complete factual setting see Evans v. United States, 375 F.2d 355 (8th Cir. 1967). The weakness of the evidence against Bruton was admitted by the Solicitor General, who urged that the judgment below should be reversed and the case remanded for a new trial. The Solicitor General stated that too great a strain was put on the *Delli Paoli* rule in sustaining Bruton's conviction because the evidence against Bruton was not strong. 391 U.S. at 125-26.

6. 391 U.S. at 125. The instruction in part stated:

> 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. . . . [Y]ou 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 Bruton. *Id.* at 125 n.2.

found guilty.[7] On appeal the Eighth Circuit reversed Evans' conviction on the grounds that his confession should not have been received into evidence against him.[8] Bruton's conviction, however, was affirmed in reliance on *Delli Paoli*[9] on the grounds that when the judge instructed the jury to disregard Evans's confession in determining Bruton's guilt or innocence, the jury was presumed to have done so.[10] The Supreme Court granted Bruton's petition for certiorari and reversed his conviction.[11]

JOINT TRIAL AND THE PRE-*Bruton* LAW

The Problems of Joint Trial

Although the joint trial has been praised as a device for saving time and money, avoiding additional delay in an already overcrowded trial docket, offering convenience to witnesses, and preventing inconsistent verdicts, it has also been criticized for undermining the personal rights of each defendant.[12] This undermining of the individual defendant's rights results from both the inherent prejudice and the rules of evidence in a joint trial.[13] Such prejudice is occasioned by the natural tendency to view the defendants as one.[14] In addition there exists the risk that the mere fact of association with another defendant may be prejudicial.[15] Moreover, because joint trials often involve conspiracy cases and because such cases depend on circumstantial evidence to prove the essential element of intent, any inference which the jury draws from the joint trial or from the confusion that device may create could be crucial to the outcome.[16] Further, under *Delli Paoli*, where the

7. Evans v. United States, 375 F.2d 355, 357 (8th Cir. 1967).

8. *Id.* at 363.

9. See notes 20-29 *infra* and accompanying text.

10. Evans v. United States, 375 F.2d 355, 362 (8th Cir. 1967).

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

12. *See* Note, *Bruton v. United States: A Belated Look at the Warren Court Concept of Criminal Justice*, 44 ST. JOHN'S L. REV. 54, 59-60 (1969); Note, *Admissibility of Codefendant's Admissions in Joint Trials*, 36 U. CIN. L. REV. 306, 306-07 (1967); 56 COLUM. L. REV. 1112, 1115 (1956); 28 OHIO ST. L.J. 356, 359 (1967).

13. *See* 28 OHIO ST. L.J. 356, 359 (1967).

14. *Id.; see* United States v. Corallo, 413 F.2d 1306, 1327 (2d Cir. 1969); People v. Diaz, 81 Cal. Rptr. 16 (Sup. Ct. 1969) for two defendants' unsuccessful claims based on the theory that they and their codefendant were viewed as one. *But see* Brief for the State of California as Amicus Curiae at 13-14, Harrington v. California, 395 U.S. 250 (1969).

15. *See* Note, *Codefendants' Confessions*, 3 COLUM. J. L. & SOCIAL PROBS. 80, 81 (1967).

16. *See* 56 COLUM. L. REV. 1112, 1113 (1956). The problem of possible prejudice in a joint trial involving a conspiracy case may be increased by the relaxation of the rules of evidence

confession of a nontestifying codefendant was admissible against him but inadmissible hearsay as to the other defendants, the jury was instructed to consider the confession only against the defendant who had made it.[17] The protection afforded the defendant against whom the confession was inadmissible was nearly illusory, and the possibility of prejudicial spillover was great. The jury was presented with the moral dilemma of determining guilt or innocence either without evidence which it believed to be probative and which it was using against another defendant or with such evidence, thereby violating the judge's instructions.[18] Although *Delli Paoli* is no longer the law, there remains the above mentioned problem of an individual's rights being undermined in a joint trial. The prosecutors who are the beneficiaries of this undermining prefer joint trials.[19] This preference arises both from a desire to conserve time and a realization that when evidence, which would be inadmissible in a single trial, is admitted in a joint trial subject to a limiting instruction, the jury might disregard the instruction and consider the evidence for all purposes.

The Rule of Delli Paoli *and Joint Trials*

In *Delli Paoli v. United States*,[20] while adhering to the theory that the jury could be expected to follow the court's instruction and not consider the confession of a nontestifying codefendant in determining the guilt or innocence of another defendant, the Supreme Court recognized that there might be circumstances which

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in a conspiracy trial. *See Developments in the Law: Criminal Conspiracy*, 72 HARV. L. REV. 920, 983-90 (1959); Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741, 754 (1965); 28 OHIO ST. L.J. 356, 359 (1967). A specific example of this relaxation is the easing of the relevancy standard. *See* 72 HARV. L. REV., *supra* at 983. A further source of possible prejudice in conspiracy trials is the admission of acts in furtherance of a conspiracy which the jury is instructed not to consider unless it first finds that there is a conspiracy. *See* United States v. Lawler, 413 F.2d 622 (7th Cir. 1969); 113 U. PA. L. REV., *supra* at 754.

17. See notes 20-29 *infra* and accompanying text. For an example of a *Delli Paoli* type instruction see note 6 *supra*.

18. *See* Jack v. United States, 409 F.2d 522, 528 (9th Cir. 1969); 28 OHIO ST. L.J. 356, 362 (1967). *See also* Comment, *Post-Conspiracy Admissions in Joint Prosecutions—Effectiveness of Instructions Limiting the Use of Evidence to One Co-Defendant*, 24 U. CHI. L. REV. 710, 713 (1957).

19. *See* O'Dougherty, *Prosecution and Defense under Conspiracy Indictments*, 9 BROOKLYN L. REV. 263, 271 (1940); 28 OHIO ST. L.J. 356, 359 (1967). For other factors which prosecutors consider in determining if they are going to utilize the joint trial see the text accompanying note 12 *supra*.

20. 352 U.S. 232 (1957).

would make unreasonable the assumption that the jury did, in fact, follow the instruction. *Delli Paoli* involved the joint trial of five individuals charged with unlawful dealing in alcohol. The government case consisted of the testimony of eyewitnesses and the confession of one codefendant which was admitted with the normal limiting instruction.[21] On these facts, the Court held that it was reasonable to assume that the jury followed the judge's instruction.[22] In reaching its decision, the Court said that all of the circumstances of the case must be considered.[23] Because the trial judge best knows the circumstances of each case, the Court further stated that the trial judge's decision to sever the joint trial or not to sever and, therefore, admit the confession subject to the limiting instruction was reversible only if the trial judge abused his discretionary power.[24] In dissenting, Justice Frankfurter, joined by three other Justices, rejected the majority's belief that the jury would follow the judge's limiting instruction.[25] It is important to note that neither the *Delli Paoli* nor *Bruton* holdings was concerned with the general prejudice problems of joint trials but rather they were directed only to the specific problem of the effectiveness of a judge's instruction concerning the inadmissibility of a nontestifying codefendant's confession against another defendant.[26]

Although *Delli Paoli* did not hold that as an absolute rule the jury was to be presumed to have followed the court's instruction, trial courts, adhering to *Delli Paoli*, seldom granted severance, and appellate courts were slow to reverse the trial courts' decisions.[27] Indeed, some courts went so far as to imply that *Delli Paoli* established an absolute rule.[28] Despite widespread criticism of the

21. *Id.* at 233.

