The Confrontation Clause and the Supreme Court: Some Good News and Some Bad News

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In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .1

To one who feels as I do that the Confrontation Clause of the sixth amendment means pretty much what it says, the opinions of the Supreme Court over the last thirty years present an uneven combination of good news and bad news. That combination is most dramatically reflected in the Court's most recent Confrontation Clause opinions,2 which have involved two factual contexts: (1) cases involving joint criminal trials3 and (2) cases involving a single criminal defendant.4 A convergence between the two lines of cases is likely to occur sometime in the immediate future,5 compelling the Court to determine the appropriate role of the Confrontation Clause in both types of cases.6

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1. U.S. Const. amend. VI.
3. See infra notes 7-149 and accompanying text.
4. See infra notes 150-251 and accompanying text.
5. See infra notes 252-351 and accompanying text.
6. There has been a great deal of scholarly commentary over the Supreme Court's attempts to reconcile the Confrontation Clause with the hearsay rules. See Ohio v. Roberts, 448 U.S. 56, 66 n.9 (1980) (listing treatises, law review articles, and judicial opinions that have advanced approaches for reconciling the Confrontation Clause and the hearsay rules); see also Lilly, Notes on the Confrontation Clause and Ohio v. Roberts, 36 U. Fla. L. Rev. 207, 215-17 (1984) (discussing the various interpretations of the relationship between the Confrontation Clause and the hearsay rules).
I. THE CONFRONTATION CLAUSE AND JOINT CRIMINAL TRIALS

Recently, the Court’s attention has focused on the applicability of the Confrontation Clause in joint criminal trials. In *Cruz v. New York*, for example, the Court held that the Confrontation Clause precludes the receipt in evidence of the confession of one joint defendant, inculpating both defendants, where the confessing joint defendant does not take the stand. This preclusion prevails even where a jury is instructed to consider the confession only against the confessor and not as to any joint defendants, even if the other defendant’s own confession is admitted against him. The Court found that the receipt in evidence of the codefendant’s confession violated the defendant’s right of confrontation. The opinion in *Cruz* is noteworthy because it broadens the applicability of the Confrontation Clause. To fully appreciate the significance of *Cruz*, the judicial history of this area of law must be examined.

A. Delli Paoli and its Progeny

In *Delli Paoli v. United States*, five defendants were tried jointly on charges of conspiring to deal unlawfully in alcohol. In the government’s case, the confession of Whitley, one of the joint defendants who did not take the stand, was received in evidence. That confession seriously inculpated Delli Paoli. The trial court, upon receiving Whitley’s confession in evidence, admonished the jury to consider the confession only in determining the culpability of Whitley, and not in judging the other joint defendants. The court later repeated that admonition in its final instructions. The jury convicted all five defendants. Only Delli Paoli appealed. The Sec-

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8. 107 S. Ct. at 1717. In *Richardson v. Marsh*, 107 S. Ct. 1702 (1987), the companion case to *Cruz*, the Supreme Court held that the admission of a nontestifying codefendant’s confession with limiting instructions did not violate the Confrontation Clause when redacted to remove all references to codefendants. See infra notes 99-149 (discussing *Marsh*).
10. Id.
11. 352 U.S. 232 (1957) (Burton, J.). Justice Frankfurter wrote the dissenting opinion, in which he was joined by Justices Black, Douglas, and Brennan. See id. at 246.
12. Id. at 233.
13. Id.
14. Id. at 245-46.
15. Id. at 234.
16. Id.
17. Id. at 233.
18. Id.
The Circuit\textsuperscript{19} and the Supreme Court (dividing 5-4)\textsuperscript{20} affirmed the jury's conviction.

The Supreme Court's opinion is particularly remarkable in its acquiescent assumption that the jury, after having heard Whitley's detailed confession chronicling both his and Delli Paoli's participation in the alleged conspiracy,\textsuperscript{21} would still be able to observe the trial court's limiting instruction.\textsuperscript{22} The dissenting opinion, however, declined to indulge in the majority's accommodating assumption.\textsuperscript{23} The dissent found:

Where the [confessor's] statement is so damning to another against whom it is inadmissible . . . the difficulty of introducing it against the declarant without inevitable harm to a [codefendant] . . . is no justification for causing such harm. The 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 con-

\textsuperscript{19.} 229 F.2d 319 (2d Cir. 1956), aff'd, 352 U.S. 232 (1957).
\textsuperscript{20.} 352 U.S. at 232.
\textsuperscript{21.} \textit{See id.} at 243-46 (reprinting Whitley's confession in its entirety as an appendix to the Court's opinion).
\textsuperscript{22.} \textit{See id.} at 240-41. I have enormous respect for the manner in which juries function. I believe that in the deliberation room, individual jurors achieve a level of competence and conscientiousness beyond any they could achieve individually or collectively in any other environment. But it strikes me as unrealistic to assume that a jury required to determine the guilt or innocence of Whitley and Delli Paoli, having heard the confession of the former detailing his participation and the participation of the latter in the alleged conspiracy, could consider the confession in determining the guilt of Whitley and disregard the confession in determining the guilt of Delli Paoli.

A number of studies have been conducted to assess the ability of juries to disregard inadmissible evidence. \textit{See, e.g.,} Carretta & Moreland, \textit{The Direct and Indirect Effects of Inadmissible Evidence,} 13 \textit{J. APPLIED SOC. PSYCHOLOGY} 291 (1983) (concluding that "inadmissible evidence clearly has direct effects on [experimental jurors'] initial reactions toward a defendant," that jurors are "careful to remind one another of . . . inadmissibility," and that "[i]nsofar as inadmissible evidence is a salient discussion topic and [experimental jurors] neglect to remind one another of its inadmissibility, the effects of such evidence on their discussions are strengthened."); Thompson, Fong & Rosenhan, \textit{Inadmissible Evidence and Juror Verdicts,} 40 \textit{J. PERSONALITY & SOC. PSYCHOLOGY} 453, 461 (1981) (finding that "there are strong indications that the biasing effects of inadmissible evidence persisted following deliberations," but that "[g]roup deliberation did produce a substantial shift toward acquittal in all conditions."); cf. \textit{R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY} 231-32 (1983) (stating that "research has repeatedly shown that jurors do not or cannot disregard biasing extralegal testimony.").

\textsuperscript{23.} \textit{See Delli Paoli,} 352 U.S. at 246-48 (Frankfurter, J., dissenting). The dissent stated: The 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.

\textit{Id.} at 247.
sider but which they cannot put out of their minds. After all, the prosecution could use the confession against the confessor and at the same time avoid such weighty unfairness against a defendant who cannot be charged with the declaration by not trying all the [codefendants] in a single trial.  

Another striking aspect of *Delli Paoli* is the lack of reference to the Confrontation Clause by both the majority and the dissent. Both opinions viewed *Delli Paoli* as a case not involving any constitutional issues; instead, it was seen as a case dealing solely with the Court's supervisory power over federal prosecutions. With the advent of the Court's broadening recognition of the applicability of the Confrontation Clause to joint criminal trials, however, its steadfast faith in the ability of juries to observe limiting instructions would soon diminish.  

In *Bruton v. United States*, defendants Bruton and Evans were tried jointly for armed postal robbery. The government's witness, a postal inspector, testified to an oral confession allegedly made by Evans, which inculpated both Evans and Bruton. Evans did not testify. The trial court instructed the jury to consider Evan's confession only in deciding Evan's guilt or innocence, and to disregard the confession in judging Bruton.  

The jury found both defendants guilty. The Eighth Circuit af-

24. *Id.* at 247-48.
25. This aspect of the opinion is particularly surprising given the Second Circuit's discussion of the dilemma of admitting the confession or redacting it in some manner that avoids mutilation. *See Delli Paoli*, 229 F.2d 319, 321 (2d Cir. 1956) (L. Hand, J.), *aff'd*, 352 U.S. 232 (1957).

Significantly, the Court in *Bruton* stated:

We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence. . . . There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause.

*Id.* at 128 n.3. That issue, carefully left unresolved in *Bruton*, was confronted by the Court in *Lee v. Illinois*, 476 U.S. 530 (1986), discussed *infra* notes 252-81 and accompanying text.
29. *Id.*
30. *Id.* at 136.
31. *Id.* at 124-25.
32. *Id.* at 124.
firmed Bruton's conviction, relying on *Delli Paoli*, but the Supreme Court reversed. The *Bruton* Court expressly overruled *Delli Paoli*, concluding that there was a substantial risk that the jury used Evan's confession in determining Bruton's guilt, thus violating Bruton's right of cross-examination guaranteed by the Confrontation Clause. In so holding, the Supreme Court recognized that judicial instructions to disregard any incriminating evidence in the confession as to Bruton, no matter how clear, would not necessarily prevent the jury from considering it. Thus, the Court's faith in juries following judicial instructions had indeed begun to lessen.

The Supreme Court would soon visit the issue again in *Nelson v. O'Neil*. Defendants Runnels and O'Neil were charged with kidnapping, robbery, and vehicle theft, and were tried jointly. A police officer appearing for the prosecution testified to an oral confession allegedly made by Runnels which incriminated both defendants. The trial court admonished the jury to disregard Runnels' confession in determining the guilt or innocence of O'Neil and that admonition was repeated in final instructions. Both defendants offered alibi testimony that corroborated the testimony of the other. Even though

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33. See Evans v. United States, 375 F.2d 355, 363 (8th Cir. 1967), *rev'd sub nom.* Bruton v. United States, 391 U.S. 123 (1968). Evans also appealed and the Eight Circuit set aside his conviction, holding that Evan's oral confession to the postal inspector was tainted and should not have been admitted in evidence against him. 375 F.2d at 361.

34. See 375 F.2d at 361-63.

35. See Bruton, 391 U.S. at 137.

36. Id. at 126. The Court decided that admission of Evan's confession in the joint trial violated Bruton's right of cross-examination since there existed a substantial risk that the jury looked to the incriminating extrajudicial statements in determining Bruton's guilt, despite instructions to the contrary. *Id.*

37. *See id.* The Court reaffirmed this conclusion in *Nelson v. O'Neil*, 402 U.S. 622 (1971), discussed *infra* notes 39-60 and accompanying text, stating that "such a cautionary instruction to the jury is not an adequate protection for the defendant where the co-defendant does not take the witness stand." *O'Neil*, 402 U.S. at 626.


40. Id. at 623-24.

41. Id. at 624.

42. Id. at 624-25.

43. Id. at 624.

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Runnels denied having made the oral confession to the police officer, the jury convicted both defendants. After unsuccessful efforts to set aside the conviction, O'Neil applied for habeas corpus relief in federal district court, and, while the case was pending, the Supreme Court decided Bruton. The district court ruled that O'Neil's conviction had to be set aside under Bruton and the Ninth Circuit affirmed.

The Supreme Court reversed, holding that "[t]he Constitution as construed in Bruton . . . is violated only where the out-of-court hearsay statement is that of a declarant who is unavailable at the trial for 'full and effective' cross-examination." The Court found that because Runnels took the stand, he had been available for cross-examination. Indeed, the Court determined that O'Neil had had the opportunity for "full and effective" cross-examination despite the fact that O'Neil's lawyer had not cross-examined Runnels, finding further that the fact that Runnel's denied having made the oral confession was much more favorable to O'Neil than cross-examination would have been. The Court therefore concluded that "[w]here a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments."

