No. 98-CF-1045

IN THE

DISTRICT OF COLUMBIA COURT OF APPEALS

Marquette E. Riley,

Appellant,

v.

United States,

Appellee.

On Appeal from the
Superior Court of the District of Columbia
Criminal Division — Felony Branch
F 2594-97

APPELLANT'S SUPPLEMENTAL BRIEF

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QUESTIONS PRESENTED

1. During oral argument the Court, *sua sponte*, inquired whether, in light of the U.S. Supreme Court's opinion in *Crawford v. Washington*, 541 U.S. ____, 124 S. Ct. 1354, 158 L. Ed. 2^{d} 177 (2004), the Trial Court's admission into evidence, over objection, of portions of codefendants' inculpatory confessions to police following their arrests violated Appellant's Sixth Amendment right to confront witnesses against him?

IN THE
DISTRICT OF COLUMBIA COURT OF APPEALS

MARQUETTE E. RILEY, ***APPELLANT,*** **VS.** **UNITED STATES,** ***APPELLEE.***	**NO. 98-CF-1045** **(F 2594-97)**

APPELLANT'S SUPPLEMENTAL BRIEF

STATEMENT OF RELEVANT PROCEDURAL HISTORY

Appellant Marquette E. Riley set out a comprehensive procedural history of this case in his main Brief, Appellant's Brief, 1 – 4, and will focus here on the procedural history directly relevant to the issue the Court raised at oral argument.

On September 9, 1999, the day Metropolitan Police and Prince George's County Police arrested Mr. Riley and his codefendants, Sayid Muhammad and Antonio Marks gave statements to police implicating themselves and Appellant in the shooting deaths of Larnell and Larell Littles.[1] In a Motion filed January 20, 1998, Mr. Riley's trial counsel moved to exclude the codefendants' statements, citing *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968); and *Carpenter v. United States*, 430 A.2d 496 (D.C. 1981). R. 12.[2] Counsel also filed a motion to sever defendants. R. 13.

In an omnibus opposition to these motions and similar motions filed by codefendants Muhammad and Marks the government argued that the Trial Court should not sever the defendants even though the prosecutor intended to introduce written and electronically recorded

[1] Late on September 9 Mr. Riley gave a written statement after Prince George's County Det. Dwight DeLoach repeatedly acted to overcome Appellant's decision not to waive his Sixth Amendment right to counsel and Fifth Amendment protection against self incrimination. That was the main issue raised in Appellant's Brief.

[2] References to the Record on Appeal will be designated "R." followed by the document number, and where necessary the relevant page number, i.e. R. 12, 2. References to transcripts of proceedings will be designated "Tr." followed by the date of the proceeding and the relevant page number, i.e. Tr. 4/23/98, 135.

statements all three defendants gave police after their arrests. R. 15.

In a hearing March 4, 1998 the Trial Court expressed skepticism about the government's argument that Mr. Muhammad's and Mr. Marks's statements against penal interest would be admissible against Mr. Riley. Tr. 3/4/98, 13 – 16. In the end, the prosecutor argued that a defendant's statement would be admissible only against him, but "there ought not to be a limiting instruction" telling jurors not to consider the statement against codefendants. *Id.* at 16.

The Trial Court admitted the redacted statements over objections raised by trial counsel for Mr. Riley and Mr. Muhammad. Before the jury, from redacted transcripts the prosecutor read questions asked by the officer who interrogated each defendant and the officer read the defendant's responses. Tr. 4/24/98, 381 – 91 (Muhammad), 395 – 404 (Marks), Tr. 4/28/98, 244 – 8 (Riley). Before jurors heard the excerpts from each defendant's statement the Trial Court instructed them that the statement could be used only as evidence against that defendant. Tr. 4/24/98, 379, 394, Tr. 4/28/98, 242 – 3. It included a similar instruction in the final instructions. Tr. 4/29/98, 131 – 2.

After jurors began deliberating they sent out a note asking for transcripts of the defendants' statements. *Id.* at 176. Mr. Riley's lawyer objected to a proposal that the judge or the prosecutor could re-enact the statements in a manner similar to that used in the evidence phase of the trial, and argued that the defendants' statements were not in evidence and the judge could provide no record responsive to the jurors' request. *Id.* at 178. Mr. Muhammad's lawyer objected as well, arguing that if the Court gave the jury redacted transcripts of the defendants' statements it would read them together and readily understand that the defendants had implicated each other. *Id.* at 180 – 2.

Over objection the Judge permitted jurors to review the redacted transcripts. He again instructed jurors to consider each statement only in judging the defendant who made it. Tr. 4/30/98, 201 – 2.