22. *Id.* at 241. The Court considered five factors important in determining the reasonableness of a belief that the instruction to consider the confession of the nontestifying codefendant as evidence only against him was followed: The simplicity of the conspiracy, the safeguarding of the individual interest of the defendants, the point in time the confession was admitted, the contents of the confession, and the lack of any indication of confusion. *Id.* at 241-42.

23. *Id.* at 243.

24. *Id.*

25. *Id.* at 246-48. The dissent's position was that "[t]he Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." *Id.* at 248.

26. See notes 12-16 *supra* and accompanying text.

27. 72 HARV. L. REV., *supra* note16, at 983.

28. *See* United States v. Ramos, 268 F.2d 878, 881 (2d Cir. 1959); United States v. DeFillo, 257 F.2d 835, 838-39 (2d Cir. 1958), *cert. denied*, 359 U.S. 915 (1959). *But see* United States v. Bozza, 365 F.2d 206, 216 (2d Cir. 1966).

belief that the jury could or would follow the court's instruction in a *Delli Paoli* situation, only a small minority of states abandoned the *Delli Paoli* rule.[29]

The Erosion of Delli Paoli

In two pre-*Bruton* cases the Supreme Court foreshadowed its overruling of *Delli Paoli.* In *Douglas v. Alabama,*[30] a co-indictee, who had been tried separately, was called as a witness by the state prosecutor. After the co-indictee had invoked the fifth amendment privilege against self-incrimination, the prosecutor, under the guise of leading a hostile witness, read the co-indictee's confession which implicated Douglas. The Court held that this constituted a denial of Douglas' right to cross-examination, secured by the sixth amendment right of confrontation.[31] The holding was based upon the premise that the jury could not be expected to disregard the prosecutor's reading of the confession and that Douglas could not effectively cross-examine one who had invoked the fifth amendment and, thus, refused to affirm the confession.[32] The more significant foreshadowing of *Delli Paoli's* demise was *Jackson v. Denno,*[33] where the Supreme Court invalidated a New York procedure which allowed the jury to determine first the voluntariness of a confession and then the defendant's guilt or innocence with the instruction that if the confession were found to be involuntary the jury was to disregard it in determining guilt. In reaching its decision, the Court cited Frankfurter's dissent in *Delli Paoli* and concluded that the jury could not be reasonably expected to follow an instruction which required it to disregard an involuntary confession after it had examined that same confession to determine if it was, in fact, involuntary.[34]

29. For an example of the criticism of the *Delli Paoli* rule see 36 U. CIN. L. REV., *supra* note 12. States rejecting *Delli Paoli* included California in People v. Aranda, 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965) and New Jersey in State v. Young, 46 N.J. 152, 215 A.2d 352 (1965). For the views of those states which adhered to *Delli Paoli* see Kinsey v. State, 193 So. 2d 437 (Fla. App. 1967); People v. Carver, 77 Ill. App. 2d 247, 257-58, 222 N.E.2d 17, 23 (1966).

30. 380 U.S. 415 (1965).

31. *Id.* In Pointer v. Texas, 380 U.S. 400 (1965), the Supreme Court affirmed that the right to cross-examination was included in the right of confrontation and incorporated into the fourteenth amendment's concept of due process, thus becoming obligatory for the states.

32. 380 U.S. at 419-20.

33. 378 U.S. 368 (1964).

34. *Id.* at 381-83.

Bruton: THE DEMISE OF *Delli Paoli*

Bruton v. United States

In overruling *Delli Paoli*, the Supreme Court in *Bruton* stated that *Jackson v. Denno* had repudiated the basic premise that it was reasonably possible for a jury to follow sufficiently clear instructions to disregard a nontestifying codefendant's confession in determining another defendant's guilt.[35] The Court cited with approval Judge Traynor's opinion in *People v. Aranda*[36] in which the California Supreme Court held inadmissible in a joint trial a confession of a nontestifying codefendant which strongly implicated another defendant.[37] Judge Traynor's opinion stated: "A jury cannot 'segregate evidence into separate intellectual boxes,' . . . It 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."[38] After explicitly repudiating the *Delli Paoli* premise, the Court attempted to answer some of the arguments against overruling *Delli Paoli*. It recognized the advantages of joint trial and implied that effective deletion of a codefendant's extrajudicial statement would allow the introduction of such a statement without infringing on the right of confrontation of the other defendants.[39] When effective deletion is not possible, the Court found that denying a defendant the right of confrontation was too high a price to pay for joint trial.[40] In discussing the contention that the maintenance of the jury system depended on the belief that the jury would follow the judge's instructions, the Court answered that although there were many circumstances in which this belief was justified, there were others where human limitations created so great a risk of the jury not following the instruction that the inadequacies of the system could not be ignored.[41] In an apparent effort to allay the fear that its holding implied that certain exceptions to the hearsay rule raised

35. 391 U.S. at 126.

36. 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965).

37. *Id.* at 527, 407 P.2d at 270, 47 Cal. Rptr. at 358.

38. *Id.* at 529, 407 P.2d at 272, 47 Cal. Rptr. at 360.

39. 391 U.S. at 133-34. For a procedure which would allow the introduction of an effectively deleted confession in a joint trial, see notes 123-43 *infra* and accompanying text.

40. 391 U.S. at 134-35.

41. *Id.* at 135.

constitutional questions under the confrontation clause,[42] the Court explicitly noted that it was not dealing with their constitutionality.[43]

In *Bruton* the Court twice spoke of the defendant being denied the right of confrontation because of the substantial risk that the jury would disregard the judge's instruction and consider Evans' extrajudicial statements in determining Bruton's guilt.[44] However, the Court failed to make clear whether this risk resulted from the extreme weakness of the case against Bruton which the Solicitor General, himself, conceded[45] or from the mere admission of a nontestifying codefendant's confession into evidence. This ambiguity gives rise to several questions critical to the administration of criminal justice. Specifically, is there a violation of a defendant's right of confrontation every time the confession of a nontestifying codefendant which implicates the defendant is admitted into evidence, or is there a violation only when the jury's disregard of the court's instruction could lead the jury to consider implications in the confession which are not contained in any state evidence which *is* admissible against the defendant? Further, once it is determined that a violation of the right of confrontation has occurred, is the test of reversible error an automatic one, a variation of the harmless error test of *Chapman v. California*,[46] or a substantial weight test? For

42. *See id.* at 128 n.3. The fear which the Court sought to dissipate was that because Bruton was denied his right of confrontation when his nontestifying codefendant's extrajudicial statements were introduced in the joint trial, then the introduction of a dying declaration or a statement of a coconspirator may similarly deny a defendant's right of confrontation.

