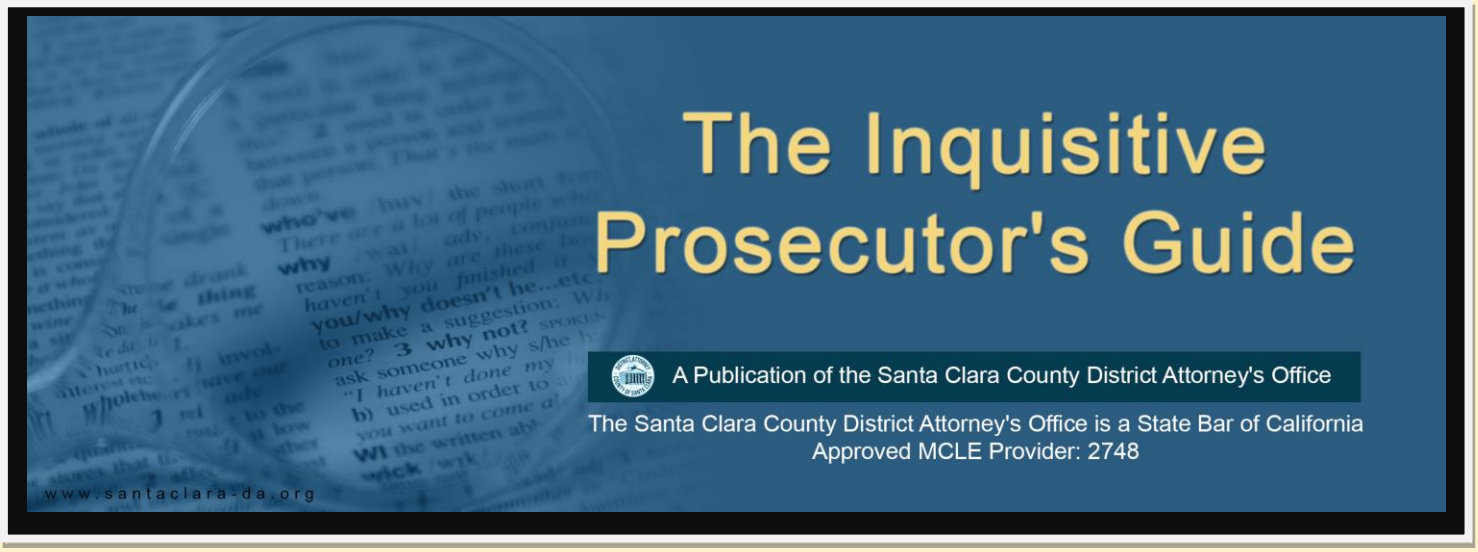


**Date: October 7, 2016**

2016-IPG#23 (TOP 30 QUESTIONS ON THE *ARANDA-BRUTON* RULE)

If you have a case with multiple defendants, one or more of whom have given statements implicating one or more of the codefendants, it's nice to know about the ***Aranda-Bruton*** rule. This edition of IPG does its darndest to answer the most commonly asked questions in this tricky area of the law.

**This edition of IPG is accompanied by a podcast providing 60 minutes of general self-study credit. The podcast features Santa Clara County DDA David Boyd and may be accessed at: https://www.youtube.com/channel/UC5aiUCbAzLfrlQ8AdCF3GCA**

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# *Aranda-Bruton* Cheat Sheet

Codefendant B makes a motion to exclude the statement of codefendant A from their joint trial and/or sever the trials if the statement is not excluded. Should the motion be granted? To answer, you need to consider six questions

***One, is the statement of defendant A hearsay as to defendant B?***

If the statement is not offered for its truth (i.e., it is nonhearsay), it is admissible in a joint trial against codefendant B over both hearsay and confrontation clause objections and generally without any redaction.

***Two, if the statement of defendant A is hearsay as to defendant B, does it fall within a hearsay exception?***

If the statement falls under a state hearsay exception, it is admissible in a joint trial against codefendant B over a hearsay objection without redaction but it may or may not be admissible over a Confrontation Clause objection.

***Three, if the statement of defendant A is hearsay (whether or not it falls within a hearsay exception) as to defendant B, is it testimonial hearsay?***

If the statement is not testimonial hearsay, it is admissible against codefendant B over a Confrontation Clause objection. If the statement is testimonial hearsay and it does not fall under one of the "exceptions" to the requirement of confrontation (e.g., the forfeiture by wrongdoing doctrine), it is not admissible over a Confrontation Clause objection unless proper redaction occurs.

***Four, if the statement of defendant A is inadmissible testimonial hearsay against codefendant B (whether or not it falls within a hearsay exception), can the statement be redacted?***

If the statement cannot be effectively redacted, the statement must be excluded, a motion for severance must be granted, or dual juries must be empaneled. If the statement can be effectively redacted, the statement may be admitted in the joint trial subject to an instruction that the redacted statement may not be considered in evaluating codefendant B's guilt.

***Five, if the statement of defendant A is inadmissible testimonial hearsay against codefendant B, is it facially and powerfully incriminating?***

If the statement of defendant A does not mention or refer to the existence of defendant B in any way, the statement need not be redacted and is admissible in a joint trial subject to an instruction that the redacted statement may not be considered in evaluating codefendant B's guilt. If the statement of defendant A is facially and powerfully incriminating, some redaction must occur to avoid exclusion of the statement or separate trials. Redaction will not be sufficient if the statement (powerfully) incriminates defendant B and defendant B is directly identified or the jury can immediately figure out (without reference to evidence other than the statement) that the person referred to is defendant B. Redaction will be sufficient if it eliminates any reference to the identity *and existence* of defendant B. Redaction *may* be sufficient if it eliminates any reference to the identity of defendant B and the jury cannot immediately determine that any reference in defendant A's statement to the existence of another participant in the crime refers to defendant B – regardless of whether the jury can figure out the reference to another participant in the crime refers to the defendant by considering evidence other than the statement. How directly and forcefully the statement incriminates defendant B plays a role in determining whether redaction is sufficient.

***Six, is the probative value of the statement substantially outweighed by the risk of prejudice?***

Defendant B may always make a motion to exclude the statement of defendant A in a joint trial pursuant to Evidence Code section 352, regardless of whether the statement is hearsay and/or is testimonial. However, so long as the statement of defendant A is probative and relevant to defendant A's guilt (and because of the strong interest in joint trials) the motion for exclusion should ordinarily be denied in favor of admission of the statement subject to a limiting instruction if the statement is: (i) non-hearsay; (ii) nontestimonial hearsay; or (iii) non-incriminating–either before or after redaction.

## 1. What is the *Aranda-Bruton* rule?

The ***Aranda-Bruton*** rule, in its current form, is the following: **A defendant's Sixth Amendment right to confront and cross-examine witnesses is violated when the testimonial statement of a codefendant that facially and (but possibly "or") powerfully implicates the defendant is admitted in their joint trial regardless of whether the jury is instructed it can only use and consider the codefendant's statement against the codefendant**. (**See *Bruton* v. *United States*** (1968) 391 U.S. 123; ***People* v. *Cortez*** (2016) 63 Cal.4th 101, 129; ***People* v. *Aranda*** (1965) 63 Cal.2d 518; this IPG memo, section 14 at pp. 50-53.)

Up until 1965, "California had followed the rule that in a joint trial of two defendants, a confession by one that implicated both was admissible in evidence, provided only that the trial court instructed the jury to disregard the confession when determining the guilt or innocence of the nondeclarant." (***People* v. *Fletcher*** (1996) 13 Cal.4th 451, 460 citing to ***People* v. *Ketchel*** (1963) 59 Cal.2d 503, 532–534.) That rule was discarded by the California Supreme Court in ***People* v. *Aranda*** (1965) 63 Cal.2d 518.

In ***People* v. *Aranda*** (1965) 63 Cal.2d 518, two defendants (Martinez and Aranda) committed a robbery. Martinez confessed that he and defendant Aranda committed the robbery. Martinez's confession was admitted in their joint trial, but the jury was instructed the jury on several occasions that the confession was to be considered as evidence only against Martinez not Aranda. (***Id***. at pp. 522-524.) The California Supreme Court reversed Martinez's conviction because it had not been shown Martinez waived his right to counsel or silence. Defendant Aranda argued that the error in admitting Martinez's confession into evidence was *also* prejudicial to him. The Attorney General responded that the error did not prejudice Aranda because the trial court had instructed the jury the confession was to be considered as evidence only against Martinez. (***Id***. at pp. 523-524.) The California Supreme Court held that "the *erroneous* admission into evidence of a confession implicating both defendants is not necessarily cured by an instruction that it is to be considered only against the declarant" and reversed defendant Aranda's conviction because it was "reasonably probable that a result more favorable to Aranda would have been reached had Martinez's confession been excluded." (***Id***. at pp. 526-527, emphasis added by IPG.) However, because the case would have to be retried (and because it was possible that Martinez' confession might be found to be admissible in the retrial), the California Supreme Court addressed whether even a *lawful* confession could be used in their joint trial or whether severance would be required. (***Id***. at p. 527.) This is what they said:

> "When the prosecution proposes to introduce into evidence an extrajudicial statement of one defendant that implicates a codefendant, the trial court must adopt one of the following procedures: (1) ***It can permit a joint trial if all parts of the extrajudicial statements implicating any codefendants can be and are effectively deleted without prejudice to the declarant***. By effective deletions, we mean not only direct and indirect identifications of codefendants but any statements that could be employed against nondeclarant codefendants once their identity is otherwise established. (2) It can grant a severance of trials if the prosecution insists that it must use the extrajudicial statements and it appears that effective deletions cannot be made. (3) If the prosecution

has successfully resisted a motion for severance and thereafter offers an extrajudicial statement implicating a codefendant, the trial court must exclude it if effective deletions are not possible." (***Id***. at pp. 530-531, emphasis added by IPG.)

*__Editor's note__: The ***Aranda*** court declined to fully set out the "rules governing the cases in which deletion would be a permissible alternative" but said "[u]se of the procedure would depend on the evidence linking the defendants together before and after the crime and on the actual statements made by the declarant defendant." (***Id***. at p. 530, fn. 10 [and finding deletion would have been effective in the case before it because it would eliminate mention of Aranda (albeit not to the fact two people were involved) without prejudicing Martinez].)

Three years after ***Aranda*** was decided, the United States Supreme Court came up with a similar but not identical conclusion in ***Bruton* v. *United States*** (1968) 391 U.S. 123.

In ***Bruton***, two defendants were tried in a single trial. One of the defendants had given a confession to the police that implicated his co-defendant. At trial, the court admitted the confession against the confessing defendant but instructed the jury that they could only consider the statement against that defendant not the codefendant. (***Id***. at p. 124.) The ***Bruton*** court held the Sixth Amendment right of the non-confessing defendant to confront and cross-examine witnesses was violated when the statement of the confessing defendant implicating the non-confessing defendant was admitted at their joint trial – even though the jury was instructed they could only not use and consider the confessing defendant's statement against the non-confessing defendant. (***Id***. at p. 137.) The ***Bruton*** court recognized that in many cases "the jury can and will follow the trial judge's instructions to disregard" certain information but that "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" then "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." (***Id***. at p. 135-136.)

The ***Bruton*** rule was later limited in its application in ***Richardson* v. *Marsh*** (1987) 481 U.S. 200.

In ***Richardson***, the defendant and a co-defendant (Williams) were charged with murder, robbery, and assault. At their joint trial, Williams' confession was admitted over defendant's objection. In the confession, Williams described a conversation he had with a third accomplice (Martin) as they drove to the victim's home. During that conversation, according to Williams, Martin said that he would have to kill the victims after the robbery. The defendant was in the car at the time but William's confession had been redacted to omit all reference to defendant and to omit any indication that anyone other than Williams and a third accomplice (Martin) participated in the crime. At the time the confession was admitted, the jury was admonished not to use it in any way against the defendant. Williams did not testify. The defendant, however, did testify and her testimony indicated that she had been in the car with Williams and Martin but she said she had not heard their conversation and was not aware Williams and Martin were going to rob the victim. (***Id***. at pp. 203-205.) In closing argument, "the prosecutor admonished the jury not to use Williams' confession against [the defendant]." (***Id***. at p. 205.) "Later in his argument, however,

he linked [the defendant] to the portion of Williams' confession describing his conversation with the third accomplice in the car. (**Ibid**.)

In the High Court, the defendant claimed that the admission of William's confession violated the ***Bruton*** rule because Williams' confession discussing the conversation in the car was the only direct evidence that defendant knew (before entering the victim's house) that the victim would be robbed and killed and that confession, *coupled with* defendant's own testimony placing herself in the car, inculpated the defendant. That is, the defendant claimed that in deciding whether the statement of a codefendant admitted in a joint trial was inculpatory for purposes of the ***Bruton*** rule, the court "must assess the confession's 'inculpatory value' by examining not only the face of the confession, but also all of the evidence introduced at trial." (***Richardson*** at pp. 205-206.)

The High Court described the issue before it as whether the ***Bruton*** rule (i.e., "that a defendant is deprived of his rights under the Confrontation Clause when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant") is applicable "when the codefendant's confession is redacted to omit any reference to the defendant, but the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial." (***Id***. at pp. 201-202.)

The High Court in ***Richardson*** characterized ***Bruton*** as creating a narrow exception to the general rule that jurors can be expected to follow limiting instruction. The court distinguished ***Bruton*** on the ground that, unlike in the case before it, the codefendant's confession in ***Bruton*** "expressly implicat[ed]" the defendant as his accomplice and thus, there was "not the slightest doubt" in ***Bruton*** that the confession would prove "powerfully incriminating." (***Richardson*** at p. 208.) In contrast, in ***Richardson***, "the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony)." (**Ibid**.) The ***Richardson*** court observed that "while it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so that is the foundation of ***Bruton***'s exception to the general rule." (***Id***. at p. 208.) Accordingly, the ***Richardson*** court declined to extend the ***Bruton*** rule beyond facially incriminating confessions and 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 his or her existence." (***Id***. at p. 211.)

The ***Richardson*** opinion left open the question of whether a limiting instruction would suffice if the incriminating statement was redacted simply by replacing the defendant's name with a symbol or neutral pronoun. (***Id***. at p. 211, fn. 5.) The question left open in ***Richardson*** was answered 11 years later in ***Gray v. Maryland*** (1998) 523 U.S. 185.

In ***Gray***, the defendant and a codefendant (Bell) were charged with murder. Bell gave a confession to the police in which he said that he (Bell), the defendant, and third person who was not charged (Vanlandingham) had participated in the beating that resulted in the victim's death. (***Gray*** at p. 188.) At the trial, codefendant Bell's confession was introduced into evidence through the testimony of a police detective, who read the confession into evidence but said the word "deleted" or "deletion" whenever defendant's name or Vanlandingham's name appeared. Immediately after the police detective read the redacted confession to the jury, the prosecutor asked, "after he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?" The officer responded, "That's correct." (***Id***. at pp 188-189.) The prosecution "also introduced into evidence a written copy of the confession with those two names omitted, leaving in their place blank white spaces separated by commas." The prosecution produced other witnesses, who said that six persons (including codefendant Bell, defendant Gray, and Vanlandingham) participated in the beating. Codefendant Bell did not testify. The jury was instructed it could not use codefendant Bell's statement against the defendant. (***Id***. at p. 189.)

The ***Gray*** court took up the case to decide whether redacting the codefendant's confession by substituting a blank space or the word "deleted" for the defendant's name in the confession was sufficient to preclude application of the ***Bruton***'s protective rule. (***Id***. at p. 188.) The ***Gray*** court held a "redaction that replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word "deleted," or a similar symbol, still falls within ***Bruton***'s protective rule." (***Id***. at p. 192.) And thus a prosecutor must do more than "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" if the prosecutor wants to use the statement in a joint trial. The prosecutor "must redact the confession to reduce significantly or to eliminate the special prejudice that the ***Bruton*** Court found." (**Ibid**; **see also *Greene* v. *Fisher*** (2011) 132 S.Ct. 38, 43.)

The ***Gray*** Court noted that it had earlier held in ***Richardson* v. *Marsh*** (1987) 481 U.S. 200 that statements which implicate inferentially are outside the scope of the ***Bruton*** rule. And the ***Gray*** Court recognized that, technically, a jury must use inference to connect the defendant to a co-defendant's statement where the only editing is the deletion of the defendant's name and replacement with a symbol. However, it went on to conclude that it is not the simple fact that inference is required that takes a statement outside the scope of ***Bruton***. Rather, whether ***Bruton*** is violated depends in significant part upon ***the kind of***, not the simple fact of, inference. (***Gray*** at p. 196.) The ***Gray*** court also distinguished the case of ***Richardson v. Marsh*** on the ground that, unlike in ***Richardson***, the confession in ***Gray*** referred "directly to the 'existence' of the nonconfessing defendant." (***Ibid***; **see also *People* v. *Ardoin*** (2011) 196 Cal.App.4th 102, 137 [post-***Gray*** decision holding a "***Bruton*** problem exists only where a co-defendant's statement on its face implicates the defendant."].)

**Editor's note:** ***Gray*** did not overrule ***Richardson***'s interpretation of the ***Bruton*** rule (i.e., that the ***Bruton*** rule "extends only to confessions that are not only 'powerfully incriminating' but also 'facially incriminating' of the nondeclarant" – **see *People v. Fletcher*** (1996) 13 Cal.4th 451, 455-456). What it did was essentially expand the definition of "facially incriminating" to include statements where the defendant was not identified by name but is clearly *identifiable* on the face of the statement.

The current version of the ***Bruton*** rule also now requires that in order for the rule to apply, the statement of the codefendant must be testimonial hearsay. This more recent gloss is a result of the decision in ***Crawford* v. *Washington*** (2004) 541 U.S. 36, which changed the analysis of when the Confrontation Clause applies to exclude hearsay. (**See *People* v. *Cortez*** (2016) 63 Cal.4th 101, 129.) The modification to the ***Bruton*** rule stemming from the High Court decision in ***Crawford*** is discussed in depth in this IPG memo, section 4 at pp. 15- 25.

## 2. Why is the *Aranda-Bruton* rule really just the *Bruton* rule?

The rule limiting the use, in a joint trial, of a co-defendant's statement that incriminates the other defendant, to this day, is commonly known as the ***Aranda-Bruton*** rule. (**See e.g.**, ***People* v. *Hajek*** (2014) 58 Cal.4th 1144, 1173, fn. 5; ***People* v. *Jennings*** (2010) 50 Cal.4th 616, 652.) However, with the passage of Proposition 8 in 1982, the ***Aranda-Bruton*** rule is more appropriately entitled simply the ***Bruton*** rule. This is why:

At the time ***Aranda*** was decided, the governing decision of the United States Supreme Court on the admissibility of confessions in a joint trial was ***Delli Paoli* v. *United States*** (1957) 352 U.S. 232 which "had approved the rule in federal courts that a joint trial was permissible even though one defendant's extrajudicial confession implicating another defendant would be introduced into evidence." (***People* v. *Boyd*** (1990) 222 Cal.App.3d 541, 560.) Thus, "the ***Aranda*** court could not base its holding on federal constitutional principles." (***People* v. *Boyd*** (1990) 222 Cal.App.3d 541, 560.) Rather, the ***Aranda*** court held the principles it announced regarding the admissibility of codefendant statements in a joint trial were not constitutionally compelled but were "judicially declared rules of practice." (***People* v. *Aranda*** (1965) 63 Cal.2d 518, 530.)

In 1982, the electorate changed the California Constitution by passing Proposition 8. That proposition enacted, among other things, a new constitutional provision encompassed in section 28 of article I that "was intended to preclude ... reliance on the state Constitution to create new exclusionary rules rejected by applicable decisions of the United States Supreme Court." (***People* v. *Fletcher*** (1996) 13 Cal.4th 451, 465.) Accordingly, and following several appellate court decisions, the California Supreme Court in ***People* v. *Fletcher*** (1996) 13 Cal.4th 451 held: "To the extent that our decision in ***People v. Aranda***, supra, 63 Cal.2d 518, constitutes a rule governing the admissibility of evidence, and to the extent this rule of evidence requires the exclusion of relevant evidence that need not be excluded under federal constitutional law, it was abrogated in 1982 by the 'truth-in-evidence' provision of Proposition 8 (Cal.

Const., art. I, § 28, subd. (d)).)" (***Fletcher*** at p. 465; **accord *People* v. *Capistrano*** (2014) 59 Cal.4th 830, 868, fn. 10; ***People* v. *Arceo*** (2011) 195 Cal.App.4th 556, 572; ***People* v. *Hampton*** (1999) 73 Cal.App.4th 710, 718; ***People* v. *Fuentes*** (1998) 61 Cal.App.4th 956, 962, fn. 5; ***People* v. *Greenberger*** (1997) 58 Cal.App.4th 298, 331, fn. 12; ***In re Jose M.*** (1994) 21 Cal.App.4th 1470, 1479; ***People* v. *Walkkein*** (1993) 14 Cal.App.4th 1401, 1409; ***People* v. *Boyd*** (1990) 222 Cal.App.3d 541, 558-563; **cf., *People* v. *Mitcham*** (1992) 1 Cal.4th 1027, 1045 [to the extent the rules in ***Aranda do*** correspond to the holding in ***Bruton***, they have a constitutional basis and have not been abrogated by Prop 8]; ***People* v. *Song*** (2004) 124 Cal.App.4th 973, 981 [same].)

"[S]ince the adoption by the voters in June 1982 of Proposition 8, with its preclusion of state constitutional exclusionary rules broader than those mandated by the federal Constitution (see Cal. Const., art. I, § 28, subd. (d)), the ***Aranda*** rule is coextensive with that of ***Bruton***." (***People* v. *Coffman*** (2004) 34 Cal.4th 1, 43, underlining added by IPG.) This "overruling" of ***Aranda*** to the extent it differs from the holding in ***Bruton*** (and later High Court cases modifying or clarifying ***Bruton***) has three practical ramifications.

First, ***Aranda*** barred the use of an unredacted statement of one codefendant which incriminated the other co-defendant in a joint trial *regardless of whether the codefendants are being tried jointly*. (**See *People* v. *Brown*** (1978) 79 Cal.App.3d 649, 657; ***People* v. *Atkins*** (1975) 53 Cal.App.3d 348, 356-357; ***People* v. *Matola*** (1968) 259 Cal.App.2d 686, 692–693.) The ***Bruton*** rule only applies in joint trials. (**See** this IPG memo, section 7 at p. 36.)

Second, the holding in ***Aranda*** required the exclusion of the codefendant's statement even if the codefendant took the stand. (***Id.*** at p. 524.) Whereas the High Court does not require exclusion of the codefendant's statement if the co-defendant is available to be cross-examined. (**See** this IPG memo, section 8 at p. 36.)

Third, the holding in ***Aranda*** excludes the statements that are not necessarily powerfully incriminating on their face (**see *Aranda*** at p. 530 [requiring deletion of "not only direct and indirect identifications of codefendants but any statements that could be employed against nondeclarant codefendants once their identity is otherwise established"]) while "[t]he class of inferentially incriminating statements under ***Bruton*** is limited to 'obvious[ ]' ones, 'inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial.' (***Gray* v. *Maryland*** (1998) 523 U.S. 185, 196)." (***People* v. *Montes*** (2014) 58 Cal.4th 809, 867.)

## 3. What is the rationale behind the *Bruton* rule?

The principle that was adopted by the ***Bruton*** court (i.e., that admission of a codefendant's statement incriminating a codefendant in a joint trial will violate the Sixth Amendment rights of the other codefendant) rested on four factual predicates, one assumption, and one fear.

The first factual predicate was that the **statement was *inadmissible* hearsay as to the defendant who did not make the statement**. In ***Bruton***, the Court stated "We ***emphasize*** that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence." (***Id***. at p. 128, fn. 3, emphasis added by IPG.) The Court explicitly left open the question of how they would rule if the statement made by the confessing defendant fell within a hearsay exception: "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." (**Ibid**; **see *People* v. *Greenberger*** (1997) 58 Cal.App.4th 298, 332 [The ***Bruton*** rule "presumes the statement is an admissible admission by the declarant and inadmissible hearsay against the codefendant."].)

The second factual predicate was that the **statement expressly and powerfully incriminated the other defendant**. The ***Bruton*** court indicated the risk of the jury using the codefendant's statement against the defendant was compounded by the fact the unreliable "***powerfully incriminating*** extrajudicial statements of a codefendant" would be presented to the jury without the codefendant having the ability to test the credibility of the statement. (***Id***. at pp. 135-136 [emphasis added by IPG].) The ***Bruton*** court suggested at p. 134, fn. 10 that there would be no violation if the confession was redacted to remove reference to the non-confessing codefendant. (**See also *Richardson* v. *Marsh*** (1987) 481 U.S. 200, 207-208 [noting that "[i]n ***Bruton***, the codefendant's confession 'expressly implicat[ed]' the defendant as his accomplice" and "[t]hus, at the time that confession was introduced there was not the slightest doubt that it would prove 'powerfully incriminating'"].)

The third factual predicate was that **the statement was being offered in a joint trial of the codefendants**. The ***Bruton*** court was concerned about the jury being unable to ignore the confession where the defendant implicated in the confession "stands accused side-by-side with the defendant[.]" (***Id***. at p. 136; **see** this IPG memo, section 7 at p. 36.)

The fourth factual predicate is that the **incriminating aspect of the statement was inherently suspect** because it was the confession of a codefendant. The ***Bruton*** court noted that "[n]ot 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 others." (***Id***. at p. 136, emphasis added; **see also *Lee* v. *Illinois*** (1986) 476 U.S. 530, 542 ["We based our decision in ***Bruton*** on the fact that a confession that incriminates an accomplice is so "inevitably suspect" and "devastating" that the ordinarily sound assumption that a jury will be able to follow faithfully its instructions could not be applied."].)

The **assumption** drawn by the ***Bruton*** court was that where these factual predicates exist, **the jury is incapable of following a limiting instruction** that told them they can only consider evidence of a defendant's admission against the defendant who made the admission. The idea was that the confession

of one defendant that implicates a co-defendant "who stands accused side-by-side with the defendant" is so "powerfully incriminating" (***id***. at pp. 135-136), that the jury will ignore the instruction to only consider the statement as to the confessing defendant; [and] the effect of the admission is the same as if there had been no instruction at all" (***id***. at p. 137). That is, the admission of a confession of a non-testifying codefendant in a joint trial is too prejudicial to allow it come before the jury. (***Id***. at pp. 130-132 [and suggesting, at p. 130 that it "may also be a denial of *due process* to rely on a jury's presumed ability to disregard a codefendant's confession implicating another defendant when it is determining that defendant's guilt or innocence," emphasis added by IPG].)

Based on this assumption (which is based on the presence of the factual predicates) there was **a fear that if the jury ignored the instruction, the defendant's Sixth Amendment rights would be violated**. It was the threat to the violation of defendant's Sixth Amendment rights if the jury ignored the instruction that laid at the heart of the ***Bruton*** rule. (**See *Bruton*** at p. 137 ["Here the introduction of Evans' confession posed a substantial threat to petitioner's right to confront the witnesses against him, and this is a hazard we cannot ignore."].) And it was an attempt to pre-empt that threat which prompted the High Court in ***Bruton*** to hold the introduction of the codefendant's confession violated the defendant's "right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." (***Id***. at p. 126.)

In the absence of one or more of the necessary factual predicates, the assumption cannot be drawn. (**See e.g.**, ***People* v. *Hajek*** (2014) 58 Cal.4th 1144, 1176-1177 [noting the narrow exception to the general rule that juries are presumed to follow limiting instructions created in ***Bruton*** "should not apply to confessions that are not incriminating on their face, but become so only when linked with other evidence introduced at trial . . . because, '[w]here the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence.'"]; **accord *People* v. *Homick*** (2012) 55 Cal.4th 816, 838.)

However, even when the ***Bruton*** rule does not apply, some of those factual predicates considered by the ***Bruton*** court remain relevant in deciding whether a limiting instruction would be ineffectual in ensuring the jury does not consider the admission of an incriminating statement of one defendant against the other defendant under an Evidence Code section 352 analysis. (**See** this IPG memo, section 4-b-i at p. 21.)

**Editor's note (Part I of II):** It is important to keep in mind going forward that, at the time ***Bruton*** was decided, the High Court was operating under a *pre*-***Ohio* v. *Roberts*** (1980) 448 U.S. 56 interpretation of how the Confrontation Clause worked. In other words, the interpretation of the Confrontation Clause as it existed in ***Bruton*** was different than the interpretation of the Confrontation Clause as it existed immediately before ***Crawford v. Washington*** (2004) 541 U.S. 36 ***or*** as it currently exists. Interestingly, the interpretation of what the Confrontation Clause required in ***Bruton*** has aspects that foreshadowed the interpretation of the Confrontation Clause as outlined in both ***Roberts*** and ***Crawford***.