ARGUMENT

This case lies at the intersection of two lines of Sixth Amendment Confrontation Clause precedent. One, anchored by *Bruton, supra*, addresses the admissibility in a joint trial of confessions of non-testifying codefendants that tend to incriminate the defendant. The other, most recently examined by the Supreme Court in *Crawford, supra*, addresses the admissibility of incriminating hearsay statements of non-testifying witnesses who may or may not be codefendants. The former focuses mainly on the risk that jurors will use codefendants' statements, regardless of their reliability, to convict the defendant, and the latter focuses mainly on the admissibility of hearsay statements the Court found to be inherently unreliable.[3]

Underlying both is the principle grounded in common law that cross-examination is essential to the truth-finding process. The Court held in *Bruton, supra* at 125 – 6, that

> because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.

It held in *Crawford, supra*, at 1377, that "Where testimonial evidence is at issue … the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."

THE CODEFENDANT STATEMENTS IMPLICATE APPELLANT'S CONFRONTATION RIGHT UNDER *CRAWFORD*

There is no question that statements police obtained from Mr. Riley and his codefendants fall within *Crawford's* definition of "testimonial evidence." Justice Scalia wrote:

> Statements taken by police officers in the course of interrogations are also

[3] In *Bruton, supra*, at 129 n. 3, the Supreme Court specifically refused to address the issue raised in *Crawford*, stating:

> 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.

> testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not sworn testimony, but the absence of oath was not dispositive.

Id. at 1364. This is so because "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse — a fact borne out time and again throughout a history with which the Framers were keenly familiar." *Id.* at 1367 n. 7.

There is no question that Mr. Muhammad and Mr. Marks were unavailable to be cross-examined because they, too, were on trial and chose not to testify in their own defense. Finally, there is no question that Mr. Riley's counsel never had an opportunity to cross-examine either codefendant during police interrogation or in another proceeding.

Under *Crawford* the codefendants' confessions were inadmissible against Mr. Riley in their joint trial, and would have been inadmissible if they had been tried separately.

THE CODEFENDANT STATEMENTS IMPLICATE APPELLANT'S CONFRONTATION RIGHT UNDER *BRUTON*

The government argued, in opposition to defense motions to exclude codefendants' statements, that under *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2^{d} 597 (1980), Mr. Muhammad's and Mr. Marks's confessions might have been admissible against Mr. Riley when he was tried. In *Roberts* the Supreme Court ruled that a statement of an unavailable witness would be admissible against the defendant if it bore "adequate 'indicia of reliability' " and either came within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness."

The government argued that the Trial Court should not sever the defendants even though the prosecutor intended to introduce written and electronically recorded statements all three defendants gave police after their arrests. In support of its position the government relied on *Akins v. United States*, 679 A.2^{d} 1017 (D.C. 1996), and *Roberts*, *supra*, arguing that the statements were admissible as statements against penal interest, which "satisf[y] a recognized hearsay exception based on the statements' presumed reliability, [and] that reliability in turn

would satisfy the concerns of the Confrontation clause." Gov't. Opp. 5 (citing *Laumer v. United States*, 409 A.2d 190 (D.C. 1979)(*en banc*)). R. 14, 5. Citing *Williamson v. United States*, 512 U.S. 594, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994), the government went on to argue that "a declarant's squarely self-inculpatory confession … will likely be admissible under [the declaration against penal interest exception] against accomplices of his who are being tried under a co-conspirator liability theory." R. 14, 6 – 7 (internal quotations omitted).

The Trial Court rejected this argument, insisting that each statement was admissible only against the defendant who made it. The Judge recognized that the three statements were "interlocking confessions" and their use in a joint trial would pose special problems.

> If the law hadn't been reversed, the old law about … interlocking confessions, this would have been a classic case for it because that's what they are. And none is prejudicial to the non-declarant because the non-declarant himself made a virtually identical admission, assuming again, for the moment, that Mr. Riley's comes in.
>
> But I don't think that is the law and therefore I think that, particularly after the case I cited to you this morning, I think we have to be pretty careful about the redactions so that it meets the *Bruton* test as to those statements.

Tr. 4/21/98, 316 – 7.

Relying on *Gray v. Maryland*, 523 U.S. 185, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998), the Judge insisted that the prosecutor redact Marks's taped statement and Muhammad's typed statement by replacing collective pronouns with the word "I" and eliminating blank spaces from which jurors could infer that codefendants' names had been excised. Later, when he decided to send to the jury room copies of the statements that had been admitted into evidence and read aloud by the prosecutor and a police officer, the Judge directed the prosecutor to create a typed version of Riley's handwritten statement with similar alterations.