Justice Brennan's dissent, however, concluded that the majority had "ask[ed] and answer[ed] the wrong question in this case." Since under California law Runnels' alleged confession was not admissible against O'Neil, as the trial court had instructed the jury,

44. Id.
45. Id. at 625.
46. Id.; see supra notes 27-38 and accompanying text (discussing Bruton).
47. 402 U.S. at 625; see 422 F.2d 319 (9th Cir. 1970).
48. 402 U.S. at 627 (emphasis in original).
49. See id. at 628-29.
50. Id. at 628-29. The Court found:

The short of the matter is that, given a joint trial and a common defense, Runnels' testimony respecting his alleged out-of-court statement was more favorable to the respondent than any that cross-examination by counsel could possibly have produced, had Runnels "affirmed the statement as his." It would be unrealistic in the extreme in the circumstances here presented to hold that the respondent was denied either the opportunity or the benefit of full and effective cross-examination of Runnels.

Id. at 629.
51. Id. at 629-30.
52. Id. at 632 (Brennan, J., dissenting).
the dissent explained that "[t]he question with which we are faced is not . . . whether the sixth amendment would forbid California from using Runnels' statement as substantive evidence against . . . O'Neil if it chose to do so." Rather, Justice Brennan wrote:

The question . . . is whether California, having determined for whatever reason that the statement involved in this case was inadmissible against [O'Neil], may nevertheless present the statement to the jury that was to decide [O'Neil's] guilt, and instruct that jury that it should not be considered against [O'Neil]. I think our cases [including Bruton] compel the conclusion that it may not. He concluded that the procedure utilized by the trial court produced "the inevitable result . . . that . . . different rules of evidence will be applied to different defendants depending solely upon the fortuity of whether they are jointly or separately tried. This is a discrimination that the Constitution forbids."

Justice Marshall's separate dissenting opinion explored this impropriety in joint trials, stating that "there is no question that Runnels' alleged statement to the police was not admissible under state law against O'Neil but . . . there is a very real danger that the statement was in fact used against O'Neil." To eliminate this constitutional impropriety, Justice Marshall urged that:

if a defendant in a joint trial moves for a severance because the prosecutor intends to introduce an out-of-court statement by his co-defendant that is inadmissible against the moving defendant, then the trial court should require the prosecutor to elect between a joint trial in which the statement is excluded; a joint trial at which the statement is admitted but the portion that refers to the moving defendant is effectively deleted; and severance. I believe that the adoption of such a practice is the only way in which the recurring problems of confrontation and equal protection can be eliminated.

In considering O'Neil, it may be helpful to question why O'Neil's counsel elected not to cross-examine Runnels. The majority opinion implies a wholly benign answer: "Runnels' testimony [on direct] respecting his alleged out-of-court statement [—he denied ever making such a statement—] was more favorable to [O'Neil] than

53. Id.
54. Id. at 633.
55. Id. at 634-35.
56. Id. at 635 (Marshall, J., dissenting).
57. Id. at 636 (citing STANDARDS RELATING TO JOINDER AND SEVERANCE § 2.3(a) (Approved Draft 1968)).
any that cross-examination by counsel could possibly have produced . . . ."58 An alternative explanation may exist, however. O'Neil's counsel may have preferred Runnels to testify that he gave the confession only because the police officer had coerced him to do so, or that he gave the confession only because the officer promised not to prosecute him if he falsely implicated O'Neil. To attempt to elicit that testimony from Runnels, however, O'Neil's counsel would have been required to engage Runnels in a truly adversarial cross-examination, implying that a portion of Runnels' testimony on direct had been false. Bearing in mind that another portion of Runnels' testimony on direct, the alibi testimony, had corroborated O'Neil's alibi testimony,59 O'Neil's counsel may well have concluded that he could not risk suggesting to the jury that any portion of Runnels' direct testimony had been false. Alternatively, O'Neil's counsel could have conducted a "friendly" cross-examination of Runnels, giving Runnels the opportunity to repeat his testimony on direct. But, of course, that would have suggested to the jury that Runnels and O'Neil were "as thick as thieves."

In those circumstances, O'Neil's counsel could not feasibly have elected to cross-examine Runnels because, whether adversarial or friendly, the cross-examination would most likely have prejudiced O'Neil in the eyes of the jury. Furthermore, this quandary was imposed on O'Neil by the prosecution's decision to try Runnels and O'Neil jointly, knowing that Runnels' alleged confession inculpating both would be offered into evidence. The majority nonetheless concluded that O'Neil had suffered no violation of his right of confrontation.60

In *Parker v. Randolph*,61 three defendants were charged with felony murder and tried jointly.62 Each defendant had given an oral
confession which inculpated the confessor and the other two defendants. Although each confession "was subjected to a process of re-
daction in which references by the confessing defendant to other defendants were replaced with the word "blank" or "another person[,] . . . the confessions were nevertheless 'such as to leave no possible doubt in the jurors' minds concerning the 'person[s]' re-
ferred to.' "

In the prosecution's case-in-chief, the three confessions were re-
ceived in evidence. The usual charge was given to the jury by the trial court, instructing that each confession could be used only
against the defendant who made it and that it could not be consid-
ered as evidence of a codefendant's guilt. None of the three defendants testified. All three were convicted. After exhausting the Ten-
nessee appellate process, the three defendants sought habeas corpus relief in federal court.

The district court granted the defendants' applications for writs of habeas corpus, determining that their rights under Bruton had been violated. The Sixth Circuit affirmed, holding that the admission of the confessions was not harmless error "since the evidence against each [defendant], even considering his confession, was 'not so overwhelming as to compel the jury verdict of guilty . . . .' "

The Supreme Court reversed. In a plurality opinion, then-As-
sociate Justice Rehnquist distinguished the case from Bruton, finding:

When, as in Bruton, the confessing codefendant has chosen not to take the stand and the implicated defendant has made no extrajudicial admission of guilt, limiting instructions cannot be ac-
cepted as adequate to safeguard the defendant's rights under the Confrontation Clause. Under such circumstances, the "practical
and human limitations of the jury system” . . . override the theoretically sound premise that a jury will follow the trial court’s instructions. But when the defendant’s own confession is properly before the jury, we believe that the constitutional scales tip the other way. The possible prejudice resulting from the failure of the jury to follow the trial court’s instructions is not so “devastating” or “vital” to the confessing defendant to require departure from the general rule allowing admission of evidence with limiting instructions. We therefore hold that admission of interlocking confessions with proper limiting instructions conforms to the requirements of the Sixth and Fourteenth Amendments to the United States Constitution. 3

The dissent faulted the plurality opinion in part because “it assume[d] that the jury's ability to disregard a codefendant's inadmissible and highly prejudicial confession is invariably increased by the existence of a corroborating statement by the defendant.” 7 The dissent concluded that “such . . . corroboration would enhance, rather than reduce, the danger that the jury would rely on [the codefendant's] confession when evaluating [the implicated defendant's] guilt.” 7

Although the dissent correctly recognized some of the problems with the plurality, it overlooked another troubling implication latent in the plurality opinion. The plurality's statement that “when the defendant’s own confession is properly before the jury, we believe that the constitutional scales tip the other way” 76 dangerously suggests that the defendant who confesses somehow loses a part of his constitutional presumption of innocence, notwithstanding his subsequent plea of not guilty. Nevertheless, the point is moot since the entire plurality opinion in Randolph was repudiated in Cruz v. New York. 77 That is part of the good news.

B. Cruz v. New York

In Cruz v. New York, 78 brothers Eulogio and Benjamin Cruz

73. Id. at 74-75 (footnotes omitted) (quoting Bruton v. United States, 391 U.S. 123, 135 (1968)).
74. Id. at 84 (Stevens, J., dissenting).
75. Id. at 85.
76. Id. at 74.
77. 107 S. Ct. 1714 (1987), discussed infra notes 78-98 and accompanying text.
were charged with the felony murder of a gas station attendant. The two were tried jointly over Eulogio’s objection. In the prosecution’s case-in-chief, a videotaped confession made by Benjamin to the police inculpating both brothers was received in evidence. The trial court instructed the jury to disregard that confession in judging Eulogio. In addition, an oral confession made by Eulogio to a friend, apparently consistent with Benjamin’s taped confession, was received in evidence against Eulogio. Benjamin did not take the stand. At the end of the trial, the oral confession of Eulogio was the only evidence admissible against Eulogio that directly linked him to the crime. Both defendants were convicted.

The conviction of Eulogio was affirmed by the New York Court of Appeals, which adopted the Randolph rationale that Bruton did not mandate the exclusion of Benjamin’s confession since Eulogio himself had confessed and his confession “interlocked” with Benjamin’s. The Supreme Court, dividing 5-4, reversed, rejecting the plurality opinion in Randolph. The Court held that “where a non-testifying codefendant’s confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant’s own confession is admitted against him.”

The Court found that the “interlocking” nature of the confession for harmless error, under which a Bruton violation that is harmless beyond a reasonable doubt does not offend the Confrontation Clause. See supra note 60. Second, in Randolph, the Court created an exception for codefendant confessions that interlock with a defendant’s own confession that has been admitted into evidence. See supra notes 61-76 and accompanying text. The latter exception was eliminated in Cruz.

79. 107 S. Ct. at 1716.
80. Id.
81. Id. at 1716-17.
82. Id.
83. Id. at 1717.
84. See id.
85. Id.
86. Id.
87. See id.
89. 107 S. Ct. at 1719. Justice Scalia, writing for the majority, admitted that the issue was considered in Randolph, but stated that the Court in Randolph proved unable to resolve the question of whether Bruton applies where the defendant’s own confession, corroborated by that of his codefendant, is introduced against him. Id. at 1716. This time the Court settled the issue by barring the admission of a coconspirator’s confessions. See id. at 1719.
90. Id. (citation omitted).
sions in *Cruz* and, by implication, in *Randolph*, did nothing to ameliorate the predicament of the implicated defendant.91 Instead, the Court determined that “a codefendant’s confession that corroborates the defendant’s confession significantly harms the defendant’s case.”92 The majority found that:

> what the “interlocking” nature of the codefendant’s confession pertains to is not its *harmfulness* but rather its *reliability*: If it confirms essentially the same facts as the defendant’s own confession it is more likely to be true. Its reliability, however, may be relevant to whether the confession should (despite the lack of opportunity for cross-examination) be *admitted as evidence* against the defendant, but cannot conceivably be relevant to whether, assuming it cannot be admitted, the jury is likely to obey the instruction to disregard it, or the jury’s failure to obey is likely to be inconsequential. The law cannot command respect if such an inexplicable exception to a supposed constitutional imperative is adopted. Having decided *Bruton*, we must face the honest consequences of what it holds.93

As noted earlier, part of the good news is that *Cruz* repudiated the plurality opinion in *Randolph*.94 *Cruz*, I believe, represents a more accurate assessment of the plight of the implicated defendant and a more appropriate application of the Confrontation Clause. But even within the majority opinion in *Cruz* there are disturbing implications. One is the rather ominous suggestion that the codefendant’s confession, when “supported by sufficient ‘indicia of reliability’” may be directly admissible against the defendant even though the defendant has no trial opportunity to confront and cross-examine the codefendant.95 In that event, the codefendant’s confession, substantively admissible against the defendant, would require no limiting instruction.

The problem with admitting the codefendant’s confession, however, is that it would result in an even greater adverse impact on the defendant than had befallen any of the defendants from *Delli Paoli* to *Cruz*.96 Furthermore, such prejudice would occur notwithstanding the defendant’s lack of opportunity for cross-examination.97 Never-
theless, the realization of this rule of substantive admissibility may be imminent; indeed, to date it has failed in the Court by only one vote.