**Editor's note (part II of II):** ***Bruton*** foreshadowed ***Roberts*** in two aspects. First, the High Court left open the question of whether the Confrontation Clause would require exclusion of a statement of a co-defendant that fell within a hearsay exception. (***Bruton***, at p. 128, fn. 3.) Second, there is language in the ***Bruton*** opinion that the Confrontation Clause exists to prevent unreliable evidence from being admitted absent cross-examination. Specifically, in discussing why a statement of one co-defendant was barred from admission at a joint trial, notwithstanding a limiting instruction, the High Court pointed out the credibility of such statements is "inevitably suspect" and stated: "The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed." (***Bruton*** at p. 136.)

In other words, ***Bruton*** suggested that the Confrontation Clause does not apply to bar statements falling within hearsay exceptions or reliable hearsay - a position later adopted in modified form by the Court in ***Ohio v. Roberts*** which held the Confrontation Clause does not bar the admission of statements that fall within some hearsay exceptions (i.e., firmly rooted hearsay exceptions) or have particularized guarantees of trustworthiness. (***Roberts***, at p. 66.)

At the same time, ***Bruton*** also used language placing indicating the primary purpose of the Confrontation Clause is to ensure cross-examination. The ***Bruton*** court quoted an earlier decision for the premise that "a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him." (***Id***. at p. 126.) Later, in discussing why the admission of the confession of the co-defendant posed a substantial threat to the other defendant's right to confront the witnesses against him, notwithstanding limiting instructions, the ***Bruton*** court stated, "in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination." (***Bruton*** at p. 137.) Indeed, one of the statements in ***Bruton*** that arguably foreshadowed ***Roberts*** (i.e., "The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed") also foreshadowed the approach taken in ***Crawford***.

The above statements foreshadowed the later language of ***Crawford*** that "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." (***Crawford***, at p. 61.)

On the other hand, unlike ***Crawford*** and its progeny, the ***Bruton*** court did not discuss at all the historical setting of the Confrontation Clause or whether the Confrontation Clause was designed only to bar statements that were made to serve as substitutes for in-court testimony, i.e., the ***Bruton*** court did not draw a distinction between testimonial or nontestimonial hearsay. (**See** this IPG memo, section 4 at pp. 15-16.)

## 4. How has the *Crawford* line of cases impacted the *Bruton* rule?

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." (U.S. Const., 6th Amend.)

Before the decision in ***Crawford* v. *Washington*** (2004) 541 U.S. 36, the United States Supreme Court had construed the Sixth Amendment right of confrontation as allowing the admission of hearsay so long as it was reliable hearsay. (**See *Ohio v. Roberts*** (1980) 448 U.S. 56 [and cases following it].) Under the ***Roberts*** approach, hearsay was considered reliable if it fell "within a 'firmly rooted hearsay exception' or had 'particularized guarantees of trustworthiness.'" (***People* v. *Dungo*** (2012) 55 Cal.4th 608, 616; ***accord People* v. *Sanchez*** (2016) 63 Cal.4th 665, 680.)

This understanding of what type of hearsay could permissibly be introduced at trial without violating the Sixth Amendment was abandoned in ***Crawford* v. *Washington*** (2004) 541 U.S. 36. As recently pointed out by the California Supreme Court in ***People* v. *Sanchez*** (2016) 63 Cal.4th 665, 680:

> "***Crawford*** clarified that a mere showing of hearsay reliability was insufficient to satisfy the confrontation clause. 'To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee.... [¶] The ***Roberts*** test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one.' (***Crawford***, supra, 541 U.S. at pp. 61–62, 124 S.Ct. 1354.) Under ***Crawford***, if an exception was not recognized at the time of the Sixth Amendment's adoption (see ***Crawford***, at p. 56, fn. 6, 124 S.Ct. 1354), admission of ***testimonial*** hearsay against a criminal defendant violates the confrontation clause unless (1) the declarant is unavailable to testify and (2) the defendant had a previous opportunity to cross-examine the witness or forfeited the right by his own wrongdoing." (***Sanchez*** at p. 680 citing to ***Crawford*** at pp. 62, 68 and ***Giles* v. *California*** (2008) 554 U.S. 353, 357–373, emphasis added by IPG.)

Under ***Crawford* v. *Washington*** (2004) 541 U.S. 36, where the declarant of the hearsay is not testifying (and subject to a few exceptions), the test for the admissibility of hearsay over a Confrontation Clause objection does not turn on whether the hearsay is reliable but on whether the hearsay is "testimonial." (**See *Sanchez*** at p. 680.)

Although the definition of testimonial was not fully flushed out in ***Crawford*** and the definition is still subject to some dispute, the California Supreme Court in ***Sanchez*** did an overview of the High Court cases that have attempted to give the term "testimonial" a more definitive meaning. In that overview the ***Sanchez*** court highlighted that the majority of the United States Supreme Court in ***Davis* v. *Washington*** (2006) 547 U.S. 813 and ***Michigan* v. *Bryant*** (2011) 562 U.S. 344 had held that "[t]estimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (***Sanchez*** at p. 689.) The ***Sanchez*** court also noted that in deciding whether the statement is testimonial, the High Court will consider whether the "statement was made by or to a government

investigating agent" (***Ohio v. Clark*** (2015) 135 S.Ct. 2173, 2181) and whether the statement was "sufficiently formal" to resemble the statutes that permitted use of an ex parte examination to establish facts and were "the principal evil at which the Confrontation Clause was directed" (***Crawford* v. *Washington*** (2004) 541 U.S. 36, 50). (***Sanchez*** at pp. 689, 692, 694, fn. 19.)

After reviewing the High Court's decisions in the ***Crawford*** line, the ***Sanchez*** court defined testimonial hearsay as including statements made in the following manner: "When the People offer statements about a completed crime, made to an investigating officer by a nontestifying witness, ***Crawford*** teaches those hearsay statements are generally testimonial unless they are made in the context of an ongoing emergency as in ***Davis*** [**v.** ***Washington*** (2006) 547 U.S. 813] and [***Michigan* v.] *Bryant*** [(2011) 562 U.S. 344], or for some primary purpose other than preserving facts for use at trial." (***Sanchez*** at p. 694.)

The discussion in ***Sanchez*** is consistent with the California Supreme Court's conception of testimonial hearsay as stated in ***People v. Leon*** (2015) 61 Cal.4th 569 at p. 603: "Although the Supreme Court has not settled on a clear definition of what makes a statement testimonial, we have discerned two requirements. First, 'the out-of-court statement must have been made with some degree of formality or solemnity.' (***People v. Lopez*** (2012) 55 Cal.4th 569, 581 [alternate citation omitted].) Second, the primary purpose of the statement must 'pertain[ ] in some fashion to a criminal prosecution.' (***Id***. at p. 582 [alternate citation omitted]; **accord**, ***People* v. *Dungo*** (2012) 55 Cal.4th 608, 619[.]")

**Editor's note:** Part of the difficulty in giving a bottom line definition of "testimonial" is that there is not a consensus among the High Court justices on what kind of hearsay qualifies as "testimonial hearsay." For example, in ***Williams* v. *Illinois*** (2012) 132 S.Ct. 2221, four of the justices in the plurality opinion attempted to modify the "primary purpose" testimonial test by indicating the test of whether a statement was testimonial turned on whether it was "prepared for the primary purpose of *accusing a targeted individual*." This modification of the primary purpose test was rejected by four other justices in the dissent and Justice Thomas in his concurring opinion.

Justice Thomas has adopted his own unique (albeit probably the most workable) definition of testimonial. For Justice Thomas the question does not turn on the primary purpose for which the statement was made but "on whether the proffered statement was sufficiently formal to resemble the disapproved civil law procedure reflected, inter alia, in the 'Marian statutes' that permitted use of an ex parte examination to establish facts." (**See** ***People* v. *Sanchez*** (2016) 63 Cal.4th 665, 689-692 [discussing ***Williams***].)

Prosecutors should assume that hearsay will considered "testimonial" if it would be considered "testimonial" under (1) both the test used by the plurality *and* the dissent in ***Williams*** or (2) under *either* the test used by the plurality or the test used by the dissent s so long as it also would be considered testimonial under the test utilized by Justice Thomas. It remains to be seen how the definition of "testimonial" will evolve now that the author of the ***Crawford*** opinion (Justice Scalia) has been elevated to the celestial court. In the meantime, California prosecutors are governed by the definition of testimonial as most recently expressed in ***People v. Sanchez*** (2016) 63 Cal.4th 665 and ***People* v. *Leon*** (2015) 61 Cal.4th 569, 603. (**See** the 2016-IPG#22 for a full discussion of ***Sanchez***.)

## a. So what is the significance of the High Court's rejection of the test for admitting hearsay over a Confrontation Clause objection used in *Ohio* v. *Roberts* and adoption of the test used in *Crawford* v. *Washington* on the *Bruton* rule?

The most significant impact on the ***Bruton*** rule of the switch by the High Court from the ***Roberts*** analysis regarding when hearsay may be admitted over a Confrontation Clause objection to the analysis used in ***Crawford*** is that whether the Sixth Amendment applies (and hence whether the ***Bruton*** rule applies) now generally turns on whether a statement is testimonial rather than whether it bears particular guarantees of trustworthiness. Under ***Crawford***, the Sixth Amendment no longer bars the use of ***nontestimonial*** hearsay statements of a codefendant in a joint trial ***regardless*** of whether those statements incriminate the codefendant. (**See** this IPG memo, section 4-b at pp. 17-20.)

Another impact of the switch is that before ***Crawford***, a codefendant's confession was admissible in a joint trial over a Confrontation Clause objection if the confession fell within "a firmly rooted hearsay exception" or contained "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements' reliability. (***Lilly* v. *Virginia*** (1999) 527 U.S. 116, 124-125 [citing ***Ohio* v. *Roberts*** (1980) 448 U.S. 56, 66].) Now the question of admissibility of a hearsay statement over a Confrontation Clause objection (when the defendant has not had in the past and will not have in the future an opportunity to cross-examine the declarant) does not depend on whether the statement falls within a hearsay exception (other than a few select exceptions existing at the time the Constitution was enacted such as the dying declaration hearsay exception). (**See *Crawford* v. *Washington*** (2004) 541 U.S. 36, 53-69.)

The holding in ***Crawford***, however, did **not** impact the general rules relating to *how* statements must be redacted as outlined in ***Bruton***, ***Richardson***, and ***Gray*** – assuming the statements are testimonial hearsay as to the nondeclarant defendant. (**See *United States* v. *Ramos-Cardenas*** (5th Cir. 2008) 524 F.3d 600, 609; ***United States* v. *Williams*** (8th Cir. 2005) 429 F.3d 767, 773 n.2; ***United States* v. *Lung Fong Chen*** (2d Cir. 2004) 393 F.3d 139, 150.)

## b. In light of *Crawford*, can an unredacted *nontestimonial* statement which implicates a codefendant be admitted at a joint jury trial?

The issue of whether an unredacted nontestimonial confession of a codefendant which implicates the defendant can be admitted a joint jury trial was recently addressed by the California Supreme Court in ***People v. Cortez*** (2016) 63 Cal.4th 101. There, all the justices agreed (albeit in summary fashion) that the ***Bruton*** rule does not apply to nontestimonial hearsay.

In ***Cortez***, defendant Cortez drove a car while her co-defendant Bernal fired 5-6 shots at a two teenagers, killing one of them. (***Id***. at p.105.) After the shooting, police spoke with a nephew of defendant Bernal (Tejada) and recorded their conversation with Tejada. In that conversation, Tejada recounted for the police a statement made to him by defendant Bernal in which Bernal said he "and this woman … went to—we went shooting some 18s," that they "went … in her car," and that she "was the one driving" and "he was the one shooting." (***Id***. at pp. 107-108.) Tejeda also told police defendant Bernal had identified the woman as "Norma" (the first name of defendant Cortez). (***Id***. at p. 108.) Tejada later testified at trial inconsistently with his statement to the police and a tape recording of his statement to the police was admitted into evidence (presumably, as a prior inconsistent statement of Tejada). (***Id***. at p. 108.)

In the California Supreme Court, defendant Cortez unsuccessfully raised several objections to the admission of codefendant Bernal's statement to Tejada, including that: (i) the portion of defendant Bernal's statements implicating her did not qualify as declarations against penal interest because that portion was not against Bernal's penal interest; (ii) Tejada's reliability was questionable; and (iii) the statements were unduly prejudicial and should have been excluded pursuant to Evidence Code section 352 because the statements of defendant Bernal could "easily [be] misconstrued to implicate [her] as being somehow involved in the planning or the underlying conduct or the planning or participation or knowledge of the shooting."* (***Id***. at p. 123.) For purposes of this IPG memo, the most significant claim raised by defendant Cortez in the California Supreme Court, however, was that the admission of defendant Bernal's "statements to Tejeda violated her Sixth Amendment right to confront and cross-examine witnesses." (***Id***. at p. 129.) This claim rested principally on ***Bruton* v. *United States*** (1968) 391 U.S. 123. (***Cortez*** at p. 129.) The ***Cortez*** court determined that binding United States Supreme Court precedent required rejection of the claim the ***Bruton*** rule was violated on two grounds.

First, the ***Cortez*** court held the decision in ***Bruton*** was "inapposite because it involved a nontestifying codefendant's hearsay statement that did not qualify for admission against the defendant under any hearsay exception and that was 'clearly inadmissible against [the defendant] under traditional rules of evidence.'" (***Cortez*** at p. 129 citing to ***Bruton*** at p. 128, fn. 3 [and noting as well that "the high court in ***Bruton*** expressly declined to comment on the admissibility of a nontestifying codefendant's hearsay statement where, as here, a 'recognized exception to the hearsay rule' applies."].)

Second, the ***Cortez*** court held the decision in ***Bruton*** was inapposite because "in ***Davis v. Washington*** (2006) 547 U.S. 813, 824 [alternate citation omitted], the high court unequivocally held 'that the confrontation clause ***applies only to testimonial hearsay statements*** and not to [hearsay] statements that are nontestimonial." (***Cortez*** at p. 129 [quoting ***People v. Geier*** (2007) 41 Cal.4th 555, 603 but adding italics to the quote; and noting that defendant Bernal's statements to his nephew "were unquestionably nontestimonial"].)

The ***Cortez*** decision settles question whether the ***Aranda/Bruton*** rule applies only to extrajudicial testimonial statements – a question an earlier appellate court had claimed was unsettled. (**See *People* v.**

***Garcia*** (2008) 168 Cal.App.4th 261, 295, fn. 12 [stating the issue appeared to be unsettled and noting, without citation or reliance, that there is inconsistency in unpublished California appellate court opinions on the issue and that the federal Third Circuit Court of Appeals has "interpreted ***Bruton*** expansively, holding that it applies not only to custodial confessions, but also when the statements of the non-testifying co-defendant were made to family or friends, and are otherwise inadmissible hearsay."].)

***Editor's note:** The third circuit court decision referred to in ***Garcia*** was ***United States* v. *Mussare*** (3rd Cir.2005) 405 F.3d 161, 168.). However, as noted in the unpublished decision of ***People* v. *Strain*** 2013 WL 3233242, *12, in ***United States* v. *Berrios*** (3d Cir.2012) 676 F.3d 118, 128, the Third Circuit disapproved of its earlier holding in ***United States* v. *Mussare*** (3d Cir.2005) 405 F.3d 161 that ***Bruton*** applies to statements made by nontestifying codefendants to family or friends. (**See also** this IPG this section at p. 20.)

The decision in ***People v. Cortez*** (2016) 63 Cal.4th 101 was presaged to a large extent by the California appellate court decision in is ***People v. Arceo*** (2011) 195 Cal.App.4th 556. In ***Arceo***, the two defendants (Arceo and Mejorado) were charged and convicted of numerous counts stemming from the murder of three individuals. (***Id***. at p. 559.) At defendant Arceo's trial, witnesses recounted nontestimonial statements made by defendant Mejorado implicating defendant Arceo in the murders. (***Id***. at p. 570-571.)

On appeal, defendant Arceo argued the aforementioned statements were hearsay statements of nontestifying codefendants and should have been excluded under the ***Aranda-Bruton*** rule. (***Id***. at p. 571.) The court rejected the argument, finding the Confrontation Clause has no application to out-of-court nontestimonial statements and that this principle governed even when such nontestimonial statements are made by co-defendants. (***Id***. at p. 571.) Accordingly, the ***Arceo*** court concluded that since the Confrontation Clause has no application to nontestimonial hearsay and the ***Aranda-Bruton*** rule is premised on the Confrontation Clause, the ***Aranda-Bruton*** rule does not apply to non-testimonial statements of co-defendants. (***Id***. at pp. 571-575.) The ***Arceo*** court observed that the ***Bruton*** line of cases presupposes that the aggrieved codefendant has a Sixth Amendment right to confront the declarant in the first place. "If none of the co-defendants has a constitutional right to confront the declarant, none can complain that his right has been denied. It is thus necessary to view ***Bruton*** through the lens of ***Crawford*** **[v. *Washington*** (2004) 541 U.S. 36] and ***Davis*** **[v. *Washington*** (2006) 547 U.S. 813]. The threshold question in every case is whether the challenged statement is testimonial. If it is not, the Confrontation Clause 'has no application.'" (***Arceo***, at pp. 574-575.) The ***Arceo*** court rejected defendant's assertion that the ***Bruton*** line of cases represents a "special rule" that applies to extrajudicial statements of unavailable codefendants who make incriminating statements, "a rule that survives the 'testimonial vs. nontestimonial' classification." (***Id***. at p. 574 [albeit, the court also held, at p. 575, that even if the ***Bruton*** rule *did* apply to nontestimonial statements, the ***Bruton*** rule would be inapplicable in the ***Arceo*** case because the statements introduced in ***Arceo*** fell within hearsay exceptions]; **see also** ***People v. Arauz*** (2012) 210 Cal.App.4th 1394, 1397 ["Where, as here, an accomplice inculpates himself and his codefendant to a fellow inmate/informant, his statements, if trustworthy, are admissible in the codefendant's trial. Such statements are declarations against penal interest, are not "testimonial," and

their admission does not violate the confrontation clause as explained in ***Crawford v. Washington*** (2004) 541 U.S. 36"]; ***People v. Ardoin*** (2011) 196 Cal.App.4th 102, 137 [noting fact codefendant's statement was not testimonial as a factor "limiting both the incriminating nature of the statement and the risk that a jury could not follow the trial court's instruction to disregard the evidence"].)

Although the United States Supreme Court has not specifically addressed whether the ***Bruton*** rule applies to nontestimonial statements, the federal circuit courts are unanimous in finding that if statements are nontestimonial, they fall outside the ambit of ***Crawford*** and, necessarily, the ***Bruton*** rule. (**See e.g.**, ***United States* v. *Figueroa–Cartagena*** (1st Cir. 2010) 612 F.3d 69, 85; ***United States v. Williams*** (2d Cir. 2007) 506 F.3d 151, 155–157; ***United States* v. *Berrios*** (3d Cir.2012) 676 F.3d 118, 128; ***United States* v. *Dargan*** (4th Cir.2013) 738 F.3d 643, 651; ***United States* v. *Taylor*** (7th Cir.2007) 509 F.3d 839, 850; ***United States* v. *Johnson*** (6th Cir. 2009) 581 F.3d 320, 326; ***United States* v. *Spotted Elk*** (8th Cir. 2008) 548 F.3d 641, 662; ***United States* v. *Clark*** (10th Cir. 2013) 717 F.3d 790, 816; ***United States* v. *Smalls*** (10th Cir. 2010) 605 F.3d 765, 768 fn. 2; ***Hundley v. Montgomery***, No. 2:12-cv-3051 JKS, 2014 WL 1839116, **11-13 (E.D. Cal. May 8, 2014) [the circuit courts which have considered the issue "appear to have unanimously concluded that where a statement is non-testimonial, neither ***Crawford*** or ***Bruton*** apply."]; **see also *State* v. *Wilcoxon*** (Wash. 2016) 373 P.3d 224, 229 ["limiting the ***Bruton*** doctrine to testimonial hearsay is the natural conclusion under *Crawford*"]; ***State v. Norah*** (La. Ct. App. 2013) 131 So.3d 172, 189; ***State* v. *Usee*** (Minn.App. 2011) 2011 WL 2437271, *3; ***Thomas* v. *United States*** (D.C. 2009) 978 A.2d 1211, 1224.)

The Ninth Circuit Court of Appeals has yet to rule on the issue in a published case but has agreed the ***Bruton*** rule does not apply to nontestimonial hearsay in an unpublished decision (***Smith* v. *Chavez*** (9th Cir. 2014) 565 Fed. Appx. 653) and several federal district courts in the Ninth Circuit have also so held. (**See *Roberts* v. *Warden, San Quentin State Prison*** (E.D. Cal., July 20, 2016, No. 293CV0254DADKJNTEMP) 2016 WL 3922632, at *2; ***Harris* v. *Soto*** (C.D. Cal., Mar. 25, 2016, No. CV 15-0352 BRO (RAO)) 2016 WL 2587373, at *14; ***Rodriguez* v. *Foulk*** (N.D. Cal., June 15, 2015, No. 14-CV-00976-VC (PR)) 2015 WL 3749760, at *4; ***Hundley* v. *Montgomery*** (E.D. Cal. May 8, 2014) No. 2:12-cv-3051 JKS, 2014 WL 1839116, at **11-13.)

***Editor's note:** The contrary argument (i.e., that the ***Bruton*** rule applies equally to nontestimonial statements) was summed up by the *dissenting* opinion in the Washington State Supreme Court decision in ***State v. Wilcoxon*** (2016) 373 P.3d 224. The dissenting justice believed that "***Bruton*** and ***Crawford*** address different concerns under the confrontation clause. ***Bruton*** addresses the prejudice of having inadmissible codefendant statements put before a jury in a joint trial. ***Crawford***, on the other hand, addresses the proper means for assessing the reliability of evidence admitted directly against a defendant." (***Id***. at p. 243.) "Because of these distinctly different concerns and the protections that evolved in the case law to guard against them, [the dissenting justice believed] that ***Bruton*** and its progeny remain good law, applicable even to nontestimonial statements." (**Ibid**.) The dissenting justice believed the Sixth Amendment protected both of these *separate* interests but indicated that that the "separate interest" in avoiding prejudice protected by the ***Bruton*** rule is also be protected by the Due Process clause. (**See** dis. opn of J. Madsen in ***Wilcoxon*** at p. 349, fn. 7.)

## i. Does the fact the statement is nontestimonial guarantee its admission into evidence either with or without a limiting instruction?

Keep in mind that while the admission of nontestimonial hearsay will not violate the Confrontation Clause, it still must fall *within a hearsay exception* in order to be admissible over a hearsay objection. (**See *People* v. *Arceo*** (2011) 195 Cal.App.4th 556, 575 [even though ***Bruton*** rule does not apply to nontestimonial statements of codefendant implicating defendant, statements still must be admissible under state law as exceptions to the hearsay rule].) If the only reason the nontestimonial hearsay is admitted in a joint trial is because it constitutes an admission under Evidence Code section 1220 as to one defendant, it remains inadmissible hearsay against the codefendant in a joint trial.

Thus, the issue of whether the jury can compartmentalize the admission and follow a court's instruction to only use it against the defendant who made the admission still exists –even when the Sixth Amendment is not implicated. The difference is that when it comes to nontestimonial hearsay, severance or exclusion is not *compelled* in the way it would be if the Sixth Amendment right of confrontation was implicated. The balancing test the trial court must engage in when determining whether to sever codefendants, redact the statement, or exclude the statement is significantly altered because admission of the statement cannot violate the Sixth Amendment.

It likely remains within a trial court's discretion whether to redact a nontestimonial statement and/or grant a severance or exclude a *nontestimonial* statement of one defendant that powerfully and facially incriminates the other defendant when the nontestimonial statement does not fall within a hearsay exception. (**Cf.**, ***Matthews* v. *United States*** (D.C. 2011) 13 A.3d 1181, 1186 [finding local rule requires court to minimize prejudice from joinder and thus even a *nontestimonial* out-of-court statement from a nondeclarant codefendant "remains a candidate for redaction (or other remedial measures) under Criminal Rule 14 unless it fits within a hearsay exception rendering it admissible against the nondeclarant co-defendant."]; ***Jones* v. *Basinger*** (7th Cir. 2011) 635 F.3d 1030, 1050 [finding that even when a codefendant's confession directly implicating the defendant is offered for a *nonhearsay* purpose, there is strong possibility it will be misused for its truth and thus a court should should still "exclude or redact the confession to whatever extent it is possible to do so 'without detracting from the alleged [non-hearsay] purpose for which the confession was introduced'"].)

However, in conducting this analysis, the most important reason for *granting* severance or exclusion is no longer in the mix (i.e., avoiding a violation of the Sixth Amendment rights). Thus, the scales tilt much more heavily toward allowing use of the statement subject to a limiting instruction.

Expect the defense to argue codefendant's incriminatory nontestimonial statement should *still* be excluded in a joint trial notwithstanding the fact that "the ***Bruton*** rule does not apply to nontestimonial statements." Here's how we envision the back and forth:

Def: Your honor, *regardless* of whether the statement is nontestimonial "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" the great risk identified in ***Bruton*** "that the jury will not, or cannot, follow instructions" remains, as does the "vital" consequences of failure. (***Id***. at p. 135-136.)

DDA: As repeatedly pointed out by the High Courtin decisions subsequent to ***Bruton***, the conclusion in ***Bruton*** that a jury cannot follow a limiting instruction was the rare exception to the general rule that jurors are presumed to follow a court's instructions (**see *Blueford* v. *Arkansas*** (2012) 132 S.Ct. 2044, 2051; ***Penry* v. *Johnson*** (2001) 532 U.S. 782, 799; ***Weeks* v. *Angelone*** (2000) 528 U.S. 225, 234), and must be limited to its specific context. ***Bruton*** was premised on the fact that "the consequences of failure" to follow the instruction was vital to the defendant. But the *reason* why the consequences were so vital was because the defendant's *Sixth Amendment rights* would be violated if the jury failed to follow the instruction. It was the threat to the violation of defendant's Sixth Amendment rights if the jury ignored the instruction that laid at the heart of the ***Bruton*** rule. (**See *Bruton*** at p. 137 ["Here the introduction of Evans' confession posed a substantial threat to petitioner's right to confront the witnesses against him, and this is a hazard we cannot ignore."].) And when the statement is nontestimonial, the Sixth Amendment is ***not*** implicated. Thus, the consequences are significantly less vital and the strong state interest in joint trials (**see *People* v. *Hoyos*** (2007) 41 Cal.4th 872, 895 [noting Penal Code "(s)ection 1098 expresses a legislative preference for joint trials] should outweigh any competing interests in exclusion; **accord *People* v. *Coffman and Marlow*** (2011) 34 Cal.4th 1, 40), coupled with the probative value of the statement as an admission against the codefendant, should trump any concerns about prejudice to the defendant – especially those that can be minimized by a limiting instruction.

When nontestimonial statements are offered, they should be treated as akin to statements that are not offered for their truth but could still potentially be misused by the jury, i.e., the statements are admissible subject to a limiting instruction. That was the situation in ***Tennessee v. Street*** (1985) 471 U.S. 409, where a statement implicating the defendant made by a defendant's accomplice was offered into evidence for a nonhearsay purpose. In ***Street***, the defendant testified that his confession was coerced and that the sheriff taking his statement had directed him to say the same thing that his co-defendant had said in the co-defendant's confession. To rebut this claim, the prosecutor called the sheriff to testify to what the co-defendant had said in his confession - a confession which actually differed from the defendant's confession. The co-defendant's confession implicated the defendant. The jury was admonished not to consider the statement for its truthfulness but only as rebuttal evidence. (***Tennessee* v. *Street*** (1985) 471 U.S. 409, 411-412.)

The ***Street*** court recognized that, as in ***Bruton***, the accomplice's confession in ***Street*** could have been misused by the jury. "If the jury had been asked to infer that [the accomplice's] confession proved that [the defendant] participated in the murder, then the evidence would have been hearsay; and because [the accomplice] was not available for cross-examination, Confrontation Clause concerns would have been

implicated. The jury, however, was pointedly instructed by the trial court "not to consider the truthfulness of [the accomplice's] statement in any way whatsoever." . . . Thus ***as in Bruton***, the question is reduced to whether, in light of the competing values at stake, we may rely on the "'crucial assumption"' that the jurors followed "'the instructions given them by the trial judge."' (***Street*** at pp. 414-415 [bracketed information and emphasis added by IPG].)

