No. _____

In the

Supreme Court of the United States

RUBEN CENICEROS CAZARES

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

On Petition for Writ of Certiorari to the
Eighth Judicial District Court of Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Fifty years ago, this Court began the *Bruton* era by making two points perfectly clear. One, *Bruton* evidence is "devastating" to the accused. *Bruton v. U.S.,* 391 U.S. 123 (1968). But, two, the admission of *Bruton* evidence does not necessarily require a new trial. *Brown v. U.S.*, 411 U.S. 223, 231 (1973); *Schneble v. Florida*, 405 U.S. 427 (1972); *Harrington v. California*, 395 U.S. 250 (1969). Since those foundational cases, this Court has elaborated the first point. As a result, we now understand (a) that the devastating character of *Bruton* evidence demands courts treat it as a class, and (b) when erroneously admitted, courts must treat instances of that class differently from other evidence to protect the rights of the accused. This Court has not revisited the second point, however, to explain how to evaluate *Bruton* harm given the unique character of the class; and it has never explained the full reach of *Bruton*'s protections. Lower courts have fractured over these questions.

The questions presented are:

1. Whether lower courts correctly evaluate the harmfulness of *Bruton* error without accounting for the devastating "special prejudice" to the accused that inheres in the entire class of *Bruton* evidence.

2. Whether *Bruton*'s rationale—centered on the particularly devastating character of that class of evidence—reaches separate trials where the accomplice's statement that facially incriminates the accused is introduced.

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INTRODUCTION

Bruton is a landmark case for defendants. It held the devastating prejudice of a codefendant's statement that incriminates the accused cannot come before the jury, even at the cost of holding separate trials or not using the evidence, because limiting instructions cannot prevent its prejudicial taint. *Bruton*, 391 U.S. at 134-36. Thus, reality trumped legal fiction; rights prevailed over efficiency; and "*Bruton*'s protective rule," refined over the following few decades, was born. *See Gray v. Md.*, 523 U.S. 185, 188 (1998).

Despite *Bruton*'s prestige, courts disagree over its application and what its protections entail. At least two splits among the lower courts have thus emerged. The first is over how to analyze the harm of *Bruton* error: some courts use the *Van Arsdall* factors designed for a different kind of error; other courts continue to anchor their analyses to the "overwhelming" evidence approach from *Harrington* and *Schneble*; while at least one court employs a tailor-made test to reflect this Court's consistent emphasis that *Bruton* evidence is uniquely damaging, a point this Court has developed since *Harrington* and *Schneble*.

The second split is simply over when *Bruton* applies. Although this court has never held that *Bruton*'s protections only apply in joint trials, some courts deny its protections to defendants tried separately. Others do not.

These divides mean defendants receive different degrees of constitutional protections based solely on location – the sort of arbitrary justice this Court should seek to eliminate. The splits have persisted without resolution for too long.

Now is the time for this Court to address how and when *Bruton* applies. After all, the divisions below developed because this Court has not addressed *Bruton* harm in almost fifty years and never addressed its relevance, or not, to a separate trial. Resolving them now matters for Mr. Cazares and other defendants who continue to unfairly face devastating *Bruton* evidence. Plus, this case presents a clean vehicle for review. And, finally, whether *Bruton* remains anything more than a relic after *Crawford* is itself an open question. *Crawford v. Wash.*, 541 US 36 (2004). Mr. Cazares respectfully asks this Court to take up these questions with this petition.

OPINION AND ORDERS BELOW

The decision of the court of appeals was not designated for publication. Appendix at 29a. The orders denying rehearing and refusing Mr. Cazares' petition for discretionary review to the Texas Court of Criminal Appeals are likewise unpublished. Appendix at 30a and 31a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Texas Court of Criminal Appeals denied the petition for discretionary review on May 23, 2018. Appendix at 31a. Therefore, this petition is timely under Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right… to be confronted with the witnesses against him…"

STATEMENT OF THE CASE

This case originates in the deaths of Alma Reaux, eighteen-years-old and four months pregnant, and her unborn child. They were run over in a drug deal gone bad. Alma was the dealer selling marijuana; David and Ruben Cazares were the would-be buyers. The Cazareses tried to take the marijuana without paying. Alma, trying to stop them, fell under their vehicle as it sped away.