What the Judge failed to recognize was that because the codefendants' statements were "interlocking," the method of redaction used to sanitize them was wholly ineffective under *Gray*. In that case a police officer read aloud to the jury from a codefendant's inculpatory statement, substituting the word "deleted" for the defendant's name. Jurors were given a redacted copy of the statement in which the government had inserted a blank space set off by commas everywhere

the defendant's name appeared in the original. The Supreme Court held that

> [r]edactions that simply replace a name with an obvious blank space or a word such as "deleted" or a symbol or other similarly obvious indications of alteration [] leave statements that, considered as a class, so closely resemble *Bruton's* unredacted statements that, in our view, the law must require the same result.

Gray, at 192.

In the case at bar, jurors only needed to insert the word "we" for "I" to conclude that Mr. Muhammad and Mr. Marks implicated Mr. Riley in their statements, and the interlocking nature of the statements was an open invitation to do so. Mr. Muhammad's counsel raised that objection twice unsuccessfully, in the motions hearing arguing that the statements were inadmissible in a joint trial, Tr. 4/21/98, 325, and after jurors requested copies of the statements for use in deliberations. Tr. 4/29/98, 180 – 2.

After the Judge decided to send the redacted statements to the jury room and professed faith that jurors would follow his instructions, he instructed them that each statement could be used only in reaching a verdict as to the defendant who made it and added,

> [T]hat's the risk of just handing them over to you, there may be a tendency to swap them and cross reference them. That's not the way you're to use them. You're to use them only in connection with the consideration of the particular defendant who made the statement and not against any other defendant.

Id. at 202.

The Supreme Court ruled that inculpatory interlocking codefendant confessions were inadmissible in a joint trial, even where the defendant's confession was admitted into evidence. *Cruz v. New York*, 481 U.S. 186, 191 – 2, 107 S. Ct. 1714, 95 L. Ed. 2^{d} 162 (1987). The government argued that the codefendants' statements were admissible because they could not have the same "devastating effect" in such a case as they would have in a case where the defendant did not confess. Justice Scalia wrote,

> "interlocking" bears a positively inverse relationship to devastation. A codefendant's confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told, but enormously damaging if it confirms, in all essential respects, the defendant's alleged confession…. But in the real world of criminal litigation, the defendant is seeking to *avoid* his confession — on the

> ground that it was not accurately reported, or that it was not really true when made…. In such circumstances a codefendant's confession that corroborates the defendant's confession significantly harms the defendant's case, whereas one that is positively incompatible gives credence to the defendant's assertion that his own alleged confession was nonexistent or false.

Id. at 192.

In *Cruz* the majority focused not on the harmfulness of the codefendant statement, one major concern in *Bruton*, but on its capacity to prejudice the defendant, the other major concern in *Bruton*. It said,

> 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 … 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.

Id. at 192 – 3.

Unlike the Trial Court in the case at bar, the Supreme Court in *Bruton* and *Cruz* assumed that in a joint trial jurors could not be relied upon to follow instructions, no matter how carefully and often given, when evaluating inculpatory codefendant confessions.

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect….

Bruton, supra, 391 U.S. at 135 – 6.

It follows, then, that in Mr. Riley's case, despite the Trial Court's instruction not to "swap" or "cross reference" the three redacted statements, the Supreme Court likely would presume that jurors did just that. Similarly, it would likely presume that jurors looked at the word "I" wherever it appeared in each statement and substitute the word "we" wherever it made sense to do so. By emphasizing in his closing argument that the defendants acted as a team the

prosecutor subtly encouraged them make the substitutions. Tr. 4/29/98, 40 – 2.[4]

Thus, in Mr. Riley's case the confessions of his codefendants clearly come under *Bruton* and should have been excluded in a joint trial because they inculpate Appellant, and their introduction deprived him of his Sixth Amendment right to confront witnesses against him.

CRAWFORD DEMONSTRATES THAT CONCERN FOR PROTECTION OF CRIMINAL DEFENDANTS' CONFRONTATION RIGHTS IS PARAMOUNT

By itself, *Crawford, supra*, does not resolve the issue of whether introduction of Mr. Muhammad's and Mr. Marks's post-arrest inculpatory statements at the trial deprived Mr. Riley of his Sixth Amendment right to confront witnesses against him. But read with *Bruton, Gray* and *Cruz* it demonstrates a significant shift in the Supreme Court's jurisprudence concerning the admissibility in joint trials of confessions obtained by police. With the exception of *Gray*,[5] each overruled a relatively recent precedent admitting out-of-court "testimonial" statements made by individuals who did not testify at trial, where the defendant never had an opportunity to cross-examine the declarant. With the exception of *Crawford*, each involved codefendant confessions introduced in a joint trial.[6]

Bruton, supra, holding that the prejudicial nature of codefendant confessions is so great that jurors cannot be expected to adhere to limiting instructions, overruled *Delli Paoli v. United States*, 352 U.S. 232, 77 S. Ct. 294, 1 L. Ed. 2d 278 (1957), in which the Court held that a codefendant's inculpatory statement was admissible where the Trial Court gave jurors clear instructions to consider the statement only against the person who made it. In the latter the Court held that