43. *Id.*

44. *Id.* at 128, 137.

45. See note 5 *supra.*

46. 386 U.S. 18 (1967).

To better understand the *Chapman* harmless error test and the later discussion concerning its application (see notes 60-64, 79, 109-17 *infra* and accompanying text), an examination of the history of harmless error may be helpful. Every state and the federal government has a harmless error statute to avoid the Exchequer rule that all errors in a trial require reversal. The federal act, like the state acts, was intended to stop reversals for unimportant technical errors. *See* People v. Ross, 67 Cal. 2d 64, 80-83, 429 P.2d 606, 618-21, 60 Cal. Rptr. 254, 266-68 (1967) (Traynor, J., dissenting), *rev'd*, 391 U.S. 470 (1968); 45 N.C.L. REV. 1044, 1049 (1967). These statutes were expanded to include constitutional errors. In *Chapman* the Supreme Court held, after noting that some constitutional errors are never harmless, that other constitutional errors are not reversible if the prosecution shows that the error was harmless beyond a reasonable doubt. The Court said that the prosecutor must prove that the error did not contribute to the conviction, 386 U.S. at 26, and explicitly rejected California's overwhelming weight of the evidence test. *Id.* at 23-24. The holding in *Chapman* indicates that despite the expansion of the harmless error test to constitutional errors, the scope of the test is still a narrow one. *See* Harrington v. California, 395 U.S. 250 (1969); United States v. Maurice, 416 F.2d 234 (9th Cir. 1969).

example, if the similar confessions of two nontestifying codefendants are each admitted into evidence with a limiting instruction, (1) is there a violation of the right of confrontation and (2) is there reversible error?[47] When it is determined which test is to be applied, does the test apply retroactively?

The Supreme Court After Bruton

Subsequent Supreme Court decisions have been concerned with some of the questions created by *Bruton*. In *Roberts v. Russell*,[48] a case with facts that paralleled *Bruton*, the Court, in a per curiam opinion, held *Bruton* retroactive, vacated judgment, and remanded for further consideration in light of *Bruton*. The Court said that its holding was required because the *Bruton* decision "went to the basis of fair hearing and trial"[49] and corrected a "serious [flaw] in the fact-finding process at trial."[50] Although this decision is consistent with the Court's history of finding sixth amendment holdings involving jury trials to be retroactive,[51] it adds confusion to other questions

47. Consideration of the reversal tests indicates the importance of asking the two separate questions: (1) Is there a violation of the right of confrontation? (2)Is there reversible error? See notes 60-64, 79, 101-22 *infra* and accompanying text.

48. 392 U.S. 293 (1968).

49. *Id.* at 294, *quoting* Linkletter v. Walker, 381 U.S. 618, 639 n.20 (1965).

50. 392 U.S. at 294, *quoting* Stovall v. Denno, 388 U.S. 293, 298 (1967).

51. Although the Court appears to be using the three-part test of Stovall v. Denno, 388 U.S. 293 (1967), of determining the purpose of the new standard, evaluating the extent of reliance on the old standard, and predicting the effect of retroactivity on the administration of justice, the Court may actually be using a different test: "Does the new standard involve a sixth amendment right at a jury trial?" If it does, the new standard will be applied retroactively; if not, the standard will not be so applied. Thus a new standard involving a police function will not be held retroactive. *See* Desist v. United States, 394 U.S. 244 (1969) (holding Katz v. United States, 389 U.S. 347 (1967), which involved federal eavesdropping, not retroactive); Fuller v. Alaska, 393 U.S. 80 (1968) (holding Lee v. Florida, 392 U.S. 378 (1968), which concerned state eavesdropping, not retroactive); Stovall v. Denno, 388 U.S. 293 (1967) (holding Gilbert v. California, 388 U.S. 263 (1967) and United States v. Wade, 388 U.S. 218 (1967), which dealt with line-ups, not retroactive); Johnson v. New Jersey, 384 U.S. 719 (1966) (holding Miranda v. United States, 384 U.S. 436 (1966) and Escobedo v. Illinois, 378 U.S. 478 (1964) not retroactive); Linkletter v. Walker, 381 U.S. 618 (1965) (holding Mapp v. Ohio, 367 U.S. 643 (1961) not retroactive). Furthermore, a new standard involving a non-sixth amendment right at trial will generally not be held retroactive. *See* Halliday v. United States, 394 U.S. 831 (1969) (holding McCarthy v. United States, 394 U.S. 459 (1969), which involved guilty plea procedures, not retroactive); Tehan v. Shott, 382 U.S. 406 (1966) (holding Griffin v. California, 380 U.S. 609 (1965), which concerned prosecutorial comment on the failure to testify, not retroactive). *But see* Jackson v. Denno, 378 U.S. 368 (1964),which involved jury determination of the voluntariness of a confession, where the Court emphasized that the reliability of the fact finding process was at stake. Several sixth amendment standards have been held retroactive. *See* Berger v. California, 393 U.S. 314 (1969) (holding Barber v.

presented by *Bruton*. That the admission of a nontestifying codefendant's confession is a per se violation of a defendant's right of confrontation and requires an automatic reversal is suggested by the retroactive holding in *Roberts*, for the Court generally holds retroactive only those cases involving errors which require automatic reversal.[52] On the other hand, the Court's remand of the case to the district court for further consideration would seem to indicate that reversal is not automatic. It has been claimed that this vacating and remanding has the further significance of indicating that the admission of a nontestifying codefendant's confession is not a per se violation of the defendant's right of confrontation.[53] However, the Supreme Court's subsequent remanding of three cases[54] in which the codefendant did take the stand would seem to indicate that the Court was not defining *Bruton's* scope when it remanded *Roberts*.

In *Frazier v. Cupp*,[55] where the prosecutor included in his opening statement a summary of the testimony he expected a co-indictee, who had pleaded guilty, to give, where the summary suggested that the testimony would implicate the petitioner, and where the co-indictee invoked the privilege against self incrimination and did not testify, the Court held that *Bruton* did not require reversal.[56] *Bruton* was distinguished on the basis that the mental gymnastics required of the jury in *Bruton* in considering evidence

Page, 390 U.S. 719 (1968), which involved prosecutorial good faith in securing witnesses when the prosecution introduces the witnesses' former testimony, retroactive); Arsenault v. Massachusetts, 393 U.S. 5 (1968) (holding White v. Maryland, 373 U.S. 59 (1963), which concerned the right to counsel at a preliminary hearing, retroactive); McConell v. Rhay, 393 U.S. 2 (1968) (holding Mempa v. Rhay, 389 U.S. 128 (1967), which dealt with the right of counsel at a probation revocation hearing, retroactive); Douglas v. California, 372 U.S. 353 (1963) (right to counsel on appeal); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel at trial); Hamilton v. Alabama, 368 U.S. 52 (1961) (right to counsel at arraignment); Griffin v. Illinois, 351 U.S. 12 (1956) (right to a transcript on appeal). *But see* DeStefano v. Woods, 392 U.S. 631 (1968) (holding Bloom v. Illinois, 391 U.S. 194 (1968) and Duncan v. Louisiana, 391 U.S. 145 (1968), each of which concerned state denial of a jury trial, not retroactive).

