

THE *BRUTON* RULE: JOINT TRIALS & CODEFENDANTS' CONFESSIONS

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I. The *Bruton* Rule.

- A. Generally.** In *Bruton v. United States*, 391 U.S. 123 (1968), the U.S. Supreme Court held that a defendant's confrontation clause rights are violated when a non-testifying codefendant's confession naming the defendant as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider the confession only against the defendant. See also *Richardson v. Marsh*, 481 U.S. 200, 201-02 (1987) (so stating the rule); *State v. Brewington*, 352 N.C. 489, 507 (2000) (same). The Court explained:

[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, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto other.

Bruton, 391 U.S. at 135-36 (citations omitted). Later cases modified the *Bruton* rule and held that the confrontation clause is not violated by the admission of a non-testifying codefendant's confession if:

- a proper limiting instruction is given and
- the confession is redacted to eliminate not only the defendant's name but also any reference to his or her existence.

Richardson, 481 U.S. at 208, 211 (confession was redacted to omit all reference to the defendant and omit any indication that anyone was involved in the crime other than the declarant and a third accomplice); see also *Gray v. Maryland*, 523

U.S. 185, 189-91 (1998) (noting that *Richardson* so limited *Bruton*); *Brewington*, 352 N.C. at 507-08 (so stating the *Richardson* rule). This is true even if other evidence admitted at trial links the defendant to the confession. *Richardson*, 481 U.S. 200 (admission of a confession was proper when it was redacted to omit all reference to the defendant but the defendant was nonetheless linked to the confession by evidence properly admitted against him at trial).

B. Implications of *Crawford* on the *Bruton* Rule.

- 1. Must Be Testimonial.** Like the *Bruton* rule, the *Crawford* rule is grounded in the confrontation clause. *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* and its progeny made clear that the confrontation clause protections are limited to testimonial statements. *Whorton v. Bockting*, 549 U.S. 406, 420 (2007) (confrontation clause has “no application” to non-testimonial statements). Thus, if the statement is non-testimonial, neither *Crawford* nor *Bruton* apply. Although there does not appear to be a North Carolina decision on point, ample case law supporting this proposition exists in other jurisdictions. See, e.g., *United States v. Figueroa-Cartagena*, 612 F.3d 69, 85 (1st Cir. 2010); *United States v. Dale*, 614 F.3d 942, 955 (8th Cir. 2010); *United States v. Johnson*, 581 F.3d 320, 325-26 (6th Cir. 2009).

The *Bruton* issue arises most typically with respect a co-defendant’s confession that was procured through police interrogation. Such a statement is clearly testimonial under *Crawford*. *Crawford*, 541 U.S. at 51. Because the *Bruton* rule is not limited to confessions procured by police interrogation, issues may arise as to whether a confession is testimonial and subject to the confrontation clause at all. For guidance on that issue, see *Crawford Primer* in this Bench Book.

- 2. No Exception for Reliable Hearsay.** A number of pre-*Crawford* North Carolina *Bruton* cases hold that if a *Bruton*-challenged confession falls within a hearsay exception and is reliable, *Bruton* does not bar admissibility. See, e.g., *State v. Porter*, 303 N.C. 680, 695-97 (1981). This law is clearly invalid after *Crawford*. *Crawford*, 541 U.S. 36 (overruling the old *Ohio v. Roberts* reliability test).
- 3. Scope of the Rules.** Finally it is worth noting a difference in the scope of the two rules. *Crawford* applies whenever the State seeks to admit a testimonial hearsay statement of a non-testifying declarant. *Bruton* however applies in a more limited context: whenever the State seeks to admit a testimonial hearsay confession of a non-testifying codefendant that directly incriminates the defendant.

- C. Must Incriminate.** The *Bruton* rule only applies if the statement incriminates the defendant. *State v. Brewington*, 352 N.C. 489, 511 (2000); *State v. Jones*, 280 N.C. 322, 340 (1972) (“[t]he Sine qua non for application of *Bruton* is that the party claiming incrimination without confrontation at least be incriminated”).

A statement that does not mention or refer to the defendant in any way does not incriminate the defendant. *State v. Boozer*, ___ N.C. App. ___, 707 S.E.2d 756, 766 (2011) (so holding); *State v. Taylor*, 344 N.C. 31, 48 (1996) (same); *State v. Howard*, 56 N.C. App. 41, 45 (1982) (statement did not reference the defendant; the portion of her statement suggesting that the goods were stolen did not suggest that they were stolen by the defendant). On the other hand, a statement that is facially inculpatory (e.g., “the defendant helped me commit the

crime”) clearly incriminates the defendant. *Richardson v. Marsh*, 481 U.S. 200, 208 (1987) (describing such a statement as “vivid[ly]” incriminating). The facially inculpatory statement need not refer to the defendant by proper name to be incriminatory; the U.S. Supreme Court has recognized that use of nicknames and specific descriptions (“red-haired, bearded, one-eyed man—with-a-limp”) fall within *Bruton*. *Gray v. Maryland*, 523 U.S. 185, 195 (1998).

