

221 STATEMENT OF CODEFENDANT: STATEMENT DOES NOT MENTION DEFENDANT¹

Evidence has been received of a statement made by defendant (name). It may be used only in considering whether defendant (name) is guilty or not guilty. It must not be used or considered in any way against defendant (name other defendant).

COMMENT

Wis JI-Criminal 221 was approved by the Committee in August 1987 and republished without change in Release No. 28C12/91. The comment was updated in 1999. It was republished without substantive change in 2000.

1. This instruction is intended for the situation reviewed by the United States Supreme Court in Richardson v. Marsh, 481 U.S. 200 (1987). The case involved application of the so-called Bruton rule (see discussion in the Comment to JI-220) to a case where the following facts are present: (1) there is a joint trial of two or more codefendants; (2) the statement of one defendant is introduced against him; (3) that defendant does not take the stand at trial; and (4) the statement does not expressly mention the other defendant.

The Court in Richardson 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." (Emphasis added.) 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.

The Richardson decision appears to be consistent with Wisconsin law: "[I]f reference to codefendants are 'effectively' excised and the jury is properly instructed, no Bruton violation occurs." (Emphasis added.) Cranmore v. State, 85 Wis.2d 722, 746, 271 N.W.2d 402 (Ct. App. 1978).

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.

While edited (or "redacted" or "excised") confessions present an exception to Bruton's mandatory severance rule, trial courts retain the discretionary power under § 971.12(3) to order separate trials or "provide whatever other relief justice requires" if "it appears that a defendant or the state is prejudiced by a joinder of crimes or defendants." Where a joint trial "would be unduly prejudicial . . . the interests of administrative efficiency must yield to the mandates of due process." Haldane v. State, 85 Wis.2d 182, 189, 270 N.W.2d 75 (1978). Two such situations are cases involving antagonistic defenses, Jung v. State, 32 Wis.2d 541, 145 N.W.2d 684 (1966), Lampkins v. State, 51 Wis.2d 564, 187 N.W.2d 164 (1971), or where an entire line of evidence relevant to the liability of only one defendant may be treated as evidence against all the defendants by the trier of fact simply because the defendants are tried jointly. State v. Nutley, 24 Wis.2d 527, 129 N.W.2d 155 (1964).

In a joint trial where the statement of one defendant does not explicitly refer to a codefendant, the trial court retains its usual discretionary power to disallow the statement if their probative value is outweighed by the danger of unfair prejudice. § 904.03, Wis. Rules of Evidence.