The new test readily explains *Roberts*, holding *Bruton* retroactive. *Bruton* involves the sixth amendment right of confrontation in a jury trial. The inadequacies of the *Stovall* test are apparent when the Court does not even discuss the third factor of the *Stovall* test and ignores the near unanimous approval of *Delli Paoli* by the state courts.

52. See note 51 *supra*.

53. *See* Brief for the State of California as Amicus Curiae at 8, Harrington v. California, 395 U.S. 250 (1969).

54. Hunt v. Connecticut, 392 U.S. 304 (1968); Santoro v. United States, 392 U.S. 301 (1968); United States v. Bujese, 392 U.S. 297 (1968).

55. 394 U.S. 731 (1969).

56. *Id.* at 735.

against only one of two defendants was not present in *Frazier*, that the statements were before the trial and could be easily segregated by the jury and that the inadmissible evidence was not a vital part of the prosecution's case as it was in *Bruton*.[57] Although *Frazier* does not involve the mental gymnastics of *Bruton*, the Court's emphasis on the confession not being an important part of the prosecution's case suggests that the mere admission of a nontestifying codefendant's confession is not reversible error.[58]

The suggestions in *Bruton*, *Roberts*, and *Frazier* that the standard of reversal must be one which considers the content of the confession in light of the other evidence in the case was given support in *Harrington v. California*[59] where the Court applied the *Chapman* "harmless error test."[60] *Harrington* involved four defendants, three Negroes and Harrington, a Caucasian, who were charged with felony murder. The evidence against Harrington consisted of the testimony of a codefendant who placed Harrington at the robbery scene and the identification testimony of eyewitnesses who had at first said all the robbers were Negroes.[61] The confessions of the other nontestifying codefendants which implicated Harrington were admitted subject to the *Delli Paoli* instruction. Harrington did not confess. The Supreme Court affirmed Harrington's conviction by holding that any error in admitting the confessions was harmless under the *Chapman* test.[62] In so holding the Court said: "[The case against Harrington] is so overwhelming that unless we say no violation of *Bruton* can constitute harmless error, we must leave this state conviction undisturbed."[63] Justice Brennan speaking for three dissenters claimed that the majority had in reality overruled

57. *Id.*

58. The Court in *Frazier* twice spoke of the importance of the codefendant's extrajudicial statement in the prosecution's case. The Court first observed that "unlike the situation in either *Douglas* or *Bruton*, [the codefendant's] statement was not a vitally important part of the prosecution's case." 394 U.S. at 735. The Court then concluded:

> At least where the anticipated, and unproduced, evidence is not touted to the jury as a crucial part of the prosecution's case, "it is hard for us to imagine that the minds of the jurors would be so influenced by such incidental statements during this long trial that they would not appraise the evidence objectively and dispassionately." *Id.* at 736.

See United States v. Maurice, 416 F.2d 234 (9th Cir. 1969); United States v. Carlson, No. 23,337 (9th Cir., Feb. 2, 1970).

59. 395 U.S. 250 (1969).

60. See note 46 *supra*.

61. 395 U.S. at 253.

62. *Id.* at 254.

63. *Id.*

Chapman and its requirement that for a constitutional error to be harmless the state must show that the error made *no* contribution to the criminal conviction.[64] The question of the dilution of *Chapman* aside, however, because *Harrington* involved a case tried before *Bruton*, it is not absolute authority for the proposition that the *Chapman* test is always applicable. Rather it may possibly be limited to cases tried before *Bruton*, while an automatic reversal test may be proper for post-*Bruton* cases. Such a reading of *Harrington* would enable the courts to follow the suggestion of some commentators who would apply the harmless error test retroactively and the automatic reversal test prospectively.[65] Whether or not this reading of *Harrington* is acceptable, the opinion does indicate that an error, reversible or otherwise, occurs whenever a confession of a nontestifying codefendant which implicates another defendant is admitted into evidence.

THE SCOPE OF *Bruton*

Since the Supreme Court's decisions in *Bruton* and *Roberts*, the lower federal courts and the state courts have been flooded by *Bruton* claims. Although the courts agree that *Bruton* applies to state trials[66] and that the decision is based on the right of confrontation,[67] the courts are divided both as to the scope of *Bruton* and the reversible error test to be applied. As compared to the situation where the codefendant has not taken the stand, the question of *Bruton*'s scope when the defendant *has* testified has created less difficulty for the courts. Generally, *Bruton* has been held not to apply in this instance, since the guarantee of confrontation is not breached.[68] Some courts seem to suggest that this inapplicability is absolute.[69] Others have applied *Bruton* where the codefendant took

64. *Id.* at 255. See Jones v. State, 227 So. 2d 326 (Fla. App. 1969), for an example of the dissent's fear that the lower court would read *Harrington* as a weakening of *Chapman*. *See* Note, *Harmless Constitution Error: A Reappraisal*, 83 HARV. L. REV. 814, 819-20 (1970). *See also* People v. Smith, 84 Cal. Rptr. 229 (Ct. App. 1970).

65. See notes 132-39 *infra* and accompanying text.

66. *See, e.g.*, State v. Gardner, 54 N.J. 37, 41, 252 A.2d 726, 730 (1969). This application of *Bruton* to state cases is explicitly required by Roberts v. Russell, 293 U.S. 293 (1968).

67. *E.g.*, United States v. Harris, 409 F.2d 77, 81 (4th Cir. 1969).

68. *E.g.*, United States v. Jackson, 409 F.2d 8 (6th Cir. 1969); Parker v. United States, 404 F.2d 1193 (9th Cir. 1968); Lipscomb v. State, 5 Md. App. 500, 248 A.2d 491 (1968); State v. Richard, 251 A.2d 326 (N.H. 1969); *see The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 237 (1968). *But see* Bujese v. United States, 405 F.2d 888 (2d Cir. 1969).

69. *See, e.g.* United States v. Sims, 297 F. Supp. 1009 (W.D. Tenn. 1969); People v. Ross, 41 Ill. 2d 445, 244 N.E.2d 608 (1969). *But see In re* Whitehorn, 462 P.2d 361, 82 Cal. Rptr.

the stand and invoked the fifth amendment after being read his confession[70] or where the codefedant after taking the stand denied making the confession.[71] Still others have applied *Bruton* where both defendants had the same lawyer.[72] These courts based their holdings on the theory that the right of confrontation secured by *Bruton* includes the right to an *effective* cross-examination. The emphasis in *Bruton* on cross-examination would seem to indicate that the Supreme Court intended to assure a defendant more than a theoretical right to cross-examine his codefendant.