> It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis

[4] Marks's trial counsel objected to this argument, but the Judge overruled the objection. Tr. 4/29/98, 46.
[5] The Court distinguished *Gray, supra*, from *Richardson v. Marsh*, 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987), in which it held that the codefendant's confession survived *Bruton* analysis because the codefendant statement had been redacted to give no indication that the defendant participated in the crime. When she testified, the defendant provided the only link to events discussed in the confession, from which jurors could infer her guilt..
[6] Police apparently considered both Crawford and his wife to be suspects and gave them *Miranda* warnings before interrogating them. At Crawford's trial he invoked the state marital privilege to preclude the government from calling his wife as a witness and because she was unavailable, the government sought use of her statement.

> that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice. 'To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions.

Delli Paoli, at 242. The Court never mentioned the Confrontation Clause or the Sixth Amendment, and considered the decision about whether to sever defendants or to admit codefendant confessions in a joint trial on a par with evidentiary rulings made during trial.

> There may be practical limitations to the circumstances under which a jury should be left to follow instructions but this case does not present them. As a practical matter, the choice here was between separate trials and a joint trial in which the confession would be admitted under appropriate instructions. Such a choice turns on the circumstances of the particular case and lies largely within the discretion of the trial judge.

Id. at 243.

In *Bruton, supra,* at 128, the Supreme Court said the underlying premise of *Delli Paoli* had been "effectively repudiated." As it had in *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2^{d} 908 (1964), the *Bruton* Court adopted Justice Frankfurter's dissenting view in *Delli Paoli* that,

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

Bruton, supra, 391 U.S. at 129 (citing *Delli Paoli, supra,* at 247 (Frankfurter, J. dissenting).

Cruz, supra, holding that interlocking, inculpatory confessions of non-testifying codefendants are inadmissible in a joint trial, even when the defendant's confession is admitted, overruled *Parker v. Randolph*, 442 U.S. 62, 99 S. Ct. 2132, 60 L. Ed. 2^{d} 713 (1979), in which the Court held that when a defendant's confession is in evidence, interlocking confessions of non-testifying codefendants were admissible with proper limiting instructions. *Id.* at 75. In that situation 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," the *Parker* Court held. *Id.* at 74 – 5. Invoking the Confrontation Clause, the *Cruz* Court stated, "It seems to us illogical, and therefore contrary to common sense and good judgment, to believe that codefendant confessions are less likely to be taken into account by the jury the more they are corroborated by the defendant's own admissions; or that they are less likely to be harmful when they confirm the validity of the defendant's alleged confession." *Id.* 481 U.S. at 193.

Crawford, holding that the only adequate means of testing the reliability of a non-testifying witness's "testimonial" statements against the defendant is to subject them to cross-examination, overruled *Roberts, supra*, which held admissible such statements if deemed sufficiently reliable and if they either fell within a recognized hearsay exception or were deemed trustworthy. According to the *Roberts* Court, in certain circumstances the defendant's confrontation right had to be balanced against competing state interests.

> 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… This Court, in a series of cases, has sought to accommodate these competing interests. True to the common-law tradition, the process has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions. The Court has not sought to "map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay 'exceptions.' " But a general approach to the problem is discernible.

Roberts, supra, 448 U.S. at 64 – 5 (citations omitted). If a witness was unavailable,

> [t]he focus of the Court's concern has been to insure that there are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant, … and to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement….
>
> The Court has applied this indicia of reliability requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the substance of the constitutional protection.

Id. at 65 – 6 (citations and internal quotations omitted). The *Roberts* Court reached the startling conclusion, soundly rejected in *Crawford*, that "hearsay rules and the Confrontation Clause are

generally designed to protect similar values, … and stem from the same roots…. It also responds to the need for certainty in the workaday world of conducting criminal trials." *Roberts, supra*, at 66. As Justice Scalia stated succinctly, "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Crawford, supra*, 124 S. Ct. at 1371.

In short, the *Crawford* decision clearly indicates a course correction. The Court views its own past decisions and those of lower courts as straying too far from the core principles underlying the Confrontation Clause of the Sixth Amendment. As it did in *Bruton, supra*, the Court again sees protection of defendants' confrontation rights as paramount over competing governmental interests in obtaining convictions.

CONCLUSION

For the reasons stated above, in Appellant's briefs and at oral argument, Mr. Riley respectfully requests that the Court vacate his conviction and remand his case for a new trial.

Respectfully submitted,

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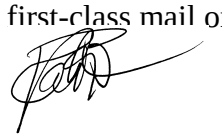
CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Marquette E. Riley, certify that on July 22, 2004 I served a true copy of the attached Appellant's Supplemental Brief by first-class mail on counsel listed below.



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