The other troubling implication in the Cruz opinion is the Court’s almost grudging attitude toward Bruton, reflected in the observation that “[h]aving decided Bruton, we must face the honest consequences of what it holds.”98 So while the Cruz Court’s repudiation of Randolph may be good news, there is lurking in Cruz a foreboding of bad news.

C. Richardson v. Marsh

On the same day that Cruz was decided, the Court decided Richardson v. Marsh.99 In Marsh, the bad news is manifest. Marsh, her boyfriend Martin, and Williams were charged with felony murder.100 Over Marsh’s objection, she and Williams were tried jointly.101 The prosecution’s theory of the case was that Marsh, Martin, and Williams drove to the home of one Ollie Scott with the intention of committing robbery and killing all those in the house.102 When the three arrived at the house, they encountered Scott, her niece Cynthia Knighton, and Knighton’s son.103 The three defendants stole money from Scott, and Martin and Williams then forced Scott and the Knightons into the basement, where Martin shot them.104 Cynthia Knighton was the only survivor.105

In the prosecution’s case, Mrs. Knighton testified as to the roles of the three defendants.106 Then, over Marsh’s objection, the prosecution introduced into evidence a written confession that Williams had given the police after his arrest.107 The confession was redacted to omit all reference to Marsh, even to the extent of removing all indication that anyone other than Martin and Williams were in-

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98. Id. at 1719.
101. Id. Martin was a fugitive at the time of trial. Id.
102. See id.
103. Id.
104. Id.
105. Id.
106. Id.
107. Id. at 1705.
volved in the crime.108 In addition to corroborating Knighton’s testimony, Williams’ confession described a conversation that Williams and Martin had in the car on the way to the Scott home, in which Martin allegedly told Williams that he would have to kill the victims after the robbery.109

The jury was admonished to disregard Williams’ confession in deciding the guilt or innocence of Marsh,110 and that admonition was repeated in final instructions.111 Williams did not take the stand.112 Marsh took the stand and testified that she had gone to Scott’s home with Williams and Martin to borrow money from Scott, a former co-worker.113 Marsh testified that she was unaware that Williams and Martin were armed or that they intended to commit robbery or murder.114

However, the jury was informed through Williams’ confession of the alleged conversation between Williams and Martin during the drive to Scott’s house, in which Martin allegedly said he would have to murder the victims after the robbery.115 Moreover, Mrs. Knighton’s testimony made it fairly plain that Williams, Martin, and Marsh had arrived at Scott’s house together,116 and Marsh testified that she had been a passenger in the car with Williams and Martin.117 Such facts must raise the question in the minds of the jurors as to how Marsh could have been unaware of their intent to commit robbery and murder.

Marsh and Williams were convicted.118 After exhausting the Michigan state appellate process, Marsh sought habeas corpus relief

108. Id.
109. Id. Williams’ confession read, in part:

I got in the car and Kareem [Martin] told me he was going to stick up this crib, told me the place was a numbers house. Kareem said there would be over $5,000 or $10,000 in the place. Kareem said he would have to take them out after the robbery. Kareem had a big silver gun. He gave me a long barreled [sic] .22 revolver.

We then drove over to [Scott’s] house and parked the car . . . .

Id. at 1705 n.1 (emphasis added).
110. Id. at 1705.
111. Id. at 1706.
112. Id. at 1705.
113. Id.
114. Id. at 1705-06.
115. See supra note 109 and accompanying text. Furthermore, the prosecutor in his closing argument emphasized the confession and may have reinforced the jury’s deliberation of Williams’ confession in assessing Marsh’s guilt. See Marsh, 107 S. Ct. at 1709.
117. Id. at 1705.
118. Id. at 1706.
in federal court, asserting that her right of confrontation had been violated.\textsuperscript{119} The district court denied the petition,\textsuperscript{120} but the Sixth Circuit reversed, holding that in order to determine whether \textit{Bruton} precludes "the admission of a nontestifying codefendant's confession, a court must assess the confession's 'inculpatory value' by examining not only the face of the confession, but also all of the evidence introduced at trial."\textsuperscript{121}

The Supreme Court reversed, holding 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 her existence."\textsuperscript{122} The majority offered two rationales for that conclusion. The first was the majority's belief that where the codefendant's confession incriminates the defendant only when linked to other evidence it is not as likely that the jury will disobey the limiting instruction to disregard the confession.\textsuperscript{123} The second was based upon considerations of the so-called "efficiency and ... fairness of the criminal justice system."\textsuperscript{124} The majority reasoned that where a codefendant's confession incriminates the defendant only through linkage with other admissible evidence, it would be impossible to predict the admissibility of a confession in advance of trial.\textsuperscript{125} Although one way to solve that problem would be to grant the defendant's motion for severance, the majority noted that such a solution is not as simple or as equitable a remedy as it might seem.\textsuperscript{126}

\begin{footnotes}
\footnotetext[119]{Id.}
\footnotetext[120]{Id.}
\footnotetext[121]{Id. (discussing \textit{Marsh v. Richardson}, 781 F.2d 1201, 1212 (6th Cir. 1986), \textit{rev'd}, 107 S. Ct. 1702 (1987)).}
\footnotetext[122]{Id. at 1709.}
\footnotetext[123]{See id. at 1707 (finding that "[w]here the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence."). Justice Scalia, writing for the Court, defined the extent of the \textit{Bruton} exception as applicable to inferentially incriminating testimony only where the codefendant confession directly identifies the defendant. \textit{See id.} In his dissent, Justice Stevens strongly criticized the constitutional distinction between those codefendant confessions that directly identify the defendant and those that do not. \textit{See id.} at 1710 (Stevens, J., dissenting); \textit{see also} \textit{Note, supra} note 99, at 1879 (summarizing Justice Stevens' dissent).}
\footnotetext[124]{107 S. Ct. at 1708.}
\footnotetext[125]{Id.}
\footnotetext[126]{See \textit{id.} The Court stated: Joint trials play a vital role in the criminal justice system, accounting for almost one third of federal criminal trials in the past five years. Many joint trials—for example, those involving large conspiracies to import and distribute illegal drugs—involves a dozen or more codefendants. Confessions by one or more of the defendants are commonplace—and indeed the probability of confession increases with the number of}
\end{footnotes}
The Court's reasoning, however, is not entirely persuasive. The first rationale asserts that the Marsh jury was better able to disregard Williams' confession in deciding the guilt of Marsh than the Bruton jury was able to disregard Evans' confession in determining the guilt of Bruton. In Marsh, the jury learned through Williams' confession that Martin and Williams drove to Scott's home together and that, once in the car, Martin expressed to Williams the intention to commit robbery and murder. Through Knighton's testimony, the jury learned that Martin, Williams, and Marsh apparently arrived at Scott's home together. Yet Marsh testified in her own defense that when she arrived at Scott's home, she had no knowledge that Martin and Williams were armed and were contemplating robbery or murder. How likely is it that the jury in its deliberations would not have questioned why Marsh had not heard Martin's alleged statement of intent? Not likely. Furthermore, how likely is it that the jury, having heard the court's admonition and final instructions, would have been able to displace such inquisitiveness from its collective mind? Again, not likely.

It is no surprise then that Marsh and her counsel felt compelled to offer the jury an explanation—she testified that she was in the back seat of the car with the radio speaker at her ear, unable to hear the conversation between Martin and Williams. Having heard that explanation, however, it is even more unlikely that the jury would be able to disregard Williams' confession in deciding Marsh's guilt or innocence—the jury would recognize that Marsh's explanation was given to dispel any discrepancies between her testimony and Williams' confession.

It is notable that there was no explicit evidence, other than Williams' confession, that Marsh may have had knowledge of Martin's intentions. Therefore, absent Williams' confession, there would have
been no need for Marsh to offer the explanation. Williams' confession almost certainly influenced the substance of Marsh's testimony and, just as certainly, influenced the jury which convicted Marsh.\textsuperscript{132}

The majority, I believe, implied the wrong test in determining that Marsh's right under the Confrontation Clause was not violated when it found that "while it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so that is the foundation of Bruton's exception to the general rule."\textsuperscript{133} Indeed, the phrase "overwhelming probability" appears nowhere in the Bruton opinion. The Bruton Court referred to a "substantial risk" that the jury may have considered the codefendant's confession in deciding Bruton's guilt.\textsuperscript{134} Additionally, the Bruton Court wrote of "the likelihood" that the jury would accept the codefendant's confession as true, including those portions which implicated Bruton.\textsuperscript{135} Moreover, the Court concluded that the introduction into evidence of the codefendant's confession "posed a substantial threat to [Bruton's] right to confront the witnesses against him . . . ."\textsuperscript{136}

Indeed, the majority opinion in Marsh itself had stated earlier that "[w]here the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence."\textsuperscript{137} Then why did the majority in Marsh ultimately feel compelled to conclude that the "overwhelming probability" of the jury's inability to obey "is the foundation of Bruton's exception to the general rule"?\textsuperscript{138}

I suppose there are two possible explanations. One is that the majority was consciously seeking to restrict the applicability of the rule announced in Bruton. The more likely explanation, I am inclined to think, is simply that the language in Marsh was the result of the Court's subconscious recognition of the absurdity of writing that the jury which convicted Marsh was most likely not influenced by Williams' confession.\textsuperscript{139}

\textsuperscript{132} See Note, supra note 99, at 1877-79.
\textsuperscript{133} Marsh, 107 S. Ct. at 1708.
\textsuperscript{134} See Bruton v. United States, 391 U.S. 123, 126 (1968).
\textsuperscript{135} Id. at 127.
\textsuperscript{136} Id. at 137.
\textsuperscript{137} Marsh, 107 S. Ct. at 1707.
\textsuperscript{138} See id. at 1708.
\textsuperscript{139} As Justice Stevens noted in dissent, "the difference between the facts of Bruton and the facts of this case does not eliminate their common, substantial, and constitutionally unac-
The Court's second rationale, emphasizing the importance of joint trials to the efficient administration of justice, is equally unconvincing. To demonstrate that importance, the majority noted that joint trials "account[ed] for almost one third of federal criminal trials in the past five years." This statistic indicates that prosecutors prefer joint trials. Their preference, however, should not be permitted to diminish a defendant's constitutional right of confrontation. To further prove the point, the majority noted that "[m]any joint trials—for example, those involving large conspiracies to import and distribute illegal drugs—involve a dozen or more codefendants." Clearly, Marsh was not a "large conspiracy to import and distribute illegal drugs" nor did it involve "a dozen or more codefendants." The majority also pointed out that as the number of defendants in a joint trial increased, so too did the likelihood of confessions. However, while that may identify one of the reasons why prosecutors prefer joint trials, it seems to have no legitimate bearing on a particular defendant's constitutional right of confrontation.

The majority further emphasized that separate trials would require duplicative effort on the part of prosecutors and inconvenience, perhaps even trauma, on the part of victims and witnesses. Perhaps that is true. Those consequences, however, should also have no bearing on a defendant's right of confrontation. A criminal defendant's right to confront the witnesses against him is constitutionally protected, and should not be taken away merely because of considerations of convenience.