The State of Texas indicted both David and Ruben for murder, though it tried Ruben separately from David. During trial, Elizabeth Moncayo testified that she recorded David on three occasions for the police. (RR4: 56.)[1] The prosecutor admitted Moncayo acted as a state agent and recorded David because the police did not have enough evidence to make an arrest. (RR3: 183-84; RR4: 33.) In these recordings, David details his and Ruben's involvement in Alma's death. Among other things, David explains that he and Ruben "really did this," that Ruben was the driver, that Ruben drove his wife's green Trailblazer, that Ruben was most culpable, and that David did not give himself up to the police because of Ruben. (SX18a; SX22a: 6-8, 11, 19.)

Ruben objected repeatedly and vehemently to the use of the recordings. He first objected to the prosecution's mention of them during its opening statement when it explained the recordings placed Ruben at the scene. (RR3: 13.) The trial court sustained this objection. (RR3: 14.) When the prosecution later sought to introduce the recordings, Ruben argued the recordings were inadmissible unless

[1] This petition refers to the reporter's record below with volume number as "RR#," followed by the page number of that volume. "SX" refers to State's Exhibit, which is followed by the exhibit number.

David testified "live" and their admission would violate his Sixth Amendment right to confrontation. (RR3: 179, 185, 190-91, 195, 197-98.) The court disagreed and admitted the recordings, ruling they were not testimonial. (RR3: 198-99.) Ruben re-urged his objection by referencing *Bruton* and citing *Crawford*. (RR4: 7-9, 37.) The court again overruled him. At the end of trial, the jury convicted Ruben of two counts of murder. Facing fifteen years to life, the same jury sentenced him to two-counts of life and two ten-thousand dollar fines (the maximum possible).

On direct appeal, Ruben maintained his contention that the admission of David's statements violated his right to confront the witness against him. This time, the Eighth Court of Appeals of Texas agreed. It held the statements were testimonial and their admission at Ruben's trial violated his Sixth Amendment right to confrontation. Appendix at 23a.

The court affirmed, however, because it also held the admission of David's statements harmless to both the jury's finding of guilt and to its maximum sentence. Appendix at 23a-28a. In doing so, the court made no mention of any *Bruton* case even though Ruben argued the *Bruton* line of cases compelled reversal. (Appellant's Brief: 27.) Ruben argued that a correct application of the *Van Arsdall* factors, which Texas employs for all Confrontation Clause errors, required reversal, as well.

Ruben filed a timely motion for rehearing in the court of appeals, again contending that under the *Bruton* cases the court could not reasonably call the error harmless. The court denied the motion without opinion. Appendix at 30a. Ruben

then petitioned the Texas Court of Criminal Appeals—the state's highest court—for discretionary review of his case. It refused the petition without opinion, leading to this petition. Appendix at 31a.

REASONS FOR GRANTING THE WRIT

I. *Bruton* Has Spawned Two Splits Among State and Circuit Courts.

Not one but two splits divide state and federal courts over *Bruton* errors. The first fragments courts over how to analyze the prejudice of *Bruton* error, whereas the second severs courts because they cannot agree on even the basic question of when *Bruton* applies.

The splits reflect confusion over *Bruton*'s essence. Boiled down, the guts of the *Bruton* line of cases is this: *Bruton* evidence is uniquely devastating so courts cannot treat it like other evidence. The ruptures spring primarily from the fact that some courts forget this, treating *Bruton* error as they would any other Confrontation error and hinging its protections on the existence of a joint trial rather than the class of evidence used. These practices eviscerate *Bruton* and generate the divisions below.