Nevertheless, for several reasons, the ***Street*** court held that "the trial judge's instructions were the appropriate way to limit the jury's use of that evidence in a manner consistent with the Confrontation Clause." (***Id.*** at p. 417.) Two of those reasons weigh heavily in favor of finding the strong interest in maintaining joinder of defendants should control and permit admission of a nontestimonial statement incriminating the defendant in a joint trial subject to a limiting instruction.

First, "[t]he nonhearsay aspect of [the accomplice's] confession—not to prove what happened at the murder scene but to prove what happened when [the defendant] confessed—***raise[d] no Confrontation Clause concerns***. (***Street*** at p. 414 [bracketed information and emphasis added by IPG].) Similarly, when it comes to nontestimonial hearsay, no Confrontation Clause concerns are raised. (**See** this IPG memo, section 4 at pp. 17-20.)

Second, the defendant's confession in ***Street*** was the prosecution's "most important piece of substantive evidence[.]" (***Id.*** at p. 415.) The ***Street*** court said "[w]hen [the defendant] testified that his confession was a coerced imitation, therefore, the focus turned to the State's ability to rebut [his] testimony. Had the prosecutor been denied the opportunity to present [the accomplice's] confession in rebuttal so as to enable the jury to make the relevant comparison, the jury would have been impeded in its task of evaluating the truth of [the defendant's] testimony and handicapped in weighing the reliability of his confession. Such a result would have been at odds with the Confrontation Clause's very mission—to advance 'the accuracy of the truth-determining process in criminal trials.'" (***Ibid.***) Similarly, the defendant's nontestimonial confession is an important piece of evidence in this case and excluding that confession would not advance the accuracy of the truth-determining process in criminal trials.

Def: The prosecutor has overlooked a very significant fact that renders the ***Street*** case inapposite to whether the nontestimonial statement of the codefendant should be excluded or a severance granted. In ***Street***, it was not a joint trial! In ***Street***, the co-defendant had *already been severed*. Indeed, the third reason the ***Street*** court gave for allowing use of the accomplice's statement for rebuttal purposes subject to a limiting instruction *undermines* the prosecution's argument. Namely, that "there were no alternatives that would have both assured the integrity of the trial's truth-seeking function and eliminated the risk of the jury's improper use of evidence. (***Tennessee* v. *Street*** (1985) 471 U.S. 409, 414-416.) All we are asking for is for this Court to do the same thing as was done in ***Street***: sever the trial. Moreover, if this Court were to accept the prosecution's argument that this Court should admit the codefendant's statement subject to a limiting instruction because it is an important piece of evidence and its exclusion would undermine the truth-finding process, then the ***Bruton*** rule would be rendered a nullity altogether - since that argument

could always be made whether the statement was nontestimonial or not. It is also inconsistent with the general understanding in ***Bruton*** that prompted the need for the ***Bruton*** rule, i.e., that accomplice confessions are unreliable. (**See *Bruton*** at p. 136 ["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 others."].)

DDA: Your honor, notice how the defendant completely avoids the argument that the concern in ***Bruton*** was with whether the *Sixth Amendment* was violated. But even assuming that in some cases redaction of a nontestimonial statement of a codefendant might be necessary, it is not necessary in the instant case because the nontestimonial statement of the codefendant falls "outside the narrow exception" ***Bruton*** created to the general rule that a limiting instruction will suffice. (***Richardson* v. *Marsh*** (1987) 481 U.S. 200, 208.)

As pointed out in ***Richardson***, "[t]he rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process. ***On the precise facts*** of ***Bruton***, involving a facially incriminating confession, we found that accommodation inadequate. As our discussion above shows, the ***calculus changes*** when confessions that do not name the defendant are at issue." (***Richardson*** at p. 211, emphasis added.) "[T]here does not exist the overwhelming probability of jurors' inability to disregard incriminating inferences that is the foundation of ***Bruton***" when a confession is not incriminating on its face, but becomes "so only when linked with evidence introduced later at trial." (***Id***. at p. 208.) Granted, this language from ***Richardson*** was made in support of its conclusion that "the admission of a nontestifying codefendant's confession with a proper limiting instruction when . . . the confession ***is redacted*** to eliminate not only the defendant's name, but any reference to his or her existence." (***Id***. at p. 211, emphasis added by IPG.) And, here, we are asking for the statement to be admitted without redaction. However, ***Richardson*** highlights that ***Bruton***'s rule that a limiting instruction is insufficient must be read very narrowly and that the "***calculus changes***" unless all contextual aspects of ***Bruton*** are present. One very significant factor in that calculus is whether the Sixth Amendment is implicated and it is not in the instant case.

Def: Well, if this Court is going to allow in the codefendant's statement, then it still should be redacted to reduce or eliminate any mention of my client.

DDA: We are prepared to accept some redaction if this can be done without distorting the statement of the co-defendant. (**See** this IPG memo, section 17 at pp 60-68.) Though the amount of redaction should be significantly less than is necessary when the statements are testimonial because the interests in redacting are substantially diminished by the absence of any risk of a Confrontation Clause violation.

### c. In light of *Crawford*, can an unredacted *testimonial* statement which implicates a codefendant be admitted at a joint jury trial?

In light of the holding in ***Crawford***, and assuming all the other factors requiring application of the ***Bruton*** rule are present (**see** this IPG memo, section 3 at p. 11-15), the ***Bruton*** rule requires severance of trial or, alternatively, exclusion or effective redaction of a ***testimonial*** statement of a codefendant that implicates the other codefendant in their joint trial. (**See *People* v. *Song*** (2004) 124 Cal.App.4th 973, 980-984.) Indeed, all the cases finding that the ***Bruton*** rule does *not* apply when the codefendant's statement implicating another codefendant is *nontestimonial*, simultaneously imply that the ***Bruton*** rule *can* be violated if the statement is *testimonial* hearsay. (**See** this IPG memo, section 4-b at pp. 17-20.) Thus, if the confession at issue involves testimonial hearsay (as most confessions to police will - **see e.g., *Crawford* v. *Washington*** (2004) 541 U.S. 36), then the question should become whether the statement should and can be redacted and/or whether testimonial statement falls within a hearsay exception that renders the ***Bruton*** rule inapplicable. (**See** this IPG memo, section 5 at pp. 25-32.)

## 5. Does the *Bruton* rule apply to statements of a defendant which implicate a codefendant when the statements fall under a hearsay exception?

As noted above in this IPG memo, at p. 12, in ***Bruton***, the government did not attempt to use the confession of Bruton's codefendant as evidence against Bruton himself, because under the prevailing rules of evidence, the confession constituted inadmissible hearsay if used against Bruton. The ***Bruton*** court expressly reserved the question of whether the Confrontation Clause would be violated by the admission of one defendant's extrajudicial statements against his codefendant at their joint trial if the confession fell under an exception to the hearsay rule: "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." (***Bruton* v. *United States*** (1968) 391 U.S. 123, 128, fn. 3; **see also *Dutton* v. *Evans*** (1970) 400 U.S. 74, 86 [reiterating ***Bruto***n left open the question]; ***People* v. *Cortez*** (2016) 63 Cal.4th 101, 129 [finding ***Bruton*** inapposite when the nontestifying codefendant's hearsay statement qualifies for admission against the defendant under a hearsay exception]; ***People* v. *Fletcher*** (1996) 13 Cal.4th 451, 455 [noting the rule "presumes the statement is an admissible admission by the declarant and inadmissible hearsay against the codefendant."].)

As pointed out in ***People* v. *Smith*** (2006) 135 Cal.App.4th 914, the ***Bruton*** rule "presumes the statement is an admissible admission by the declarant and inadmissible hearsay against the codefendant ..., [and] if the statement is admissible against the codefendant under a hearsay exception, and its admission otherwise survives confrontation analysis, then the jury may consider it against the

codefendant; no reason exists for severance or redaction." (***Id***. at p. 922 citing to ***People* v. *Greenberger*** (1997) 58 Cal.App.4th 298, 331–332; **see also *United States* v. *York*** (7th Cir. 1991) 933 F.2d 1343, 1362 n. 3 ["***Bruton*** only prohibits the use of an inculpatory hearsay statement against an accused when the jurisdiction's rules of evidence do not permit the statement to be introduced into evidence against the accused. Where the rules so permit, ***Bruton*** is inapplicable."].)

## a. In light of *Crawford*, can an unredacted *testimonial* statement which implicates a codefendant be admitted at a joint jury trial if the statement falls within a hearsay exception?

Before ***Crawford***, California courts had held the ***Bruton*** rule did **not** require the exclusion or redaction of a codefendant's statement even in a joint trial if the statement fell within a state hearsay exceptions subject to one caveat. The statement had to be found to bear "adequate indicia of reliability" - which existed if the codefendant's statement fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." (**See *People* v. *Castille*** (2003) 108 Cal.App.4th 469, 478-480; ***People* v. *Fuentes*** (1998) 61 Cal.App.4th 956, 962-969; ***People* v. *Greenberger*** (1997) 58 Cal.App.4th 298, 332; ***People* v. *Harris*** (1986) 175 Cal.App.3d 944, 959.)

However, since ***Crawford***, the High Court has made it clear that the fact a statement falls under a hearsay exception (firmly rooted or otherwise) does not *necessarily* bring it outside the scope of the Sixth Amendment. (**See e.g.**, ***Melendez-Diaz* v. *Massachusetts*** (2009) 557 U.S. 305, 321 ["the affidavits do not qualify as traditional official or business records, and *even if they did*, their authors would be subject to confrontation nonetheless" emphasis added by IPG].) Rather, whether the Sixth Amendment applies generally turns on whether the hearsay is testimonial or nontestimonial. Certain kinds of hearsay exceptions *are* more likely to encompass nontestimonial statements than others but that is only because of the rationale that underlies the exception. (**See *Michigan* v. *Bryant*** (2011) 562 U.S. 344, 362, fn. 9 ["Many other exceptions to the hearsay rules similarly rest on the belief that certain statements are, by their nature, made for a purpose other than use in a prosecution and therefore should not be barred by hearsay prohibitions."].)

In light of ***Crawford***, a codefendant's statement that falls under a hearsay exception should be admissible in a joint trial over a ***Bruton*** objection if it is nontestimonial hearsay. (**See *People v. Cortez*** (2016) 63 Cal.4th 101, 129; ***People v. Arceo*** (2011) 195 Cal.App.4th 556, 571-575; this IPG, section 4-b at pp. 17-20.) Moreover, if a testimonial statement of a codefendant is redacted to comply with the ***Bruton*** rule and a limiting instruction is given, then the defendant will not be able to complain about any alleged ***Crawford*** violation because "redacted codefendant statements that satisfy ***Bruton***'s requirements are not admitted "against" the defendant for ***Crawford*** purposes." (***People* v. *Lewis*** (2008) 43 Cal.4th 415, 506, citing to ***People* v. *Stevens*** (2007) 41 Cal.4th 182, 199.) However, whether an ***unredacted*** codefendant's statement that falls into a hearsay exception is admissible when the statement is testimonial hearsay is another story.

**Does the fact that the codefendant's unredacted testimonial statement is admissible against both defendants pursuant to a state hearsay exception mean the statement is outside the scope of the *Bruton* rule under the current *Crawford* approach to the Confrontation Clause? There are three potential answers.**

One way to answer the question is simply to conclude that the ***Bruton***'s assumption that jurors cannot cabin codefendant confessions to the declarant defendant in a joint trial does not apply when the confession is admissible against both defendants under *state hearsay* rules **regardless** of whether the statement is testimonial hearsay. If this is true, then it would not matter whether the statement is inadmissible against one of the defendants over a *Confrontation Clause* objection. However, this is probably not true since application of the ***Bruton*** rule generally tracks application of the Confrontation Clause, i.e., if a statement is admissible against both defendants over a Confrontation Clause objection it is admissible over a ***Bruton*** objection (**see *People* v. *Jennings*** (2010) 50 Cal.4th 616, 660-662; ***United States* v. *Berrios*** (3d Cir. 2012) 676 F.3d 118, 128 ), and under *either* the ***Ohio v. Roberts*** test *or* the ***Crawford*** test, statements admissible under a state hearsay exception are not necessary admissible over a Confrontation Clause objection. (**See e.g.**, ***Lilly* v. *Virginia*** (1999) 527 U.S. 116, 120, 125 [statement of nontestifying accomplice admissible under state hearsay exception for declarations against interest was inadmissible over Confrontation Clause objection under ***Roberts*** test because it was unreliable]; ***Crawford* v. *Washington*** (2004) 541 U.S. 36, 40, 52, 61 [statement of nontestifying accomplice admissible under state hearsay exception for declarations against interest was inadmissible over Confrontation Clause objection under ***Crawford*** test because it was testimonial].)

Another way to answer the question is to conclude the ***Bruton*** rule always applies if the statement of the codefendant implicating the defendant is testimonial hearsay *regardless* of whether the statement falls under a state hearsay exception. (**See *Thomas* v. *United States*** (D.C. 2009) 978 A.2d 1211, 1224 ["if a defendant's extrajudicial statement inculpating a co-defendant is testimonial, ***Bruton*** requires that it be redacted for use in a joint trial to protect the co-defendant's Sixth Amendment rights even if the unredacted statement would be admissible against the co-defendant under a hearsay exception"].) However, this approach would be inconsistent with strong indication in ***People* v. *Cortez*** (2016) 63 Cal.4th 101 that the decision in ***Bruton*** is "inapposite" when the statement at issue is a statement *other than* a nontestifying codefendant's hearsay statement *that did not qualify for admission against the defendant under any hearsay exception* and that was 'clearly inadmissible against [the defendant] under traditional rules of evidence.'" (***Cortez*** at p. 129 citing to ***Bruton*** at p. 128, fn. 3, emphasis added.) And it is also inconsistent with the California Supreme Court's approach in ***People* v. *Jennings*** (2010) 50 Cal.4th 616, which held that clearly testimonial statements made by a co-defendant during a joint police interrogation were admissible under the adoptive admissions hearsay exception in a joint trial. (***Id***. at pp. 660-663.)

IPG suggests the **best way to answer the question** is to conclude that application of the ***Bruton*** rule is contingent upon the applicability of the Sixth Amendment under the test devised in ***Crawford* v. *Washington*** (2004) 541 U.S. 36. (**See *United States* v. *Berrios*** (3d Cir. 2012) 676 F.3d 118, 128 [finding the ***Crawford*** dictates the ***Bruton*** rule be limited to testimonial statements "because ***Bruton*** *is no more than a by-product* of the Confrontation Clause," emphasis added by IPG]; ***United States* v. *Johnson*** (6th Cir.2009) 581 F.3d 320, 326 ["Because *it is premised on the Confrontation Clause*, the ***Bruton*** rule, like the Confrontation Clause itself, does not apply to nontestimonial statements"], emphasis added by IPG.) Under this approach, the ***Bruton*** rule would be assumed to apply when the confession of a nontestifying codefendant is testimonial unless it falls under a hearsay exception that is premised on a rationale that takes it outside the scope of the Confrontation Clause as interpreted in ***Crawford***, - for instance, where the rationale behind the hearsay exception is based on equitable concerns (such as the hearsay exception created by Evidence Code section 356) or the exception still provides some form of confrontation (such as the hearsay exception for former testimony). And, it should be noted, that this is generally the approach the California Supreme Court has taken. (**See e.g.**, ***People* v. *Jennings*** (2010) 50 Cal.4th 616, 661-662.)

This approach will be illustrated as we discuss some hearsay exceptions which might involve testimonial hearsay but which, if the codefendant's statement falls within them, should permit use of a statement in a joint trial without redaction.

## b. Which hearsay exceptions will allow the admission of an unredacted testimonial statement into evidence at a joint trial post-*Crawford*?

Although it is often stated that the question of whether a statement is admissible over a Confrontation Clause objection turns on whether the statement is testimonial or nontestimonial – which, in turn, depends largely on the purpose for which the statement has been made - this is not completely true. Both before and after ***Crawford***, the High Court has recognized that certain statements may be admissible against a defendant over a Confrontation Clause objection for reasons having nothing to do with the purpose for which the statement was taken. For example, a defendant's "confession" is clearly testimonial hearsay – it is a statement given for the purpose of later use in court. However, it is not barred in a defendant's trial because the defendant is not considered a witness against himself, i.e., he is not being deprived of the right to confront the declarant. Similarly, a statement made by a witness to the police for the purpose of later use in court is not barred by the Confrontation Clause when it is being offered as a prior inconsistent statement of the witness because the declarant is available for cross-examination. On a different note, a statement made by a witness to police that is undoubtedly testimonial may still be admissible in court if the declarant is unavailable but only because the defendant murdered the declarant in order to prevent him from testifying. Below are a few thoughts on which hearsay exceptions sometimes used to admit statements in joint trials will permit the use of a ***testimonial*** hearsay statement of one defendant in a joint trial without redaction and without running afoul of the ***Bruton*** rule.

## i. Adoptive Admissions (Evidence Code section 1221) - Yes

Under Evidence Code section 1221, "[e]vidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

"There are only two requirements for the introduction of adoptive admissions: '(1) the party must have knowledge of the content of another's hearsay statement, and (2) having such knowledge, the party must have used words or conduct indicating his adoption of, or his belief in, the truth of such hearsay statement.'" (***People* v. *Combs*** (2004) 34 Cal.4th 821, 843.)

In ***People v. Jennings*** (2010) 50 Cal.4th 616, the California Supreme Court addressed the question of whether the ***Bruton*** rule barred the admission of testimonial statements made by two defendants during a joint police interview at a joint trial. In ***Jennings***, police interviewed two defendants together and obtained statements from each that the other defendant agreed was correct. The defendant (Jennings) did not dispute that his own statements made during the joint interview were admissible against him, as admissions of a party, under Evidence Code section 1220. However, the defendant contended, the concurrent admission of numerous "essential" statements made by his codefendant during the joint interview violated his right to confrontation under ***Crawford*** and the ***Aranda–Bruton*** line of cases. The ***Jennings*** court rejected the argument because the codefendant's statements qualified as "adoptive admissions" under Evidence Code section 1221. (***Id***. at pp. 659-660.)

The ***Jennings*** court reasoned that "an adoptive admission can be admitted into evidence without violating the Sixth Amendment right to confrontation 'on the ground that "once the defendant has expressly or impliedly adopted the statements of another, the statements become his own admissions"'." (***Id***. at p. 661.) "Being deemed the defendant's own admissions, we are no longer concerned with the veracity or credibility of the original declarant. Accordingly, no confrontation right is impinged when those statements are admitted as adoptive admissions without providing for cross-examination of the declarant." (***Id***. at pp. 661-662.) "Stated another way, when a defendant has adopted a statement as his own, 'the defendant himself is, in effect, the declarant. The 'witness' against the defendant is the defendant himself, not the actual declarant; there is no violation of the defendant's right to confront the declarant because the defendant only has the right to confront 'the witnesses against him.'" (***Id***. at p. 662.) "It follows that the admission of an out-of-court statement as the predicate for an adoptive admission does not violate the principles enunciated in ***Crawford*** or in ***Aranda*** and ***Bruton***. (**Ibid**; **see also *People* v. *Roldan*** (2005) 35 Cal.4th 646, 711, fn. 25 ["admission of defendant's adoptive admissions did not violate the confrontation clause as interpreted in ***Crawford***; ***People* v. *Combs*** (2004) 34 Cal.4th 821, 841–843 [no ***Crawford*** violation when incriminating statements made during joint interrogation were admitted as adoptive admissions]; ***People* v. *Preston*** (1973) 9 Cal.3d 308, 315 [admission of evidence under the adoptive-admission exception to the hearsay rule does not violate the ***Aranda*** rule]; ***People* v. *Osuna*** (1969) 70 Cal.2d 759, 765 [there is no ***Aranda–Bruton*** error when conversation among

codefendants was admitted under adoptive-admission rule]; ***People* v. *Castille*** (2005) 129 Cal.App.4th 863, 877 [the admission in evidence of adoptive admissions made during the joint interview did not violate the principles enunciated in ***Crawford***, or in ***Aranda*** and ***Bruton***]; ***United States* v. *Chappell*** (7th Cir.1983) 698 F.2d 308, 312 ["The exclusion of party admissions from the definition of hearsay, unlike most hearsay exceptions, is not grounded on a probability of trustworthiness but rather on the idea that a party cannot object to his failure to cross-examine himself."].)

A related but slightly different rationale for finding that statements made during a police interview that qualify as adoptive admissions are admissible against both defendants in a joint trial is that "the statement of defendant A implicating defendant B is admitted not for its truth, but to supply meaning to B's response adopting A's statement as his own." (***People* v. *Jennings*** (2010) 50 Cal.4th 616, 663 citing to ***People* v. *Castille*** (2005) 129 Cal.App.4th 863 at p. 878.) That is, when a declarant's statements are admitted to supply meaning to defendant's conduct or silence in the face of an accusatory statement, the declarant's statements are not admitted for purposes of establishing the truth of the matter asserted. And when a testimonial statement is admitted for a *nonhearsay* purpose, the Sixth Amendment (and, thus the ***Bruton*** rule) is not implicated. (**See *People* v. *Jennings*** (2010) 50 Cal.4th 616, 663; this IPG memo, section 6 at p. 33-36 and 5-a at p. 28.)

**Editor's note:** We discuss how to use this exception as a tool for taking statements that will be admissible in joint trials in this IPG, section 30 at pp. 81-83.

### ii. Forfeiture by wrongdoing (Evidence Code section 1390) - Yes

Evidence Code section 1390(a) provides that "[e]vidence of a statement is not made inadmissible by the hearsay rule if the statement is offered against a party that has engaged, or aided and abetted, in the wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." (Evid. Code, § 1390(a).) Evidence Code section 1390 embodies the doctrine of forfeiture by wrongdoing, which "is an exception to the bar against the admission of unconfronted ***testimonial*** statements." (***People* v. *Jones*** (2012) 207 Cal.App.4th 1392, 1398, emphasis added by IPG.)

The rationale behind allowing statements subject to the forfeiture by wrongdoing hearsay exception/doctrine to be admitted at trial even though the declarant is not testifying and the statements are testimonial, is that the defendant has *forfeited* his right to claim the right to confront witnesses guaranteed by the Sixth Amendment protection. That is the hearsay exception/doctrine is taken outside the scope of the Confrontation Clause, notwithstanding its testimonial character, for *equitable* reasons. (**See *People* v. *Vines*** (2011) 51 Cal.4th 830, 862 ["In interpreting the requirements of the confrontation clause, the United States Supreme Court in ***Crawford*** recognized the continuing validity of exceptions, like the rule of forfeiture by wrongdoing, that derive from equitable considerations rather than an improper judicial determination of reliability."].)

As explained by the High Court, "[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system." (***People* v. *Jones*** (2012) 207 Cal.App.4th 1392, 1398 citing to ***Davis* v. *Washington*** (2006) 547 U.S. 813, 833.) Thus, "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." (**Ibid**; **see also *Crawford* v. *Washington*** (2004) 541 U.S. 36, 61 ["the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds"]; ***Giles v. California*** (2008) 554 U.S. 353 367, fn. 2 [12 states recognize wrongdoing as a basis for forfeiting objection to out-of-court statements].)

Accordingly, if it could be shown that the defendant wrongfully dissuaded his codefendant from testifying at trial, the codefendant's statement would be admissible against both defendants at a joint trial.

### iii. Partial or detached act, conversation, etc. – inquiry into whole (Evidence Code section 356) - Yes

Evidence Code section 356 states: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." (Evid. Code, § 356.)

"Evidence Code section 356 creates an exception to the hearsay rule without labelling it as such." (***People* v. *Pic'l*** (1981) 114 Cal.App.3d 824, 863, fn. 13; **see also *People* v. *Parrish*** (2007) 152 Cal.App.4th 263, 272 [treating section 356 as hearsay exception].)

As explained by the California Supreme Court in ***People* v. *Vines*** (2011) 51 Cal.4th 830, the rationale behind Evidence Code section 356 is an equitable rationale. The ***Vines*** court reasoned that section 356's rule of completeness is an exception that is based on equitable concerns (i.e., that a party not be allowed to introduce some portions of a statement to create a misleading impression) not reliability concerns, and the ***Crawford*** decision did not change the law regarding the admissibility of statements proffered under exceptions to the hearsay rules or the Confrontation Clause that are based on equitable concerns, such as the rule of forfeiture by wrongdoing. (***Id***. at p. 862.) Thus, the ***Vines*** court held that the introduction of hearsay evidence pursuant to Evidence Code section 356 does not violate the Confrontation Clause. (**Ibid**; **see also *People* v. *Parrish*** (2007) 152 Cal.App.4th 263, 272-273 [stating section 356 is "is founded on the equitable notion that a party who elects to introduce a part of a conversation is precluded from objecting on Confrontation Clause grounds to introduction by the opposing party of other parts of the conversation which are necessary to make the entirety of the conversation understood."].)

Thus, if a defendant wishes to introduce the portions of a statement of his codefendant potentially exculpating the defendant at a joint trial, the prosecution should be able to introduce other aspects of the codefendant's statement which inculpate the defendant pursuant to Evidence Code 356, even though the remaining portions are "testimonial" hearsay, without running afoul of the Confrontation Clause or, accordingly, the ***Bruton*** rule.

**Editor's note:** We discuss the impact of Evidence Code section 356 on the question of whether a defendant whose statement is being redacted can prevent the redaction and require severance in this IPG memo, section 17-a at pp. 61-62.

### iv. Declarations against interest (Evidence Code section 1230) - No

Evidence Code section 1230 permits the admission of a hearsay statement by a declarant having sufficient knowledge of the subject . . . if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

The declaration against interest hearsay exception has traditionally been relied upon by prosecutors more than any other exception to try and work around the ***Bruton*** rule.

California courts have held that declarations against interest that are *nontestimonial* (i.e., those made to friends and family) are admissible at a joint trial over both a Confrontation Clause and hearsay objection. (**See *People* v. *Cortez*** (2016) 63 Cal.4th 101, 129; ***People* v. *Arceo*** (2011) 195 Cal.App.4th 556, 571-575; **see also *People* v. *Arauz*** (2012) 210 Cal.App.4th 1394, 1397; ***People* v. *Ardoin*** (2011) 196 Cal.App.4th 102, 137.) Moreover, notwithstanding a contrary belief by many appellate courts, such nontestimonial declarations against interest should be admissible if the statements meets the statutory elements, regardless of whether the statement is found independently trustworthy.

***Editor's note (Part I of II):** In ***People* v. *Arceo*** (2011) 195 Cal.App.4th 556, the court acknowledged the ***Bruton*** rule has no application when the codefendant's confession is nontestimonial. However, the court then went on to decide whether the codefendant's confession was admissible against the defendant in a joint trial over a *hearsay* objection. The court held that if the statement fell under the state declaration against interest hearsay exception (Evid. Code, § 1230), it would be. But, in deciding whether the codefendant's statement qualified under section 1230, the ***Arceo*** court considered whether the statements were "so trustworthy that adversarial testing would add little to [their] reliability....". (***Id***. at p. 578.) That is, the ***Arceo*** court expressly applied the old ***Ohio* v. *Roberts*** test for the admissibility of hearsay over a Confrontation Clause objection in deciding whether the codefendant's confession was admissible over a *hearsay* objection. We respectfully suggest this is a mistake which stems from a long history of courts mixing up the question of whether a statement qualifies as a declaration against interest with whether a statement falling into that category would be admissible over a Confrontation Clause objection.

**Editor's note (Part II of II):** Evidence Code section 1230 does not require the statement be trustworthy: there is no separate element of trustworthiness above and beyond the express statutory requirement. And now that the question of admissibility of a statement over a Confrontation Clause objection turns on whether the statement is testimonial and not on the trustworthiness of the statement (**see *People v. Rangel*** (2016) 62 Cal.4th 1192, 1217–1218 [the High Court has made clear that ***Roberts*** . . . and its progeny are overruled for all purposes, and retain no relevance to a determination whether a particular hearsay statement is admissible under the confrontation clause")], there should be no reason to require any more trustworthiness than the trustworthiness that automatically results from compliance with the express statutory requirement of the exception. (**See** the 04-26-10 P&A [available upon request].)

No post-***Crawford*** California court, however, has held a *testimonial* declaration against interest to be admissible against both defendants in a joint trial.

True, in ***Cortez***, the court indicated, without qualification, that the ***Bruton*** rule is inapposite when the admissibility of a nontestifying codefendant's hearsay statement falls within a "recognized exception to the hearsay rule." (***Id***. at p. 129.) But it was not addressing a *testimonial* declaration against interest and also expressly relied on the fact that the declaration against interest was *nontestimonial* in finding it was admissible against both defendants in their joint trial. (***Cortez*** at p. 129.)