The conflict in the courts' determination of the scope of *Bruton* when the codefendant does not testify is first presented by the threshold question: What is incriminating?[73] *Bruton* and *Roberts* spoke of the denial of the right to confrontation in the situation where the jury might consider a nontestifying codefendant's extra-judicial statements which implicate or incriminate another defendant. When the codefendant's statement in no way incriminates or implicates another defendant, that defendant cannot claim prejudice. All courts would probably agree with the Florida Supreme Court's holding that a statement which tells how the murder was committed, where the murder weapon was hidden, and where the body was buried was incriminatory.[74] Similarly, most courts would hold as not incriminatory the deleted confession of a nontestifying codefendant introduced as follows:

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609 (Cal. 1969), where the California Supreme Court found that the introduction of a confession of a codefendant who takes the stand is error, the reversibility of which is to be determined by using the *Chapman* test. Using the *Chapman* test the court held the error harmless. 462 P.2d at 368, 82 Cal. Rptr. at 617. The court's finding of error would seem to be an overreading of *Bruton*. *Bruton* did not hold that the introduction of a codefendant's confession was error if the codefendant was subject to cross-examination. Rather, *Bruton* held that error occurred when the defendant was denied his right to cross-examine his codefendant. Bruton v. United States, 391 U.S. 123 (1968). Determination of whether there is error which is harmless or whether there is no error at all gains importance in the application of an automatic reversal test. See notes 132-40 *infra* and accompanying text.

70. Goodwin v. Page, 296 F. Supp. 1205, 1212 (E.D. Okla. 1969).

71. O'Neil v. Nelson, No. 23,149 (9th Cir., Jan. 26, 1970); Townsend v. Henderson, 405 F.2d 324, 329 (6th Cir. 1968).

72. State v. Coleman, 9 Ariz. App. 526, 454 P.2d 196 (1969). The presence of a single lawyer obviously denies effective cross-examination of the codefendant. Yet this does not mean that the mere failure of counsel to cross-examine is reversible error. *See* United States *ex rel.* Hundley v. Pinto, 413 F.2d 727 (3d Cir. 1969). *See generally* People v. Anthony, 249 N.E.2d 747, 749 (1969).

73. For a possible answer to the question "What is incriminating?" see note 124 *infra* and accompanying text.

74. Schneble v. State, 215 So. 2d 611 (Fla. 1968).

Q (by the prosecutor)—
Will you tell us what [the codefendant] indicated to you insofar as he himself is concerned?
A (by the police officer)—
He orally admitted his participation in the robbery.[75]

However, in the large area between these extremes there exists uncertainty. Some courts require that the defendant must be inculpated directly[76] and that the defendant is not incriminated by statements referring to "other fellows" which do not refer to the defendant by name.[77] Other courts hold that the defendant need not be directly incriminated.[78] The *Bruton* case made no distinction between directly and indirectly incriminating statements, but, rather, was concerned with whether the defendant was, in fact, incriminated. Further, any direct-indirect distinction seems to be an unjustified limitation on the right of confrontation, which enables a court to couch its decision in terms of the applicability of *Bruton* and to avoid utilization of the *Chapman* harmless error test which nearly always requires a reversal.[79] This avoidance technique is best seen in cases where both defendants who have made similar confessions do not testify and their confessions are admitted into evidence subject to the limiting instruction. In such cases, a court, instead of finding error and then applying the *Chapman* test as required by *Harrington*, may simply say that the codefendant's confession does not implicate the defendant, even though it adds support to the defendant's own confession.[80]

If a court decides that a nontestifying codefendant's statements incriminate another defendant, it must then determine the applicability of *Bruton* in light of the hearsay exceptions, the limited admissibility doctrine, the concept of waiver, and the techniques of impeachment. The Court in *Bruton* specifically stated that it was not deciding any constitutional questions arising under the hearsay

75. State v. Parker, 74 Wash. 2d 269, 272, 444 P.2d 796, 798 (1968). However, where the confession is more extensive, the deletion of such references may prejudice the confessor by suggesting that he was the sole actor. 82 HARV. L. REV., *supra* note 68, at 238.

76. *E.g.*, United States v. Fellabaum, 408 F.2d 220 (7th Cir. 1969).

77. *E.g.*, United States v. Lipowitz, 407 F.2d 597 (3d Cir. 1969).

78. *E.g.*, Commonwealth v. Bosman, 213 Pa. Super. 258, 247 A.2d 647 (1968).

79. *See* United States v. Levinson, 405 F.2d 971 (6th Cir. 1968). The court's statement that "even if it be considered error, [it] was harmless" appears to be mere dicta added after the court had decided that *Bruton* did not apply. *Id.* at 988.

80. *See* United States v. Levinson, 405 F.2d 971 (6th Cir. 1969); United States *ex rel.* Catanzaro v. Mancusi, 404 F.2d 296 (2d Cir. 1968); Commonwealth v. Scott, 245 N.E.2d 415 (Mass. 1969).

exceptions,[81] and in cases since *Bruton* the lower courts have consistently held that *Bruton* does not apply to such exceptions.[82] The California Supreme Court in *People v. Brawley*[83] held that *Bruton* did not apply to the coconspirator's exception to the hearsay rule.[84] The basis of this decision was that *Bruton* did not deal with the exceptions to the hearsay rule, that the constitutionality of the coconspirators exception has long been recognized, and that because of the need for such evidence the exception will continue to be recognized.[85]

The doctrine of limited admissibility which allows evidence to be introduced for only a limited purpose has been the subject of much *Bruton* litigation. Because *Bruton* was concerned with the denial of the right of confrontation and not with the prejudicial effect of the limited admissibility doctrine,[86] the courts have held *Bruton* inapplicable where the problem is strictly one of limited admissibility. Thus, it has been held that in a trial involving a multi-count indictment where the evidence admitted to prove one count might be misused by the jury to determine guilt under another count, *Bruton* does not apply.[87] Similarly, where a codefendant's statements are admitted to show the defendant's silence when silence can be taken as an admission against interest, *Bruton* has been held inapplicable.[88] However, where the right of confrontation rather than limited admissibility is the central issue, such as when a

81. Bruton v. United States, 391 U.S. 123, 134 n.10 (1968). The hearsay exception which has special significance in a joint trial is the exception which allows the introduction into evidence of a statement made by a coconspirator in furtherance of a conspiracy.

82. *See, e.g.*, Pinion v. State, 225 Ga. 36, 165 S.E.2d 708 (1969).

83. 82 Cal. Rptr. 161 (Sup. Ct. 1969).

84. *Id.* at 169.

85. *Id.*; *see* 72 HARV. L. REV., *supra* note 16, at 983; 113 U. PA. L. REV., *supra* note 16, at 754.