A. Courts are split over how to analyze *Bruton* harm.

While this Court has repeatedly[2] emphasized that *Bruton* evidence is not only deeply prejudicial but also, for that reason, unique, it has provided little guidance

[2] *See Gray*, 523 U.S. 185 (1998) (placing *Bruton* evidence in own "class" that is "so prejudicial" limiting instructions cannot work); *Cruz v. New York*, 481 U.S. 186, 191-92 (1987) (describing *Bruton* evidence as belonging to own "category" and describing such evidence that interlocks with defendant's own statement as "enormously damaging"), *See also Kansas v. Carr*, 136 S. Ct. 633, 645 (2016) (rejecting as "implausibl(e)" the respondents' attempt to compare the prejudice in their case to *Bruton* prejudice).

for analyzing the harmfulness of the admission of *Bruton* evidence other than to "reject the notion that a *Bruton* error can never be harmless." *Brown v. U.S.*, 411 U.S. 223, 231 (1973). As a result, lower courts diverge over what the proper harm analysis is. The disagreement divides both the states and the circuits along the general line between courts that have turned to the *Van Arsdall* factors for analyzing *Bruton* error and those that do not. *See Del. v. Van Arsdall*, 475 U.S. 673 (1986).

1. The *Van Arsdall* courts

The *Van Arsdall* test was not designed for *Bruton* error, but it has become one of the most important authorities among lower courts facing *Bruton* error. *Van Arsdall* described the "correct inquiry" for analyzing the harm resulting from the "constitutionally improper denial of a defendant's opportunity to impeach a witness (who is otherwise available) for bias." *Id.* at 684. In its inquiry, a reviewing court must first assume that the defendant would have fully achieved "the damaging potential of the cross-examination" if not for the court's error. *Id.* With that in mind, the court then weighs five factors—"the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case"—to determine whether beyond a reasonable doubt the error was harmless. *Id.*

Several courts have adopted modified versions of the *Van Arsdall* test for *Bruton* errors.[3] Under the modified versions, courts typically discard the assumption that the defendant would have "fully realized" his right to cross-examine the witness.[4] *See, e.g.*, *U.S. v. Eskridge*, 164 F.3d 1042, 1044 (7th Cir. 1998). Then, they apply their own interpretation of the *Van Arsdall* factors.[5] For example, the Ninth Circuit excises the "importance of the witness' testimony" factor from its harm analysis. *U.S. v. Nguyen*, 565 F.3d 668, 675 (9th Cir. 2009); *U.S. v. Peterson*, 140 F.3d 819, 822-23 (9th Cir. 1998). Virginia does not consider the "extent of cross-examination" factor. *Lilly v. Commonwealth*, 258 Va. 548, 551 (1999). Neither does the Eleventh Circuit, replacing it with a "frequency of the error" factor. *Hull v. Sec'y, Fla. Dep't of Corr.*, 572 F. App'x 697, 701 (11th Cir. 2014) (unpublished opinion). In contrast, the Seventh Circuit and Washington state use the five *Van Arsdall* factors just as this Court originally announced them. *U.S. v. Eskridge*, 164 F.3d 1042, 1044 (7th Cir. 1998); *State v. Wilcoxon*, 185 Wn.2d 324, 335-36 (2016).

2. The *Harrington-Schneble* courts

On the other side of the split, courts analyze the harmfulness of *Bruton* error by looking to *Harrington v. California*, 395 U.S. 250 (1969), and *Schneble v. Florida*,

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[3] The cases in this section are meant to illustrate the split, not provide an exhaustive list of jurisdictions that may fall under this side of it.

[4] On the one hand, eliminating that assumption makes some sense for *Bruton* error because the codefendant-witness is completely unavailable. But on the other hand, doing so reduces the state's burden to show the error was harmless, a paradoxical approach for the especially "devastating" class of *Bruton* evidence.

[5] And not all courts apply the standard consistently.