Finally, the majority concluded that separate trials would randomly favor those defendants who are tried last because they would have the advantage of knowing the prosecution's case beforehand. To the extent that the majority balanced the advantage of the last-
tried against a particular defendant's constitutional right of confrontation, it seems to me that the counterweights are not appropriate. To preclude the last-tried from enjoying an advantage at the expense of any defendant's confrontation right seems to penalize one class of defendants (the last-tried) by penalizing another class of defendants (all those who suffer from the diminution of the confrontation right effected by *Marsh*).

Moreover, to the extent that the majority was concerned about fairness to the first-tried, it should be remembered that an important aspect of that fairness is the right of confrontation, a right diminished by the majority's holding. Furthermore, given the proclivity of prosecutors to utilize joint trials and the capacity of defendants jointly charged to move for severance (whether or not such motion is granted), those defendants fortunate enough to secure a severance perhaps could be said to have "waived" any objection to being among the first-tried.

In addition, the learning process that the majority indicated would randomly favor the last-tried defendants may not be exclusively a one-way street. Successive trials could give the prosecution additional insight into the defense theories likely to be postulated by the last-tried. As a result, being among the last-tried might not be a total blessing and being among the first-tried might not be a total curse.

Ultimately, however, the basic response to the majority's second rationale, that judicial efficiency compels the restricted applicability of the confrontation right achieved in *Marsh*, appeared in the Court's opinion in *Bruton*. The *Bruton* Court explicitly rejected the argument that the benefits of joint trials justify a narrow interpretation of the Confrontation Clause, concluding that the price for convenience and judicial economy is too high to pay if they are bought by the loss of constitutional liberty. Thus, I find neither of the two

148. *See id.* at 1709 (Stevens, J., dissenting).
149. *See Bruton v. United States*, 391 U.S. 123, 134-35 (1968). The *Bruton* Court wrote:

Another reason cited in defense of *Delli Paoli*, [repudiated in *Bruton*] is the justification for joint trials in general, the argument being that the benefits of joint proceedings should not have to be sacrificed by requiring separate trials in order to use the confession against the declarant. Joint trials do conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial. But the answer to this argument was cogently stated by Judge Lehman of the New York Court of Appeals, dissenting in *People v. Fisher*:

"We still adhere to the rule that an accused is entitled to confrontation of the
rationales offered by the majority in *Marsh* convincing.

II. THE CONFRONTATION CLAUSE AND SINGLE CRIMINAL DEFENDANTS

While the Court was struggling with the role of the Confrontation Clause in joint criminal trials, it was also attempting to determine the appropriate role of the Clause in single defendant cases. In *Pointer v. Texas*, for example, the Court held that the constitutional right of confrontation was applicable to state criminal proceedings through the Due Process Clause of the fourteenth amendment. The defendant in *Pointer* was charged with robbery. The victim, since removed to California and having no intention of returning to Texas, was not called as a prosecution witness. Instead, over the defendant’s objection, the state offered and had received in evidence the victim’s preliminary hearing testimony inculpating the defendant.

The Supreme Court reversed the defendant’s conviction. Although the defendant had not been represented by counsel at the preliminary hearing, the Court reserved the question as to whether the defendant had thereby been denied his constitutional right to counsel. The Court instead went directly to the Confrontation Clause issue, holding that the receipt in evidence of the victim’s preliminary hearing testimony, absent a meaningful opportunity to cross-examine the victim, violated the defendant’s right of confronta-

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150. 380 U.S. 400 (1965) (Black, J.). Justices Harlan, see id. at 408, Stewart, see id. at 409, and Goldberg, see id. at 410, each wrote separate concurring opinions.

151. Id. at 403.
152. Id. at 401.
153. Id.
154. Id. at 401-02.
155. Id. at 408.
156. Id. at 402-03. In Coleman v. Alabama, 399 U.S. 1 (1970), the Court held that the right to counsel existed at a preliminary hearing since such a hearing is a "critical stage" in the state's criminal process. Id. at 10-11.
The Court found, "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

Next came Douglas v. Alabama. In that case, defendants Douglas and Loyd were charged with assault with intent to murder and were tried separately. Loyd was tried first and convicted. At Douglas' trial, the prosecution called Loyd as a witness. Loyd, who planned to appeal his conviction, invoked his fifth amendment right against self-incrimination. He persisted in his refusal to testify even after the court rejected his fifth amendment assertion and directed him to answer.

The judge granted the State Solicitor's motion to declare Loyd a hostile witness, which gave the prosecutor the privilege of cross-examination. The Solicitor then produced a document which was said to be a confession signed by Loyd and proceeded to read from it under the guise of refreshing Loyd's memory. The Solicitor paused after every few sentences to ask Loyd, in the presence of the jury, "Did you make that statement?" Loyd asserted his right against self-incrimination each time and refused to answer, but the Solicitor continued this form of questioning until the entire document had been read.

Loyd's alleged confession was the only direct evidence that Douglas had fired the shotgun that wounded the victim. The jury convicted Douglas, and the Alabama appellate court affirmed. The Supreme Court reversed, finding that the reading of Loyd's...

158. Id. at 406-08.
159. Id. at 405.
160. 380 U.S. 415 (1965) (Brennan, J.). Justices Harlan, see id. at 423, and Stewart, see id., each wrote separate concurring opinions.
161. Id. at 416.
162. Id.
163. Id.
164. Id.
165. Id.
166. Id.
167. Id.
168. Id.
169. Id. at 416-17.
170. Id. at 417, 419.
171. Id. at 417.
172. Id. at 418.
173. Id. at 423.
alleged confession violated Douglas' right of confrontation.\textsuperscript{174} The Court found that:

\begin{quote}
[a]lthough the Solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true.\textsuperscript{175}
\end{quote}

Because Douglas had had no opportunity to confront and cross-examine Loyd in the presence of the jury, the Court found that Douglas had suffered a "denial of the essential right secured by the Confrontation Clause."\textsuperscript{176} Thus, to \textit{Pointer}, Douglas added this important consideration—the alleged declarant's unavailability as a witness at trial did not preclude a finding that the defendant's confrontation right had been violated.

Then came \textit{Barber v. Page}.\textsuperscript{177} There, defendants Barber and Woods were charged with armed robbery.\textsuperscript{178} At the preliminary hearing, both were represented by the same counsel, a Mr. Parks.\textsuperscript{179} During the hearing, Woods waived his privilege against self-incrimination.\textsuperscript{180} Parks then withdrew as Woods' counsel but continued to represent Barber.\textsuperscript{181} Although another attorney cross-examined Woods, Parks did not.\textsuperscript{182}

At the time of Barber's trial in Oklahoma, Woods was in a federal penitentiary in Texas, outside the court's jurisdiction.\textsuperscript{183} Over Barber's objection, a transcript of Woods' preliminary hearing testimony, which incriminated Barber, was offered and received in evidence.\textsuperscript{184} Barber was later convicted.\textsuperscript{185} After exhausting the state appellate process, Barber sought habeas corpus relief, but both the
district court and the Tenth Circuit rejected his contention that the use of the transcript deprived him of his confrontation right.\textsuperscript{186}

The Supreme Court reversed, concluding that the defendant's sixth amendment right of confrontation had been violated.\textsuperscript{187} The Court responded to the state's argument that Woods had been unavailable as a trial witness by pointing out that the state did not make a good-faith effort to secure Woods' appearance at trial.\textsuperscript{188}

In addressing the state's argument that Barber had waived his right to cross-examine Woods at the preliminary hearing, the Court began by assuming that Barber had validly waived his right to cross-examine Woods at that time.\textsuperscript{189} Nevertheless, the Court concluded that the opportunity to cross-examine Woods at the preliminary hearing did not satisfy Barber's right of confrontation because:

\begin{quote}
[t]he right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.\textsuperscript{190}
\end{quote}

Thus, \textit{Pointer} had made it clear that the Confrontation Clause was applicable to state criminal proceedings\textsuperscript{191} and that the Clause was violated where incriminating preliminary hearing testimony was received against the accused who had had no meaningful opportunity to cross-examine the witness at the preliminary hearing.\textsuperscript{192} \textit{Barber} went one step further—the Confrontation Clause was violated even though the defendant had waived his right to cross-examine the witness at the preliminary hearing.\textsuperscript{193} Indeed, the Court in \textit{Barber} noted that "we would reach the same result on the facts of this case had

\begin{footnotes}
\item[186] \textit{Id.} at 721.
\item[187] \textit{Id.} at 726.
\item[188] \textit{Id.} at 723. The Court argued that the state could have attempted to get Woods for trial, noting that "it is the policy of the United States Bureau of Prisons to permit federal prisoners to testify in state court criminal proceedings pursuant to writs of habeas corpus \textit{ad testificandum} issued out of state courts." \textit{Id.} at 724.
\item[189] \textit{Id.} at 722. The Court made it clear that this assumption was made only "[f]or the purpose of this decision" since "such an assumption seems open to considerable question under the circumstances." \textit{Id.}
\item[190] \textit{Id.} at 725.
\item[191] \textit{Pointer}, 380 U.S. at 403.
\item[192] \textit{Id.} at 407; \textit{see supra} notes 150-59 and accompanying text.
\item[193] \textit{See Barber}, 390 U.S. at 725.
\end{footnotes}
[Barber's] counsel actually cross-examined Woods at the preliminary hearing. The reason for the Court's position is the basic and critical distinction between a preliminary hearing, limited to a determination of whether to hold the accused for trial, and a full-blown trial, at which the jury must determine the guilt or innocence of the defendant.

But then came California v. Green. Sixteen-year-old Melvin Porter, arrested for selling marijuana to an undercover police officer, told the police that Green had been his supplier and described the method of delivery. Testifying at Green's preliminary hearing one week later, Porter again named Green as the supplier but offered a different version of the method of delivery. Green's counsel subjected Porter to "extensive cross-examination."

At Green's trial for furnishing narcotics to a minor, Porter, the principal prosecution witness, testified that Green had contacted him and requested that he sell some unidentified "stuff." Porter testified that he then obtained twenty-nine plastic "baggies" of marijuana and sold some of them. However, when questioned about whether Green had been his supplier, Porter claimed that he was unsure where he obtained the marijuana because he had been on LSD at the time, having taken the LSD twenty minutes before Green phoned. The prosecution, over Green's objection, then offered Porter's preliminary hearing testimony and the transcript was received as substantive evidence. Green was convicted.

The district court of appeal reversed the conviction, finding that Green's right of confrontation had been violated, and the California Supreme Court affirmed. The Supreme Court of the United States disagreed, and vacated

194. Id.
195. See id.
196. 399 U.S. 149 (1970) (White, J.). Chief Justice Burger, see id. at 171, and Justice Harlan, see id. at 172, each wrote a separate concurring opinion. Justice Brennan wrote a dissenting opinion. See id. at 189. Justice Marshall took no part in the decision of the case and Justice Blackmun took no part in the consideration or decision of the case. Id. at 170.
197. Id. at 151.
198. Id. at 151.
199. Id.
200. Id. at 152.
201. Id.
202. Id.
203. Id. The prosecutor was allowed to read portions of Porter's preliminary hearing testimony. Id.
204. Id. at 153.
205. Id.
the judgment of the California Supreme Court. The Court found that each of the purposes to be accomplished by the Confrontation Clause, i.e. securing testimony under oath, subjecting testimony to cross-examination, and providing the opportunity for jury scrutiny of the witness' demeanor, had been fulfilled. Moreover, the Court wrote "that Porter's preliminary hearing testimony was admissible as far as the Constitution is concerned wholly apart from the question of whether respondent had an effective opportunity for confrontation at subsequent trial." Thus, the Court concluded that the preliminary hearing testimony could have been admissible even if Porter had been actually unavailable at trial, since such testimony "had... been given under circumstances closely approximating those that surround the typical trial."