86. See notes 12-16 *supra* and accompanying text. *Bruton's* discussion of circumstances under which the jury cannot be presumed to have followed the trial court's instructions would seem to raise serious questions concerning limited admissibility, 391 U.S. at 135-36; *cf.* United States v. Heft, 413 F.2d 1027 (7th Cir. 1969). However, the Court's emphasis on the right of confrontation and the Court's holding based on this right indicate that the Court was not dealing with the validity of the limited admissibility rule. Further, the Court recognized that in many cases, such as those where questions of limited admissibility may arise, the jury can be presumed to have followed the judge's instructions. 391 U.S. at 135.

87. *See* United States v. Catino, 403 F.2d 491 (2d Cir. 1968); United States v. American Oil Co., 291 F. Supp. 968 (D.N.J. 1968); *cf.* United States v. Hoffa, 402 F.2d 380, 386 (7th Cir. 1968).

88. State v. McLain, 222 So. 2d 855 (La. 1969). When evidence of a defendant's silence is admitted it is solely for showing the silence of the defendant.

nontestifying codefendant's civil depositions are admitted into evidence in a criminal trial[89] or where the confession of the nontestifying principal is admitted into evidence at the trial of the accomplice to show the principal's guilt,[90] *Bruton* has been applied. The decision in the latter case seems to be justified as a means of preventing the prosecution from doing at a separate trial what *Bruton* prevents it from doing at a joint trial.

In the area of waiver and impeachment the courts have had an opportunity to set a varied pattern of decisions. One court has ruled that endorsing a codefendant's confession waives a defendant's *Bruton* rights,[91] while another has held that this endorsement can occur if the extrajudicial statements of the codefendants agree in the details of the crime.[92] A third court, however, has held that endorsement does not avoid *Bruton*.[93] It would seem that the waiver of a constitutional right, such as the right of confrontation, should not be assumed as easily as in the first two cases above. The pattern set by the third case and decisions which have adhered to its principle seem more in accord with the Supreme Court's reminder in *Miranda*[94] that "[t]his court has always set high standards of proof for waiver of constitutional rights."[95] It may even be argued that the state cannot meet this burden of proof unless the defendant's counsel is present when the waiver is made.[96] Where impeachment is at issue, the courts have consistently held *Bruton* inapplicable.[97] This, however, does not mean that *Bruton* is inapplicable whenever

89. *Cf.* United States v. Detroit Vital Foods, Inc., 407 F.2d 570, 575 (6th Cir. 1969) (evidence adduced as a result of a codefendant's confession is inadmissible in a joint trial), *rev'd sub nom.* United States v. Kordel, 90 S. Ct. 763 (1970) (reversed on the basis that the codefendant's statements never were admitted into evidence).

90. Schepps v. State, 432 S.W.2d 926 (Tex. 1968).

91. State v. Greer, 202 Kan. 212, 447 P.2d 837 (1968).

92. People v. Osuna, 452 P.2d 678, 76 Cal. Rptr. 462 (1969).

93. Smithson v. State, 5 Md. App. 378, 247 A.2d 542 (1968).

94. Miranda v. Arizona, 384 U.S. 436 (1966).

95. *Id.* at 475.

96. The suggestion that the presence of the defendant's counsel may be required to make an effective endorsement is based on the theory that endorsement is a critical stage of the procedural system. *See* United States v. Wade, 388 U.S. 218, 223-27 (1967). By endorsing a codefendant's confession one may well be determining the outcome of his trial.

For a problem related to waiver, that of rendering any error harmless by the defendant testifying to the validity of the codefendant's confession, see United States v. Lyon, 397 F.2d 505 (7th Cir.), *cert. denied*, 393 U.S. 848 (1968).

97. *E.g.*, Javor v. United States, 403 F.2d 507 (9th Cir. 1968); United States v. Boone, 401 F.2d 659 (3d Cir. 1968); Minor v. State, 6 Md. App. 82, 250 A.2d 113 (1969); State v. Cartagena, 40 Wis. 2d 213, 161 N.W.2d 392 (1968).

the codefendant's confession is used for impeachment purposes, be it to impeach a codefendant or a codefendant's character witness. Usually the confession is used to impeach a codefendant who has been called by the defendant to testify. In such a case when the confession is introduced in cross-examination the defendant can confront the codefendant on redirect concerning the confession.[98] However, where the confession is used to impeach a character witness, a different question is raised. Where the witness is simply asked if he knew that the codefendant had confessed, it has been held that *Bruton* is inapplicable because the question did not suggest that the confession incriminated the other defendant.[99] But if the prosecutor asked the same question and then read the complete confession which incriminated the other defendant, it would seem that the defendant has been effectively denied his right of confrontation.[100]

APPELLATE REVIEW AND REVERSIBLE ERROR IN *Bruton* SITUATIONS

Regardless of how broad or narrow a reading is given to *Bruton*, if a court limits review of *Bruton* errors, the effectiveness of *Bruton* will be correlatively impaired. Some courts have treated *Bruton* cases as analogous to those involving nonconstitutional evidentiary rulings where the appellate court will not hear an objection not made at the trial level.[101] This position severely limits the effect of *Roberts v. Russell*[102] which held *Bruton* retroactive, because when *Delli Paoli* was the law there was generally little reason to object to the court's admitting into evidence a nontestifying codefendant's confession implicating the defendant, assuming the proper instruction was given to the jury.[103] Under such circumstances, a court should not treat a

98. *See* C. MCCORMICK, EVIDENCE § 32 (1954). When the defendant calls the codefendant to testify and the codefendant's confession is introduced in cross-examination of the codefendant, the defendant's right to an effective cross-examination secured by *Bruton* becomes the right to an effective redirect examination. Therefore, if the codefendant on cross-examination denies making the confession or invokes the privilege against self-incrimination, the defendant has been denied the right of confrontation. See notes 70-71 *supra* and accompanying text.

99. United States v. Safley, 408 F.2d 603 (4th Cir. 1969).

100. *Cf.* Douglas v. Alabama, 380 U.S. 415 (1965) (discussed in *Bruton*).

101. *See* People v. Shirk, 14 Mich. App. 623, 166 N.W.2d 21 (1968). *See also* People v. Floyd, 464 P.2d 64, 80-81, 83 Cal. Rptr. 608, 624-25 (1970). *But see* People v. Baker, 23 N.Y.2d 307, 244 N.E.2d 232, 296 N.Y.S.2d 745 (1968); *cf.* O'Connor v. Ohio, 385 U.S. 92 (1966).

102. 392 U.S. 293 (1968). See notes 48-54 *supra* and accompanying text.