405 U.S. 427 (1972). These cases established that a court should reverse for *Bruton* error unless "the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." *Schneble*, 405 U.S. at 430.

This approach is more vague but more favorable to defendants than the modified *Van Arsdall* framework. Like the *Van Arsdall* courts, the *Harrington-Schneble* courts differ in the details of the application, but the common ground among them is the courts all hold that the independent evidence must be "overwhelming." *See, e.g., U.S. v. Nash*, 482 F.3d 1209, 1219-20 (10th Cir. 2007) (ruling *Bruton* error would not have changed verdict based on fourteen pieces of overwhelming, untainted evidence); *U.S. v. Kirsh*, 54 F.3d 1062, 1068-69 (2nd Cir. 1995) (concluding independent evidence that defendant sent letters overwhelming); *Commonwealth v. Markman*, 591 Pa. 249, 278-80 (2007) (finding overwhelming evidence of guilt, including live testimony from eyewitnesses and other accomplice); *Looney v. State*, 803 So. 2d 656, 671-73 (Fla. 2001) (deciding error not "so overwhelming" to be harmless where accomplice's confession directly accused defendant of "directing" the murder).

3. California's tailored test

California offers a third approach. Unlike the prior two models for analyzing the harm of *Bruton* error, it accounts for the uniquely prejudicial quality of *Bruton* evidence. It is also simple and easy-to-apply: *Bruton* error is harmless if (1) the

properly admitted evidence is overwhelming, and (2) the incriminating statement "is merely cumulative of other *direct* evidence," such as eyewitness testimony. *People v. Burney*, 47 Cal. 4th 203, 232 (2009) (emphasis added).

The California rule is tailored to *Bruton* error, fashioned from the court's review of relevant Supreme Court and California cases. *People v. Anderson*, 43 Cal.3d 1104, 1128-29 (1987) (announcing rule after examination of *Bruton* error cases). This aspect stands out positively against the other approaches. After all, the first derives from a non-*Bruton* case (*Van Arsdall*), while the second relies on cases (*Harrington* and *Schneble*) that only generically describe the harmless error standard in the context of overwhelming evidence and that significantly predate this Court's development of *Bruton* prejudice in *Cruz* and *Gray*. *See Gray*, 523 U.S. at 192-94, and *Cruz v. New York*, 481 U.S. 186, 191-93 (1987).

B. Courts are split over *Bruton*'s application to separate trials.

The *Bruton* cases—the focus of which is the special prejudice attached to an accomplice's facially incriminating statement—all arose from joint trials. The admission of an unavailable accomplice's statement incriminating the accused, however, can just as easily occur in a separate trial (it is simply less likely). Do the protections of *Bruton* apply to defendants tried separately? State and circuit courts disagree.

This split over when *Bruton* applies is straightforward but significant. For if a defendant is tried separately from her accomplice and the prosecution introduces

the unavailable accomplice's statement naming the defendant as the guilty party, as happened below, then she would certainly want *Bruton*'s protections to apply.

At least the Fifth Circuit, Massachusetts, and California flatly refuse to apply *Bruton* where a defendant is tried alone. *See U.S. v. Gomez*, 276 F.3d 694, 698-99 (5th Cir. 2001); *Commonwealth v. Wilson*, 443 Mass. 122, 135 (2004); *People v. Combs*, 34 Cal. 4th 821, 840-41 (2004). There is no discernible basis for this other than the fact that the defendants in *Bruton* were tried jointly.