206. Id. at 170.
207. Id. at 158-61.
208. Id. at 165.
209. Id. For example, the Court found that:
Porter was under oath; respondent was represented by counsel—the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings.

Id.

Justice Harlan's concurring opinion states that "the Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause." Id. at 173-74. Against that "amorphous backdrop," Justice Harlan "reached two conclusions":

First, the Confrontation Clause of the Sixth Amendment reaches no farther than to require the prosecution to produce any available witness whose declarations it seeks to use in a criminal trial. Second, even were this conclusion deemed untenable as a matter of Sixth Amendment law, it is surely agreeable to Fourteenth Amendment "due process," which, in my view, is the constitutional framework in which state cases of this kind should be judged.

Id. at 174 (emphasis in original). Justice Harlan further wrote that:

Notwithstanding language that appears to equate the Confrontation Clause with a right to cross-examine, and, by implication, exclude hearsay, the early holdings and dicta of this Court can, I think, only be harmonized by viewing the confrontation guarantee as being confined to an availability rule, one that requires the production of a witness when he is available to testify.

Id. at 182. Applying his views to the facts of Green, Justice Harlan concluded that "[t]he fact that the witness [Porter], though physically available, cannot recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence." Id. at 188.

That narrow view of the Confrontation Clause, expressed in Justice Harlan's separate concurrence in Green, was adopted by the majority in United States v. Owens, 108 S. Ct. 838 (1988), discussed infra notes 299-351 and accompanying text. The Court in Owens stated:

Justice Harlan, in a scholarly concurrence, stated that he would have... held that a witness's inability to "recall either the underlying events that are the subject of an
The dissent, however, could find "no significant difference between a witness who fails to testify about an alleged offense because he is unwilling to do so [Loyd in Douglas, for example] and a witness whose silence is compelled by an inability to remember [Porter in Green, for example]." The dissent also found the Court's result inconsistent with Barber, since there it was found that "confrontation at a preliminary hearing cannot compensate for the absence of confrontation at trial, because the nature and objectives of the two proceedings differ significantly."

It seems to me that the majority's conclusion that each of the purposes to be accomplished by the Confrontation Clause had been fulfilled can be justified only by combining what had occurred at the preliminary hearing with what occurred at trial. At the preliminary hearing, Porter testified that Green had been the supplier. He further testified to the mode of delivery. That testimony was made under oath and was subjected to cross-examination. However, the jury which ultimately convicted Green had no opportunity to observe Porter's demeanor at the preliminary hearing.

At trial, of course, the jury was accorded the opportunity to observe Porter's demeanor, but Porter offered no meaningful testimony as to the delivery. The jury, therefore, had no meaningful opportunity to observe Porter's demeanor either on direct or cross-examinations or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence."

Here that question is squarely presented, and we agree with the answer suggested 18 years ago by Justice Harlan.

108 S. Ct. at 842 (quoting California v. Green, 399 U.S. 149, 188 (1970) (Harlan, J., concurring)). It seems to me that such a view of the protection assured the accused by the Confrontation Clause is feckless. See infra notes 299-351 and accompanying text (discussing Owens). It permits the accused to be inculpated by the extrajudicial declaration even though at trial the declarant is unable to respond on cross-examination to any questions concerning the circumstances which led to the declaration. As the dissent in Owens noted, the declarant's "profound memory loss . . . prevented him from affirming, explaining, or elaborating upon the out-of-court statement just as surely and completely as his assertion of a testimonial privilege, or his death, would have." 108 S. Ct. at 846 (Brennan, J., dissenting).

210. Green, 399 U.S. at 194 (Brennan, J., dissenting); see also supra notes 160-76 and accompanying text (discussing Douglas).

211. 399 U.S. at 195; see supra notes 177-95 and accompanying text (discussing Barber).

212. 399 U.S. at 151.

213. Id.

214. Id. at 165.

215. Id. at 190-91 (Brennan, J., dissenting).

216. See id. at 152.
tion with regard to the delivery. Consequently, the majority’s effort to combine preliminary hearing and trial for confrontation purposes seems somewhat incongruous. As to the majority’s ultimate conclusion that the preliminary hearing testimony would have been admissible even if Porter had been unavailable, in toto, at trial, my reaction is that in those circumstances there would have been absolutely no opportunity for the jury to have observed Porter’s demeanor. If “[t]he right to confrontation is basically a trial right . . . [and] includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness,”\(^217\) that right did not exist in *Green*.

After a decade, *Green* was followed by *Ohio v. Roberts*.\(^218\) While the *Green* decision may have been relatively fact-sensitive, *Roberts* purported to offer a generally applicable test for determining when hearsay could be received against the accused without violating his right of confrontation.\(^219\)

The defendant in *Roberts* was charged with possession of stolen credit cards belonging to one Benjamin Isaacs and his wife Amy, and with forgery of a check in the name of Isaacs.\(^220\) At Roberts’ preliminary hearing, Roberts’ court-appointed counsel called as the only defense witness the Isaacs’ daughter, Anita.\(^221\) Although Anita admitted that she knew Roberts and had permitted him to use her apartment in her absence, she denied having given him checks and credit cards without making him aware that she did not have permission to use them.\(^222\)

At trial, Roberts testified that Anita Isaacs had given him her parents’ checkbook and credit cards with the understanding that he could use them.\(^223\) In rebuttal, the prosecution offered Anita’s preliminary hearing testimony and, over Roberts’ Confrontation Clause objection, the transcript was received.\(^224\) Roberts was convicted.\(^225\)

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\(^219\). See id. at 66; infra note 232 and accompanying text.

\(^220\). 448 U.S. at 58.

\(^221\). Id.

\(^222\). Id.

\(^223\). Id. at 59.

\(^224\). Id. at 59-60. Although Anita received subpoenas for the various trial dates, she did not appear at trial and her mother testified during voir dire that she did not know of anyone who knew the whereabouts of her daughter. Id. at 60.

\(^225\). Id.
The Ohio appeals court reversed, concluding that the prosecution had not made a showing of a "good-faith effort" to secure Anita Isaacs' attendance at trial, as required by *Barber v. Page.* 226

The Supreme Court of Ohio affirmed, but on other grounds.227 It concluded that Anita's unavailability was not due to any misconduct or neglect attributable to the prosecution.228 The court found, however, that the defense counsel's examination of Anita at the preliminary hearing, a proceeding limited to determining if there was probable cause to have a grand jury consider the matter, was not an adequate substitute for confrontation and cross-examination before the jury required to determine the guilt or innocence of the defendant.229

The Supreme Court of the United States reversed,230 and set forth a general rule for determining when hearsay evidence may be received against the accused without violating his sixth amendment right of confrontation.231 The Court held:

[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.222

The Court found that the prosecution had made bona fide, albeit unsuccessful, efforts to subpoena Anita Isaacs as a witness at trial and, therefore, her "unavailability, in the constitutional sense, was established."223 As to reliability, the Court concluded that, although the preliminary hearing testimony did not constitute a firmly rooted hearsay exception, it possessed particularized guarantees of

226. *Id.; see supra* note 188 and accompanying text (discussing the "good-faith effort" requirement of *Barber*); *see also* *Barber v. Page,* 380 U.S. 719, 722-25 (1968) (establishing the "good-faith effort" requirement).

227. *Roberts,* 448 U.S. at 60.

228. *Id.* at 61. The court distinguished *Barber* as a case where the prosecution knew where the witness could be found, unlike *Roberts,* where the whereabouts of the witness were entirely unknown. *Id.* at 60-61. The court also attempted to distinguish *Green.* *See id.* at 61.

229. *Id.* at 61.

230. *Id.* at 77.

231. *See id.* at 66.

232. *Id.* (footnote omitted).

233. *Id.* at 75.
trustworthiness because the defense counsel had examined Anita at the preliminary hearing. Since both parts of the two-step test fashioned by the Court, unavailability and reliability, were satisfied, the Court concluded that there had been no violation of the defendant's right of confrontation.

The Court's analysis of the Confrontation Clause began with an apparent recognition that the Clause was not simply congruent with the hearsay rule. In addition, the Court's analysis seemed to reflect a sensitivity to the purposes to be accomplished by the Clause:

The historical evidence leaves little doubt . . . that the Clause was intended to exclude some hearsay. Moreover, underlying policies support the same conclusion. The Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that "a primary interest secured by [the provision] is the right of cross-examination." In short, the Clause envisions "a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." These means of testing accuracy are so important that the absence of proper confrontation at trial "calls into question the ultimate 'integrity of the fact-finding process.'"

Yet, the test ultimately fashioned by the Court, if not actually making the Confrontation Clause and the hearsay rule congruent, comes perilously close to achieving that result. Unavailability and reliability, the two prongs of the Court's test for satisfying the Confrontation Clause, are, of course, the same two requirements for a number of hearsay exceptions. As to those hearsay exceptions requiring only reliability, the Court's test would require only the ad-

234. Id. at 73; see also California v. Green, 399 U.S. 149, 165 (1970) (holding that a declarant's statement at a preliminary hearing closely resembling a trial would have been admissible even if the declarant had been unavailable).
235. Roberts, 448 U.S. at 71-73.
236. See id. at 62-65 (discussing the relationship between the Confrontation Clause and the hearsay rule and its exceptions).
237. Id. at 63-64 (quoting in part from Mattox v. United States, 156 U.S. 237, 242-43 (1895), and from Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (quoting Berger v. California, 393 U.S. 314, 315 (1969))) (citations and footnotes omitted).
238. See FED. R. EVID. 804(b) (setting forth those hearsay exceptions requiring unavailability of the declarant and indicia of trustworthiness).
239. See FED. R. EVID. 803 (setting forth those hearsay exceptions for which the availa-
ditional showing of unavailability. Moreover, the Court's alternative methods for determining reliability perfectly track the methods for determining reliability when applying an exception to the hearsay rule.\textsuperscript{440} The first method precisely reflects traditional hearsay exceptions: "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."\textsuperscript{241} The second method, "particularized guarantees of trustworthiness,"\textsuperscript{242} is a nearly perfect statement of the reliability showing required for the fashioning of an ad hoc exception to the hearsay rule.\textsuperscript{243} That same second method is, in addition, a nearly perfect statement of the reliability showing manifested by those hearsay exceptions which, while not yet firmly rooted, are more properly characterized as generally applicable than as merely ad hoc.\textsuperscript{244}

The two-step test promulgated in \textit{Roberts} therefore points almost inexorably toward the conclusion that evidence admissible against the accused over his hearsay objection will likely be admissible against him over his Confrontation Clause objection as well. What impelled the Court to limit the constitutional right of confrontation to hardly more than a hearsay objection?

