

**220 EVIDENCE: LIMITED PURPOSE: STATEMENT OF CODEFENDANT**

## [INSTRUCTION WITHDRAWN]

**COMMENT**

Wis JI-Criminal 220 was originally published in 1962. It was withdrawn by the Committee in 1969. This withdrawal note was approved by the Committee in 1985 and was revised in August 1987. It was republished without change in Release No. 28—12/91. This revision added the paragraph discussing Gray v. Maryland and was approved by the Committee in June 1998.

Wis JI-Criminal 220, Evidence: Limited Purpose: Statement of Codefendant, was originally intended for use at the joint trial of codefendants where the statement of one defendant was admitted into evidence. Its purpose was to caution that the statement was to be considered only against the defendant who made it.

Wis JI-Criminal 220 was withdrawn in 1968 after the U.S. Supreme Court decided Bruton v. United States, 391 U.S. 123 (1968). Bruton dealt with the following situation: (1) there is a joint trial of two or more codefendants; (2) the out-of-court statement of one defendant is introduced against him; (3) that defendant does not take the stand at trial; (4) the statement implicates a codefendant; and (5) the statement is not directly admissible against the codefendant under the rules of evidence. Bruton was concerned about the "spillover effect" of admitting the statement: even though admitted only against the person who made it, the statement implicates the codefendant and is likely to have a serious prejudicial effect. Because the codefendant is unable to cross-examine the maker of the statement, his right to confrontation is violated. The use of a cautionary jury instruction was not enough to cure the error because a confession that incriminates an accomplice is so "inevitably suspect" and "devastating" that the ordinary assumption that the jury will be able to follow faithfully its instructions could not be applied. 391 U.S. 123, 136. Severance of defendants was identified as the required remedy because cautionary instructions alone could not overcome the prejudicial effect. Wis. Stat. § 971.12(3), was enacted in 1970 to codify the Bruton rule, requiring severance in any case where the district attorney "intends to use the statement of a codefendant which implicates another defendant in the crime charged."

Severance may not be required if all references to the other defendant are removed from the codefendant's statement. "[I]f references to codefendants are 'effectively' excised and the jury is properly instructed, no Bruton violation occurs." Cranmore v. State, 85 Wis.2d 722, 746, 271 N.W.2d 402 (Ct. App. 1978). Also see Pohl v. State, 96 Wis.2d 290, 291 N.W.2d 554 (1980). "Excising" also satisfies § 971.12(3) because the excised statement "no longer 'implicates another defendant' and therefore does not fall within the prohibition of the statute." Cranmore, 85 Wis.2d 722, 747-48.

Editing or "redacting" the codefendant's confession was approved by the United States Supreme Court in Richardson v. Marsh, 481 U.S. 200 (1987). The Court held 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." The decision reversed the holding of the U.S. Court of Appeals for the Sixth Circuit which had ruled the confession

inadmissible because the defendant was linked to it by other evidence. Thus, the Court rejected the "evidentiary linkage" or "contextual implication" approach to Bruton questions adopted by some courts.

Both Richardson and Cranmore emphasize the need for a limiting instruction when an edited or "redacted" confession of a nontestifying codefendant is admitted at a joint trial. See Wis JI-Criminal 221 for an instruction for the case where the confession does not explicitly name the defendant.

In Gray v. Maryland, 118 S. Ct. 1151 (1998), the court reviewed a redacted confession: wherever the defendant's name appeared in the codefendant's confession, a blank space or the word "deleted" was substituted. The court found that this was insufficient to satisfy the interests addressed by Bruton. Richardson v. Marsh was distinguished on the ground that the statement in that case was edited to remove all reference to anyone other than the codefendant who made the statement. The court concluded:

Unless the prosecutor wishes to hold separate trials or to use separate juries or to abandon use of the confession, he must redact the confession to reduce significantly or to eliminate the special prejudice that the Bruton Court found. Redactions that simply replace a name with an obvious blank space or a word such as "deleted" or a symbol or other similarly obvious indication of alteration, however, 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.

Two other situations present variations on the Bruton problem. One was a short-lived exception for "interlocking" confessions. The other is an exception for cases where the codefendant's confession, which is hearsay, is admitted for a nonhearsay purpose.

(1) Interlocking Confessions: Parker v. Randolph

In 1979, the U.S. Supreme Court decided Parker v. Randolph, 442 U.S. 62 (1979), holding (in a plurality decision) that "interlocking confessions" do not implicate the Bruton rule. When each defendant has confessed, the jury's exposure to the codefendant's confession cannot have the "devastating effect" that was the concern in Bruton. Proper limiting instructions are required: "A crucial assumption underlying that system [the jury system] is that juries will follow the instructions given them by the trial judge." 442 U.S. 62, 73.

Though Parker v. Randolph was only a plurality decision, it has been adopted by the Wisconsin Court of Appeals. See State v. Smith, 117 Wis.2d 399, 344 N.W.2d 711 (Ct. App. 1983); State v. Denny, 120 Wis.2d 614, 357 N.W.2d 12 (Ct. App. 1984). Denny also held that because interlocking confessions present an exception to Bruton, they present an exception to the § 971.12(3) which was intended to codify Bruton. 120 Wis.2d 614, 620.

In Cruz v. New York, 481 U.S. 186 (1987), the Court repudiated the plurality decision of Parker v. Randolph. Cruz held that the codefendant's confession is not admissible even if it is closely paralleled by (that is, "interlocks" with) a confession of the defendant. The Court rejected the reasoning of the Parker v. Randolph plurality that the "devastating effect" is absent in the interlocking confession case. Rather, Cruz says the devastating effect is even greater in such cases, requiring full application of the Bruton rule.

No published decision of a Wisconsin appellate court has revisited the interlocking confessions issue since Cruz was decided.

(2) Nonhearsay Purpose: Tennessee v. Street

In Tennessee v. Street, 471 U.S. 409 (1985), the U.S. Supreme Court held that the Bruton rule was not implicated by the introduction of an accomplice's confession for a nonhearsay purpose – rebutting the defendant's testimony that his own confession was coercively derived from the accomplice's statement. The statement was not introduced to prove what happened at the murder scene, so it raises no confrontation clause concerns.

The Court said the only similarity to Bruton is that the statement could have been misused by the jury. This danger can be effectively addressed by a limiting instruction directing the jury to consider the statement for the nonhearsay purpose only.

Wis JI-Criminal 220B, Law Note, discusses Tennessee v. Street.