Conversely, the Second Circuit, Sixth Circuit, and Mississippi have applied *Bruton* to defendants tried separately.[6] *See Mason v. Scully*, 16 F.3d 38, 44 (2nd Cir. 1994) (relying on "*Bruton* principle" to hold prosecutor's use of codefendant's statement improper in a separate trial); *U.S. v. Gomez-Lemos*, 939 F.2d 326, 330-31 (6th Cir. 1991) (reversing conviction and remanding "for the several reasons given by the Supreme Court in *Lee*, *Bruton*, *Richardson*, and *Cruz*" in separate trial); *Clark v. State*, 891 So. 2d 136, 142 (Miss. 2004) (finding "a *Bruton* violation has occurred" in separate trial where defendant could not cross-examine accomplice). Whether looking at *Bruton*'s reliance on *Douglas*[7] or the entire line's clear focus on the type of evidence rather than the fact of a joint trial, this Court's jurisprudence supports the second approach. Thus, the Sixth Circuit characterized a Michigan court's reasoning "that any Confrontation Clause issues can be solved by separate trials"—where the defendant was tried separately and argued the prosecution

[6] This list is not meant to be exhaustive.
[7] *Douglas v. Ala.*, 380 U.S. 415 (1965) (holding Confrontation Clause violated in separate trial of defendant when prosecutor read co-defendant's statement).

violated *Bruton*—as "contrary to Supreme Court precedent" before affirming on other grounds. *Williams v. Jones*, 117 F. App'x 406, 414 (6th Cir. 2004) (unpublished).

II. The Questions Presented Are Important and Recurring.

A. How and when to apply *Bruton* are important questions.

Despite *Bruton*'s status as a landmark case, it remains misunderstood. This matters most to criminal defendants like Ruben Cazares who face the devastating prejudice of an incriminating statement by an accomplice. It is almost cliché to quote Professor Wigmore, who called cross-examination "the greatest legal engine ever invented for the discovery of truth," but on such sentiments our criminal justice system is based. And in cases like Ruben's that involve the most prejudicial testimony without opportunity for cross-examination, outcomes will turn on how this Court answers the questions presented by this petition.

Question one, which concerns the correct approach to measuring the harm of *Bruton* error, is important because precisely how prejudicial courts view *Bruton* evidence will determine whether they find its admission harmful. As described above, analyzing the harmfulness of *Bruton* error has splintered lower courts. The reasoning of the *Bruton* line seems to compel courts to treat *Bruton* evidence differently because it is uniquely prejudicial. Yet to Petitioner's knowledge, only California has adopted a test for harm that is tailored to reflect the special prejudice of *Bruton* evidence. The courts using any of the other assorted approaches

described above discount the prejudicial character of the evidence by ignoring it; this infringes the constitutional protections due to the defendant.

The second question, whether *Bruton*'s protections extend to separate trials, is equally important for co-defendants tried separately. After all, an accomplice's statement that incriminates the defendant probably damages him more when the jury targets him alone. Nevertheless, some jurisdictions refuse to recognize the special prejudice such a statement carries if not admitted at a joint trial. The refusal makes little sense. Plus, courts have divided over this issue, too.

Importantly, answers to both questions would settle splits that produce erratic results. Consistency of outcomes contributes legitimacy and integrity to our legal system. *See Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) (describing importance of *stare decisis*). The fractures over *Bruton* threaten the legitimacy of the criminal justice system by revealing that results turn on "the proclivities" of place rather than on "principles (that) are founded in the law." *Id.* This Court should not permit such pernicious divisions to persist.

B. *Bruton* (and potentially *Bruton*) issues recur frequently.

The questions presented are not only important; they also implicate countless cases. According to LexisAdvance, over ten thousand cases have cited *Bruton v. U.S.*[8] The same source shows over fifteen hundred cases have cited *Bruton* directly in the last five years.[9] The number of times the state accuses more than one individual for an offense is of course much higher, and each instance has the

[8] July 20, 2018 "citing decisions" of *Bruton v. U.S.*, 391 U.S. 123 (1968).
[9] July 20, 2018, dates July 19, 2013 to July 19, 2018, all jurisdictions "citing decisions."

potential to present a *Bruton* issue. The frequency magnifies the force of these issues.

III. This Case Presents an Excellent Vehicle to Resolve the *Bruton* Splits.

Ruben's case is an excellent vehicle for this Court to settle both *Bruton* splits. This is so for four reasons.