In part, I suppose, it was probably the Court's view that it is a "truism that 'hearsay rules and the Confrontation Clause are generally designed to protect similar values' and 'stem from the same roots.'"\textsuperscript{245} Even accepting that proposition, however, it does not necessarily follow that the constitutional right of confrontation should assume a role of protection hardly greater than the hearsay rule.\textsuperscript{246}

\begin{footnotes}
\item[240.] \textit{See Roberts}, 448 U.S. at 66.
\item[241.] \textit{Id.}
\item[242.] \textit{Id.}
\item[243.] \textit{See} FED. R. EVID. 803(24), 804(b)(5) (setting forth the "residual" exceptions to the hearsay rule).
\item[244.] \textit{See}, e.g., FED. R. EVID. 803(4) (statements for purposes of medical diagnosis or treatment); FED. R. EVID. 803(18) (learned treatises); FED. R. EVID. 804(b)(2) (statement under belief of impending death); FED. R. EVID. 804(b)(3) (statement against interest).
\item[245.] \textit{Roberts}, 448 U.S. at 66 (quoting in part from California v. Green, 399 U.S. 149, 155 (1970), and in part from Dutton v. Evans, 400 U.S. 74, 86 (1970)).
\item[246.] As the Court had previously noted in \textit{Green}:
\end{footnotes}

While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized...
Presumably, the Framers of the sixth amendment were aware of the hearsay rule:

> [b]ecause the experience of the last three centuries of judicial trials has demonstrated convincingly that in disputed issues one cannot depend on the mere assertion of anybody, however plausible, without scrutiny into its basis. All the weaknesses that may affect a witness’ trustworthiness—observation, memory, bias, interest, and the like—may otherwise lurk unrevealed; modifying circumstances omitted in his tale may give his facts an entirely different effect, if disclosed; and cross-examination is the best way to get at these.\(^2\)

Nevertheless, the Framers deemed it necessary and appropriate to accord the criminal defendant the additional security of the Confrontation Clause.\(^2^4^8\) Why? In part, perhaps, because of their awareness that the accused, uniquely vulnerable to a loss of his liberty, required that added safeguard.\(^2^4^6\) Or, in part, perhaps, because of their fear that the government might amend the hearsay rule from time to time, depending on modified views of what constituted those particular guarantees of trustworthiness sufficient to fashion general or ad hoc exceptions to the hearsay rule. Apparently, the Framers wanted constitutional assurance that the added protection provided the accused by the Confrontation Clause would not become eroded over time by the vicissitudes of judicial or legislative views of the hearsay rule or its exceptions. The Court’s opinion in Roberts, it seems to me, runs counter to that constitutional mandate.

There is, I believe, a second and perhaps even more influential reason for the Court’s having rendered the Confrontation Clause

\(^2^4^7\) J. Wigmore, A Student’s Textbook of the Law of Evidence 238-39 (1935) (citation omitted). Despite the forcefulness of this statement, Dean Wigmore wrote:

> And so we come now to the great hearsay rule,—a fundamental rule of safety, but one overenforced and abused,—the spoiled child of the family,—proudest scion of our jury-trial rules of evidence, but so petted and indulged that it has become a nuisance and an obstruction to speedy and efficient trials.

Id. at 238. Not surprisingly, given his somewhat jaundiced view of the hearsay rule, Dean Wigmore was not an advocate of a broad right of “confrontation.” In discussing the confrontation right of the accused, he wrote, “[T]he courts have pointed out that ‘confrontation’ is intended primarily to afford the accused an opportunity to cross-examine; the mere sight of the witness by the tribunal is a minor feature, which can be dispensed with; hence the constitutional provision is satisfied if there has been opportunity for cross-examination.” Id. at 243-44. Obviously, Wigmore thought little of the opportunity of the jury to observe the demeanor of the witness.

\(^2^4^8\) Pointer, 380 U.S. at 404.

\(^2^4^9\) See id. at 404-05.
nearly congruent with the hearsay rule. To use the words of the majority in Roberts itself, “The Court . . . has recognized that competing interests, if ‘closely examined,’ may warrant dispensing with confrontation at trial. Significantly, every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings.” If I comprehend the significance of that language, it means that efficient law enforcement constitutes a competing interest which the Court may consider in restricting the scope of the Confrontation Clause. It seems to me self-evident that the Framers must have recognized and intended that the Confrontation Clause would make criminal prosecution more difficult. Indeed, the thrust of the Clause is that the state’s desire to secure a conviction shall not be permitted to overcome the right of the accused to confront and cross-examine the witnesses against him. Why then is the Court rebalancing the state’s interest in efficient law enforcement against the accused’s right of confrontation?

There is a disturbing similarity between the language of Roberts emphasizing the “competing” state interest in efficient law enforcement and the language of Marsh stressing the efficiencies of joint criminal proceedings. It is within this ominous resemblance of language that the two lines of cases, those involving joint criminal trials of multiple defendants and those involving the criminal trial of a single defendant, seemingly begin to converge.

III. THE IMPENDING CONVERGENCE

The convergence was almost completed in Lee v. Illinois. Lee was asked by police to identify the body of a woman found in an apartment in the housing complex in which Lee lived. When a detective noticed that Lee was crying, he grew suspicious and, after reading Lee her Miranda rights, began to inquire as to the whereabouts of her aunt, with whom she occupied an apartment. Lee admitted that she and Edwin Thomas, her boyfriend, had murdered

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251. See supra notes 124-26, 140-49 and accompanying text (discussing this aspect of the Marsh decision).
253. Id. at 532.
254. Id.
Lee's aunt and one of the aunt's friends, and identified the body as that of her aunt. Lee then signed a typewritten account of her statement which was prepared by the police.

When Thomas was initially questioned, he was reluctant to talk to the police. But after he was granted permission to see Lee and she informed him of her confession, he also gave the police a signed confession. The two confessions were significantly interlocking. Thomas' confession, however, indicated premeditation on the part of himself and Lee, while Lee's confession did not reveal premeditation on her part.

Lee and Thomas were charged and jointly tried for the two murders. The judge who presided at the bench trial found both defendants guilty. There was no doubt that the judge had relied upon Thomas' confession in finding that Lee had acted with premeditation. Lee appealed, asserting that since Thomas had not taken the stand, Lee's confrontation right had been violated.

The intermediate appellate court concluded that, because the two confessions were "interlocking," they fell outside the scope of Bruton. The Illinois Supreme Court denied leave to appeal. Thereafter, the Supreme Court of the United States granted certiorari.

The Court noted that the obvious difference between Lee and Bruton was that in Lee the factfinder had expressly relied on the codefendant's confession in convicting the defendant. The Court stated:

Illinois concede[d] that this case involve[d] the use of a codefendant's [Thomas'] confession as substantive evidence against [Lee]. Illinois also correctly recognize[d] that the admissibility of the evidence as a matter of state law is not the issue in this case; rather, it

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255. Id.
256. Id.
257. Id.
258. Id. at 533.
259. See id. at 534-35.
260. See id. at 535-36.
261. Id. at 531.
262. See id. at 538.
263. See id.
264. Id.
265. Id.
266. Id. at 539.
268. See 476 U.S. at 539.
properly identified the question presented to be "whether that substantive use of the hearsay confession denied [Lee] rights guaranteed her under the Confrontation Clause." 269

On that question, the Court divided five to four. 270 Both the majority and the dissent applied the two-step test of Roberts. Both seemed willing to assume that Thomas had been unavailable. 271 They split, however, with regard to the test of reliability. The majority found that the "particularized guarantees of trustworthiness" required by Roberts were absent. 272 The majority wrote, "Thomas may have had [a desire] either to mitigate the appearance of his own culpability by spreading the blame or to overstate Lee's involvement in retaliation for her having implicated him in the murders." 273 Furthermore, while the majority recognized that the two confessions were significantly interlocking, thereby enhancing "the likelihood that they are accurate," 274 it emphasized that "[t]he discrepancies between the two go to the very issues in dispute at trial: the roles played by the two defendants in the killing of [the aunt's friend], and the question of premeditation in the killing of [Lee's aunt]." 275

The dissent noted that Thomas' confession had been "thoroughly and unambiguously adverse to his penal interest." 276 The dissent then drew analogies between both the hearsay rule and the Confrontation Clause, and the declaration against penal interest exception to the hearsay rule and the reliability requirement advanced in Roberts:

The hearsay exception for declarations against interest is firmly established; it rests upon "the principle of experience that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or heedlessly incorrect." Again, I recognize that the requirements of the Confrontation Clause and the hearsay rule often diverge. But statements squarely within established hear-

269. Id. (citation omitted).
270. See supra note 252.
271. 476 U.S. at 539 (majority determining that it "need not address the question of Thomas' availability" since it disposed of the case on the reliability prong of the Roberts test); id. at 549 (Blackmun, J., dissenting) (finding that "[f]or all practical purposes, Thomas was unavailable as a prosecution witness" since he would surely have invoked his fifth amendment privilege against self-incrimination).
272. Id. at 543.
273. Id. at 544.
274. Id. at 545.
275. Id. at 546.
276. Id. at 551 (Blackmun, J., dissenting).
say exceptions possess “the imprimatur of judicial and legislative experience,” and that fact must weigh heavily in our assessment of their reliability for constitutional purposes.277

It is difficult to determine the more appropriate application of Roberts. As the majority noted, Thomas may have been motivated to “spread[] the blame” or even to “overstate Lee’s involvement in retaliation for her having implicated him in the murders.”278 Still, the dissent pointed out that:

there is little reason to fear that Thomas’ statements to the police may have been motivated by a desire to shift blame to [Lee]. Thomas’ confession was less favorable in all respects to his own interests than [Lee’s] confession, and there is no claim by either side that Thomas actually was more culpable than either he or [Lee] admitted. Also, Thomas’ description of [Lee’s] involvement in the murders in no way diminished his own complicity.279

Yet the dissent sought to treat Thomas’ confession as a firmly rooted hearsay exception280 when, in fact, declarations against penal interest, unlike declarations against pecuniary or proprietary interest, constitute a relatively new exception to the hearsay rule.281 Common

277. Id. at 551-52 (quoting in part from 5 J. Wigmore, Evidence § 1457, at 329 (J. Chadbourne rev. ed. 1974), and in part from G. Lilly, An Introduction to the Law of Evidence § 78, at 277-78 (1978)).

278. Id. at 544-45.

279. Id. at 553 (Blackmun, J., dissenting).

280. See id. at 551.

281. See Fed. R. Evid. 804(b)(3) advisory committee’s note. The Advisory Committee stated:

The exception [to the hearsay rule set forth in Rule 804(b)(3) of the Federal Rules of Evidence] discards the common law limitation [to declarations against pecuniary or proprietary interest] and expands to the full logical limit. . . . [E]xposure to criminal liability satisfies the against-interest requirement. The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant. Nevertheless, an increasing amount of decisional law recognizes exposure to punishment for crime as a sufficient stake. The requirement of corroboration is included in the rule in order to effect an accommodation between these competing considerations. When the statement is offered by the accused by way of exculpation, the resulting situation is not adapted to control by rulings as to the weight of the evidence, and hence the provision is cast in terms of a requirement preliminary to admissibility. The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication.

Id. (citations omitted).
sense does dictate, though, that a declaration subjecting one to a potential loss of liberty is at least as trustworthy as one subjecting the declarant to the potential loss of money or property. Consequently, I believe that both the majority and dissenting opinions seem to represent rational and even persuasive (albeit conflicting) applications of Roberts. My problem is with Roberts itself.

The fact that the Court in Lee divided five to four, coupled with the conclusion that both the majority and the dissent rationally applied Roberts, points to the nearly inexorable conclusion that the Court will ultimately find itself deciding a case in which the declaration against penal interest of one person was admitted substantively against another person, the defendant, under circumstances in which the defendant had no opportunity to confront and cross-examine the declarant, but in which Roberts' "particularized guarantees of trustworthiness" are found to exist. Given that scenario, which could clearly occur in either the joint trial or single defendant context, the Court, utilizing Roberts, presumably would find no violation of the defendant's sixth amendment right of confrontation. Such a conclusion by the Court, however, would seem to me to frustrate the very purpose of the Confrontation Clause, leading to the paradoxical result that an extrajudicial declaration substantively admissible against the accused over his hearsay objection would not violate the accused's confrontation right so long as the declarant was unavailable for cross-examination by the accused.