Assuming that how the ***Bruton*** rule should currently be applied must be viewed in light of the decision in ***Crawford***, it would incongruous to argue that an accomplice's testimonial declaration against interest (which was exactly the kind of declaration found to be inadmissible in ***Crawford***) would be admissible over a ***Bruton*** objection at a joint trial. As noted in the unpublished case of ***People* v. *Mendoza*** 2007 WL 3051719, the declarations against interest held to be properly admitted in joint trials over a ***Bruton*** objection in the pre-***Crawford*** cases of ***People* v. *Fuentes*** (1998) 61 Cal.App.4th 956 and ***People* v. *Greenberger*** (1997) 58 Cal.App.4th 298 "appear to fall within the ***Crawford*** definition of testimonial statements and would ***not*** have been admitted post-***Crawford***[.]" (***Id***. at p. *12, emphasis added by IPG.)

## 6. Can the unredacted statement of a defendant which implicates a codefendant be admitted at a joint trial if it is offered for a *nonhearsay* purpose?

The introduction of nonhearsay statements do not invoke Confrontation Clause concerns. (***Crawford* v. *Washington*** (2004) 541 U.S. 36, 59 fn. 9 ["The [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."]). Because the applicability of the ***Bruton*** rule is contingent upon the applicability of the Confrontation Clause (**see *People* v. *Jennings*** (2010) 50 Cal.4th 616, 661-662; ***United States* v. *Berrios*** (3d Cir. 2012) 676 F.3d 118, 128; ***United States* v. *Johnson*** (6th Cir.2009) 581 F.3d 320, 326), a codefendant's statement offered for a nonhearsay purpose is thus potentially admissible in a joint trial. (**See *People* v. *Ardoin*** (2011) 196 Cal.App.4th 102, 137 ["Cases have declared that the ***Aranda/Bruton*** rule applies only if a codefendant's statement is hearsay . . ."]; ***United States* v. *Brock*** (unpublished) 2005 WL 1334948, at

*16 ["out-of-court statements not offered to prove the truth of the matter asserted" are admissible and "are not affected by ***Bruton*** and ***Crawford***"].)

Indeed, even before ***Crawford***, the High Court had held the ***Bruton*** rule did not bar the admission of a codefendant's statement implicating the defendant when the statement was admitted for a nonhearsay purpose. (**See *Tennessee* v. *Street*** (1985) 471 U.S. 409, 414, 417; **accord *United States* v. *Inadi*** (1986) 475 U.S. 387, 398 n. 11; **see also *Furr* v. *Brady*** (1st Cir. 2006) 440 F.3d 34, 39.)

In ***Tennessee* v. *Street*** (1985) 471 U.S. 409, the defendant testified that his confession was coerced and that the sheriff taking his statement had directed him to say the same thing that his co-defendant had said in the co-defendant's confession. To rebut this claim, the prosecutor called the sheriff to testify to what the co-defendant had said in his confession - a confession which actually differed from the defendant's confession. The co-defendant's confession implicated the defendant. The jury was admonished not to consider the statement for its truthfulness but only as rebuttal evidence. (***Id***. at pp. 411-412.)

The court held that the ***Bruton*** rule was not violated for several reasons. First, the non-hearsay aspect of the confession (to prove what happened when respondent confessed, not what happened at the murder) raised no Confrontation Clause concerns. The person claiming what happened during the confession (i.e., the sheriff) was available for cross-examination. Second, while the Court recognized the possibility of the jury misusing the statement, it held a limiting instruction would suffice when the introduction of the statement was a significant aspect of the case and excluding it would have undermined rather than furthered the Confrontation Clause's mission to advance the accuracy of the truth-finding process. Third, there were no alternatives that would have both assured the integrity of the trial's truth-seeking function and eliminated the risk of the jury's improper use of evidence. (***Tennessee* v. *Street*** (1985) 471 U.S. 409, 414-416.) The Court also held that, under the circumstances, the co-defendant's statement was properly introduced. (***Tennessee* v. *Street*** (1985) 471 U.S. 409, 416.)

It is true that ***Street*** did not involve a joint trial. However, this was <u>not</u> the reason that the High Court in ***Street*** found the ***Bruton*** rule to be inapplicable. (**See also *People* v. *Ardoin*** (2011) 196 Cal.App.4th 102, 137 [finding no violation of ***Bruton*** rule in joint trial of codefendants because, inter alia, the statement of the codefendant "was not hearsay evidence, as it was not offered for the truth of the matter, but only to reflect upon the witness's state of mind and the reasons that convinced her to 'change [her] mind' and testify against defendants and noting "(c)ases have declared that the ***Aranda/Bruton*** rule applies only if a codefendant's statement is hearsay and inadmissible against the defendant."]; ***People* v. *Hajek*** (2014) 58 Cal.4th 1144, 1177 [noting ***Bruton*** rule not violated by eliciting statements of defendant from expert because, inter alia, not elicited for truth but to show expert accepted a lie as true].)

Expect the defense to argue that a codefendant's statement must be redacted or excluded if it implicates the defendant even when the statement is offered for a nonhearsay purpose based on the holding of the California Supreme Court in ***People* v. *Anderson*** (1987) 43 Cal.3d 1104, 1125.

In ***People* v. *Anderson*** (1987) 43 Cal.3d 1104, one defendant presented experts to show that she suffered from diminished capacity. During cross-examination of the experts, they testified to statements made by that defendant incriminating her co-defendant and minimizing her own culpability. On rebuttal, the prosecution called an expert who testified to statements made to him by defendant which incriminated the co-defendant but did not minimize the defendant's own culpability. Thus, the statement of the one defendant incriminating her co-defendant were not introduced into evidence as an admission (i.e., to prove the truth of what was said by the co-defendant) but to challenge the reliability of the defense expert's opinion. The People argued this distinguished the case from ***Bruton***. (***Id.***, at pp. 1118, 1123.) The California Supreme Court held it was still error to allow the statements to be introduced. The ***Anderson*** court believed the purpose for which the statement was entered did not make a difference. Rather, they concluded the co-defendant was still prejudiced because the unreliability of the statement was not affected by the rationale for its introduction and the jurors still would not be capable of following a limiting instruction on its use. (***Id***. at p. 1124.)

***Anderson*** is **likely no longer good law** insofar as it would apply the ***Bruton*** rule to prevent use of a codefendant's statement implicating the defendant even when the statement is offered for a nonhearsay purpose. First, ***Anderson*** was decided before the California Supreme Court in ***People* v. *Fletcher*** (1996) 13 Cal.4th 451 held that a codefendant's statement could only be rendered inadmissible if it was inadmissible under federal law as laid out in ***Bruton*** and its progeny. Second, ***Anderson*** cannot be reconciled with post-***Crawford*** United States Supreme Court and California Supreme Court decisions holding the Confrontation Clause does not bar admission of statements offered for a non-hearsay purpose.

Thus, when a codefendant's statement implicating the defendant is only offered for a non-hearsay purpose, the only issue *arguably* should be whether defendant would be *unduly prejudiced* by having the jury hear the confession - an issue which should be decided by considering the factors used in ***Street***. Thus, in ***Jones* v. *Basinger*** (7th Cir. 2011) 635 F.3d 1030, the Seventh Circuit recognized that "***Street*** teaches that the non-hearsay use of a statement generally does not implicate the protections of the Confrontation Clause[.]" (***Id***. at p. 1050.) But the Seventh Circuit was still concerned that "another person's out-of-court confession directly implicating the accused is nevertheless so inherently prejudicial that its misuse as hearsay remains a strong possibility." (**Ibid**.) The Seventh Circuit recommended that "[t]o negate that possibility, a court admitting such a statement should always 'pointedly instruct the jury that the confession is to be used not for its truth, but only for a non-hearsay purpose. (**Ibid**.) The court also stated that "[b]efore admitting the confession for a non-hearsay purpose, the court must exclude or redact the confession to whatever extent it is possible to do so 'without detracting from the alleged [non-hearsay] purpose for which the confession was introduced.'" (**Ibid**.) The Seventh Circuit believed "[such exclusion or redaction, if possible, can go a long way to ensure that a confession's irrelevant or inflammatory details do not distract the jury from the narrow purpose for which it might legitimately consider that confession and to ensure that the jury will follow a limiting instruction." (**Ibid**.)

The Seventh Circuit also believed that "***Street*** . . . teaches that a non-testifying accomplice's confession can be admitted only if, in light of the inherent unreliability of accomplice confessions implicating the accused, [citation omitted], the asserted non-hearsay purpose actually advances the compelling interests at the heart of the Court's analysis in that case: "the integrity of the trial's truth-seeking function" and the "accuracy of the truth-determining process." (**Ibid**.)

## 7. Does the *Bruton* rule apply in cases where the defendant is not being jointly tried with his codefendant but the prosecution seeks to introduce the incriminating statement of the absent codefendant in the defendant's separate trial?

The California Supreme Court has repeatedly stated that the ***Aranda-Bruton*** rule does not apply when the declarant is not jointly charged with the defendant. Rather, the California Supreme court has made it clear that the ***Aranda-Bruton*** rule only applies when "an out of court confession of one defendant ... incriminates not only that defendant but another defendant jointly charged." (***People v. Combs*** (2004) 34 Cal.4th 821, 841; ***People* v. *Brown*** (2003) 31 Cal.4th 518, 537; **accord *People* v. *Hajek*** (2014) 58 Cal.4th 1144, 1204; ***In re Sakarias*** (2005) 35 Cal.4th 140, 15; **see also *United States* v. *Mitchell*** (9th Cir. 2007) 502 F.3d 931, 965; ***United States v. Allen*** (9th Cir. 2005) 425 F.3d 1231, 1235; **but see *People* v. *Fuentes*** (1998) 61 Cal.App.4th 956, 963, fn. 6 [finding ***Bruton*** rule applied to bar statements of a codefendant implicating another defendant even where the defendant are not tried jointly "since, in ***Douglas* v. *Alabama*** (1965) 380 U.S. 415 . . ., the Supreme Court used similar principles to find a confrontation clause violation where the defendant was tried separately from the cohort whose confession was placed before the jury]; ***Mason* v. *Yarborough*** (9th Cir. 2006) 447 F.3d 693, 695-697 [applying ***Bruton*** principles in single defendant case much to the chagrin of the concurring justice].)

Presumably, the reason the ***Bruton*** rule does not apply in this circumstance is that the statement of the declarant codefendant would only be admissible in defendant's trial if it was admissible over both a hearsay objection (i.e., it was nonhearsay or fell within a hearsay exception) and a Confrontation Clause objection (it was nontestimonial or not offered for its truth). Thus, there would be no need to even give a limiting instruction which is a prerequisite to application of the ***Bruton*** rule.

## 8. Can the unredacted testimonial statement of a co-defendant which implicates the defendant be admitted at a joint jury trial without running afoul of the *Bruton* rule if the codefendant takes the stand?

When the defendant who gave the statement implicating his co-defendant takes the stand in the joint trial, the statement may be admitted without offending the Confrontation Clause. (***Nelson* v. *O'Neil*** (1971) 402 U.S. 622, 626-627; **see also *Bruton* v. *United States*** (1968) 391 U.S. 123,132; ***People* v. *Hoyos*** (2007) 41 Cal.4th 872, 896; ***People* v. *Roberts*** (2010) 184 Cal.App.4th 1149, 1197; ***People* v. *Boyd*** (1990) 222 Cal.App.3d 541, 562–563; ***United States* v. *Allen*** (9th Cir. 2005) 425 F.3d 1231, 1235].)

And this holds true regardless of whether the defendant admits or denies making the earlier statement implicating his co-defendant. (***Nelson* v. *O'Neil*** (1971) 402 U.S. 622, 627, 629-630.)

**Practice Tip**: When a codefendant's statement has been excluded from evidence in a joint trial, prosecutors should ask the trial court to limit its ruling to use of the statement in the People's case-in-chief so that if the codefendant takes the stand, the statement of the codefendant can be used for impeachment purposes. (**See *People* v. *Hoyos*** (2007) 41 Cal.4th 872, 895-896; ***People* v. *Roberts*** (2010) 184 Cal.App.4th 1149, 1197.)

## 9. Doesn't the holding in *Aranda* rule bar the use of an unredacted statement of a codefendant implicating the defendant even when the codefendant takes the stand?

In ***People* v. *Aranda*** (1965) 63 Cal.2d 518, the California Supreme Court found it was error to allow in the statement of one defendant implicating the other defendant even in a case where the declarant took the stand. (***Id***. at p. 524.) However, as noted earlier in this IPG at section 2, pp. 10-11, in determining whether to admit a co-defendant's statement incriminating a defendant in a joint trial, ***Aranda*** is abrogated to the extent it would require exclusion where exclusion would not otherwise be required by the federal Constitution. Thus, where a defendant who gave a statement implicating his codefendant takes the stand and submits to cross-examination, the codefendant's Sixth Amendment rights are not violated.

As pointed out in ***People* v. *Coffman*** (2004) 34 Cal.4th 1: "Although California law predating *Bruton* had required severance whenever a codefendant's extrajudicial statement implicating the defendant was to be introduced, barring effective redaction, regardless of whether the codefendant testified at trial (see *People v. Aranda*, *supra*, 63 Cal.2d at pp. 530–531 [alternate citations omitted]), since the adoption by the voters in June 1982 of Proposition 8, with its preclusion of state constitutional exclusionary rules broader than those mandated by the federal Constitution (see Cal. Const., art. I, § 28, subd. (d)), the *Aranda* rule is coextensive with that of *Bruton*. (*People v. Boyd* (1990) 222 Cal.App.3d 541, 562.) Consequently, the introduction of defendants' extrajudicial statements did not compel the trial court to grant severance." (***Coffman*** at p. 43.) Bottom line: ***Aranda*** is no longer governing law in this regard.

## 10. If the testimonial statement of a codefendant implicates the defendant, can it be redacted in a way so that the statement would still be admissible at a joint trial?

The hearsay and confrontation clauses issues that arise when a statement of one codefendant implicating another codefendant is admitted in a joint trial can be avoided by redacting the statement in a manner eliminating the portion of the statement implicating the codefendant. (**See *Richardson* v. *Marsh*** (1987) 481 U.S. 200, 211; ***Bruton* v. *United States*** (1968) 391 U.S. 123, 133-134 and fn. 10; ***People* v. *Gamache*** (2010) 48 Cal.4th 347, 378-379; ***People* v. *Burney*** (2009) 47 Cal.4th 203, 231; ***People* v. *Hoyos*** (2007) 41 Cal.4th 872, 895; ***People* v. *Coffman*** (2004) 34 Cal.4th 1, 43; ***People* v. *Fletcher*** (1996) 13 Cal.4th 451, 464.) Even in ***People* v. *Aranda*** (1965) 63 Cal.2d 518, the court authorized

redaction "if all parts of the extrajudicial statements implicating any codefendants can be and are effectively deleted without prejudice to the declarant" as one mechanism for utilizing the extrajudicial statement of one defendant that implicates a codefendant in a joint trial. (***Id***. at p. 530.)

## 11. What is the safest way of redacting a statement?

"[T]he line between testimony that falls within ***Bruton***'s scope and that which does not is often difficult to discern[.]" (***United States* v. *Jass*** (2d Cir. 2009) 569 F.3d 47, 56; ***United States* v. *Lung Fong Chen*** (2d Cir.2004) 393 F.3d 139, 149.) Thus, when redacting a codefendant's statement for a joint trial, the safest way of ensuring admission of a codefendant's statement does not run afoul of the ***Bruton*** rule is to eliminate any reference to someone other than the declarant being involved in the crime. Under any variation of what is required for an adequate redaction, elimination of any reference to the identity or existence of the codefendant should suffice. (**See *Gray v. Maryland*** (1998) 523 U.S. 185, 197 [approving of the redaction in ***Richardson* v. *Marsh*** (1987) 481 U.S. 200, 203 that omitted all reference to the defendant and gave no indication that anyone other than the declarant and a third identified person participated in the crime]; ***People* v. *Coffman*** (2004) 34 Cal.4th 1, 43 [declining to require exclusion of a facially incriminating non-testifying codefendant's confession "when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence."].) When a statement "contain[s] no evidence against defendant," it "cannot implicate the confrontation clause." (***People* v. *Stevens*** (2007) 41 Cal.4th 182, 199.)

Redaction will ordinarily also be sufficient in a case involving several perpetrators where reference is made by the declarant to the fact other persons participated in the crime but the defendant is not identified as one of the perpetrators and the statement does not otherwise imply the defendant was one of the perpetrators. For example, in ***Gray* v. *Maryland*** (1998) 523 U.S. 185, the Court disapproved of redacting a declarant's response to the question "Who was in the group that beat Stacey?" that read: "Me, deleted, deleted, and a few other guys." But the ***Gray*** court *approved* of a redaction that would have simply read: "Me and a few other guys." (***Id***. at p. 196; **see also *United States* v. *Straker*** (D.C. Cir. 2015) 800 F.3d 570, 595-597; ***United States* v. *Vasilakos*** (6th Cir. 2007) 508 F.3d 401, 408.)

Ultimately, the better practice is "wherever possible, to eliminate completely ... any mention of a non-declarant defendant's existence .... Neutral pronoun substitution should be employed only when complete redaction would distort the [statement], for example, by excluding substantially exculpatory information, or changing the tenor of the utterance as a whole." (***United States* v. *Jass*** (2d Cir. 2009) 569 F.3d 47, 56; **see also *United States* v. *Ramos-Cardenas*** (5th Cir. 2008) 524 F.3d 600, 609, fn. 6 [upholding redaction of confession that made used plural terminology, but indicating it would have been "undoubtedly the safer course" for the officer to have related the confession "entirely in the singular" since "codefendant statements that give absolutely no indication that anyone else participated in the crime are more likely to fall within the class of statements that do not offend the Confrontation Clause"].)

**Editor's note:** This is just the *safest* way to ensure compliance with the ***Bruton*** rule. IPG is not suggesting that redaction must always occur when a codefendant declarant's statement mentions defendant's name but does not incriminate the defendant at all. Nor that if some redaction occurs, it will always be insufficient if a statement still mentions defendant's name after redaction but the redacted statement does not incriminate the defendant. (**See e.g.**, ***People v. Bowie*** (unpublished) 2011 WL 4458975, at *2 [redaction sufficient where codefendant's hearsay statements mentioned defendant's name twice, but only to identify other people and places and did not incriminate defendant].)

## 12. Can a co-defendant's statement which only implicates the defendant by reference to other evidence introduced at trial (i.e., inference by linkage) still violate the *Bruton* rule?

In ***Richardson* v. *Marsh*** (1987) 481 U.S. 200, the United States Supreme Court held that the ***Bruton*** rule was limited to "facially incriminating" statements. The Court essentially found that if the only way the jury would know the defendant was incriminated by the co-defendant's statement was by being able to infer it through reference to other evidence introduced at trial, there was no violation of ***Bruton***. (***Richardson*** at pp. 208-209.)

However, in ***Gray* v. *Maryland*** (1998) 523 U.S. 185, the High Court held that a statement, which was not *literall*y incriminating on its face, was "facially incriminating" for purposes of the ***Bruton*** rule, i.e., because the statement was redacted to simply replace the defendant's name with the word "deleted" or an obvious blank space. (***Id.*** at pp. 194-196.)

The ***Gray*** Court recognized that in ***Richardson*** it had held that statements which implicate inferentially are outside the scope of the ***Bruton*** rule and that technically, a jury must use inference to connect the defendant to a co-defendant's statement where the only editing is the deletion of the defendant's name and replacement with a symbol. However, it went on to conclude that it is not the simple fact that inference is required that takes a statement outside the scope of ***Bruton***. Rather, whether ***Bruton*** is violated depends in significant part upon ***the kind of***, not the simple fact of, inference. (***Gray* v. *Maryland*** (1998) 523 U.S. 185, 192, 196.)

The ***Gray*** Court identified three reasons why the jury faced with the type of redacted statement it was reviewing in the case would not be able to refrain from drawing the inference incriminating the defendant: (1) the redacted confession referred directly to the existence of another perpetrator, (2) the jury would be likely to *realize immediately* that a redacted confession replacing a name with an obvious blank space or a word such as "deleted" referred to the defendant sitting with defense counsel, and (3) the obvious deletion was likely to call the jurors' attention to the removed name. (***Id.***, at pp. 196-197.)

The ***Gray*** Court did <u>not</u>, however, authorize courts to look at other evidence that might be introduced at trial in assessing whether the redacted statement inferentially incriminated the defendant. Rather, the

***Gray*** court only condemned redacted statements that "obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, *even were the confession the very first item introduced at trial*." (***Id.*** at p. 196, emphasis added by IPG.)

The language in ***Gray*** certainly seems to suggest that, in assessing whether a confession inferentially or directly incriminates a defendant, the trial court is limited to considering the confession itself *without reference to other evidence to be introduced at trial* (i.e. because the inference must be one the jury could make even if the confession were the very first item introduced at trial). And the majority of post-***Gray*** federal decisions do **not** find that ***Gray*** authorizes courts to consider other evidence at trial in assessing whether a redacted statement facially implicates the defendant. (**See *United States* v. *Taylor*** (11th Cir. 1999) 186 F.3d 1332, 1335-1336; ***United States* v. *Verduzco- Martinez*** (10th Cir. 1999) 186 F.3d 1208, 1214; ***United States* v. *Gayekpar*** (8th Cir. 2012) 678 F.3d 629, 637; ***United States* v. *Logan*** (8th Cir. 2000) 210 F.3d 820, 822; ***United States* v. *Stockheimer*** (7th Cir. 1998) 157 F.3d 1082, 1086-1087; ***United States* v. *Powell*** (5th Cir. 2013) 732 F.3d 361, 377; ***United States* v. *Vejar-Urias*** (5th Cir. 1999) 165 F.3d 337, 340; ***United States* v. *Jass*** (2d Cir. 2009) 569 F.3d 47, 62; ***United States* v. *Smith*** (2nd Cir. 1999) 198 F.3d 377, 385; ***United States* v. *Figueroa-Cartagena*** (1st Cir. 2010) 612 F.3d 69, 85; ***United States* v. *Rodríguez-Durán*** (1st Cir.2007) 507 F.3d 749, 769; ***United States* v. *Wilson*** (D.C. Cir. 1998) 160 F.3d 732, 740, fn. 5; **see also *United States* v. *Akinkoye*** (4th Cir. 1999)185 F.3d 192, 197-198 [focusing on internal implications of statement]; ***United States* v. *Cambrelen*** (E.D.N.Y. 1998) 18 F.Supp.2d 226, 229-230.) Albeit, some post-***Gray*** decisions have not adopted this approach. (**See *United States* v. *Straker*** (D.C. Cir. 2015) 800 F.3d 570, 596-598 [citing to a pre-***Gray*** decision from the D.C. Circuit for the proposition that the "Confrontation Clause is not violated by the redacted statement's admission if, *when viewed together with other evidence*, the statement does not create an inevitable association with the defendant, and a proper limiting instruction is given."]; ***United States* v. *Hoover*** (7th Cir. 2001) 246 F.3d 1054, 1059 [suggesting looking beyond "four corners of statement"]; ***United States*. v. *Mayfield*** (9th Cir. 1999) 189 F.3d 895, 902 ["the impermissible inference that [the codefendant] named [defendant] as the drug ringleader was unavoidable, if not on its face, then c*ertainly in the context of the previously admitted evidence at trial*"].) (Emphasis added throughout by IPG.)

Before the decision in ***Gray*** issued, a slightly different approach was taken by the California Supreme Court in ***People* v. *Fletcher*** (1996) 13 Cal.4th 451. In ***Fletcher***, the court indicated that even in cases "in which it is not feasible to eliminate all of the confession's references to the nondeclarant's ***existence*** . . . redaction that replaces the nondeclarant's name with a pronoun or similar neutral and nonidentifying term will adequately safeguard the nondeclarant's confrontation rights unless the average juror, viewing the confession ***in light of the other evidence introduced at trial***, could not avoid drawing the inference that the nondeclarant is the person so designated in the confession and the confession is "powerfully incriminating" on the issue of the nondeclarant's guilt**.**" (***Id.***, at p. 467, emphasis added by IPG.)

***Fletcher*** is arguably inconsistent with the holdings in ***Gray*** and ***Richardson*** to the extent ***Fletcher*** can be viewed as holding that whether the ***Bruton*** rule is violated depends, in part, on (i) what *other* evidence was introduced or (ii) that the kind of redaction in ***Gray*** may suffice to avoid a ***Bruton*** rule violation. If such a conflict exists between the holdings in ***Gray*** and ***Fletcher***, the decision in ***Gray*** controls. (**See *People* v. *Fletcher*** (1996) 13 Cal.4th 451, 469, fn. 6 [presciently noting that its holding may not be the last word, because the issue may come before the United States Supreme Court, whose decisions on questions of federal constitutional law are binding on all state courts]; **see also *People* v. *Hampton*** (1999) 73 Cal.App.4th 710, 718-722 [resolving ***Bruton*** issues based solely on the standards laid out ***Gray*** and other United States Supreme Court cases and citing to ***Fletcher*** solely in support of the proposition that for purposes of assessing whether a redacted statement was admissible, federal constitutional law controlled].)

More recent decisions of the California Supreme Court have repeatedly cited to the decision in ***Gray*** for the proposition that "[t]he class of inferentially incriminating statements under ***Bruton*** is limited to 'obvious[ ]' ones, 'inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial.'" (***People* v. *Montes*** (2014) 58 Cal.4th 809, 867; **accord *People* v. *Burney*** (2009) 47 Cal.4th 203, 231; ***People* v. *Lewis*** (2008) 43 Cal.4th 415, 455; **see also *People* v. *Capistrano*** (2014) 59 Cal.4th 830, 869 [citing to ***Fletcher*** for the proposition that "[s]tatements that incriminate by implication, however, are not within the scope of ***Bruton***."]; ***People* v. *Lopez*** (2013) 56 Cal.4th 1028, 1057 [citing to ***People v. Mitcham*** (1992) 1 Cal.4th 1027, 1046–1047 for the principle that "[u]nder ***Richardson***, a defendant's confrontation clause rights are protected at a joint trial by the redaction of any reference to the defendant in his or her codefendant's confession even if the redacted confession incriminates the defendant when linked to other evidence introduced at trial."].)

Nevertheless, the California Supreme Court has ***also*** continued to cite to ***Fletcher*** for the proposition that "the sufficiency of this form of editing must be determined on a case-by-case basis in light of the statement as a whole ***and the other evidence presented at the trial***." (***People* v. *Burney*** (2009) 47 Cal.4th 203, 231; ***People* v. *Lewis*** (2008) 43 Cal.4th 415, 456–460, emphasis added by IPG.) Moreover, some California appellate cases dealing with redacted statements have overlooked (or have not seen) any conflict between ***Gray*** and ***Fletcher*** and have taken into account other evidence adduced at trial in assessing whether a redaction that uses indefinite pronouns violates the ***Bruton*** rule. (**See e.g., *People* v. *Ardoin*** (2011) 196 Cal.App.4th 102, 136, 138 [discussed in this IPG memo, section 16 at p. 57 and simultaneously citing to ***Fletcher*** for the notion that "the efficacy of this form of editing must be determined on a case-by-case basis *in light of the other evidence that has been or is likely to be presented at the trial*" and to ***Richardson*** for the principle that a "codefendant's statement that does not incriminate the defendant unless linked with other evidence introduced at trial does not violate the defendant's Sixth Amendment rights'"]; ***People* v. *Archer*** (2000) 82 Cal.App.4th 1380, 1387 [discussed in this IPG memo, section 16 at p. 59]; ***People* v. *Bryden*** (1998) 63 Cal.App.4th 159, 176 [discussed in this IPG memo, section 16 at p. 60].)

*__Editor's note__: California cases are not alone in this schizophrenic approach. For example, in ***Vazquez* v. *Wilson*** (3d Cir. 2008) 550 F.3d 270, the Third Circuit reviewed the ***Bruton-Richardson-Gray*** line of cases and concluded the following: "After it decided ***Richardson*** the Supreme Court decided ***Gray***, which we understand to read ***Richardson*** to hold that in ***Richardson*** there had not been a ***Bruton*** violation because the challenged statement incriminated the objecting defendant only when linked with evidence introduced later at the trial. . . . Yet the teaching of [cases in the Third Circuit] dealing with the extrinsic evidence issue . . . may be that there can be a ***Bruton*** violation in either of two situations. The first basis for a violation would be if the trial court erroneously admitted into evidence or allowed the use at trial of a statement that on its face incriminated the objecting defendant. The second basis for a violation would be if the court admitted into evidence or allowed the use at trial of a statement that became incriminating when linked with other evidence in the case." (***Id***. at pp. 278–279.) Alright, which is it?