First, the State of Texas tried Ruben Cazares separately from his alleged accomplice, David. David, also facing murder charges, did not testify at Ruben's trial. These are essential facts for answering whether the protections of *Bruton* extend to separate trials.

Second, the statements at issue closely resemble classic *Bruton* evidence. The prosecution accused both David and Ruben Cazares of murdering Alma Reaux and her unborn child. *Bruton*, 391 U.S. at 123 (noting Bruton and Evans jointly accused). David's statements facially incriminated Ruben by naming him and describing his involvement, as well as David's own, in detail. *Id*. at 124. *See also Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (declining to extend *Bruton* beyond its application to the "facially incriminating confession"). The statements were unredacted when presented to the jury. *Bruton,* 391 U.S. at 136-37 (concluding limiting instruction inadequate to protect defendant from accomplice's statement "inculpating" him). And the trial court admitted the statements into evidence against Ruben Cazares. *Id*. at 127-28 (observing likelihood of prejudice even greater where statements actually entered evidence). The prominent distinctions—that the jury heard audio recordings in David's own voice as well as receiving

transcripts of the incriminating statements, and that there were no limiting instructions because it was a separate trial where only Ruben's guilt was before the jury—arguably make the evidence below much more harmful to Ruben than even the "devastating" statements this Court has reviewed in the past. Thus, rather than detracting from the evidence's suitability, the distinctions amplify it.

Third, the *Bruton* issue is well preserved. Ruben argued that the admission of David's statements violated his right to confront the witness at trial and on appeal. And at every point of the appeal (the direct appeal, motion for rehearing, and petition for discretionary review to Texas' highest court), Ruben has argued *Bruton* and its progeny compelled the court to find the confrontation error harmful. His arguments pertain directly to the questions this petition presents.

Fourth, this petition puts the issues cleanly before the Court. Texas already decided that David's statements were testimonial and that their admission at trial, therefore, violated Ruben's Sixth Amendment right to confrontation. The Texas court next held the error harmless by applying a modified *Van Arsdall* test (making no mention of any case in the *Bruton* line). As a result, this Court can accept the lower court's finding of confrontation error to neatly address the questions relating to harm. *See, e.g., Giles v. Cal.*, 554 U.S. 353, 377-81 (2008) (ALITO, J., and THOMAS, J., concurring separately, and BREYER, J., dissenting) (concurring and dissenting opinions emphasizing that question of whether confrontation clause should apply was not before the court).

IV. The Ruling Below Is Wrong.

Finally, the Texas court erred when it held the admission of David's statements that facially incriminated Ruben was harmless error. These statements, taken from audio recordings of three different meetings between David and the police agent Elizabeth Moncayo, provide the only direct evidence of Ruben's involvement in the crime,[10] paint Ruben as the most culpable actor, and contain facts found nowhere else in the record. They also undercut Ruben's trial strategy to attack the credibility of the State's two key (live) witnesses, Elizabeth and Monica Moncayo.[11] (RR3: 172.) In short, the statements devastated Ruben's case; and to be clear, without them Ruben had a great chance of winning his trial.

The opinion below makes two mistakes that are particularly relevant to this petition.

One, the court of appeals completely omitted *Bruton* from its analysis. Thus, it failed to recognize the special prejudice that David's incriminating statements caused Ruben. Again, this Court has repeatedly characterized *Bruton* evidence as especially prejudicial, and David's statements are classic *Bruton* evidence. Denying that quality to them denied Ruben the full protection of the Confrontation Clause.

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[10] David was the only eyewitness to put Ruben at the scene. The other eyewitnesses described a driver that did not look like Ruben. One of them even picked a different man from a lineup. No one present at the scene identified Ruben in court. Finally, the only two people that saw Alma killed that testified in court described a vehicle that did not match Ruben's.