Indeed, Cruz may have presented just such a set of facts.282 There, Benjamin Cruz' confession indicated that he and his brother Eulogio had robbed a gas station, and that Benjamin had killed the attendant after the attendant shot Eulogio.283 Benjamin's confession to the police could be characterized as a declaration against his penal interest. Accepting that characterization, the confession could have been substantively admissible against Eulogio over his hearsay objection, given the "unavailability" of Benjamin resulting from his decision not to take the stand.284

283. Cruz, 107 S. Ct. at 1716.
284. Cruz was prosecuted in New York. In that state, in appropriate circumstances, a third party's declaration against penal interest may be admitted against the accused over his hearsay objection. See People v. Brensic, 70 N.Y.2d 9, 14-16, 509 N.E.2d 1226, 1228-29, 517 N.Y.S.2d 120, 122-23, order amended, 70 N.Y.2d 722, 513 N.E.2d 1302, 519 N.Y.S.2d 641 (1987). In Cruz, however, Benjamin's confession was offered only against Benjamin, with an admonition to the jury to disregard Benjamin's confession when deciding the guilt or innocence
Then, applying Roberts, as both the majority and dissent did in Lee, two questions would be posed to determine whether such admissibility violated Eulogio's confrontation right: whether Benjamin was unavailable and whether his confession was reliable. By hypothesis and in fact, Benjamin's decision not to take the stand made him "unavailable." Furthermore, since Benjamin's confession identified him as the one who actually shot and killed the attendant, the dissent in Lee would almost certainly find Roberts' requirement of "particularized guarantees of trustworthiness" satisfied.

Indeed, even the majority in Lee might find it difficult to conclude otherwise. Benjamin apparently had no motive to spread blame onto his brother Eulogio and Benjamin was certainly not attempting to retaliate against Eulogio for incriminating Benjamin. Thus, applying Roberts, Benjamin's confession would be substantively admissible against Eulogio in the latter's felony murder prosecution, despite Eulogio's having no opportunity to confront and cross-examine Benjamin. Compare that result with the actual conclusion reached in Cruz—the Court in Cruz held that the receipt in evidence of Benjamin's confession against Benjamin, accompanied by an admonition to the jury not to use the confession against Eulogio, violated Eulogio's right to confrontation since the jury might not be able to comply with the admonition.

But if Roberts and Lee are combined, and further joined with a state or federal rule of evidence allowing the admissibility of declarations against penal interest over a hearsay objection, Benjamin's confession would become substantively admissible against Eulogio even over his Confrontation Clause objection, and notwithstanding of Eulogio. See Cruz, 107 S. Ct. at 1717. As a growing number of states follow the lead of the Federal Rules of Evidence and receive declarations against penal interest of third parties inculpating the accused over the accused's hearsay objection, the confrontation problem presented to the Court in Lee will become increasingly more common.

285. See supra notes 271-81 and accompanying text.

286. Although the Court in Cruz did not state the reason for Benjamin's unavailability, it is most likely that Benjamin was actually present in the courtroom but unwilling to take the stand. Accordingly, his unavailability would not be the result of fault or neglect attributable to the prosecution. Cf. supra note 188 and accompanying text (discussing the Court's finding in Barber v. Page that the unavailability of the witness resulted from the failure of the state to make a good-faith effort to secure his attendance at trial).

287. Cruz, 107 S. Ct. at 1716.

288. Cf. Lee, 476 U.S. at 551 (Blackmun, J., dissenting) (finding Thomas' statements regarding the murders "thoroughly and unambiguously adverse to his penal interest.").

289. In fact, Benjamin's confession came about as the police were questioning him about another unrelated murder. Cruz, 107 S. Ct. at 1716.

290. Id.; see supra notes 89-94 and accompanying text.
the lack of any opportunity on the part of Eulogio to cross-examine Benjamin. Should the fact that a confession can be characterized as a declaration against penal interest, pursuant to an applicable rule of evidence, be permitted to produce such a dramatically different result under the sixth amendment’s Confrontation Clause?

Under Roberts, of course, the answer would be yes. The Court’s nearly congruent treatment of the hearsay rule and the Confrontation Clause invites the ultimate conclusion that if the extrajudicial declaration is admissible against the accused over his hearsay objection, it is similarly admissible against him over his Confrontation Clause objection. That conclusion was foreshadowed in Roberts by the Court’s acceptance of “the truism that ‘hearsay rules and the Confrontation Clause are generally designed to protect similar values’ and ‘stem from the same roots,’”291 and the language which immediately followed: “It [the ‘indicia of reliability’ requirement] also responds to the need for certainty in the workaday world of conducting criminal trials.”292 When the hearsay rule and the sixth amendment right of confrontation are made nearly congruent, as in Roberts293 and Lee,294 and that (diminished) constitutional right is “balanced” against the need for efficient law enforcement, as in Roberts295 and Marsh,296 it should come as no great surprise that the right of confrontation becomes progressively more restricted as exceptions to the hearsay rule become progressively more expansive.

I recognize, of course, that in the typical Bruton-type case the codefendant’s confession is not admissible against the implicated defendant. It is the jury’s inability to comply with a limiting instruction that leads to the judicial conclusion that the defendant is factually inculpated by the codefendant’s confession. If the defendant, therefore, has no meaningful opportunity to confront and cross-examine the codefendant, the defendant would be factually inculpated by the codefendant’s extrajudicial declaration in violation of the defendant’s confrontation right. On the other hand, in cases like Lee, where the codefendant’s confession may be admissible against the defendant over his hearsay objection, as, for example, a declaration

292. Id.
293. See supra notes 238-44 and accompanying text.
294. See supra notes 271-81 and accompanying text.
295. See supra note 250 and accompanying text.
296. See supra notes 124-26, 140-49 and accompanying text.
against penal interest, receipt of the confession against the defendant is not the result of an "unavoidable" consequence of a joint trial. Instead, it is admissible because of a judicial determination that the confession constitutes a declaration against penal interest, an exception to the hearsay rule. To maintain, however, that in the latter case the defendant's confrontation right is not violated overlooks two critical considerations.

The first consideration is that the codefendant's confession (a declaration against penal interest) would be substantively admissible against the defendant over his hearsay objection. Consequently, the inculpating effect on the defendant would be significantly greater than in a Bruton-type case where the inculpation is inadvertent. Moreover, given such substantive admissibility, there would be no ameliorating jury instruction to ignore the codefendant's confession in determining the defendant's guilt. The jury would be entirely free to consider that confession in deciding the defendant's guilt.

The second consideration is the language of the Confrontation Clause itself: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." If the substantive admissibility of a codefendant's confession over the defendant's hearsay objection leads to the conclusion that the codefendant's confession is also admissible over the defendant's Confrontation Clause objection, notwithstanding his lack of any opportunity to confront and cross-examine the codefendant, the Confrontation Clause is thereby effectively amended to read "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him, unless their extrajudicial declarations are admissible against him." The "amendment" would, however, clearly frustrate the purpose of the Confrontation Clause, that is, to ensure that extrajudicial declarations may not be received against the accused unless the accused has a meaningful opportunity to confront and cross-examine the declarants.

The conclusion suggested by Roberts and Lee would impliedly overrule Bruton in all future cases in which the codefendant's confession was admissible against the defendant over his hearsay objection. It would also impliedly overrule Pointer, Douglas, and Barber in all future single-defendant cases in which the extrajudicial declaration of some other person was admissible over the defendant's hearsay objection, provided the declarant was not available for con-
frontation at trial. In short, if carried to its "logical" conclusion, Roberts would impliedly overrule all of the Court's earlier decisions finding a violation of the Confrontation Clause with regard to all future cases in which the inculpatory extrajudicial declaration was admissible over the defendant's hearsay objection and the declarant was unavailable for cross-examination at trial. As exceptions to the hearsay rule become progressively more expansive, the result will be a greatly restricted application of the Confrontation Clause and a concomitant diminution in constitutional protection for criminal defendants.

That constrained application of the Confrontation Clause seems to run counter to the apparent intent of the Framers of the sixth amendment. By making the Confrontation Clause uniquely applicable to criminal defendants, the Framers presumably intended to assure those defendants the right to confront and cross-examine the witnesses against them in the presence of a jury. This assurance was to be unfettered by the subsequent vagaries of courts and legislatures whose changing views of the hearsay rule and its exceptions would be applicable to litigants other than criminal defendants.298

The Court's opinion in Roberts, essentially equating the Confrontation Clause with the hearsay rule, invites courts and legislatures to implement their own views as to what constitute appropriate exceptions to the hearsay rule and to apply those views even against the criminally accused. The result is an "amended" Confrontation Clause effected by courts or legislatures with the sanction of the Supreme Court.

The problem with that result is that courts and legislatures, in amending their views as to appropriate exceptions to the hearsay rule, may be influenced toward fashioning exceptions that will facilitate convictions. After all, the state does have an interest in punishing the criminally accused. But, it seems to me, that is precisely the urge that the Confrontation Clause is intended to protect against. For the Court to weigh that urge against the confrontation right of the accused is equivalent to second-guessing the balance already struck by the Framers. Furthermore, it puts the Court in the awkward position of lending its approval to judicial and legislative efforts aimed at expediting convictions and, concomitantly, limiting the confrontation right.

The sixth amendment's Confrontation Clause, like other guar-

298. See supra notes 247-49 and accompanying text.
The Court's most recent Confrontation Clause opinion dramatically highlights the need to renunciate Roberts. In United States v. Owens, Foster, a correctional counselor at a federal prison in California, was attacked and brutally beaten with a metal pipe. Because of his injuries, Foster was hospitalized for a month and his memory was critically impaired. An FBI agent who attempted to interview Foster found him incapable of recalling his attacker's name, but during a subsequent hospital visit, the FBI agent found Foster much improved and able to describe the attack. Foster named Owens as his attacker and identified him from an assortment of photographs. Owens was charged with assault with intent to commit murder.

At trial, Foster testified as to his activities before he was attacked, and described feeling the blows to his head and seeing blood on the floor. He further testified that he clearly remembered identifying Owens as his attacker during his interview with the FBI agent, but on cross-examination he admitted that he could not remember seeing his assailant. The officer also could not remember any of his numerous visitors at the hospital except for the FBI agent,

300. Id. at 840-41.
301. Id. at 841.
302. Id.
303. Id.
304. Id.
305. Id.
306. Id.
307. Id.
308. Id.
and he could not recall whether anyone had suggested to him that Owens had been the attacker. Defense counsel sought to refresh Foster's memory with hospital records, but was unsuccessful. One such record indicated that at one time the officer had named someone other than Owens as his assailant.

Owens was convicted. On appeal, the Ninth Circuit reversed, concluding that the receipt in evidence of the victim's extrajudicial identification in circumstances where Owens was denied a meaningful opportunity to cross-examine Foster concerning that identification violated Owen's right of confrontation. The Supreme Court reversed, holding that the Confrontation Clause does not bar testimony concerning a prior out-of-court identification when the identifying witness is unable, because of memory loss, to explain the basis for his identification.