How to reconcile this apparent discrepancy? It is not easy. One possible way implicitly suggested by the cases (*albeit not* ***expressly*** endorsed by any case) is to ignore any evidence other than the codefendant's statement itself when the statement of the codefendant *makes no mention of the defendant in any manner* but to take into consideration other evidence besides the codefendant's statement when assessing whether use of a statement *that refers to another person*, *but does not expressly identify the other person as the defendant*, will violate the ***Bruton*** rule. Another possible way (also not ***expressly*** endorsed by any case) is to treat the question of whether a statement is *directly or facially* incriminating as a separate question from whether a statement is *powerfully* incriminating (**see** this IPG memo, section 14 at pp. 50-53); and ignore any evidence other than the codefendant's statement itself when deciding the first question, but consider other evidence besides the codefendant's statement when deciding the second question.

## 13. If it is not possible to redact the statement so that any mention of other parties being involved is eliminated, will the statement be admissible if the prosecution simply eliminates the defendant's name from the statement and substitutes a symbol or indefinite pronoun?

### a. Redaction by substitution of the defendant's name with the term "deleted," a blank space, or similar symbol

In ***Gray* v. *Maryland*** (1998) 523 U.S. 185, the High Court held a "redaction that replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word "deleted," or a similar symbol, still falls within ***Bruton***'s protective rule." (***Id***. at p. 192.) And thus a prosecutor must do more than "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" if the prosecutor wants to use the statement in a joint trial. The prosecutor "must redact the confession to reduce significantly or to eliminate the special prejudice that the ***Bruton*** Court found." (**Ibid**; **see also *Greene* v. *Fisher*** (2011) 132 S.Ct. 38, 43.)

This is because, "considered as a class, redactions that replace a proper name with an obvious blank, the word 'delete,' a symbol, or similarly notify the jury that a name has been deleted" are similar enough to ***Bruton***'s unredacted confessions as to warrant the same legal results." (***Gray* v. *Maryland*** (1998) 523 U.S. 185, 195; **accord *People* v. *Lewis*** (2008) 43 Cal.4th 415, 455; **see also *United States* v. *Peterson*** (9th Cir. 1998) 140 F.3d 819, 822 [substituting "person X" for defendant's name impermissible under ***Gray***]; ***Foxworth* v. *St. Amand*** (1st Cir. 2009) 570 F.3d 414, 434 [substituting "Mr. X" for defendant's name impermissible under ***Gray***].)

Thus, the ***Bruton*** rule **is** violated when the ***only*** redaction is replacing the name of a defendant implicated with a blank space, the word "deleted," or a similar symbol, and the statement still refers directly to the "existence" of the "unidentified" nondeclarant defendant. (***Gray* v. *Maryland*** (1998) 523 U.S. 185, 192.)

## b. Redaction by substituting indefinite pronouns

There is somewhat of a split among the cases as to whether the use of neutral pronouns or other nondescript terms in a redacted statement (i.e., replacing "I told Joe to kill Bob" with "I told someone to kill Bob") will be viewed the same as the type of redaction condemned in ***Gray*.**

Part of the uncertainty in this regard, at least in California, stems from the fact that the seminal California Supreme Court case in the area, ***People* v. *Fletcher*** (1996) 13 Cal.4th 451 attempted to answer the question left open in ***Richardson* v. *Marsh*** (1987) 481 U.S. 200, 211, fn. 5 (i.e., whether a limiting instruction would suffice if the incriminating statement was redacted simply by replacing the defendant's name with a symbol or neutral pronoun) before the High Court did in ***Gray* v. *Maryland*** (1998) 523 U.S. 185. (**See** this IPG memo, section 1 at pp. 8-9.)

The ***Gray*** Court was concerned with redactions that simply replaced a name with a blank space, or a word such as "deleted," or a symbol, or another similarly obvious indication of alteration. (***Id.*** at p. 192.) In ***Fletcher***, the case did not involve this specific type of redaction. Rather, it involved a case where a witness recounted a statement made by the defendant to her that "he and *a friend* were on a freeway ramp and had a cab or a vehicle-like there was a cab or something there, and *they* were using jumper cables or some kind of ruse to get people to stop" and "that *they* were doing that so when people would stop that *they* could rob them, take their money." (***Fletcher*** at p. 459, emphasis added by IPG.)

The ***Fletcher*** Court characterized the question before it as deciding whether the ***Bruton*** rule could be avoided by replacing a defendant's name "with a symbol or neutral pronoun." (***Fletcher*** at p. 456.) In other words, the ***Fletcher*** court did an analysis that resulted in a rule governing whether a *broader* set of redactions than the type of redaction condemned in ***Gray*** (i.e., an obvious deletion) would violate the ***Bruton*** rule.

The ***Fletcher*** court concluded "that whether this kind of editing-which retains references to a coparticipant in the crime but removes references to the coparticipant's name-sufficiently protects a nondeclarant defendant's constitutional right of confrontation may not be resolved by a "bright line" rule of either universal admission or universal exclusion. Rather, the efficacy of this form of editing must be determined on a case-by-case basis in light of the other evidence that has been or is likely to be presented at the trial. The editing will be deemed insufficient to avoid a confrontation violation if, despite the editing, reasonable jurors could not avoid drawing the inference that the defendant was the coparticipant designated in the confession by symbol or neutral pronoun." (***Id***. at p. 456.)

Under the test adopted in ***Fletcher***, a statement redacted with neutral pronouns may still violate ***Bruton*** if, for example, it contains references to distinctive clothing, mannerisms, place of residence, or other information that readily and unmistakably identifies the person referred to as the nondeclarant defendant. (***Id***. at pp. 465-466.) On the other hand, the ***Fletcher*** court also noted that there are instances in which replacing the nondeclarant defendant's name with a symbol or neutral pronoun will be effective in protecting the nondeclarant's rights under the confrontation clause. For example, a confession that is redacted to substitute pronouns or similar neutral and nonidentifying terms for the name of a codefendant will be sufficient if the codefendant was just one of a large group of individuals any one of whom could equally well have been the coparticipant mentioned in the confession. (***Id***. at p. 466.)

As noted above, the ***Fletcher*** court's analysis may be inconsistent with the High Court decisions in ***Richardson*** and ***Gray*** to the extent it permits consideration of other evidence that might be introduced at trial in determining whether the neutral pronoun used would directly or facially incriminate the defendant. (**See** this IPG memo, section 12 at pp. 39-42.) However, with that caveat, all the other factors identified by ***Fletcher*** in assessing whether a redaction using nondescript pronouns directly or facially incriminates the nondeclarant defendant are likely valid considerations - so long as they can be sussed out by looking only at the redacted statement itself.

Many post-***Gray*** cases, including have upheld the admission of codefendant statements in a joint trial despite the fact there is a nondescript reference to another person who, in reality, is the defendant. (**See e.g.**, ***People*** **v.** ***Ardoin*** (2011) 196 Cal.App.4th 102, 136 [noting several reasons a codefendant statement was properly admitted, including that witness testifying to codefendant's declaration replaced defendant's name with the pronouns "person" and "they."]; ***United States*** **v.** ***Straker*** (D.C. Cir. 2015) 800 F.3d 570, 595 [anonymized references to the "other guy" or "another fella" did not violate ***Bruton*** rule – at least where many perpetrators involved]; ***United States*** **v.** ***Jass*** (2d Cir. 2009) 569 F.3d 47, 59 [use of "another person" sufficient]; ***United States*** **v.** ***Ramos-Cardenas*** (5th Cir. 2008) 524 F.3d 600, 609–610 [while codefendant's statement "they crossed" might serve to incriminate the other defendants by inference in case charging thirteen individuals with transported marijuana across the United States-Mexico border it only does so if certain inferences are drawn and "the use of an indefinite pronoun does not so obviously refer to specific individuals" or give "rise to inferences so strong that they would be made immediately if the statement were the first item introduced at trial"]; ***United States*** **v.** ***Vasilakos*** (6th

Cir. 2007) 508 F.3d 401, 408 [redaction sufficient where government replaced each reference to other defendants with a neutral word, such as "the person" or "another person" – at least where many perpetrators involved]; ***Priester* v. *Vaughn*** (3d Cir.2004) 382 F.3d 394, 399 [substitutions such as "the other guy," "someone," "someone else," "the guy," and "another guy" did not violate the Confrontation Clause where there were "at least fifteen perpetrators in various cars involved in the shooting"]; ***United States* v. *Yousef*** (2d Cir. 2003) 327 F.3d 56, 149-150 [reference to a "former neighbor" okay – albeit where other indefinite pronouns that referenced defendant redacted]; ***United States* v. *Taylor*** (11th Cir.1999) 186 F.3d 1332, 1335-1337 [redacted statement which replaced defendant's name with "they" and "captain" did not violate ***Bruton*** rule]; ***United States* v. *Logan*** (8th Cir. 2000) 210 F.3d 820, 821-822 [detective properly allowed to testify codefendant said that he planned and committed the relevant robbery with "another individual" even though the codefendant refused to name his accomplice in another confession introduced into evidence]; ***United States* v. *Verduzco–Martinez*** (10th Cir.1999) 186 F.3d 1208, 1213–14 [use of "another person" did not violate Confrontation Clause]; ***United States* v. *Akinkoye*** (4th Cir.1999) 174 F.3d 451, 457 [use of "another person" and "another individual" did not violate Confrontation Clause]; ***Plater* v. *United States*** (D.C. 2000) 745 A.2d 953, 961–962 [use of the term "we" did not violate ***Bruton*** rule].) Indeed, even in ***People* v. *Aranda*** (1965) 63 Cal.2d 518, the court proposed a hypothetical confession of a codefendant indicating others were involved which the Court felt would be admissible: "I was one of the ***persons*** who robbed the store but I will tell you nothing more." (***Id.,*** at p. 531, fn. 10, emphasis added by IPG.)

On the other hand, some opinions (including some from California courts) have held that replacing a defendant's name with the indefinite reference to a term like "someone" or "another person" instead of the defendant's name is an insufficient redaction. (**See e.g.**, ***People v. Burney*** (2009) 47 Cal.4th 203, 228-232 [reference to "others" or "the other" insufficient redaction where "the statements in conjunction with other evidence led to the obvious inference that defendant was "the other" who shot [the victim]"]; ***People* v. *Schmaus*** (2003) 109 Cal.App.4th 846, 856 [reference to "another guy" in the place of the defendant's name does not avoid the Sixth Amendment confrontation issue because "the confession may not contain any reference to the existence of the defendant"]; ***Vazquez* v. *Wilson*** (3d Cir.2008) 550 F.3d 270, 280-282 [even though defendant's name and absent third occupant's name had been replaced with neutral terms such as "my boy" and "other guy," redaction insufficient where overriding issue was which of three occupants of automobile, only two of whom were tried, had fired shot that killed passenger in second vehicle, and shooter in codefendant's statement was identifiable as defendant since codefendant denied firing shot and defendant was only other occupant on trial]; ***United States* v. *Hardwick*** (3d Cir. 2008) 544 F.3d 565, 572 [replacing any references to declarant's co-defendants with neutral terms such as "others" or "another person," insufficient in light of earlier evidence placing them in the van used in the crime];; ***United States* v. *Richards*** (3d Cir.2001) 241 F.3d 335, 341 [where confession stated declarant had planned the robbery with a "friend" and other testimony showed that the two co-defendants were friends, reference to the "friend" was "just as blatant and incriminating ... as the word 'deleted' in the ***Gray*** case."]; ***United States* v. *Gillam*** (9th Cir. 1999) 167 F.3d 1273, 1277 [confession that did not

mention defendant by name "but did make three indirect references to her as someone who "worked at FDA" who "was getting ready to retire" insufficient to place statement outside ***Bruton*** rule –but error harmless]; ***United States* v. *Nash*** (10th Cir. 2007) 482 F.3d 1209, 1218 [reference in confession to defendant by use of terms "partner" and "his driver" violated ***Bruton*** rule - but error was harmless]; ***United States* v. *Vejar–Urias*** (5th Cir.1999) 165 F.3d 337, 340 [use of "someone" violated ***Bruton***].)

Considering the arguably conflicting authority, the best interpretation of the law regarding the propriety of replacing a defendant's name with a neutral pronoun or phrase is the following:

"[W]here a defendant's name is replaced with a neutral pronoun or phrase there is no ***Bruton*** violation, providing that the incrimination of the defendant is only by reference to evidence other than the redacted statement and a limiting instruction is given to the jury. Where, however, it is obvious from consideration of the confession as a whole that the redacted term was a reference to the defendant, then admission of the confession violates ***Bruton***, regardless of whether the redaction was accomplished by use of a neutral pronoun or otherwise." (***United States* v. *Verduzco-Martinez*** (10th Cir. 1999) 186 F.3d 1208, 1214; **accord *United States* v. *Shaw*** (10th Cir. 2014) 758 F.3d 1187, 1196.)

In applying this test, certain considerations come to the fore:

**How inconspicuous is the deletion?**

Unartful deletions of pronouns or nouns that result in ungrammatical sentences are likely to be deemed to fall within the ***Gray*** rule. There is no functional difference between a sentence that has been edited to read, "Me and [deleted] robbed the liquor store" and a sentence that has been edited to read "Me robbed the liquor store," especially if the latter sentence is surrounded by other oddly phrased sentences which will tip off the jury that the original statement had implicated somebody else. (**See e.g.**, ***People* v. *Archer*** (2000) 82 Cal.App.4th 1380, 1389-1390; **see also *United States* v. *Taylor*** (2d Cir. 2014) 745 F.3d 15, 29 [redaction insufficient where "the wording of the statement suffer(ed) from stilted circumlocutions" such as "The robbery was the idea of the person who waited with Luana Miller and Taylor at the gas station"]; ***United States* v. *Jass*** (2d Cir. 2009) 569 F.3d 47, 61-62 [indicating redaction might not fly where the neutral-word substitution was "conspicuously awkward", e.g., a statement like "When I realized the guard had pulled the alarm, I turned and said to another person, 'Look, other person, we have to get out of here.'"]; **but see *United States* v. *Straker*** (D.C. Cir. 2015) 800 F.3d 570, 595 [finding a "single, ungrammatical redaction" which involved erroneously omitting a definite article before referring to "other guy" did "not make it obvious that the statement had been redacted: the awkward language could just as plausibly have resulted from a misstatement (by either the declarant or testifying officer) or typographical error in transcribing the confession."].)

In contrast, "[r]edactions and substitutions can avoid ***Bruton*** error if the altered statement uses words '***that might actually have been said*** by a person admitting his own culpability in the charged conspiracy while shielding the specific identity of his confederate.'" (***United States* v. *Taylor*** (2d Cir.

2014) 745 F.3d 15, 28 quoting ***United States* v. *Jass*** (2d Cir. 2009) 569 F.3d 47, 55, emphasis added by IPG]; ***United States* v. *Straker*** (D.C. Cir. 2015) 800 F.3d 570, 600[finding redaction sufficient where, inter alia, the government replaced the defendants' proper names or nicknames with a variety of neutral pronouns but did so in a way that made the "resultant statements ***appear natural*** and match the defendants' own speech"], emphasis added by IPG.) That is, how "seamlessly" the language post-redaction reads is another factor considered by the courts in deciding whether a redaction is or is not akin to the disapproved redaction in ***Gray***. (**See e.g., *United States* v. *Sandstrom*** (8th Cir. 2010) 594 F.3d 634, 648; ***United States* v. *Williams*** (8th Cir. 2005) 429 F.3d 767, 773.)

**How many deletions are inserted?**

Another factor courts will consider in deciding whether a confession using indefinite pronouns violates the ***Bruton*** rule is how many times the statement makes reference to a nondescript "other person." For example, in ***United States* v. *Williams*** (8th Cir. 2005) 429 F.3d 767, the court indicated replacing defendant's name with the designation "someone" over 40 times in the codefendant's statement ***might*** have been insufficient because, inter alia, "the neutral pronoun 'someone' may have lost its anonymity by sheer repetition." (***Id***. at p. 774 [albeit declining to decide the issue because any error was harmless]; **accord *United States* v. *Mueller*** (8th Cir. 2011) 661 F.3d 338, 349 [same in all respects except pronoun used was "the individual"]; **see also *United States* v. *Sandstrom*** (8th Cir. 2010) 594 F.3d 634, 648.)

**How many perpetrators were involved in the crime?**

Courts will also consider the number of perpetrators. A reference to the fact that more than one person was involved in the crime will be much less likely to be held "facially incriminating" if there are several perpetrators. And the greater the number of perpetrators, the less likely it using a nondescript reference will run afoul of the ***Bruton*** rule. (**See *People* v. *Lewis*** (2008) 43 Cal.4th 415, 467 ["Some courts have held that when a redacted confession, as here, avoids a "one-on-one correspondence" between the confession and an easily identifiable defendant, the confrontation clause is not violated."]; ***People* v. *Fletcher*** (1996) 13 Cal.4th 451, 466 ["a confession that is redacted to substitute pronouns or similar neutral and nonidentifying terms for the name of a codefendant will be sufficient if the codefendant was just one of a large group of individuals any one of whom could equally well have been the coparticipant mentioned in the confession"]; ***People* v. *Jefferson*** (2008) 158 Cal.App.4th 830, 845 [indicating "large group" exception identified in ***Fletcher*** might be inapplicable where the group is just three persons]; ***United States* v. *Straker*** (D.C. Cir. 2015) 800 F.3d 570, 601 ["Finally, and perhaps most importantly, the district court recognized that redactions would be effective to protect defendants' confrontation rights because of the large number of actors involved in the alleged crime. As the court observed, the greater the number of alleged perpetrators involved in the charged offense, the more indirect the inference that the jury could draw from the redacted statements."]; ***Pabon* v. *Mahanoy*** (3d Cir. 2011) 654 F.3d 385, 395 [stating "the number of codefendants that could be implicated in a ***Gray*** analysis, where redactions or substitutions have been used, is also important" and contrasting a case involving three perpetrators where

redaction was insufficient with case involving at least 15 persons where redaction was sufficient]; ***United States* v. *Sutton*** (7th Cir. 2003) 337 F.3d 792, 799 [finding reference to "another person" and similar neutral words in codefendant's statement did not violate ***Bruton*** rule "especially given that there were multiple people, identified and unidentified, involved in the various crimes detailed in" the codefendant's confession]'; ***Plater* v. *United States*** (D.C. 2000) 745 A.2d 953, 961–962 [use of the neutral pronoun, "we," when referring to the group who attacked the decedent sufficient redaction where it did not connote a particular number of people or single out any individual person and "there was no symmetry between the number of alleged perpetrators and the number of defendants on trial"].)

**How detailed is the description of the unidentified person?**

Courts will also consider whether the reference to the defendant includes a physical description or other identifying characteristic. In the case of ***Gray v. Maryland*** (1998) 523 U.S. 185 itself, the Court explained that redactions "that use shortened first names, nicknames, [or] descriptions as unique as the 'red-haired, bearded, one-eyed man-with-a-limp'" would fall within ***Bruton***'s protection. (***Gray*** at p. 195.) "So too would a description of a defendant as 'this white guy' when coupled with particulars as to 'age, height, and weight.'" (***United States* v. *Jass*** (2d Cir. 2009) 569 F.3d 47, 63 citing to ***Harrington v. California*** (1969) 395 U.S. 250, 253]; **see also *People* v. *Fletcher*** (1996) 13 Cal.4th 451, 466 [redaction may be insufficient if redacted statement "contains references to distinctive clothing, mannerisms, place of residence, or other information that readily and unmistakably identifies the person referred to as the nondeclarant defendant"]; ***United States* v. *Straker*** (D.C. Cir. 2015) 800 F.3d 570, 601 [finding redaction sufficient because, inter alia, the statements were "scrubbed of any other designations or identifiers based on a defendant's physical characteristics or role"]; ***United States* v. *Hoover*** (7th Cir.2001) 246 F.3d 1054, 1059 [holding replacement of defendant's names with terms "incarcerated leader" and "unincarcerated leader" provided jury with "aliases based on their occupations" that "no more concealed their identities" than would "the substitution of 'Mark Twain' for 'Samuel Clemens'"].)

## c. Redaction by restructuring sentences

Another potential way of redacting a statement is to make changes to the sentence structure in order to eliminate reference to a defendant. (**See e.g.**, ***People* v. *Lewis*** (2008) 43 Cal.4th 415, 466-467.) For example, a confession in which the codefendant states "The defendant told me to drive to the store" can be recast as "I was told to drive to the store." This sometimes, but not always, is found to be sufficient.

In ***People* v. *Archer*** (2000) 82 Cal.App.4th 1380, the codefendant had accompanied the victim to the defendant's home where the victim was killed. The statement of the co-defendant was redacted to delete any mention of defendant and the language of the statement was restructured. In the redacted and restructed version of the statement, the codefendant said he picked up the victim and suggested they go to

4181 La Madera Avenue (which was the defendant's address). In the redacted statement, the codefendant stated "[t]he *plan* was to attack [the victim] by surprise as he walked into the back yard of 4181 La Madera Avenue." (***Id***. at p. 1388.) The codefendant stated he knew that bringing the victim to that address "was gonna set him up" and that when he and victim reached the address and walked into the patio area, "[*the victim] was behind me*, and *then [the victim] was stabbed*." (**Ibid**, emphasis added.) The codefendant's statement recounted that the victim "tried to escape, but I didn't know what to do, so I held him." (**Ibid**.) And that while the codefendant stabbed the victim in the arm, "maybe twice ...." the codefendant believed the victim was stabbed more than 10 times, "mostly in the chest or in the stomach." (**Ibid**.) (Emphasis added throughout by IPG.) The ***Archer*** court held this restructuring unmistakably implicated defendant because the statement left no doubt that "the serious stab wounds were inflicted by someone other than [the codefendant] and that this other person was waiting at [defendant's] house for [the codefendant] to arrive with [the victim]." (***Id***. at p. 1389.)

On the other hand, in ***Quisenberry* v. *Com***. (Ky. 2011) 336 S.W.3d 19, two defendants were charged with the robbery murder of a victim and an assault on the victim's two-year old daughter in the victim's house. Both defendants gave statements admitting being present in the victim's house, having seen a black, 9mm gun; and having heard gunshots. Codefendant Quisenberry acknowledged having been present when the victim was shot in the leg, and he recalled at least three or four shots. Defendant Williams recalled that the victim was on the ground when she was shot, and he also remembered hearing the child crying from the bed. (***Id***. at p. 25.) At trial, a detective paraphrased what the defendants told him. "In doing so, the detective scrupulously avoided any mention either defendant made of the other, limiting his testimony to what each defendant said about his own actions, about the two victims, and about his having seen a gun and heard gunshots." (***Id***. at p. 27.) On cross-examination "each defendant was allowed to ask whether he had denied shooting anyone, and in both cases the detective answered that he had." (**Ibid**.) The defendant Williams contended "that this paraphrased version of [codefendant] Quisenberry's statement violated his confrontation right because notwithstanding the fact that it does not refer to him expressly it does so by obvious implication." (**Ibid**.) Defendant Williams reasoned that "if Quisenberry saw a gun and heard gunshots, but was not himself the shooter, then clearly . . . he is accusing Williams of filling that role." (**Ibid**.) The appellate court characterized the redaction as falling "somewhere between ***Gray*** and ***Richardson***" but believed it was more like the latter than the former and thus found the redaction sufficient. (**Ibid**.) The court recognized that "Quisenberry's admission that he heard shots and his denial of having fired them imply that someone else did[.]" (***Id***. at p. 28.) But held Quisenberry's statement did not expressly or directly refer to Williams and "the inference that Williams was 'the someone else' is not suggested by the redacted paraphrase of Quisenberry's statement" and arose only by inference through consideration of the other evidence of Williams's involvement admitted at trial. (**Ibid**.)

In ***People* v. *Lewis*** (2008) 43 Cal.4th 415, the trial court permitted a restructuring of a codefendant's statement in an attempt to comply with ***Bruton*** in a case involving four defendants who committed

robberies, kidnappings, and/or murders of eight separate victims. For example, the jury heard a statement from one defendant that she "observed [a victim] *to be forcibly abducted*"; that she saw the victim exit the car at a particular location; and that "a gun misfired" as the victim jumped off a cliff. (***Id***. at p. 466, emphasis in original.) Similarly, regarding a different victim, the jury heard that the codefendant stated her car "*was driven*" around the mall parking lot until the victim was spotted, the victim "*was overcome* and her hands *were bound*," money and an ATM card "*was [sic ] removed* " from the victim's purse, and that the codefendant saw the victim walk down an embankment and then heard shots fired. (***Id***. at p. 467.) The ***Lewis*** court recognized that each of the statements implied the existence of one or more accomplices but also that it was "impossible to determine from the redacted statements how many accomplices were involved in" the two crimes because three people in addition to the codefendant were on trial for those crimes. (**Ibid**.) After noting that "[s]ome courts have held that when a redacted confession, as here, avoids a 'one-on-one correspondence' between the confession and an easily identifiable defendant, the confrontation clause is not violated[,]" the ***Lewis*** court declined to decide whether the admission of these statements violated the ***Bruton*** rule because "any assumed error was harmless beyond a reasonable doubt. (***Id***. at pp. 467, 468.)

## 14. Is there a difference between "powerfully" incriminating and "facially or directly" incriminating?

As pointed out in ***Gray* v. *Maryland*** (1998) 523 U.S. 185, "***Bruton***, as interpreted by ***Richardson***, holds that certain '***powerfully incriminating*** extrajudicial statements of a codefendant'—those naming another defendant—considered as a class, are so prejudicial that limiting instructions cannot work." (***Gray*** at p. 192 citing to ***Richardson* v. *Marsh*** (1987) 481 U.S. 200, 207, emphasis added by IPG.) In ***People* v. *Lewis*** (2008) 43 Cal.4th 415, the California Supreme Court held that only a "narrow class" of codefendant's statements fall "within the holdings of ***Bruton*** and ***Gray***—that is, statements ***that powerfully incriminate*** the defendant on their face because they directly implicate the defendant by name or do so in a manner the jury could not reasonably be expected to ignore. (***Lewis*** at p. 506 citing to ***Gray*** at pp. 194–196 and ***Richardson*** at pp. 206–211, emphasis added by IPG.) Thus, both the United States Supreme Court and the California Supreme Court have assumed that a prerequisite to excluding a statement on ***Bruton*** grounds is that the statement be "powerfully incriminating." (**See also *United States* v. *Clark*** (10th Cir. 2013) 717 F.3d 790, 814 [***Bruton*** rule "applies only when the co-defendant's statement is 'so inculpatory as to the defendant that the practical and human limitations of the jury system cannot be ignored.'"]; ***United States* v. *Lopez-Lopez*** (1st Cir. 2002) 282 F.3d 1, 13 ["argument that the statement was of an "incriminatory nature" is insufficient to clear the hurdle requiring a powerfully incriminating statement"].)

Whether a codefendant's statement ***directly or facially implicates*** the defendant <u>also</u> plays a role in deciding whether the ***Bruton*** rule applies. For example, in ***Gray* v. *Maryland*** (1998) 523 U.S. 185, the High Court found the ***Bruton*** rule applied in the case before it, in part, *because* the codefendant's confession was "directly accusatory." (***Id***. at p. 194.) In contrast, the ***Gray*** court indicated codefendant's

factual statement in ***Richardson* v. *Marsh*** (1987) 481 U.S. 200 did not require application of the ***Bruton*** rule *because* that statement did "not point directly to a defendant at all." (***Gray*** at p. 194.) The reason why indirect inferences of defendant's guilt are less likely than direct inferences of defendant's guilt to run afoul of ***Bruton*** is that where the statement explicitly incriminates the other defendant, the jury cannot possibly be expected to forget it in assessing the defendant's guilt; whereas with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget. (***Richardson* v. *Marsh*** (1987) 481 U.S. 200, 208; ***People* v. *Fletcher*** (1996) 13 Cal.4th 451, 463.). Thus, the jurors' ability to obey the instructions depends upon how directly and how forcefully the codefendant's confession incriminates the nondeclarant defendant. (***People* v. *Fletcher*** (1996) 13 Cal.4th 451, 465.)

Is there a difference between statements that "powerfully incriminate" a defendant and statements that "directly or facially implicate" (as defined in ***Gray***) a defendant? In other words, if the statement does not powerfully incriminate a defendant but does facially/directly incriminate the defendant, does the ***Bruton*** rule apply? Conversely, if the statement facially/directly implicates the defendant but does not *powerfully* incriminate the defendant, does the ***Bruton*** rule apply?