103. *Cf.* People v. Friola, 11 N.Y.2d 157, 182 N.E.2d 100, 227 N.Y.S.2d 423 (1962). See note 27 *supra* and accompanying text. The view that no objection to the admission of the

constitutional right as waived because no objection had been made at the trial level. However, in cases tried after *Bruton* the failure to object should waive the right unless plain error is shown by the record.[104]

The Test for Reversible Error under Bruton

If the court chooses to review a *Bruton* claim and determines that the *Bruton* rationale is applicable to that claim, the court must then decide what reversible error test to apply. The courts have utilized three basic tests. The first, utilized only by North Carolina, is an automatic reversal test which requires a separate trial to be held whenever a codefendant's confession incriminates another defendant.[105] Using this test, the North Carolina courts have reversed where the confessions of two codefendants were substantially the same and each confession was admitted into evidence with the *Delli Paoli* instruction.[106] Although this test is not constitutionally required under *Harrington v. California*,[107] and although most courts have rejected it, it would seem to find analogical support in other sixth amendment cases which have been held retroactive and which require automatic reversal.[108] The second test utilized by the courts is the *Chapman v. California*[109] harmless error test. This is the test the Supreme Court said it applied in *Harrington*. Yet, as discussed previously, the *Harrington* test may be a diluted form of the *Chapman* test.[110] Even so, this standard has an advantage over the weight of the evidence test in that it plaees the burden of proof on

codefendant's confession in a trial before *Bruton* does not waive the defendant's right to confrontation gains support from the fact that Bruton did not make any objection to the introduction of his codefendant's confession at the trial level. Evans v. United States, 375 F.2d 355, 361 (8th Cir. 1967).

104. A suggested test for finding plain error is found in United States *ex rel.* Gainer v. New Jersey, 278 F. Supp. 127 (D.N.J. 1967).

> When it appears clearly during the course of trial . . . that there is doubt as to whether defense counsel may be aware of a fundamental constitutional right of his client, inquiry out of the presence of the jury is indicated to make certain whether or not there is knowledge of the right and an intelligent waiver thereof by the defendant. *Id.* at 131.

If there is doubt and no inquiry has been made, the reviewing court should find plain error and order a new trial.

105. *See* State v. Fox, 274 N.C. 277, 291, 163 S.E.2d 492, 502 (1968).

106. *See, e.g.*, State v. Justice, 3 N.C. App. 363, 165 S.E.2d 47 (1969).

107. 395 U.S. 250 (1969). See notes 59-64 *supra* and accompanying text.

108. See note 51 *supra*. *Cf.* 83 HARV. L. REV., *supra* note 64, at 820-24; 16 AM. U.L. REV. 416, 419 (1967).

109. 386 U.S. 18 (1967). See note 46 *supra*.

110. See notes 63-64 *supra* and accompanying text.

the prosecutor to show that the error was harmless beyond a reasonable doubt.[111] In *United States v. Maurice*,[112] where Maurice's defense was that he was not a party to the sale of marijuana and where the other defendant's lawyer opened his case by stating that Maurice had taken part in the sale by giving the narcotics to his client to deliver, the Seventh Circuit, while recognizing that it is a rare case when an appellate court may hold an error harmless under the *Chapman* test, held that upon the basis of *Harrington* such an error had occurred.[113] The courts have tended to apply the *Chapman* test only where even a substantial weight test would require reversal. In cases where a *Chapman* test would require a reversal and a substantial weight test would not, courts have generally applied a substantial weight test. Thus, where the confessions of two defendants have varied materially[114] or where a prosecutor has commented extensively on a nontestifying codefendant's confession,[115] *Chapman* has been readily applied, while only a few courts have applied the test where the other evidence in the case was legally sufficient to sustain a conviction.[116] Even when the *Chapman* test is applied in a case where the other evidence is legally sufficient to sustain a conviction, there is the risk that in applying the *Harrington* variation of the test a court may consider evidence which adds nothing to the making of a prima facie case as harmless even though it tends to make the other evidence more believable.[117] The third test, the weight of the evidence test, which was used extensively before *Harrington*, has been applied where there is enough other evidence to support the verdict.[118] It has also been applied where the same verdict would have been reached without the confessions,[119]

111. See notes 118-22 *infra* and accompanying text for a discussion of the weight of the evidence test. In some weight of the evidenee tests the burden was on the accused and not on the prosecution. *See* People v. Ross, 67 Cal. 2d 64, 83, 429 P.2d 606, 620, 60 Cal. Rptr. 254, 268 (1967), *rev'd per curiam*, 391 U.S. 470 (1968).

112. 416 F.2d 234 (9th Cir. 1969).

113. *Id.*; *see* People v. Fortman, 84 Cal. Rptr. 458 (Ct. App. 1970).

114. United States *ex rel.* Johnson v. Yeager, 399 F.2d 508 (3d Cir. 1968), *cert. denied*, 393 U.S. 1027 (1969).

115. People v. Mirenda, 23 N.Y.2d 439, 245 N.E.2d 194, 297 N.Y.S.2d 532 (1969); *see* West v. Henderson, 409 F.2d 95 (6th Cir. 1969). *See also* Sims v. United States, 405 F.2d 1381 (D.C. Cir. 1968).

116. *E.g.*, People v. Boone, 22 N.Y.2d 476, 239 N.E.2d 885, 293 N.Y.S.2d 287, *cert. denied*, 393 U.S. 991 (1968).

117. *See* Note, *Harmless Constitutional Error*, 30 U. PITT. L. REV. 553, 558 (1969).

118. People v. Rhodes, 41 Ill. 2d 494, 244 N.E.2d 145 (1969).

119. State v. Aiken, 452 P.2d 232 (Wash. 1969).

where the other evidence was strong,[120] and where other strong evidence contradicted the confession.[121] This test is no longer constitutionally permissible as a result of *Harrington* which found that the test did not provide adequate protection of a defendant's right of confrontation.[122]

SUGGESTED PROCEDURE FOR THE RESOLUTION OF *Bruton* PROBLEMS

It is submitted that a three stage procedure for the resolution of *Bruton* problems should be utilized. As put forth by the New Jersey Court Rules, the first step would require a motion by the state before trial:

> If 2 or more defendants are to be jointly tried and the prosecuting attorney intends to introduce at trial a statement, confession, or admission of one defendant involving any other defendant, he shall move before trial on notice to all defendants for a determination by the court, in camera, as to whether such portion of the statement, confession, or admission involving such other defendants can be effectively deleted therefrom. The court shall direct the specific deletions to be made, or, if it finds that effective deletions cannot practically be made, it shall order separate trials . . . .[123]

The New Jersey court has defined "effective deletion" as "the elimination of not only direct and indirect identification of co-defendants but of any statement that could be damaging to the co-defendants once their identity is otherwise established."[124] This definition, which is consistent with *Bruton* in making no distinction between directly and indirectly incriminating statements,[125] makes such references as to "X, Y, or Z,"[126] or to "another Negro male,"[127] or to "Blank"[128] ineffective deletions.[129] At trial, the second

120. People v. Rosochacki, 41 Ill. 2d 483, 244 N.E.2d 136 (1969).

121. People v. Colletti, 101 Ill. App. 2d 51, 242 N.E.2d 63 (1968).

122. Harrington v. California, 395 U.S. 250, 252 (1969).

123. N.J. CT. R. 3:15-2(a) (Supp. 1969). The first step of the proposed resolution of *Bruton* problems is also based on the opinions of People v. Aranda, 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965) and State v. Young, 46 N.J. 152, 215 A.2d 352 (1965). *See* FED. R. CRIM. P. 14. If the prosecutor does not have access to a confession but has knowledge of its existence, he should be required to state such knowledge at the pre-trial hearing. This requirement would prevent the prosecutor from ignoring the first step in the proposed procedure in such cases as when the confession is made out of his jurisdiction and he has not yet tried or been able to obtain the confession. *See* Carlson, *False or Suppressed Evidence: Why a Need for the Prosecutorial Tie?* 1969 DUKE L.J. 1171, 1181-87.