The North Carolina courts have held that statements that implicate only by connection also can be covered by *Bruton*. For example, in *State v. Owens*, 75 N.C. App. 513, 515-16 (1985), four defendants—Owens, McClain, Tyler and Kelly—were charged with robbery of a store. In a joint trial of Owens, McClain and Tyler, only Tyler testified. The evidence indicated that the police apprehended the defendants shortly after the crime in a vehicle that contained guns, clothing worn by the robbers, and items taken from the store. Tyler testified she and McClain picked up Owens and Kelly along the roadway in exchange for a promise of gas money. Apparently to discredit this testimony, the State introduced McClain’s statement to an investigating detective that they picked up the two men because they had pointed guns at him and Tyler. When Owens raised a *Bruton* issue as to McClain’s statement, the State argued on appeal that it did not implicate Owens in the robbery. The court disagreed, stating: “The statement was incriminating to Owens because it placed Owens and Kelly on foot near the scene of the robbery, in possession of the guns which were later identified as similar to those used in the robbery, and so anxious to flee the area that they forced their way into the truck at gunpoint.” However, this analysis appears to be inconsistent with U.S. Supreme Court cases. *Richardson*, 481 U.S. at 208-11 (*Bruton* is limited to facially incriminating statements and does not apply to statements that are “incriminating by connection”); *Gray v. Maryland*, 523 U.S. 185, 195 (1998) (“*Richardson* placed outside the scope of *Bruton*’s rule those statements that incriminate inferentially”).

- D. Redaction.** As noted in Section I.A above, if incriminating statements by a non-testifying codefendant are sufficiently redacted and admitted with a limiting instruction, their admission does not violate the *Bruton* rule. To be sufficient, the redaction must eliminate the defendant’s name as well as all references to his or her existence. *Richardson*, 481 U.S. at 211.

Merely replacing the defendant’s name with a blank space or the word “deleted” does not constitute a sufficient redaction. *Gray* 523 U.S. at 192-97; *State v. Roope*, 130 N.C. App. 356, 366-67 (1998). Such an approach is deficient because even after the modification, the confession still refers directly to the existence of the non-confessing defendant. *Gray*, 523 U.S. at 192-97.

A redaction that references a vague unnamed accomplice may or may not be deficient, depending on the circumstances. *Compare* *State v. Gonzalez*, 311 N.C. 80, 94 (1984) (codefendant’s confession that did not name the defendant was insufficiently sanitized when the confession included the statement: “I told him I was with some guys, but that I didn’t rob anyone, they did”; because the confessor’s two codefendants were being tried jointly with him, and since only two persons were seen in the service station at the time of the robbery, the statement clearly implicated the non-confessing defendant), *with* *State v. Johnson*, 71 N.C. App. 90, 93-94 (1984) (in a trial involving three accomplices, a statement by one of the co-defendants was adequately sanitized when all explicit references to the defendant were removed but the statement

referred to the involvement of an unidentified male ("he"); the court noted that while "he" referred to a single person, three accomplices were on trial).

In order to sufficiently redact a confession, it may be necessary to remove entire sentences and re-type the confession. *State v. Brewington*, 352 N.C. 489, 512 (2000) (confession was redacted appropriately when it was modified by taking out complete sentences and groups of sentences that mentioned, connected, or referenced the defendant's existence, as redacted it retained a natural narrative flow, and it did not contain any contextual clues indicating that it was altered in any manner; the alternations were subtle and neither attract the jury's attention nor invite speculation). Sometimes rewriting may be necessary, such as to change plural pronouns to singular pronouns, *State v. Ferrell*, 46 N.C. App. 52, 55 (1980) (statements were properly sanitized by substituting singular pronouns and eliminating any reference to the defendants), to retain a natural flow, and to avoid the suggestion that the statement was modified, *Brewington*, 352 N.C. at 512.

- E. **Limiting Instruction.** As noted above in Section I.A. a properly sanitized statement may be admitted consistent with *Bruton* if a limiting instruction is given. If defendants X and Y are being tried jointly and the statement is one of defendant X, the jury should be instructed that it may consider the statement as evidence of X's guilt but may not consider it as evidence of Y's guilt.
- F. **When Adequate Redaction is Not Possible.** There may be situations in which redaction is not possible. This may occur, for example, when the required redaction would materially alter the content of the statement in a way that prejudices the State or the declarant codefendant. In situations where the statement cannot be adequately sanitized, the prosecution must choose between relinquishing the confession or trying the defendants separately. *State v. Brewington*, 352 N.C. 489, 508-09 (2000); G.S. 15A-927(c)(1) (codifying this principle).

II. Exceptions.

- A. **Statement Otherwise Admissible.** As noted in Section I.B.2 above, pre-*Crawford* cases had excepted from the *Bruton* rule statements that fell within a hearsay exception and were reliable. As discussed above, this exception is no longer valid after *Crawford*.
- B. **Declarant Takes the Stand.** If the declarant takes the stand and is cross-examined, a defendant has been afforded his or her right to confrontation and the *Bruton* rule does not apply. See, e.g., *State v. Evans*, 346 N.C. 221, 232 (1997); *State v. Workman*, 344 N.C. 482, 496 (1996).