An argument can be made that whether a statement is powerfully incriminating is a different question than whether a statement facially/directly implicates a defendant – albeit they are interrelated since a statement that facially/directly implicates a defendant is much more likely to be powerfully incriminating than a statement that incriminates a defendant only inferentially. There is language in some cases indicating these are separate elements of the ***Bruton*** rule. (**See *People* v. *Fletcher*** (1996) 13 Cal.4th 451, 465 ["Whether instructing the jury to disregard a nontestifying codefendant's confession in determining a defendant's guilt adequately protects the defendant's Sixth Amendment right of confrontation depends upon whether the jurors can reasonably be expected to obey the instruction. (In turn, the jurors' ability to obey the instructions depends upon *how directly* ***and*** *how forcefully* the codefendant's confession incriminates the nondeclarant defendant.")]; ***People* v. *Ardoin*** (2011) 196 Cal.App.4th 102, 136 [citing to ***Fletcher*** for the position that the ***Bruton*** rule "extends only to confessions that are not only 'powerfully incriminating' ***but also*** 'facially incriminating' of the nondeclarant defendant."]; ***People* v. *Garcia*** (2008) 168 Cal.App.4th 261, 281 [same]; ***People* v. *Archer*** (2000) 82 Cal.App.4th 1380, 1386 ["While ***Bruton*** required that the admission be 'powerfully' incriminating, ***Richardson*** required that it ***also*** be "incriminating on its face ...."]; ***Foxworth* v. *St. Amand*** (1st Cir. 2009) 570 F.3d 414, 435 ["As a practical matter, the statement directly implicated the petitioner ***and*** powerfully incriminated him."]; ***United States* v. *Angwin*** (9th Cir. 2001) 271 F3d 786, 796 ["A statement is not facially incriminating merely because it identifies a defendant; the statement must ***also*** have a sufficiently devastating or powerful inculpatory impact to be incriminatory on its face."].) (Emphasis added in each quotation by IPG.)

Indeed, in the case of ***People* v. *Garcia*** (2008) 168 Cal.App.4th 261, the court found the admission of a statement of a codefendant it held to be *facially* incriminating did not violate ***Bruton*** because the statement was not *powerfully* incriminating. (***Id***. at p. 282.)

On the other hand, an argument can be made that what "powerfully incriminating" *means* is essentially that the statement facially and directly incriminates a defendant. (**See *People* v. *Lewis*** (2008) 43 Cal.4th 415, 506 [describing the ***Bruton*** rule as applying solely to "statements that powerfully incriminate the defendant on their face ***because they directly implicate*** the defendant by name or do so in a manner the jury could not reasonably be expected to ignore."].) (Emphasis added by IPG.)

This argument derives some support from the fact that in ***Cruz* v. *New York*** (1987) 481 U.S. 186, the High Court held that whether the ***Bruton*** rule applied did not turn on how "devastating" a confession was in a particular case. (***Id***. at pp. 191-192.) If the term "powerfully incriminating" is *not* referring to the fact that the codefendant's statement directly implicates the defendant, it would seem to have a definition very close to what "devastating" to the defense means. But, we know, from ***Cruz*** that the fact the statement is not "devastating" is not a reason to eschew applying the ***Bruton*** rule.

**Editor's note:** In ***Cruz* v. *New York*** (1987) 481 U.S. 186, the High Court had to address the question of whether "***Bruton*** applies where the defendant's own confession, corroborating that of his codefendant, is introduced against him." (***Id***. at p. 188.) In finding that the ***Bruton*** rule *did* apply in that circumstance, the majority rejected the argument that where a defendant's own confession corroborates that of his codefendant (i.e., are interlocking), the introduction of the codefendant's confession will seldom if ever be "devastating" and "the Confrontation Clause is violated only when introduction of a codefendant's confession is 'devastating' to the defendant's case." (***Cruz*** at p. 191.) The majority explained that "[w]hile 'devastating' practical effect was one of the factors that ***Bruton*** considered in assessing whether the Confrontation Clause might sometimes require departure from the general rule that jury instructions suffice to exclude improper testimony, 391 U.S., at 136, 88 S.Ct., at 1628, it did not suggest that the existence of such an effect should be assessed on a case-by-case basis. Rather, that factor ***was one of the justifications for*** excepting from the general rule the entire category of codefendant confessions that implicate the defendant in the crime." (***Cruz*** at p. 191, emphasis added by IPG.) That is, the fact that co-defendants' statements can be devastating in a joint trial was a reason for adopting a general bar on their admission but was *not* a prerequisite for applying the bar.

To be on the safe side, prosecutors should assume that the ***Bruton*** rule will apply to any codefendant's statement directly implicating the defendant in a joint trial – even if the statement may not "powerfully" incriminate the defendant – and seek to redact in a way that eliminates any identification of, or reference to, the existence of the defendant. If redaction cannot be done in this way and/or the question is whether the redaction was sufficient on later appeal, prosecutors can *then* rely on the argument that there was no ***Bruton*** error because the statement as redacted did not powerfully incriminate the defendant. (**See *Gray* v. *Maryland*** (1998) 523 U.S. 185, 192 [stating that if the prosecutor wants to use the codefendant's confession in a joint trial, "he must redact the confession to *reduce significantly or to eliminate* the special prejudice that the ***Bruton*** Court found."].) (Emphasis added by IPG.)

Keep in mind though that how powerfully incriminating and/or directly accusatory the statement is not only is relevant when it comes the question of whether the codefendant's statement is subject to the ***Bruton*** rule but whether section 352 should be applied to exclude the statement – even if the ***Bruton*** does not apply. (**See** this IPG memo, section 4-b-i at p. 21.)

## 15. If the statement of a co-defendant *mentions* the other defendant but facially *exonerates* the defendant and only becomes inculpatory when contrasted with other evidence, may it be admitted at a joint trial without any redaction?

It is clear that redacting a codefendant's statement so that it makes *no mention* of the identity or existence of the defendant will not violate the ***Bruton*** rule. (**See** this IPG memo, section 11 at pp. 38-39.) Moreover, if a codefendant's statement mentions the defendant but *only* exculpates the defendant (either on its face or in conjunction with the other evidence), it cannot be said to run afoul of the ***Bruton*** rule – which presumes an *incriminatory* statement. (**See** this IPG memo, section 3 at p. 12.)

But what happens when the statement mentions the defendant and is facially exculpatory but becomes partially or wholly inculpatory when contrasted with defendant's defense at trial or defendant's own statement? For example, what if the co-defendant states the defendant acted in self-defense but the defendant gives an alibi defense?

Prior to the decisions in ***Richardson*** and ***Gray***, the admission of a statement that was exculpatory on its face*, even one that did not necessarily mention the defendant*, could potentially violate the ***Bruton*** rule. In ***People* v. *Anderson*** (1987) 43 Cal.3d 1104, the California Supreme Court stated: "[W]hat is material for ***Bruton–Aranda*** analysis is not how the statement under review should be classified in the abstract—as a confession, an admission, or even an ***exculpatory*** declaration—but rather whether on the facts of the individual case it operates to inculpate the other defendant." (***Id***. at p. 1123, emphasis added by IPG.)

For example, in ***People* v. *Fulks*** (1980) 110 Cal.App.3d 609, three defendants made statements to police, each exculpatory but each different. The conflicting statements were edited before introduction. The prosecution introduced and used the statements to show "consciousness of guilt." The conflicts were reconciled technically but not practically (the edited versions were "reconcilable only by laborious flights of imagination"). The ***Fulks*** court found error in their admission on the theory that (i) the statements were offered for the sole purpose of being ***improperly*** played off against each other so as to demonstrate the collective consciousness of guilt of the three defendants (i.e., in effect, each of the defendants accused the other two of lying), and (ii) ***Aranda-Bruton*** error exists even when the statements do not identify the co-defendant in anyway if the co-defendant is incriminated by implication when the statements are viewed with the rest of the evidence. (***Id***. at pp. 614-618.)

However, both ***Anderson*** and ***Fulks**** were decided before the High Court limited the ***Bruton*** rule to statements that are directly/facially incriminating (as those terms are defined in ***Richardson* v. *Marsh*** (1987) 481 U.S. 200 and ***Gray* v. *Maryland*** (1998) 523 U.S. 185).

*__Editor's note__: Even if it is proper for courts to consider other evidence at trial in assessing whether an exculpatory statement is actually incriminatory, ***Fulks*** can usually be distinguished on the ground that in ***Fulks***, the ***Bruton*** rule was violated because the prosecutor circumvented the limiting instructions by comparing and contrasting the statements. (**See** this IPG memo, section 24 at pp. 73-74.)

In keeping with the notion that a co-defendant's statement must directly or facially incriminate a defendant to violate ***Bruton***, some courts have held there is no ***Bruton*** error where a co-defendant's statement was exculpatory and only becomes potentially inculpatory when contrasted with defendant's own out of court statements. (**See e.g., *United States* v. *Mann*** (5th Cir.1998) 161 F.3d 840, 860; ***Com. v. Blake*** (Mass. 1998) [696 N.E.2d 929, 933] **see also *Brown v. Maloney*** (1st Cir. 2001) 267 F.3d 36, 42 [holding state court could find ***Bruton*** rule not violated where the "alibi" statements of the codefendants, which stated they were at a party with defendant when the shootings took place, was exculpatory but "the fact that the place of the party was very close to the place of the shootings and that it was a party, with people coming and going" undercut the defense and so was inculpatory].)

Currently, it cannot be said with certainty that the *Bruton* rule is not violated when a codefendant's statement is introduced in a joint trial when the defendant *is mentioned* in a codefendant's statement and the statement is facially exculpatory of the defendant but becomes inculpatory when contrasted with other evidence presented at trial. (**See** this IPG memo, section 12, at pp. 39-41)

## 16. Can you give us some cases to help provide guidance in assessing when a redaction will be necessary and whether the redaction will be held sufficient to avoid a violation of the *Bruton* rule?

Below are some selected California cases that provide some examples of when redaction will or will not be sufficient:

***People* v. *Capistrano*** (2014) 59 Cal.4th 830

In ***Capistrano*** (2014) 59 Cal.4th 830, the defendant was charged with several crimes including a robbery murder that he committed with the assistance of a codefendant. The defendant and co-defendant were tried together before different juries to avoid defendant's jury hearing the codefendant's detailed statement to a third party (Santos) that inculpated the defendant. (***Id***. at p. 868.) However, defendant's jury *was* permitted to hear Santos testify to her conversation with the *defendant* during which he admitted to the murder. In that conversation, Santos asked the defendant about the murder, which she had heard about from the codefendant. To avoid having the fact she heard about the murder from the codefendant from coming to light in defendant's jury (and potentially violating the ***Bruton*** rule), the prosecutor was

only permitted to ask whether Santos had "a conversation with someone who had indicated that they were present at a murder?" and whether the person with whom she conversed was a police officer. The judge also allowed the prosecutor to elicit from Santos that when she asked the defendant if he killed someone with a belt, that the defendant responded by saying, "That pussy Mike [the co-defendant] told you, huh?" Santos said her response was to deny the codefendant was her source. (***Id***. at pp. 868-869.) In the California Supreme Court, the defendant claimed the trial court "violated the ***Aranda/Bruton*** rule by allowing the prosecutor to ask Santos whether the source of her information was a civilian with personal knowledge of the murder and that the violation was compounded when Santos was permitted to testify about defendant's response—'Mike told you, huh?'—when she asked if he had committed the murder. (***Id***. at p. 869.) The ***Capistrano*** court observed the issue raised was not a "conventional ***Bruton*** issue because the prosecution was not attempting to directly introduce [the codefendant's] confession at a joint trial before the same jury." (***Id***. at p. 869.) It then went on to find that the ***Bruton*** rule was not violated for two reasons. First, Santos never testified the codefendant told her defendant killed the victim – to the contrary, she denied the codefendant was her source. While "[t]he testimony implied that the unknown person told her defendant killed someone with a belt[,]" "[s]tatements that incriminate by implication, however, are not within the scope of ***Bruton***." (***Id***. at p. 870 citing to ***People* v. *Fletcher*** (1996) 13 Cal.4th 451, 463.) Second, "the challenged testimony is reasonably viewed as explaining the basis for Santos's questions to defendant and to give context to his responses . . . including recounting defendant's accusations that "Mike" must have told her[.]" (***Id***. at p. 870.)

**Editor's note:** The second rationale related to the bottom line question in ***Capistrano***: whether the questioning and answers "pose[d] a substantial threat to [defendant's] right to confront the witnesses against him." IPG suggests that why this second rationale took the statement outside the scope of the *Bruton* (even though the ***Capistrano*** court did not expressly so state) was because the ***Capistrano*** court implicitly recognized that the codefendant's statement was properly viewed as an adoptive admission (**see** this IPG memo, section 5-b-i at p. 29) or nonhearsay (**see** this IPG memo, section 6 at p. 33-35).

***People* v. *Hajek*** (2014) 58 Cal.4th 1144

In ***Hajek***, the ***Bruton*** issues arose twice. First, when a witness testified in a murder case that one defendant (Hajek) told her that he planned to kill the victim. The witness gave somewhat conflicting versions of what she had told the police but she acknowledged that she had told them that defendant Hajek talked about going to the victim's house with two or three others, and had so testified at the preliminary hearing. (***Id***. at p. 1204.) Hajek's codefendant (Vo) contended that the witness' recounting of what Hajeck told the witness in their joint trial violated the ***Bruton*** rule. The California Supreme Court rejected the argument because the statement of Hajeck to the witness was "not 'powerfully incriminating' as to Vo. Instead, they reflected vague statements about unnamed individuals whom Hajek might enlist in an event that had not yet occurred." (**Ibid**.) Second, in the penalty phase the prosecutor attempted to impeach defendant Hajek's mental defense expert by suggesting he had not pressed defendant Hajek about the circumstances in the murder because doing so would have undermined a diagnosis favorable to

the defense. To four of these questions, the expert replied that defendant Hajek had denied killing the victim. Although the trial court gave a limiting instruction that such evidence could only be considered against defendant Hajek, defendant Vo's counsel objected to this testimony on the ground that by relating codefendant Hajek's denial that he killed the victim, the expert's testimony violated the ***Bruton*** rule. The California Supreme Court rejected this argument because defendant Hajek's statement to the expert that he did not kill the victim did not facially incriminate defendant – its incriminatory effect depended entirely on its linkage to other evidence. Moreover, the court held "the point of the prosecutor's cross-examination was to suggest that Hajek's denial of culpability was a lie that [the expert] accepted at face value because it was consistent with his diagnosis. Thus, the issue was not the identity of [victim's] killer, but [expert witness'] credibility as an expert." (***Id***. at p. 1177.)

***People* v. *Homick*** (2012) 55 Cal.4th 816

In ***Homick***, a witness testified that after a codefendant (Woodman) was arrested he called the witness from jail and asked him to destroy business cards located beneath the codefendant's desk. Two of the cards belonged to the defendant Homick. Defendant Homick objected that the codefendant Woodman's statement inculpated him in violation of the ***Aranda–Bruton*** rule. The trial court allowed it in subject to a limiting instruction. The California Supreme Court rejected defendant Homick's claim of a ***Bruton*** violation because the statement "was not a confession, much less one that facially incriminated defendant. Its incriminatory effect on defendant depended entirely on its linkage to other evidence." (***Homick*** at p. 874.)

***People* v. *Burney*** (2009) 47 Cal.4th 203

In ***Burney***, the defendant and his two co-defendants were charged with special circumstances murder. All three defendants gave statements to the police. The defendant's statement implicated himself and his codefendants in the crimes committed against the murder victim. The codefendants (Rembert and Burnett) statements implicated defendant and themselves in the crimes, and named the defendant as the victim's killer. Each of the statements was redacted to eliminate direct reference to the other defendants by deleting the names of the codefendant and substituting terms such as "the others" or "the other." (***Id***. at pp. 228.) The words "the other" and "the others" did not appear in quotations or brackets, and were not otherwise highlighted. With the exception of some statements that had been deleted with the use of obvious censor's lines, the redactions in the transcripts that were read and provided to the jurors was not apparent. (***Id***. at p. 228, fn. 7.) The codefendants' statements largely tracked defendant's own statement, but Burnett said he advised "the others" (i.e., the defendant and Rember) not to kill the victim and Rember said he advised the "the others" (i.e., defendant and Burnett) not to kill the victim as well - contradicting defendant's contention in his own statement that "the others" (i.e., Burnett and Rember) repeatedly urged defendant to shoot the victim and someone with a gun (not the defendant) shot the victim. (***Id***. at pp. 229.) Applying a "***Fletcher***" type analysis, the California Supreme Court held the redactions "did not satisfy the standard set forth in ***Gray***" because "the redacted statements of codefendants Rembert and Burnett did not completely eliminate any reference to the 'existence' of

accomplices" and "the statements in conjunction with other evidence led to the obvious inference that defendant was "the other" who shot [the victim]." (***Id***. at pp. 231-232 [albeit finding admission of the codefendants' statements to be harmless error].)

***People* v. *Brown*** (2003) 31 Cal.4th 518

In ***Brown***, the defendant and three other individuals (Fields, Bender and P.M.) went looking for some deep-dish tire rims to steal. They drove around in Bender's car. They spotted a woman driving a red truck with the type of wheels they sought. (***Id***. at p. 524.) According to P.M., they followed the woman and when she stopped for a red light, the defendant jumped out of Bender's car carrying a pistol, ran to the driver's side window, and then shot the woman. Defendant then pulled the woman out of the truck and got into it himself through the driver's side. Fields also jumped from Bender's car at this time, ran to the passenger side of the truck and got in. All the men, then left the scene with Bender and P.M. in P.M.'s car and defendant and Fields in the woman's car. (***Id***. at p. 525.) The prosecution called a detective who interviewed Fields. The detective recounted the following: Fields admitted to him that he was in Bender's car, directly behind a red truck on the night of the crime. Fields said he got out of Bender's car and got into the passenger side of the truck and left the scene in the truck. Fields did not mention defendant's name or discuss what defendant did, although the implication was that *someone* entered the driver's side and drove away with Fields in the passenger seat. (***Id***. at pp. 533-534.) The California Supreme Court rejected the claim the ***Bruton*** rule applied at all because the declarant of the inculpatory statement was not being jointly tried. However, the court also found that *even if Fields had been tried jointly* with the defendant, his statement would still be admissible because it was not "facially incriminating" of defendant (i.e., no mention of the defendant was made). (***Id***. at p. 537, fn. 5.)

***People* v. *Ardoin*** (2011) 196 Cal.App.4th 102

In ***Ardoin***, defendant Ardoin and a codefendant Jaquez murdered a drug dealer. The primary witness (Burgos) for the prosecution was the ex-wife of defendant Jaquez and was originally also charged with the murder. (***Id***. at pp. 109-110.) In her explanation for why she decided to ultimately testify truthfully against codefendant Jaquez after three years, Burgos stated that codefendant Jaquez failed to follow through with his assurance to her that he "would talk to the person" who committed the murder and "have them stand up and say what they did." (***Id***. at p. 134.) The trial court struck that portion of Burgos testimony and admonished the jury it could not consider it. On appeal, defendant Ardoin claimed that codefendant Jaquez' statement as related by Burgos, although it did not refer to him by name, "facially" incriminated him in violation of the ***Bruton*** rule. (***Id***. at pp. 134-135.) The ***Ardoin*** appellate court acknowledged that the codefendant's statement made direct reference to another perpetrator but that the statement was "intrinsically redacted" because it did not mention defendant Ardoin by name. (***Id***. at p. 136.) The ***Ardoin*** court rejected the defendant's claim, pointing to several factors that limited both the incriminating nature of the statement and the risk that a jury could not follow the trial court's instruction to disregard the evidence. First, the statement was not testimonial in nature. Second, it was not a "powerfully incriminating" confession. Third, the statement is not directly or "facially" incriminating –

reference to the remainder of Burgos' testimony was "necessary to fully recognize the incriminating nature of the statement." Fourth, "the statement was not hearsay evidence, as it was not offered for the truth of the matter, but only to reflect upon the witness's state of mind and the reasons that convinced her to 'change [her] mind' and testify against defendants. (***Id***. at pp. 136-137.) "The trial court's instruction thus alleviated the harm associated with the obliquely incriminating statement." (***Id***. at p. 138.)

***People* v. *Garcia*** (2008) 168 Cal.App.4th 261

In ***Garcia*** (2008) 168 Cal.App.4th 261, a defendant (Garcia) and his codefendant (Ojito) were charged with the fatal shooting of a man named Barajas who had beaten defendant Garcia in a fistfight earlier in the day. One of the prosecution witnesses (Pineda) was a companion of the defendants who had driven them away from the scene of the shooting and was arrested with the defendant Garcia. (***Id***. at pp. 269-270.) The witness testified that while in the holding cell with defendant Garcia, Garcia told him that after he lost the fight with the victim (Barajas) he and codefendant Ojito "went looking for" Barajas. (***Id***. at p. 279.) The appellate court rejected defendant Ojito's claim the admission of the statement violated the ***Bruton*** rule because the court did "not find this statement to be powerfully incriminating because it facially incriminates Ojito only by showing that he and Garcia were looking for Barajas; it is not direct evidence that Ojito intended Barajas would be assaulted or murdered when they found him." (***Id***. at p. 282 [and noting as well that the statement was "merely cumulative of other overwhelming evidence that fellow gang members, friends, and relatives of Garcia, including Ojito, embarked on a quest to find Barajas minutes after his fight with Garcia."].)

***People* v. *Song*** (2004) 124 Cal.App.4th 973

In ***Song***, the defendant kidnapped the victim from her home and forced her into his vehicle with the help of codefendants Vang and Lor. The victim was subsequently sexually molested. All three defendants gave statements to the police. Codefendant Vang gave a statement in which he stated he saw defendant trying to push the victim into the car. Codefendant Vang claimed he thought the victim's legs might get hurt so he lifted them up while putting the victim into the car. This statement was recounted in court. The court held that the admission of this testimony in court was ***Bruton*** error. (***Song*** at pp. 977-979, 981.)

***People* v. *Schmaus*** (2003) 109 Cal.App.4th 846

In ***Schmaus***, defendants (Beattie, Black, and Schmaus) were inmates in a county jail. They worked together to kill another inmate - a sex offender named "No Brains." The murder went unsolved until investigators spoke with a cellmate of defendant Schmaus. The cellmate gave a recorded statement to investigators in which he claimed that defendant Schmaus had told him that Schmaus, another defendant (Glenn), and "another guy" killed a sex offender. (***Id***. at pp. 850-853.) Although co-defendants Beattie and Black objected to the introduction of the statement at their joint trial with Schmaus, the cellmate's recorded statement was introduced into evidence. The jury was instructed that it could only consider evidence of the statements against defendant Schmaus. (***Id.*** at p. 854, fn. 8.) The appellate court found

that the statements of Schmaus that he and "another guy" killed the victim incriminated defendants Beattie and Black - violating the ***Bruton*** rule and depriving Beattie and Black of the right to confront the witness making the statements. (***Id***. at pp. 855-856.)

***People* v. *Archer*** (2000) 82 Cal.App.4th 1380

In ***Archer***, a defendant was charged with the murder. A co-defendant gave a statement implicating the defendant. The co-defendant's statement was redacted to delete any mention of the defendant by name. In the redacted statement, the co-defendant stated that he brought the victim over to an identified address and that he knew bringing the victim over to the address was "going to set him up." The co-defendant then said that after he and victim walked into the patio area of the address, the victim was almost immediately stabbed. The co-defendant said he saw the victim trying to escape so he held him and possibly stabbed the victim twice but estimated the victim was stabbed ten times in the chest and stomach. The co-defendant said the victim was then buried in the backyard and when he returned later to the house to pick up the body, the victim's head had been removed. He placed the body in the back of a car. The co-defendant identified the license plate, make, and model of the car. Evidence was introduced through other witnesses that the defendant lived at the address identified by the co-defendant and that the defendant owned a car of the make, model and with the license plate described by the co-defendant. (***Id***. at pp. 1388-1389.) On appeal defendant claimed the redaction was insufficient to avoid the ***Bruton*** rule. The appellate court agreed, observing that the redaction was accomplished by an unartful omission of pronouns and names, resulting in a statement filled with ungrammatical sentences. (***Id***. at p. 1389.) From the statement itself, it was clear that somebody else must have stabbed, buried, and decapitated the victim and, with the defendant's home address and license plate number playing such a prominent role in the description of the commission of the crime, it was also clear that the somebody else was the defendant. Thus, the redacted statement was held to be "facially incriminating" in that the average juror, "viewing the confession in light of the other evidence introduced at trial, could not avoid drawing the inference that the nondeclarant is the person so designated in the confession and the confession is 'powerfully incriminating' on the issue of the nondeclarant's guilt." (***Id***. at p. 1390.)

***People* v. *Hampton*** (1999) 73 Cal.App.4th 710

In ***Hampton***, the defendant was accused of being the getaway driver in the robbery of a restaurant. The evidence established the following: A woman named Hope worked at the restaurant and was defendant's girlfriend. When the girlfriend (Hope) left the restaurant, the masked co-defendant rushed in with a gun. The defendant (who remained outside) simultaneously grabbed Hope and the two of them entered a car. The defendant waited for his co-defendant who came running out with the money. The defendant then drove off with all of them in the car. They drove to Hope's apartment where she saw the co-defendant's gun. There was no evidence introduced that the car belonged to defendant. (***Id***. at pp. 713-714.) The co-defendant gave a long statement (which was redacted down to a five-minute long statement). As redacted, the statement contained no reference to the defendant nor any substituted symbols for an unnamed person who could be the defendant. It contained no references at all to the driver of the vehicle. The

statement mentioned the gun had been at Hope's apartment the night before the robbery and the money was counted at Hope's apartment after the robbery. The statement also mentioned that the mask and the gun came from the trunk of a car. The defendant argued that this latter portion incriminated him because the other evidence would show he was driving, and inferentially he controlled the keys to open the trunk. Therefore, defendant argued the statement strongly suggested that he supplied the mask and gun for the robbery. (***Id***. at pp. 715-716.) The court found any implication in the statement that defendant was involved in the taking of the gun and mask from the car trunk required an inference to be drawn from, and linkage to be made with, other evidence, i.e., the testimony of Hope concerning defendant's arrival by car to pick her up from work and his driving of the car afterward. Such a statement was held not to fall within the ***Bruton*** exception as it was not a "'powerfully incriminating', 'expressly implicat[ing]' codefendant confession, but just an indirect and less vivid implication as to defendant which, under ***Richardson***, the jury could be presumed to have ignored in light of the instructions." (**Id**. at p. 720.)

***People* v. *Bryden*** (1998) 63 Cal.App.4th 159

In ***Bryden***, the defendant (Padin) and codefendant Bryant were charged with murder. At the trial the People introduced a note from codefendant Bryden to another inmate who later testified at trial. The note was redacted to eliminate any *direct* reference to defendant Padin. However, the inmate testified against both defendants and provided evidence regarding defendant Padin's guilt independent of the note. The defendant claimed the ***Bruton*** rule was violated because, even without the direct reference to defendant Padin, the note served to *bolster the credibility* of the witness. Defendant Padin also claimed the prosecutor improperly urged the jurors to use the kite against both defendants, despite the fact the jury was instructed not to consider the contents of note against defendant Padin. (***Bryden*** at pp. 169, 173.) The appellate court held "the redacted statements did not create the type of problem addressed in ***Gray*** and *Fletcher*" because "[t]he only potential impact of Bryden's kite on the case against Padin was indirect; the jury had to use inference to connect statements in this redacted kite with Padin[.]" (***Id***. at p. 176.) The court rejected the argument that because the note bolstered the credibility of the witness, the note was effectively used against defendant Padin. The court pointed out since all evidence "has the potential of bolstering or undermining a witness's credibility," accepting defendant Padin's argument "would essentially prohibit all joint trials, which would contravene California's preference for joint trials[.]" (**Ibid**.)

## 17. Can the defendant whose statement is being redacted prevent the introduction of the statement if the redaction results in statement that will unfairly prejudice his or her own case?