[11] The credibility of the Moncayos was susceptible to attack through cross-examination. The evidence showed that both had gone with David to buy drugs from Alma before, that Monica helped David set up the deal that led to Alma's death, that Liz was a DEA informant and was a suspect in this case, that Liz admitted the news coverage described her vehicle as involved, and the only eyewitness to the incident who was outside and close to it—it happened right in front of her—described an SUV that matched Liz's.

Instead of looking to the *Bruton* line, the court below employed a modified version of the *Van Arsdall* factors to evaluate the harm of the error. Like other jurisdictions that follow *Van Arsdall*, the court discarded the first assumption that the cross-examination was "fully realized." It also removed the fourth factor – the extent of cross-examination otherwise permitted. Both alterations favor the prosecution. So even if the *Van Arsdall* test as articulated by this court is appropriate for *Bruton* errors, the test applied below impermissibly reduced its protections.

Second, the ruling below puts the case directly at odds with *Cruz*, where this Court described "interlocking" confessions as "enormously damaging." In *Cruz* as here, the defendant allegedly made his own incriminating statements that were consistent with the codefendant's statements. *Cruz*, 481 U.S at 192. In *Cruz* as here, the statements came in through a witness that the defendant hoped to show had a motive to fabricate them. *Id.* So here as in *Cruz*, the "interlocking" nature of David's statements devastated Ruben's defense that was anchored in attacking the credibility of the Moncayos, the only witnesses who claimed Ruben had incriminated himself to them.

Indeed, David's statements were especially damaging because they eliminated all doubts about the only questions that mattered at trial: *Who drove the vehicle?* and *What vehicle was used?* Tellingly, the court below noted that the only contradictory evidence at trial surrounded these two issues. Appendix at 27a-28a. But in finding the admission of David's statement harmless, the court

reasoned that Monica and Elizabeth Moncayo also testified that Ruben drove his wife's green trailblazer – information they claimed to have obtained from Ruben. The lower court's reasoning that the Moncayos' testimony rendered the error harmless is therefore irreconcilable with *Cruz*.

Of course, *Cruz* never actually performed a harm analysis; it found error and remanded. *Cruz*, 481 U.S. at 193-94. Yet the decision is all about the "enormously damaging" impact of an accomplice's interlocking statement introduced in violation of the Confrontation Clause. *Id*. at 189-93. The lower court's failure to acknowledge the "enormously damaging" effect of David's interlocking statements is error. *See id*.

V. This Court Should Address *Bruton* in Light of *Crawford.*

Cases in the *Bruton* line confuse lower courts and litigants alike because they read like they are more relevant to a harm analysis than to the question of whether the admission of the evidence violated the Confrontation Clause in the first place. In his *Parker* dissent, Justice Stevens highlighted the oddity in this aspect of the *Bruton* cases by calling it "remarkable" that the admission of the defendant's own statement not only cured the prejudice of the introduction of his codefendant's statement but, further, eliminated the constitutional violation itself.[12] *Parker v. Randolph*, 442 U.S. 62, 85 (1979) (STEVENS, J., dissenting). Frankly, this aspect

[12] *Cruz*'s repudiation of *Parker* underscores this point. *Cruz* framed the issue before it as "whether *Bruton* applies where the defendant's own confession, corroborating that of his codefendant, is introduced against him." *Cruz*, 481 U.S. at 188. It concluded that *Bruton* applies because such an interlocking confession is "enormously damaging," "significantly harms the defendant's case," and "will have a devastating effect." *Id*. at 192-93. The only material difference between *Cruz* and *Parker* is this Court evolved its view of how damaging the evidence was to the defendant.

appears stranger still after *Crawford*. *Crawford*, 541 US at 36. As the numbers above show, lower courts believe *Bruton* remains important, but its approach to finding error may be outdated. Mr. Cazares respectfully suggests that the *Bruton* cases endure as crucial guides to the analysis of harm following the erroneous introduction of *Bruton* evidence. But this Court should explain *Bruton*'s significance, or lack thereof, in the post-*Crawford* legal world.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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