124. State v. Young, 46 N.J. 152, 215 A.2d 352 (1965).

125. See notes 76-79 *supra* and accompanying text.

126. *See* People v. Jackson, 22 N.Y.2d 446, 239 N.E.2d 869, 293 N.Y.S.2d 265 (1968).

127. *See* State v. Taylor, 104 Ariz. 264, 251 P.2d 312 (1968).

128. *See* People v. Johnson, 13 Ill. 2d 619, 150 N.E.2d 597 (1958).

129. In United States *ex rel.* LaBelle v. Mancusi, 404 F.2d 690 (2d Cir. 1968), it was held that if the portions of a codefendant's confession which exculpate the codefendant are deleted

stage of this procedure would go into effect. The judge would not admit into evidence a codefendant's confession which had not been the subject of a pretrial motion unless the prosecutor could show, in a *voir dire* with the jury excused, that he did not possess or have access to the confession before trial.[130] If this burden is met, the judge would continue the *voir dire*, hear the confession, and make a ruling as to its admissibility and as to any necessary deletions.[131] The third stage of this suggested procedure, the appeal stage, has two variations. If the trial of the case occurred before *Bruton* the reversible error test would be the *Harrington* variation of the *Chapman* harmless error test. This standard, although it does not protect the rights of a defendant as completely as an automatic reversal test, does provide a sufficient amount of protection by putting the burden on the prosecutor to prove beyond a reasonable doubt that the error did not contribute to the verdict.[132] Further, since the retroactive application of an automatic reversal test would not have an increased deterrent effect over the *Harrington* test[133] and because of the difficulty of proving old cases,[134] the *Harrington* test seems to be the proper one when considering the retroactive application of *Bruton*. However, for cases tried after *Bruton*, because the prosecutor should have knowledge of *Bruton*,[135] because the problem of proving an old case is not present, and because of the difficulty of determining the absence of prejudice beyond a reasonable doubt,[136] the automatic reversal test utilized in other sixth amendment areas should be applied. This procedure would provide maximum protection for the defendant and deter the prosecution from attempting to evade *Bruton*.[137] Because *Harrington* requires

there is reversible error as to the codefendant. Thus, a prosecutor wishing to have a joint trial must not only effectively delete those parts of the confession which incriminate another defendant, but he must also *not* delete those portions which exculpate the confessor.

130. This automatic reversal test gives substance to the New Jersey rule which allows the judge "to admit such confession . . . or take such other action as the interest of justice requires." N.J. CT. R. 3:15-2(a) (Supp. 1969).

131. *See* State v. Parker, 74 Wash. 2d 269, 272, 444 P.2d 796, 798 (1968).

132. See notes 59-64, 109-17 *supra* and accompanying text.

133. *See* 30 U. PITT. L. REV., *supra* note 117, at 557.

134. *Id.*

135. *Id.*

136. Mause, *Harmless Constitutional Error: The Implications of* Chapman v. California, 53 MINN. L. REV. 519, 541 (1969).

137. *Id.* at 548; *cf.* Jones v. State, 227 So. 2d 326, 327 (Fla. App. 1969).

When the defendant fails to object at the trial to the introduction of a nontestifying codefendant's extrajudicial statement the appellate court should apply the plain error test. See

that the prosecutor prove beyond a reasonable doubt that the error did not contribute to the conviction[138] it would seem that any added cost resulting from the ordering of a few additional trials under the automatic reversal test would be offset by the saving of judicial time at the appellate level.[139] The appellate court would still have to determine the scope of *Bruton*,[140] but once this were done the court would simply affirm or reverse.

Each of the stages in the procedure is made more effective by the successful operation of the other stages. The first and second stages are enhanced in effectiveness by the automatic reversal test. Instead of having to determine first whether *Bruton* applies and then, if it does apply, whether admission of a codefendant's statement will be grounds for reversal,[141] the trial judge need only determine the first question—the scope of *Bruton*. He knows that he will be reversed if he admits the statement without proper deletion when *Bruton* applies. The third stage is aided by the admissibility test of the first two stages. New Jersey includes as incriminating almost any reference to a defendant in a codefendant's confession[142] and, therefore, simplifes the reviewing court's determination of what is incriminating. The court no longer needs to concern itself with whether a statement is directly or indirectly incriminating or whether it adds new information or is merely cumulative.[143] The first two stages are interrelated in that the first stage limits the need for a *voir*

note 104 *supra*. Further, there would be a strong tendency when there is an automatic reversal test to find that defendant's counsel was not aware of his client's rights if the counsel failed to object to the introduction of a confession which implicated his client. Such a finding should require a new trial.

138. See notes 59-65 *supra* and accompanying text.

139. It is apparent that the argument that there will be few additional reversals under an automatic reversal test suggests that such a test should be applied not only prospectively but also retroactively. However, because of the difficulty of proving old cases and because the prosecutor did not know he was violating the defendant's rights by introducing a nontestifying codefendant's confession the above suggestion should be rejected. See notes 133-35 *supra* and accompanying text.

140. The threshold determination of what is incriminating is a simple one if the broad New Jersey approach is taken. See notes 73-80, 123-24 *supra* and accompanying text. The court's main task then becomes the determination of the scope of *Bruton* in the hearsay exception, limited admissibility, waiver, and impeachment areas. See notes 81-100 *supra* and accompanying text.

141. The trial judge's decision under the *Chapman* test can be a very difficult one. This difficulty would seem to be extremely acute where the statement is offered into evidence before all the other state evidenee is presented. In such a situation a determination of what is harmless beyond a reasonable doubt may be little more than a hopeful guess.

142. See notes 123-24 *supra* and accompanying text.

143. See notes 73-80 *supra* and accompanying text.

dire during the trial and the second stage's requirement that the prosecution prove that it did not have access to the confession before trial enforces the pre-trial motion requirement while permitting the prosecution to introduce evidence which is not prejudicial to the defendant and to which the prosecution did not have access before trial. By utilizing this three stage procedure courts will be protecting the defendant's *Bruton* rights while eliminating much of the confusion which surrounds the *Bruton* holding.