It is not unusual for a defendant to claim that he will be unfairly prejudiced by a redaction of his own statement and ask for either complete exclusion of his statement or for separate trials to be held. The claim is often based on an allegation that the redaction of a defendant's statement in order to maintain joinder with his codefendant will distort the role of the defendant (i.e., by making defendant appear more culpable

than he would be if the entire statement were admitted) and/or make an exculpatory statement inculpatory. (**See e.g., *People* v. *Rountree*** (2013) 56 Cal.4th 823, 849–851; ***People* v. *Gamache*** (2010) 48 Cal.4th 347, 379; ***People* v. *Lewis*** (2008) 43 Cal.4th 415, 456–460; ***People* v. *Ervin*** (2000) 22 Cal.4th 48, 87; ***People* v. *Stallworth*** (2008) 164 Cal.App.4th 1079, 1091; ***People* v. *Douglas*** (1991) 234 Cal.App.3d 273, 285 287; ***People* v. *Boggs*** (1967) 255 Cal.App.2d 693, 702-703.) In other words, if parts of a defendant's confession (which the prosecution seeks to introduce in a redacted version) favor the confessing defendant, the confessing defendant will want to introduce the favorable portions – regardless of whether those favorable portions implicate the codefendant. This claim is often accompanied by an argument that Evidence Code section 356 requires the confessing defendant be permitted to bring in the remainder of the statement. (**See e.g., *People* v. *Rountree*** (2013) 56 Cal.4th 823, 849–851; ***People* v. *Lewis*** (2008) 43 Cal.4th 415, 457-458; ***People* v. *Stallworth*** (2008) 164 Cal.App.4th 1079, 1091; ***People* v. *Douglas*** (1991) 234 Cal.App.3d 273, 285-286.)

### a. When will editing a defendant's statement to redact mention of his codefendant deprive the defendant of due process and a fair trial and/or violate Evidence Code section 356?

A defendant's motion to either admit or exclude his own statement in its entirety (or hold separate trials) can potentially provide a legitimate basis for a court to refuse to redact the statement in order to maintain joinder. As repeatedly pointed out by the California Supreme Court, "Severance may be necessary when a defendant's confession cannot be redacted to protect a codefendant's rights without prejudicing the defendant. ([Citation omitted].) A defendant is prejudiced in this context when the editing of his statement distorts his role or makes an exculpatory statement inculpatory." (***People* v. *Gamache*** (2010) 48 Cal.4th 347, 379; ***People* v. *Lewis*** (2008) 43 Cal.4th 415, 457; **accord *People* v. *Rountree*** (2013) 56 Cal.4th 823, 849-850; ***People* v. *Douglas*** (1991) 234 Cal.App.3d 273, 285–287.) Trial courts must review "both the unredacted and the redacted statements to determine whether the redactions so distort the original statement as to result in prejudice to the defendant." (***People* v. *Gamache*** (2010) 48 Cal.4th 347, 379; ***People* v. *Lewis*** (2008) 43 Cal.4th 415, 457.)

Evidence Code section 356 provides a state evidentiary basis for the argument that the defendant must be permitted to bring out portions of his own statement if they create a distorted impression of the defendant's role or culpability. Specifically, Evidence Code section 356 states: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." (Evid. Code, § 356.)

Evidence Code section 356, however, is usually an ancillary concern on the question of whether redaction should occur in order to comply with the ***Bruton*** rule. If the redaction of a defendant's statement "distorts his role or makes an exculpatory statement inculpatory," it will be deemed prejudicial to the

defendant and section 356 will be cited as additional grounds for granting severance. (**See e.g., *People* v. *Stallworth*** (2008) 164 Cal.App.4th 1079, 1091; ***People* v. *Douglas*** (1991) 234 Cal.App.3d 273, 285-286.) If not, and the statement can be redacted without unduly prejudicing the defendant who made the statement, any right of the defendant under section 356 to introduce the redacted portion will bow to the codefendant's constitutional rights protected by the ***Aranda-Bruton*** rule. (**See *People v. Rountree*** (2013) 56 Cal.4th 823, 850 ["limits on the scope of evidence permitted under Evidence Code section 356 may be proper when, as here, inquiring into the 'whole on the same subject' would violate a codefendant's rights under ***Aranda*** . . . or ***Bruton***"]; ***People* v. *Lewis*** (2008) 43 Cal.4th 415, 458 [same].)

*__Editor's note__: Federal cases are in accord. In federal court, the "rule of completeness" plays a similar role to California's section 356. However, the rule of completeness is not violated when the meaning of the redacted statement becomes clear despite the redaction. (***United States* v. *Long*** (8th Cir. 1990) 900 F.2d 1270, 1279.) And notwithstanding the rule, federal courts hold that a defendant cannot complain about the redacted version of his own statement unless it unfairly distorts the original, or excludes substantially exculpatory information. (**See *United States* v. *Mussaleen*** (2d Cir.1994) 35 F.3d 692, 696; ***United States* v. *Washington*** (D.C. Cir. 1991) 952 F.2d 1402, 1404; ***United States* v. *Dorrell*** (9th Cir. 1986) 758 F.2d 427, 434-435; ***United States* v. *Kaminski*** (8th Cir.1982) 692 F.2d 505, 522; **see also *United States* v. *Thuna*** (1st Cir. 1986) 786 F.2d 437, 441-442; ***United States* v. *Kershner*** (5th Cir. 1970) 432 F.2d 1066, 1071-1072; **see also *United States v. Edwards*** (8th Cir.1998) 159 F.3d 1117, 1127 [rule only protects nontestifying declarant, not third defendant]). This is especially true where the additional information the defendant seeks to bring out would recast the nature of the admission. (**See *Fox v. Ward*** (10th Cir. 2000) 200 F.3d 1286, 1293.)

Although Evidence Code section 356 is a hearsay exception (**see *People* v. *Vines*** (2011) 51 Cal.4th 830, 862; ***People* v. *Pic'l*** (1981) 114 Cal.App.3d 824, 863, fn. 13), California courts will sometimes note that a defendant cannot complain about the exclusion of portions of his statement that are not necessary to make his statement understood since those portions are just straight up hearsay. (**See *People* v. *Rountree*** (2013) 56 Cal.4th 823, 857; ***People* v. *Lewis*** (2008) 43 Cal.4th 415, 458.)

In analyzing a claim that redaction runs afoul of section 356, keep in mind that "[t]he purpose of Evidence Code section 356 is to avoid creating a misleading impression." (***People* v. *Samuels*** (2005) 36 Cal.4th 96, 130 [rejecting the defense argument it was error to refuse request to introduce complete interview where entire interview covered areas not at issue in portion offered by the prosecution].) If the redaction does not create a misleading impression, it is not likely a court will find the redaction violates section 356.

## b. Cases finding redaction of defendant's statement to protect codefendant did not prejudice the defendant

***People* v. *Rountree*** (2013) 56 Cal.4th 823

In ***Rountree***, the defendant (Rountree) and his codefendant (Stroder) were charged with the murder and robbery of a woman named Contreras. (***Id***. at p. 829.) The defendant gave two statements to a deputy

admitting his involvement in the murder. (***Id***. at pp. 831-835.) The statements were redacted to remove any reference to the codefendant and the defendant was precluded from examining the deputy who recounted the statements on the redacted portions. On many occasions, the word "we" (referring to both defendant and the codefendant) was changed to "I." (***Id***. at p. 850.) The California Supreme Court recognized that such a change can potentially overstate a declarant's personal role but held it did not do so in the instant case because: (i) the defendant "confessed to being a major participant in the victim's kidnapping and robbery and to being the actual gunman"; (ii) "[h]is confession showed that he was personally guilty of the charged crimes; (iii) the "redacted statements contained no suggestion that defendant might have done something that he attributed to" the codefendant." (**Ibid**.) The court rejected the argument that because all the jury heard was that defendant admitted the victim was in his car nonconsensually and not that his codefendant had pleaded with the victim to enter the car because the defendant had a gun and needed money, the redaction indicated defendant acknowledged doing something he attributed to his codefendant. The court rejected the argument because the fact the jury did not hear exactly how and why the victim entered the car benefitted, rather than prejudiced, the defendant. (**Ibid**.) The ***Rountree*** court also held that, notwithstanding Evidence Code section 356, the limitation on defendant bringing out his own hearsay statements was permissible; and noted that nothing in the statements clearly, and inaccurately, implied that defendant admitted his involvement in conduct he had explicitly disclaimed. (***Id***. at p. 851.)

The defendant in ***Rountree*** also claimed admitting the redacted version of his confessions prejudiced him at the *penalty* phase on the ground that they "presented a picture of the crime that was essentially false because it showed [him] as the sole planner and perpetrator of the crime." (***Id***. at p. 856.) However, the court rejected this claim - even though the jury did not hear of any actions defendant attributed to his codefendant (namely, that she was the one who told the victim to get in the car because her "'boyfriend's got a gun and we need some money") — because there was no suggestion defendant played a bigger role than he did and the jury knew defendant had not acted alone considering it also convicted the codefendant. (***Id***. at pp. 856-857.) Another argument raised by the defendant was that portions of his statement the jury did not hear were mitigating (i.e., that he and the codefendant had gotten married because he knew he would go to jail, and he thought that being married would allow them to keep in contact; and that he wanted to drive to St. Louis where he "could get her home" and turn himself in). But this argument, too, was rejected - for two reasons. First, to the extent the statement could be considered mitigating, it was also hearsay since "such portions was not necessary to make sense of the statements that were admitted." (***Id***. at p. 857.) Second, "any mitigating tendency in the unredacted statements was trivial in light of the case as a whole." (**Ibid** [and noting, at p. 856, that the defense was able to bring out that defendant was fully cooperative and willing to answer any questions when the deputy spoke with him, and that defendant was crying during the first interview].)

***People* v. *Gamache*** (2010) 48 Cal.4th 347

In ***Gamache***, three defendants were charged with a special circumstances murder. During the penalty phase, as an alternative to severance, the trial court redacted out-of-court statements the defendant had made to mental health experts on the ground those statements tended to incriminate the two codefendants. The defendant claimed ***Bruton*** error on the ground that the redactions painted him "in a much more unfavorable light by creating the impression that he was the ringleader and more culpable than his codefendants." (***Id***. at pp. 378-379.) However, the court held no error occurred because almost all the redacted portions of the expert reports recounting the defendant's statements were statements that were inadmissible hearsay that defendant would not have been able to introduce even if the statements had not been redacted. (***Id***. at pp. 379-381.) Moreover, "any prejudice from the jury's being prevented from hearing statements that might raise [the] codefendants' culpability without significantly changing his own was minimal at most." (***Id***. at p. 381 [bracketed information added by IPG].)

***People* v. *Lewis*** (2008) 43 Cal.4th 415

In ***Lewis***, defendant Lewis and three codefendants were tried together for the kidnapping, robbery and murder of a female victim. (***Id***. at p. 431.) The trial court redacted defendant's confession to avoid references to the codefendants. For example, in describing what happened when he and two codefendants approached the victim's car, defendant Lewis said that codefendant Hubbard "walked over first, took the gun out, got in behind [the victim] and told her 'Don't scream and don't move.'" (***Id***. at p. 458.) The redacted statement stated: "Then got out of the car, walked over first, took the gun out, got in behind [the victim], and told her 'don't scream and don't move.'" (***Id***. at p. 458, fn. 8.) Defendant Lewis claimed that the redacted statements inaccurately portrayed him as the sole perpetrator of the crimes to which he confessed, violating his rights to due process and a fair trial. He also argued the trial court violated his statutory and federal constitutional rights by prevented him from bringing out the omitted portions of the statements on cross-examination unless he testified. (***Id***. at p. 456.)

The California Supreme Court acknowledged that "some of the changes—such as changing 'we went to the mall' to 'I went to the mall'—did change the meaning of defendant's statements and impliedly overstated defendant's role." (**Id**. at p. 457.) The court also recognized that "some of the redactions made it appear that defendant acknowledged participating in conduct that he actually had attributed to codefendant Hubbard." (***Id***. at pp. 457-458.) Nevertheless, the ***Lewis*** court found such instances to be immaterial "in light of defendant's consistent admissions in both the unredacted and the redacted versions as to acts he himself performed that constituted the elements of the charged offenses." (***Id***. at p. 458.) The court observed that "the redactions did not distort defendant's role in the crimes or alter any of his explicit admissions as to his own actions in any material way" and that "nothing that was omitted was exculpatory." (***Id***. at pp. 457, 458.) The court noted that in each of the unredacted statements, the "defendant admitted planning and participating in the robberies with one or more of his codefendants, as well as kidnapping and personally shooting the victims" and the fact "[t]hat his codefendants also participated in some way could not relieve defendant of liability for his own criminal acts." (***Id***. at p. 458.)

Moreover, the ***Lewis*** court pointed out that while "defendant's edited statements excluded references to his codefendants, it is evident the jury did not believe defendant had acted alone, for it found at least one of his codefendants guilty along with him in each set of crimes to which he confessed. Further, the participation of others was clear from the redacted statement's use of the passive voice. For example, [a detective] testified that defendant stated 'the victim's [Nisbet's] hands and feet were bound with duct tape,' implying that someone other than defendant bound Nisbet's hands and feet." (***Id***. at p. 458.)

Regarding the argument that prohibiting the defendant from introducing the remainder of the statement ran afoul of Evidence Code section 356, the court stated: "limits on the scope of evidence permitted under Evidence Code section 356 may be proper when, as here, inquiring into the 'whole on the same subject' would violate a codefendant's rights under ***Aranda*** or ***Bruton***." (***Id***. at p. 458.) In support of this conclusion the ***Lewis*** court observed the "trial court did not prevent defendant from cross-examining the witnesses to bring out his own hearsay statements that exculpated him or lessened his own role in the crimes. Nor . . . did the trial court prevent defendant from presenting nonhearsay testimony or evidence that implicated his codefendants." (**Ibid** [and noting as well that "the trial court precluded defendant only from bringing out his own hearsay statements that expressly inculpated his codefendants"]; **see also *People* v. *Ocegueda*** [unpublished] 2007 WL 2706147, *10-*11.)

The ***Lewis*** court discounted the defendant's attempt to rely on cases interpreting the "rule of completeness" in federal courts (i.e., Federal Rule of Evidence, Rule 106) in making his argument that section 356 required that he be allowed to introduce portions of his own statement that had been redacted in order to comply with the ***Aranda-Bruton*** rule. (***Id***. at p. 459.) Lastly, the ***Lewis*** court rejected defendant's claim that trial court's ruling restricting him from cross-examining as to the redacted parts of his statement unless he testified violated his Sixth Amendment right to confront and cross-examine witnesses and his Fifth Amendment right against self-incrimination. The court reasoned that such a violation would only occur if the restriction materially affected the defense or the probative value of the excluded evidence was slight. And neither circumstance was present in the instant case. (***Id***. at p. 459 [and finding any error harmless].)

*__Editor's note__: **See also *People* v. *Stallworth*** (2008) 164 Cal.App.4th 1079 [discussed in this IPG memo, section 17-c at pp. 65-66, which is a case finding redaction prejudicial as to one count, but finding redaction not prejudicial as to *the other count*].)

## c. Cases finding redaction of defendant's statement to protect codefendant prejudiced the defendant

***People* v. *Stallworth*** (2008) 164 Cal.App.4th 1079

In ***Stallworth***, the defendant was one of a group of four crooks who committed a murder and attempted murder by shooting at several cars. The defendant's statements to the police were redacted to omit mention of the codefendant with whom he was tried. This made defendant's statement seem as if he were

suggesting there was nobody in the front passenger seat (i.e., that there were only three people in the car used by the defendants) even though the jury knew there was a driver and a passenger in the front seat, and two passengers in the second seat. The appellate court held that either the statement of the defendant "should have been excluded in its entirety or the full, unredacted statement should have been admitted under Evidence Code section 356," because the redactions (i) made it appear that the defendant gave a statement inconsistent with other evidence known to the jury (i.e., that there were four people in the drive-by car, instead of three; (ii) made defendant's statement appear more implausible by suggesting the defendant was lying or concealing information about a fourth party; (iii) altered defendant's account of who was shooting and how many weapons there were, which left defendant's statement internally inconsistent because of the varying representations as to how many weapons were used; (iv) made the statement appear more inconsistent with the statement of another witness about what occurred than it actually was; and (v) made it more likely defendant would be identified as the shooter. (***Id***. at pp. 1092-1998.) The ***Stallworth*** court held the error was prejudicial as to that incident since a redacted statement that makes "it appear that the declarant is evasive or lying in a way that the original statement did not seems to us to be the very definition of prejudice within the meaning of ***Aranda***." (***Id***. at p. 1097 [and rejecting idea that since defendant could have taken stand to clear up the misimpression himself any error was harmless].) The ***Stallworth*** court did not, however, accept defendant's argument that the redactions were inadequate or had any prejudicial impact on defendant's conviction for an assault defendant committed the day *after* the shooting since the question of three versus four occupants of the vehicle did not tend to make the defendant appear to be guilty of any offense that he did not otherwise appear to have committed, and did not undercut his denial of his participation in the assault or distort his account of the event. (***Id***. at p. 1102.)

***People* v. *Jennings*** (2003) 112 Cal.App.4th 459, 462

The defendant and her codefendant were the parents of a five-year old child who they killed through severe abuse and neglect. The defendant gave a joint statement with her codefendant. However, the defendant also gave a separate statement to a polygraph examiner in which she blamed her codefendant for some of the abuse. On direct examination, the examiner testified that the defendant stated: "The child's face and chest were bruised so badly that she had to apply makeup to her son's face in order to allow him to go out to play." The attorney for the codefendant (father) then elicited on cross-examination that the defendant said "she had hit [the child] on his face and chest area causing the bruising that she referred to." (***Id***. at p. 475.) Although defendant also alleged that the father hit the victim "several times with his fists causing some bruising," that portion of defendant's statement was redacted. (**Ibid**.) A separate statement given by the defendant to a detective about giving the victim seven or eight pills on the weekend he died was also redacted. In that statement the defendant claimed that she only gave the child medications because the codefendant father told her to - but that portion was also redacted. (**Ibid**.) The appellate court observed the first redaction left the jury with the inaccurate impression that defendant separately confessed to causing all of the victim's bruises and the second redaction left the jury thinking the defendant gave the victim the medication on her own initiative. The court held the defendant was

prejudiced because the deletions made "it appear that defendant separately admitted to more than she did during the joint interrogation." (***Id***. at pp. 457-476 [albeit finding the error harmless beyond a reasonable doubt because of statements made by the codefendant at trial].)

***People* v. *Douglas*** (1991) 234 Cal.App.3d 273

In ***Douglas***, the defendant and his brother were jointly tried for stabbing a victim to death. The defendant told an officer that his brother had placed a telephone call to the victim and that his brother had used two knives in the attack on the victim. The defendant denied stabbing the victim himself, admitting only to putting one or both knives in the sink afterward. (***Id***. at pp. 275, 282–283.) These statements were redacted to state that the defendant had indicated "a phone call was placed to [the victim]," that the defendant said he had put a butcher knife used in the attack in the sink, that he did not say he did anything with the butcher knife before putting it into the sink, that he made reference to two knives, that he said both knives had been used on [the victim], that the butcher knife caused the initial stab wound and had been used in [the victim's] back, and that the second knife had been used on [the victim's] face. (***Id***. at pp. 282–284.) Through this testimony, the jury learned that two knives had been used in the attack and that the defendant had denied having done anything with one of the knives before putting it in the sink, but the jury was not told the defendant had repeatedly denied using *either* knife or harming [the victim] in any way. (***Id***. at p. 284.) The Court of Appeal reversed the murder conviction, concluding the prejudice to the defendant was "obvious and serious." (***Id***. at p. 287.) In support of its conclusion, the court pointed to the fact the redacted portions were exculpatory of defendant on major points and the portion introduced by the People clearly, and inaccurately, implied that the declarant had said that he and a codefendant had each used a knife in the attack on the victim – despite the fact defendant, in the unredacted statement had explicitly disclaimed stabbing the victim. (***Id***. at pp. 285-286 [and noting, at p. 282, as well that the trial court permitted the redaction *without considering* whether it would have prejudiced the declarant].)

***People* v. *Tealer*** (1975) 48 Cal.App.3d 598

In ***Tealer***, the defendant and his codefendant were charged with attempted robbery of a men's clothing store. The defendant gave a statement to the police in which he stated, "We were just passing by the place and decided to rob it." The statement was redacted to delete the codefendant's participation, leaving only "I was just passing by the place and decided to rob it." (***Id***. at p. 601.) Defendant testified briefly in his own defense, limiting his testimony to a denial of the making of the statement. (**Ibid**.) And the prosecutor commented on the fact that defendant "limited" his testimony. The appellate court held that "[t]he effect of that modification was to throw the entire onus of the planned robbery on defendant by converting the sometimes ambiguous and partially exculpatory 'we' into an unmistakable 'I'." (Id. at p. 603.) The court opined that this redaction violated the ***Aranda*** rule and that while such error, standing alone, might not have been prejudicial, it was in the instant case because it led to defendant taking the stand and denying the making any statement, improper comment on that testimony by the prosecutor, and a jury instruction running afoul of ***Griffin* v. *California*** (1965) 380 U.S. 609. (***Id***. at pp. 603-604.)

## d. Should the defendant's claim of prejudice prevail if the statement is redacted in a way that creates an impression that defendant's participation in a crime was greater than it was but defendant's participation with or without the redaction is sufficient to establish defendant's culpability? And does it matter if the redacted statement is admitted in the guilt or penalty phase?

Should the defendant's claim of prejudice prevail if the statement has to be redacted in a way that creates an impression that defendant's participation in a crime was greater than it was but defendant's statement, with or without the redaction, is nonetheless sufficient to establish defendant's culpability?

If a defendant's redacted statement simply magnifies the perception of defendant's participation but does not remove any exculpatory information, it is not likely to be viewed as sufficiently prejudicial to require severance in the guilt phase of a trial. (**See e.g., *People* v. *Lewis*** (2008) 43 Cal.4th 415, 457-458 [finding redaction did not violate rights of defendant whose statement was redacted because, inter alia, defendant admitted planning and participating in the crimes in the way that would render him liable for the crime in the original statement regardless of the fact the redactions might have lessened the role of his co-defendants].) (***Id.*** at pp. 457-458; **see also *People* v. *Gamache*** (2010) 48 Cal.4th 347, 381 [any prejudice to defendant "from the jury's being prevented from hearing statements that might raise . . . codefendants' culpability without significantly changing his own was minimal at most"].)

However, the equation *might* change if the statement is going to be introduced in the penalty phase.

In ***People* v. *Boggs*** (1967) 255 Cal.App.2d 693, the defendant and his co-defendant were jointly accused of felony murder. In his confession, the defendant admitted his participation in burglarizing the victim's house, in attacking and immobilizing the victim, and in taking money from the victim's service station. In defendant's original confession he placed primary blame on the co-defendant for instigating the robbery, estimated the co-defendant inflicted 80% to 90% of the blows to the victim, and claimed the co-defendant did the actual strangling. In the redacted confession, the references to the co-defendant were deleted so that it appeared that the defendant administered the entire beating, even though he only confessed to striking the victim two or three times. (***Id.***, at pp. 703-704.) Nevertheless, the court found the defendant was not prejudiced because he confessed to first degree murder as a matter of law. The court noted that once the jury accepted his confession, it could not have found him guilty of a lesser crime even had it known of the co-defendant's role in the murder and the deletions could have had no effect on the jury's determination that the confession was voluntary. (***Id.*** at p. 704.) On the other hand, the ***Boggs*** court did find the deletions may have prejudiced the defendant at the *penalty* phase of the trial. (***Id.*** at p. 704.)

The analysis in ***Boggs*** regarding the penalty phase should be contrasted with the holding in ***People* v. *Rountree*** (2013) 56 Cal.4th 823, where the defendant claimed the redactions of his own statement "presented a picture of the crime that was essentially false because it showed [him] as the sole planner and

perpetrator of the crime." (***Id***. at p. 856.) The ***Rountree*** court rejected this claim because there was no suggestion defendant played a bigger role than he did and the jury knew defendant had not acted alone considering it also convicted the codefendant. (***Id***. at pp. 856-857.) (**See** this IPG memo, section 17-b at pp. 62-63 [discussing ***Rountree*** in greater depth]; **see also *People* v. *Lewis*** (2008) 43 Cal.4th 415, 459-460 [finding any error in redacting defendant's statement to be harmless in the penalty phase where the unredacted versions of defendant's statements contained all the evidence necessary to render defendant guilty at a minimum as an accomplice to murder and thus eligible for the death penalty, regardless of the codefendant's participation].)

## 18. Can a defendant object to *exclusion* of his own statement if a judge decides to exclude a defendant's statement because of the possibility of prejudice to the co-defendant?

In ***People* v. *Ervin*** (2000) 22 Cal.4th 48, two defendants were charged with murdering the wife of a third co-defendant in exchange for money. Defendant Ervin gave a statement implicating himself and the other hired killer but suggesting the other hired killer did the actual killing. The trial court "found the statement inadmissible at the joint trial because it could not be effectively redacted to avoid references to" the hired killer codefendant. (***Id***. at p. 87 [albeit one sentence of the statement was elicited].) In the California Supreme Court, the defendant claimed the statement's exclusion created a false picture of his complicity in the murder. The ***Ervin*** court initially held defendant waived the point by failing to object to exclusion of the entire statement, but then went on to point out that the allegedly favorable evidence in defendant statement was "presumably otherwise available to the defense in nonhearsay form. The defense was not foreclosed from implicating [the codefendant], or anyone else, through direct testimony or other nonhearsay evidence." (***Id***. at p. 87.) In other words, while defendant could not introduce his own statement because a defendant's own statement is hearsay if offered by the defendant (see ***People* v. *Williamson*** (1977) 71 Cal.App.3d 206, 213-214; ***People* v. *Edwards*** (1991) 54 Cal.3d 787, 820; ***People* v. *Cruz*** (1968) 264 Cal.App.2d 350, 356, fn. 6), a defendant cannot really complain about exclusion of his statement due to ***Bruton*** concerns because he can always *testify* to exculpatory information he provided in his own statement. (**See *People* v. *Owens*** (unpublished) 2005 WL 846135, at *7.)

On the other hand, if there is not total exclusion of the defendant's own statement, then the fact the defendant is able to testify to his own statement will not necessarily be much a rejoinder if the statement is introduced without effective redaction. (**See *People* v. *Stallworth*** (2008) 164 Cal.App.4th 1079 [rejecting argument that error in admitting insufficiently redacted statements was not prejudicial, notwithstanding fact defendant could have cleared up harm by taking the stand himself because a defendant should not "be required to abandon his Fifth Amendment privilege against self-incrimination in order to attempt to undo the prejudice caused by ineffective and misleading redactions to his extrajudicial statements concerning highly probative evidence and the core of his defense"].)

## 19. Does the *Bruton* rule have any application when it is the *defendant* who seeks to introduce a *codefendant's* statement rather than the prosecution?

Sometimes one defendant wishes to introduce his codefendant's statement because the codefendant gave a statement which took all the blame for the crime and thus, exonerated the defendant. If the co-defendant's statement falls within a hearsay exception (i.e., a spontaneous statement), the defendant should be allowed to introduce the codefendant's statement over any hearsay objection. Moreover, the statement should be admissible over a *prosecutor*'s Confrontation Clause objection because the state has no Confrontation Clause rights. However, the *codefendant* should be able to interpose a Confrontation Clause and ***Bruton*** objection to admission of the statement if it is testimonial. And, in fact, the California Supreme Court has held that where one defendant makes a timely objection to the introduction of the extrajudicial statement of a codefendant, there is no reason why the ***Bruton*** rule should not apply to such statements when it is the codefendant, rather than the prosecution, who seeks to introduce the statement. (***People* v. *Floyd*** (1970) 1 Cal.3d 694, 719; **accord *United States* v. *Macias*** (6th Cir. 2004) 387 F.3d 509, 519.)

The chance that an attorney for one defendant might inadvertently elicit the redacted portion of a codefendant's statement, however, is not grounds for granting a severance. "A court should not have to grant a severance, . . . because of the mere possibility that a co-defendant's attorney might carelessly ask questions [of other witness] at trial that elicit responses incriminating the other co-defendant; that possibility exists in practically any joint trial. However, if improper incriminating evidence does in fact come out . . . the prejudiced defendant can move for a mistrial." (***United States* v. *Monk*** (9th Cir. 1987) 774 F.2d 945, 950, fn. 1 [bracketed information added by IPG].)

## 20. Can a redacted tape-recorded statement be played before the jury?

If the tape-recorded statement can be played without running up against the concerns that render redaction ineffective (i.e., obvious deletions, ungrammatic sentence structure, etc.,) there should be no bar to playing a redacted tape-recording. Cases have noted the playing of redacted tape-recorded statements without there being any hint of it being a problem. (**See e.g.**, ***People* v. *Hampton*** (1999) 73 Cal.App.4th 710, 715; ***People* v. *Kol*** (unpublished) 2014 WL 2722351, at *6; ***Com.* v. *Rivera*** (Mass. 2013) 981 N.E.2d 171, 183, fn. 16; ***State* v. *Massey*** (La. Ct. App. 2012) 91 So.3d 453, 478.) Obviously, it will be harder to redact a tape-recorded statement than a written statement but that is a practical rather than a legal concern.