The preliminary question involved in Owens is why the extrajudicial identification was admissible over Owens' hearsay objection. Rule 801(d)(1)(C) of the Federal Rules of Evidence provides that "[a] statement is not hearsay if [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving him." The issue then becomes one of determining whether Foster was subject to cross-examination concerning the prior identification. Owens argued that Foster was not, since Foster

309. Id.
310. Id.
311. Id.
312. Id.
314. 108 S. Ct. at 845. The Court found that the Confrontation Clause guarantees only an opportunity for effective cross-examination, and not cross-examination that is in fact effective. The Court reasoned:

[T]hat opportunity is not denied when a witness testifies as to his current belief but is unable to recollect the reason for that belief. It is sufficient that the defendant has the opportunity to bring out such matters as the witness's [sic] bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination) the very fact that he has a bad memory. If the ability to inquire into these matters suffices to establish the constitutionally requisite opportunity for cross-examination when a witness testifies as to his current belief, the basis for which he cannot recall, we see no reason why it should not suffice when the witness's past belief is introduced and he is unable to recollect the reason for that past belief.

Id. at 842 (citation omitted).
315. See id. at 843-45 (analyzing Owens' hearsay objection).
317. Id.
was unable to respond to any questions concerning the basis for the prior identification.318 The majority, however, adopted an opposing position.319 In its view:

[T]he more natural reading of “subject to cross-examination concerning the statement” includes what was available here. Ordinarily a witness is regarded as “subject to cross-examination” when he is placed on the stand, under oath, and responds willingly to questions . . . . [L]imitations on the scope of examination by the trial court or assertions of privilege by the witness may undermine the process to such a degree that meaningful cross-examination within the intent of the rule no longer exists. But that effect is not produced by the witness’s assertion of memory loss—which . . . is often the very result sought to be produced by cross-examination, and can be effective in destroying the force of the prior statement. Rule 801(d)(1)(C), which specifies that the cross-examination need only “concern the statement,” does not on its face require more.320

In an effort to corroborate its interpretation of Rule 801(d)(1)(C), the majority contrasted the language of that rule with the language of Rule 804(a)(3).321 The latter rule includes within its definition of “[u]navailability of a witness” the situation in which the declarant “testifies to a lack of memory of the subject matter of [his] statement.”322 The majority’s inference from the difference in language between the two rules was that “Congress plainly was aware of the recurrent evidentiary problem at issue here—witness forgetfulness of an underlying event—but chose not to make it an exception to Rule 801(d)(1)(C).”323

The majority’s inference, however, strikes me as a bit strained. In enacting Rule 804, Congress has set forth those exceptions to the hearsay rule which may be utilized only when the declarant is unavailable as a witness.324 Therefore, Rule 804 must necessarily include a definition of “unavailability.”

In contrast, Rule 801(d)(1) requires as a condition precedent to treating declarations as “not hearsay” that the “declarant testifies at the trial or hearing and is subject to cross-examination concerning

318. See Owens, 108 S. Ct. at 843-44.
319. See id. at 844.
320. Id. (quoting Fed. R. Evid. 801(d)(1)(C)).
324. See Fed. R. Evid. 804.
the statement.” 325 It seems plain from the language of the rule itself that Congress intended the non-hearsay characterization to apply only where the declarant testifies meaningfully at trial concerning his prior statement. Therefore, Rule 804 and Rule 801(d)(1) deal with two quite different situations—Rule 804 requires unavailability of the declarant as a condition precedent to utilization of the hearsay exceptions set forth therein, 326 whereas Rule 801(d)(1) contemplates meaningful trial testimony by the declarant as a condition precedent to having the categories of declarations set forth therein characterized as non-hearsay. 327

The inclusion of the phrase “a lack of memory of the subject matter of [the] statement” as a part of the definition of unavailability in Rule 804, 328 and its exclusion from Rule 801(d)(1), 329 seem to imply that the latter rule was intended to require meaningful testimony from the declarant concerning his prior extrajudicial declaration. Meaningful testimony is precisely what was lacking in Owens—it was due to his memory loss that the victim was unable to explain the basis for his prior identification. 330 The majority’s conclusion, therefore, that the prior identification was admissible against Owens over his hearsay objection pursuant to Rule 801(d)(1)(C) seems to be a strained and overbroad interpretation of that evidentiary rule.

What about the Confrontation Clause? The majority found it unnecessary even to apply Roberts’ two-step test of unavailability and reliability. 331 To the majority, the government’s calling Foster to the stand satisfied Owens’ right of confrontation. 332 Foster’s appearance on the stand, notwithstanding his inability to “remember seeing his assailant,” 333 to remember any of his “numerous visitors in the

325. FED. R. EVID. 801(d)(1). Extrajudicial declarations which may be characterized as “not hearsay” by Rule 801(d)(1) include prior inconsistent statements if made “under oath [and] subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition,” FED. R. EVID. 801(d)(1)(A), prior consistent statements if “offered to rebut an express or implied charge against [the witness] of recent fabrication or improper influence or motive,” FED. R. EVID. 801(d)(1)(B), and prior identifications “of a person made after perceiving him,” FED. R. EVID. 801(d)(1)(C).
326. See supra note 324 and accompanying text.
327. See supra note 325 and accompanying text.
328. FED. R. EVID. 804(a)(3).
329. See FED. R. EVID. 801(d)(1).
331. See id. at 843.
332. See id. at 842-43.
333. Id. at 841.
hospital,"334 to remember "whether any of these visitors had suggested that [Owens] was the assailant,"335 or to remember "that [he] had attributed the assault to someone other than [Owens],"336 was considered "an adequate opportunity to cross-examine [the] adverse witness[]."337 The dissent, however, concluded that the victim’s "profound memory loss . . . during the approximately 18 months following his identification prevented him from affirming, explaining, or elaborating upon his out-of-court statement just as surely and completely as his assertion of a testimonial privilege, or his death, would have."338 The dissent, therefore, found that Owens had been denied any opportunity for the "'full and effective cross-examination at the time of trial'"339 guaranteed the criminally accused by the Confrontation Clause.340

Would Owens have passed the Roberts test? Assuming that Foster’s memory loss made him factually unavailable for effective cross-examination,341 that unavailability would clearly not be attributable to any fault or neglect on the part of the prosecution. Consequently, the unavailability requirement would have been satisfied. But what about the requirement of reliability? Even the majority recognized "the fact that the testimony here involved an out-of-court identification that would traditionally be characterized as hearsay."342 Such an extrajudicial identification would not qualify as a "firmly rooted hearsay exception."343

334. Id.
335. Id.
336. Id.
337. Id.
338. Id. at 846 (Brennan, J., dissenting). Taken out of context, the quoted language referring to death may seem harsh. To ameliorate any unfairness to the dissent, it should be noted that the dissent also noted that "Foster survived the beating; his memory, however, did not, and by the time of [Owens'] trial he [Foster] could no longer recall his assailant or explain why he had previously identified [Owens] as such." Id. at 845.
339. Id. at 847 (emphasis in original) (quoting California v. Green, 399 U.S. 149, 159 (1970)).
340. Id.
341. Id.
342. Id. at 846 (Brennan, J., dissenting). That assumption would appear to lead to the conclusion that the prior identification would not have been admissible against Owens over his hearsay objection. See FED. R. EVID. 801(d)(1)(C). That was precisely the conclusion reached by the Ninth Circuit. See United States v. Owens, 789 F.2d 750, 756 (9th Cir. 1986), rev’d, 108 S. Ct. 838 (1988). The Ninth Circuit, however, concluded that the erroneous admission of the prior identification under 801(d)(1)(C) was harmless, applying the non-constitutional standard of "more probable than not." See id. at 757.
343. See FED. R. EVID. 801(d)(1)(C) advisory committee’s note. The advisory committee noted that:
Under Roberts, therefore, the declaration would be admissible only if it possessed “particularized guarantees of trustworthiness.” \footnote{344} Prior to making the extrajudicial identification to the FBI agent, Foster had been “unable to remember the attacker’s name.” \footnote{345} Foster was also unable to recall, prior to making the identification, if any of his hospital visitors had “suggested that [Owens] was the assailant.” \footnote{346} Indeed, with the exception of the FBI agent, the victim was unable to recall any of his numerous hospital visitors, “including his wife who visited daily.” \footnote{347} Moreover, he “could not remember seeing his assailant.” \footnote{348}

Thus, the extrajudicial identification hardly possessed “particularized guarantees of trustworthiness.” As a result, even under the Roberts test, the prior identification would not have been admissible over Owens’ Confrontation Clause objection. Yet the extrajudicial identification’s receipt in evidence was found by the majority not to have violated the defendant’s right of confrontation. \footnote{349}

The conclusion of Owens seems painfully clear. By a strained and perhaps overbroad interpretation of Rule 801(d)(1)(C), the majority found the prior identification admissible over the defendant’s hearsay objection. Moreover, by an equally strained and seemingly unduly restrictive interpretation of the Confrontation Clause, the majority found that the declarant had been available for adequate cross-examination.

The legislative urge to permit the receipt in evidence of prior identifications over a hearsay objection in order to facilitate convictions, \footnote{350} complemented by the majority’s impulse toward concluding that those extrajudicial declarations admissible against the defendant over his hearsay objection should similarly be admissible against

\footnote{344} Ohio v. Roberts, 448 U.S. 56, 66 (1980).
\footnote{345} Owens, 108 S. Ct. at 841.
\footnote{346} \textit{Id.}
\footnote{347} \textit{Id.} at 845 (Brennan, J., dissenting).
\footnote{348} \textit{Id.} at 841.
\footnote{349} \textit{Id.} at 845.
\footnote{350} \textit{See supra} notes 124-26, 250-51 and accompanying text.

\textit{Id.} (quoting Gilbert v. California, 388 U.S. 263, 272 n.3 (1967)).
the defendant over his Confrontation Clause objection, seem to concurrently diminish both the hearsay rule and the Confrontation Clause.

What stimulated the majority toward that ultimate conclusion? I am inclined to believe that the stimulus may have been identified by the dissent when it observed that "[the] burdens [of assessing the 'effectiveness' of cross-examination for Confrontation Clause purposes] flow from our commitment to a Constitution that places a greater value on individual liberty than on efficient judicial administration." It seems to have been this impulsive concern with efficient judicial administration reflected in *Roberts* and *Marsh* that motivated the majority in *Owens*.

**IV. CONCLUSION**

If the Supreme Court is to fulfill its role as the ultimate guardian of those constitutional rights guaranteed to the individual against state intrusion, it should seek to avoid "balancing" those individual rights against the state's overzealous prosecutorial objectives in a manner inconsistent with the balance struck by the Framers.

With regard to the Confrontation Clause, the Court's effort should begin by rethinking *Roberts* in such a manner as to exclude extrajudicial accusatory declarations inculpating the accused where the accused has no meaningful opportunity to confront and cross-examine the declarant at trial. The result would be a repudiation of *Owens* and a reaffirmation of the right intended to be assured by the Confrontation Clause. Until such an effort proves successful, however, the Court will continue in its present posture of acquiescing in "amendments" to the Confrontation Clause by legislative and judicial bodies concerned with facilitating convictions. That's bad news for the accused, for those who believe that the Confrontation Clause as written by the Framers and as ratified means pretty much what it says, and for all those who believe that the Constitution is not to be amended except in a manner set forth therein.

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351. 108 S. Ct. at 849 (Brennan, J., dissenting).
352. *See* U.S. CONST. art. V.