## 21. If the actual recorded statement of the defendant implicating the codefendant cannot electronically be redacted in an intelligible fashion, can the statement be redacted by having the police officer recount the statement orally and simply leave off the parts incriminating the co-defendant in re-telling what occurred?

In the case of ***Bruton* v. *United States*** (1968) 391 U.S. 123 itself, the court observed that "[i]t has been said: 'Where the confession is offered in evidence by means of oral testimony, redaction is patently impractical. To expect a witness to relate X's confession without including any of its references to Y is to ignore human frailty. Again, it is unlikely that an intentional or accidental slip by the witness could be remedied by instructions to disregard.'" (***Id***. at p. 134, fn. 10; **see also *People* v. *Cruz*** (1988) 521 N.E.2d 18, 22.)

However, when redaction is required, it is more common than not for officers to orally recount the redacted version of the statement in court. (**See e.g., *People* v. *Lewis*** (2008) 43 Cal.4th 415, 459-460; ***United States* v. *Straker*** (D.C. Cir. 2015) 800 F.3d 570, 600-601; ***United States* v. *Ramos-Cardenas*** (5th Cir. 2008) 524 F.3d 600, 603-604; ***United States* v. *Logan*** (8th Cir. 2000) 210 F.3d 820, 822; ***United States* v. *Satterfield*** (11th Cir. 1984) 743 F.2d 827, 849; ***Quisenberry v. Com***. (Ky. 2011) 336 S.W.3d 19, 27.) And orally recounting a statement can actually be more effective in covering up deletions than trying to introduce tape recordings or written statements. (**See e.g**., ***United States* v. *Straker*** (D.C. Cir. 2015) 800 F.3d 570, 600-601 ["by only allowing prosecution witnesses to use the statements to aid in their testimony without admitting the documents themselves into evidence, the court ensured that the jury did not see written (and perhaps discernibly altered) copies of the redacted confessions'].) Moreover, the concerns raised in the ***Bruton*** footnote can be addressed by making sure that what specifically is going to be stated in court is agreed upon in advance and/or is written down. (**See** this IPG memo, section 22 at pp. 72.)

## 22. When should a motion to sever or exclude a statement based on the *Bruton* rule be brought and what steps should a court take before ruling on a motion to sever?

The motion to sever based on ***Bruton*** grounds may be brought before a case is sent to trial court. (**See *People* v. *Fletcher*** (1996) 13 Cal.4th 451, 467.) However, a motion to exclude (or in the alternative require a redaction) must be brought in the trial court because the motion will often require rulings on what evidence can or cannot be presented *at trial*, i.e., rulings by a judge other than the trial judge would not be binding. (**Cf**., ***People* v. *Smithson*** (2000) 79 Cal.App.4th 480, 495 ["a ruling made at the preliminary hearing or pursuant to a common law pretrial motion regarding the admissibility of a confession is not binding on the trial court should the defendant renew a previously denied motion"].)

A trial court tasked with determining whether to grant a severance motion or allow the admission of a redacted statement of a codefendant into evidence should adopt the following procedure.

First, either before granting a severance motion or a motion to exclude the statement, the court should review the statement of the defendant that the prosecution seeks to introduce to determine if anything in the statement needs to be redacted to protect the right of the codefendant. Because the need to redact can potentially turn on other evidence to be presented at trial (**see** this IPG memo, section 12 at pp. 39-42), a trial court should "preview the evidence to be presented at trial by reading preliminary hearing transcripts and other materials submitted by the parties and by considering the parties' offers of proof." (***People* v. *Fletcher*** (1996) 13 Cal.4th 451, 467.)

Second, if the statement can potentially be redacted, the court should review the redacted statement before ruling on the severance motion. (**See *People v. Douglas*** (1991) 234 Cal.App.3d 273, 282 [criticizing trial judge for failing to do so].) The court should review both the un-redacted and redacted statements. (***People* v. *Gamache*** (2010) 48 Cal.4th 347, 379; ***People* v. *Lewis*** (2008) 43 Cal.4th 415, 457.)

Third, it is best to go over the redactions line by line to help ensure that any redactions eliminate or minimize those aspects of the statements that inculpate the codefendant and do so in a manner that does not render the statement awkward. (**See *United States* v. *Straker*** (D.C. Cir. 2015) 800 F.3d 570, 601 [noting that the fact the trial "court reviewed drafts of the prosecution's redacted statements and required additional changes to conform them to the court's ***Bruton*** guidelines. That safeguard helped to avoid clumsiness in redactions that could have been inculpatory."].) The court should also be scrutinizing the statement "to determine whether the redactions so distort the original statement as to result in prejudice to the defendant." (***People* v. *Gamache*** (2010) 48 Cal.4th 347, 379; ***People* v. *Lewis*** (2008) 43 Cal.4th 415, 457; **see also** this IPG memo, section 17 at pp. 60-68.)

Fourth, defense counsel for the codefendant claiming the redacted statement implicates his or her client should be required to point to the specific aspects of the redacted statement that allegedly do so. And defense counsel for the defendant who made the statement should be required to identify those aspects of the redacted statement which allegedly prejudice his client. (**See *People* v. *Rountree*** (2013) 56 Cal.4th 823, 849 [noting that before the jury heard about defendant's confessions, the court and parties went over the redacted statements point by point. The court permitted defendant to state all his specific objections and to indicate what portions of the un-redacted statement he wished to elicit on cross-examination].)

Fifth, if the statement is coming in evidence by way an oral recounting of what was said, ground rules should be laid down as to how the witness will be allowed to summarize the statement and what questions will be off-limits to the parties.

## 23. Can a defendant renew his motion to exclude a statement if the evidence presented at trial changes the picture regarding the likelihood of the codefendant's statement implicating the defendant?

A motion to sever based on ***Aranda-Bruton*** grounds, like all motions to sever, is decided based on the facts as they appear at the time of the hearing on the motion to sever. (**See *People* v. *Gamache*** (2010) 48 Cal.4th 347, 379; ***People* v. *Douglas*** (1991) 234 Cal.App.3d 273, 281.) This does not mean, however, that the motion may not be reconsidered if new evidence bearing on the issue later comes to light during trial. In ***People* v. *Fletcher*** (1996) 13 Cal.4th 451, the court noted that rulings made in advance of trial may be reconsidered at trial, before admission of the confession in question, should the evidence at trial prove to be materially different than the parties and the court anticipated. (***Id***. at p. 467; **see also *People* v. *Matola*** (1968) 259 Cal.App.2d 686, 692 [recognizing that initial editing may apparently sanitize a confession and yet, due to later events, may prove ineffective].)

And, even if the denial of severance was not error at the time of the ruling on the motion, reversal of the case may still be required if proceeding with a joint trial caused such "gross unfairness" that continuing with the joint trial violated defendant's due process rights. (**See *People* v. *Gamache*** (2010) 48 Cal.4th 347, 381.)

## 24. If the redacted statement of a codefendant does not violate the *Bruton* rule, can the prosecutor still mess things up by using the statement against the defendant in contravention of the limiting instruction?

Just because the prosecutor has obtained a proper redaction of a codefendant's statement so that the jury can be assumed to follow a limiting instruction, does not mean the prosecutor is free and clear. If the prosecutor uses the statement (or asks the jury to consider the codefendant's statement) in contravention of the limiting instruction, ***Bruton*** error can still occur. (**See *People* v. *Bryden*** (1998) 63 Cal.App.4th 159, 177 [citing to ***Richardson* v. *Marsh*** (1987) 481 U.S. 200, 211 for the proposition that "the effect of a limiting instruction may be undone when the prosecutor urges the jury to use the codefendant's statements to evaluate the defendant's case"]; ***United States* v. *Peterson*** (9th Cir. 1998) 140 F.3d 819, 822 [***Bruton*** error was found where, inter alia, prosecutor in closing argument stated that the defendant was the "person X" referred to in the co-defendant's statement].) Making an argument effectively exposing who the unidentified person is or drawing an inference during closing argument that could not otherwise be made without considering the codefendant's statement against the defendant can be error. (**See e.g.**, ***Brown* v. *Superintendent Greene SCI*** (3d Cir. 2016) 2016 WL 4434398, at *12; ***United States* v. *Yousef*** (2d Cir. 2003) 327 F.3d 56, 151 [albeit finding error harmless].)

However, at least in circumstances where the statement does not facially or directly implicate a defendant, prosecutorial attempts to have the jury consider the statement of a codefendant is not necessarily ***federal constitutional*** error. As pointed out in ***People* v. *Bryden*** (1998) 63 Cal.App.4th 159, "[w]hen the statements after redaction do not directly implicate the defendant, but the prosecution improperly uses these statements against the codefendant, [courts] look to see whether the trial court abused its discretion in refusing to sever the trial and in refusing to grant a mistrial." (***Id***. at p. 179 [and citing to ***Richardson* v. *Marsh*** (1987) 481 U.S. 200].)

Thus, in ***Bryden***, even though the prosecution improperly urged the jury to rely on the testimony of the prosecution witness in convicting defendant based on a codefendant's note, the appellate court held the Confrontation Clause was not implicated. Rather, the court reviewed the error under the standard of review applicable to state law errors (***People* v. *Watson*** (1956) 46 Cal.2d 818) and held the error harmless since (1) the note did not directly implicate the defendant, (2) the witness' testimony was corroborated by evidence other than the note, and (3) the court specifically instructed the jurors not to consider the note as evidence against the defendant. (***Bryden*** at pp. 182-183; **see also *United States* v. *Sherlock*** [ (9th Cir.1989) 962 F.2d 1349, 1359–1361; **but compare *United States* v. *Powell*** (5th Cir. 2013) 732 F.3d 361, 377 [Confrontation Clause violated where statement of codefendant that had been admitted in a properly redacted fashion, but prosecutor repeatedly asked the witness to explain the statement in a way that would have required the witness to identify the defendant as being implicated in the statement].)

## 25. If a court rules the statement cannot be adequately redacted to protect the interests of all the defendants, what are the prosecutor's options?

If a court finds that a codefendant's statement would violate the ***Bruton*** rule if admitted at a joint trial and redaction is not a viable option, then the prosecutor has three alternative choices:

**Go forward without using the statement – at least until the declarant defendant testifies**

A prosecutor can forego introducing the statement in the case unless and until the defendant who gave the statement takes the stand. (**See *People* v. *Hoyos*** (2007) 41 Cal.4th 872, 895 [upholding trial court ruling that statement of codefendant could not be used except for impeachment purposes because a "codefendant's extrajudicial statement implicating another defendant need not be excluded when the codefendant testifies and is available for cross-examination"].)

**Agree to separate trials**

The prosecutor can agree to separate trials. (**See e.g.**, ***People* v. *Gamache*** (2010) 48 Cal.4th 347, 378-379 ["***Bruton*** and its progeny provide that if the prosecutor in a joint trial seeks to admit a nontestifying codefendant's extrajudicial statement, either the statement must be redacted to avoid implicating the defendant *or the court must sever the trials."*]; ***People* v. *Hoyos*** (2007) 41 Cal.4th 872, 895 [same].)

**Ask to have dual juries empaneled for a single trial**

The prosecutor can request that there be a single trial with dual juries. This procedure was expressly approved by the California Supreme Court as a method which conserves judicial and prosecutorial resources, and avoids the inconvenience and trauma to witnesses. (**See *People* v. *Fletcher*** (1996) 13 Cal.4th 451, 468.)

## a. How does the "dual jury" alternative to severance or exclusion work?

Under the dual jury alternative, two juries are empaneled for a single trial. When evidence of one defendant's confession is received, the jury for the other defendant is removed from the courtroom. The cases are argued to each jury in the other's absence.

As noted by the California Supreme Court in ***People* v. *Cleveland*** (2004) 32 Cal.4th 704, "in the context of deciding what to do when one defendant has made an out-of-court statement implicating another defendant," . . . [w]e have upheld the use of two juries in the same trial, one for each defendant, with one jury excluded when evidence is presented that is inadmissible as to that jury's defendant." (***Id***. at p. 758 citing to ***People v. Harris*** (1989) 47 Cal.3d 1047 at pp. 1071 and 1070-1076; **see also *Gray* v. *Maryland*** (1998) 523 U.S. 185, 192 [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."], emphasis added by IPG.) Prosecutors should be prepared to point out all the benefits and state interests in having the defendants tried together, including the fact that having joint trials avoids having to present "the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand." (***Richardson* v. *Marsh*** (1987) 481 U.S. 200, 210; ***People* v. *Fletcher*** (1996) 13 Cal.4th 451, 464.) Moreover, both the High Court and California Supreme Court have stated that "joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." (**Ibid**.)

Caution should be exercised when empaneling two juries to ensure the impartiality of both juries. The methods exercised by the trial court in the case of ***People* v. *Wardlow*** (1981) 118 Cal.App.3d 375 provides a model approach: "The two juries were chosen from venires that were mutually exclusive. During the trial, every effort was made to ensure that each jury could view all of the evidence and hear the witnesses. During recesses, after strict admonition not to discuss the cases, the two juries were sent to separate chambers. Each jury heard only the closing argument pertinent to its respective defendant. Each jury was instructed separately. While deliberating, evidence was shared and shuttled between the two juries upon request." (***Id***. at p. 384.)

However, whether this approach is *required* in order not to run afoul of the ***Bruton*** rule is a different question, e.g., is it truly necessary to select the juries from different venires where voir dire would not

disclose that one of the defendants gave a statement implicating the other? Indeed, even in ***Wardlow***, the court did not find "the mere fact that [one] jury knew that a statement was made by [the codefendant] without knowing its substance, was sufficient, by itself, to prejudice [the defendant's] case." (***Id***. at p. 386; **but see *People v. Hana*** (Mich. 1994) 524 N.W.2d 682, 709 ["When separate juries in a dual-jury trial are chosen from a single venire, there is a substantial risk that the voir dire questions from defense lawyers and the court will apprise all the jurors of the conflicting defenses. For this reason, the juries in a joint trial should be chosen from separate venires."].)

## 26. Does the *Bruton* rule apply to the penalty phase of a trial?

The ***Bruton*** rule applies to the penalty phase of a criminal proceeding. (***People v. Floyd*** (1970) 1 Cal.3d 694, 719; **see also *Lord* v. *State*** (Nev. 1991) 806 P.2d 548, 557 [and cases cited therein].)

## 27. Does the *Bruton* rule apply in proceedings other than criminal jury trials?

The ***Bruton*** rule is generally not applicable at proceedings other than criminal *jury* trials. This is because if there is no jury, there is not the same concern that the factfinder will be unable to cabin consideration of the statement to the defendant against whom the statement is admitted. Of course, a prior statement by one defendant incriminating a co-defendant is still *hearsay* against the co-defendant and so the fact-finder in a non-jury proceeding is still prohibited from considering the incriminating statement as evidence against the co-defendant. (**See** this IPG memo, section 4-b-i at p. 21; **but see** this IPG memo, section 28 at p. 78 [discussing consideration of codefendant statement offered pursuant to Proposition 115 against other defendant at preliminary examination].)

### a. Court trials

The ***Bruton*** rule does not apply to court trials. There is no bar to the admission of a codefendant's statement implicating the other defendant where (i) there is no jury to be prejudiced and (ii) it is only offered against the co-defendant. (**See *People v. Walkkein*** (1993) 14 Cal.App.4th 1401, 1409; **see also *In re Jose M.*** (1994) 21 Cal.App.4th 1470, 1479 [noting federal courts have "long held it unnecessary to insulate jurists like juries and thus held ***Bruton*** inapplicable to bench trials"]; ***Johnson* v. *Tennis*** (3rd Cir. 2008) 549 F.3d 296, 300 [citing a myriad of cases holding ***Bruton*** rule applies solely to jury trials].)

### b. Grand jury proceedings

There is no California case addressing whether the ***Aranda-Bruton*** rule applies at grand jury proceedings. While a grand jury may be more akin to a petit jury than a judge, it still is fulfilling a distinct role from that of the petit jury. (**See *Berardi* v. *Superior Court*** (2007) 149 Cal.App.4th 476, 489 ["A grand jury operates as part of the charging process of criminal procedure, and its function is viewed as

investigatory, not adjudicatory, in nature."].) Moreover, it is very unlikely that the ***Aranda-Bruton*** rule applies to grand jury proceedings because the Sixth Amendment right of confrontation is a trial right and the rule is premised on the fear a defendant will be deprived of his Sixth Amendment right of confrontation. (**See *People* v. *Gonzales*** (2012) 54 Cal.4th 1234, 1267 ["the right to confrontation is a trial right that does not apply with full force at a preliminary hearing"]; ***Whitman* v. *Superior Court*** (1991) 54 Cal.3d 1063, 1079 ["it is well established that hearsay is admissible in indictment proceedings before federal grand juries"].) This was the rationale behind the decision in ***People* v. *Leyva*** (N.Y.Crim.Ct. 2008) 856 N.Y.S.2d 452, which held "[t]he application of the ***Bruton*** rule at a criminal trials insulates a defendant from a violation of the Confrontation Clause of the United States Constitution. However, since there is no right of confrontation in a grand jury proceeding, the admission of a non-testifying co-defendant's statement in a grand jury proceeding does not deprive a defendant of any right whatsoever[.]" (***Id***. at p. 457; **but see *People* v. *Backus*** (1979) 23 Cal.3d 360, 393 [suggesting that there may be situations where the grand jury gets so much inadmissible evidence that even a limiting instruction to the grand jury would not help and citing to ***Aranda***].)

Significantly, there is a long line of New York cases, culminating in the ***Leyva*** decision (**see *People* v. *Rocco*** (2d Dept. 1996) 646 N.Y.S.2d 518; ***People* v. *Scalise*** (3d Dept. 1979) 421 N.Y.S.2d 637; ***People* v. *Eaddy*** (Crim. Ct. Sullivan Cnty., 1989) 537 N.Y.S.2d 465), holding the ***Bruton*** rule does *not* apply at grand jury proceedings, but there does not appear to be any out-of-state case *applying* the ***Bruton*** rule to grand jury proceedings.

That being said, if an admission of a defendant is presented that potentially incriminates the other defendant in a "joint" grand jury proceeding, prosecutors should consider whether a redaction can be accomplished that will not prevent an indictment but simultaneously will not unfairly distort or prejudice the defendant who made the statement. If that can be done and the defendant who made the statement is not being deprived by the redaction of exculpatory evidence (**see *Johnson* v. *Superior Court*** (1975) 15 Cal.3d 248, 253–254 [prosecution that must inform the grand jury of the existence of exculpatory evidence]; Pen. Code, § 939.71(a) ["If the prosecutor is aware of exculpatory evidence, the prosecutor shall inform the grand jury of its nature and existence"]), then this is the safest approach.

In any event, notwithstanding the holding in ***Stern* v. *Superior Court in and for Alameda County*** (1947) 78 Cal.App.2d 9 that a prosecutor has no obligation to instruct the grand jury that the hearsay admissions made by some defendants were inadmissible against the other defendants (***id***. at pp. 17-18), the prosecution should always give a limiting instruction informing the jury that they cannot consider the statement of one defendant against the other unless there is a permissible theory of admissibility against both. ***Stern*** was decided by the enactment of Penal Code section 936.9, which states that "[e]xcept as provided in subdivision (c), the grand jury shall not receive any evidence except that which would be admissible over objection at the trial of a criminal action, but the fact that evidence that would have been excluded at trial was received by the grand jury does not render the indictment void where sufficient competent evidence to support the indictment was received by the grand jury." (Pen. Code, § 936.9(a).)

## c. Juvenile proceedings

The ***Bruton*** rule does not apply to juvenile proceedings. (***In re Jose M.*** (1994) 21 Cal.App.4th 1470, 1480.) Case law predating the passage of Proposition 8, i.e., ***In re D. L.*** (1975) 46 Cal.App.3d 65, 70-71, . . . had assumed that ***Aranda*** and ***Bruton*** did apply to juvenile jurisdictional hearings but the California Constitution, since section 28(d) was added in 1982, now overrides that authority." (***In re Jose M.*** (1994) 21 Cal.App.4th 1470, 1480.)

## d. Parole/PRCS/probation revocation hearings

IPG did not locate any cases involving joint parole or probation hearings – though theoretically you could have sort of a joint probation hearing if a court decided to hold a simultaneous probation revocation and preliminary examination in which the defendant on probation was a co-defendant at the preliminary examination. In any event, the rationale for not applying the ***Bruton*** rule in proceedings other than jury trial would dictate that it not be applied at a parole, probation, or PRCS revocation hearing. (**See** this IPG memo, section 27 at pp. 76-77.)

## e. Preliminary examinations

The ***Bruton*** rule does not apply to preliminary examinations for two reasons. One, there is no jury. Two, the Sixth Amendment right to confrontation is basically a trial right and does not bar the admission of hearsay at preliminary hearings. (**See *People* v. *Miranda*** (2000) 23 Cal.4th 340, 349-354; ***Correa* v. *Superior Court*** (2002) 27 Cal.4th 444, 460; **see also *Peterson* v. *California*** (9th Cir. 2010) 604 F.3d 1166, 1169 ["there are no constitutionally-required procedures governing the admissibility of hearsay at preliminary hearings"].) Of course, the magistrate would not be able to consider the hearsay statement of one defendant at a joint preliminary examination against the other defendant unless the hearsay statement fell within an applicable hearsay exception.

## 28. Can an officer testify to statements of one codefendant pursuant to Proposition 115 at a joint preliminary hearing and have them considered against both defendants?

As noted above, while the ***Bruton*** rule does not apply to preliminary examinations, the magistrate would nonetheless be barred from using one defendant's admission to determine whether there was probable cause to hold the other defendant to answer – unless the defendant's admission fell within an applicable hearsay exception. However, thanks to the passage of Proposition 115, which created a hearsay exception unique to preliminary examinations, the statement of one defendant implicating his co-defendant is admissible *even against the co-defendant* if it is offered into evidence through the testimony of a qualified officer in compliance with Penal Code section 872(b), which provides that "[n]otwithstanding Section

1200 of the Evidence Code, the finding of probable cause may be based in whole or in part upon the sworn testimony of a law enforcement officer or honorably retired law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted." (**See *People* v. *Miranda*** (2000) 23 Cal.4th 340, 350-354 [albeit noting that "magistrates, of course, should continue to treat with care and caution an accomplice's statements that incriminate the defendant, whether admitted directly or through the hearsay testimony of a qualified law enforcement officer"].)

## 29. What is the standard of review for *Bruton* error?

Because ***Aranda/Bruton*** error implicates the constitutional right of confrontation, it is reviewed under the harmless beyond a reasonable doubt standard of ***Chapman* v. *California*** (1967) 386 U.S. 18. (**See *People* v. *Burney*** (2009) 47 Cal.4th 203, 231; ***People* v. *Garcia*** (2008) 168 Cal.App.4th 261, 281 citing to ***Brown* v. *United States*** (1973) 411 U.S. 223, 231–232 and ***People* v. *Anderson*** (1987) 43 Cal.3d 1104, 1128.) Under this standard, "[t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." (***Delaware v. Van Arsdall*** (1986) 475 U.S. 673, 684; **see also *Schneble* v. *Florida*** (1972) 405 U.S. 427, 430 ["The mere finding of a violation of the ***Bruton*** rule in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction."].)

Whether ***Bruton*** error is harmless depends on a variety of factors, including "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, and, of course, the overall strength of the prosecution's case." (***United States* v. *Peterson*** (9th Cir. 1998) 140 F.3d 819, 822 citing to ***Delaware* v. *Van Arsdall*** (1986) 475 U.S. 673, 684.) Additionally, while the fact the defendant against whom the statement was improperly admitted also gave a confession (admitted into evidence) that was consistent with the co-defendant's statement does not preclude application of the ***Bruton*** rule, the interlocking nature of confessions may be considered on appeal in assessing whether any Confrontation Clause violation was harmless. (***Cruz* v. *New York*** (1987) 481 U.S. 186, 194.)

"In determining whether improperly admitted evidence so prejudiced a defendant that reversal of the judgment of conviction is required, [the California Supreme Court has] observed that "if the properly admitted evidence is overwhelming and the incriminating extrajudicial statement is merely cumulative of other direct evidence, the error will be deemed harmless." (***People* v. *Burney*** (2009) 47 Cal.4th 203, 232.)

The general standard of review for ***Bruton*** error remains the same, post-***Crawford***, to the extent *testimonial* statements are improperly introduced at trial in violation of the Confrontation Clause. (**See *People* v. *Garcia*** (2008) 168 Cal.App.4th 261, 281; ***People* v. *Song*** (2004) 124 Cal.App.4th 973, 982.)

However, a distinction should be drawn between the standard of review when the error is one involving the admission of a codefendant's statement implicating the defendant that violates the *Confrontation Clause* and the admission of codefendant's statement implicating the defendant that only violates the *state hearsay* rules. The latter form of error is subject to the standard of review for errors of state law, i.e., the ***Watson*** standard.) Under that standard, reversal is required only if it is reasonably probable the defendant would have obtained a more favorable result had the evidence been excluded. (***People v. Watson*** (1956) 46 Cal.2d 818, 836.)

Thus, if a codefendant's statement was *nontestimonial* or offered for a nonhearsay purpose, its admission in a joint trial could not violate the confrontation rights of the other defendant (and, accordingly should not be subject to the ***Chapman*** standard of review) even if it was later determined that the statement should have been excluded pursuant to Evidence Code section 352 or was admitted without a limiting instruction. (**See *People* v. *Gutierrez*** (2009) 45 Cal.4th 789, 813 [applying ***Watson*** standard of review to erroneous admission of nontestimonial hearsay]; ***People* v. *Garcia*** (2008) 168 Cal.App.4th 261, 291-292.)

Note also that if there is a claim that *severance* was erroneously denied, an appellate court will review a trial court's "denial of a severance motion for abuse of discretion based on the facts as they appeared when the court ruled on the motion. [Citation.] If [the reviewing court] conclude[s] the trial court abused its discretion, reversal is required only if it is reasonably probable that the defendant would have obtained a more favorable result at a separate trial. [(The ***Watson*** standard) Citations.] If the court's joinder ruling was proper when it was made, however, [the reviewing court] may reverse a judgment only on a showing that joinder '"resulted in 'gross unfairness' amounting to a denial of due process."'" (***People* v. *Lewis*** (2008) 43 Cal.4th 415, 452 [bracketed information added by IPG].)

Presumably, however, if the failure to grant a severance motion resulted in the admission of a codefendant's statement that violated the other defendant's Confrontation Clause rights, the defendant would simply argue the error on *that* ground – which would be governed by the more favorable ***Chapman*** standard.

## 30. Are there ways to take a statement from a codefendant which will help avoid severance?

### a. Taking a redacted statement

One way to avoid an ***Aranda-Bruton*** issue is for an officer investigating a case involving multiple defendants to take a statement from each defendant which (in addition to a statement that incriminates the other defendant) does not make any reference, direct or indirect, to the defendant's codefendant. (**See e.g., *People* v. *Mitcham*** (1992) 1 Cal.4th 1027, 1047.) In this circumstance, the suspect is advised by the officer to explain what the suspect did without mentioning what anyone else who participated in the

crime did. Although attempting an "Arandized" statement is always difficult because each defendant will often be trying to place the primary blame on the other and because it is very easy for a defendant to slip and mention the other defendant, it **still should be attempted in codefendant cases**.

### i. Does a police officer's admonition to the defendant to give his statement without mentioning anyone else's name or involvement (included as part of the taped statement introduced before the jury) constitute an improper allusion to an unidentified accomplice?

The fact that the jury hears a recording of a police interview with a defendant in which the officer admonishes the defendant not to mention anyone else's name or involvement will not be viewed as implicating a second defendant. In ***People* v. *Mitcham*** (1992) 1 Cal.4th 1027, a codefendant's statement that was played for the jury included an initial admonition by the police to the codefendant that he give his statement without mentioning anyone else's name or involvement. In the California Supreme Court, the defendant claimed this was an improper allusion to an unidentified accomplice. However, the court disagreed, finding that "[t]he admonition simply directed [the codefendant] not to refer to anyone other than himself in describing his activity. It did not refer to the existence or identity of any accomplice of [the codefendant] in the commission of the crimes, but alluded only to the obvious—that somebody committed the crimes." (***Id***. at p. 147 [bracketed information added by IPG].)

## b. Taking a joint statement that makes all statements admissions or adoptive admissions against both defendants

Another method of attempting to avoid an ***Aranda-Bruton*** issue upfront is for an officer to conduct a joint interview after taking separate statements from each defendant in a multiple defendant case. In the joint interview, each defendant is asked to explain what happened step-by-step. After one defendant describes what occurred, the other defendant(s) is asked what the first defendant just stated is correct or otherwise adopts what the first defendant stated and vice versa. (**See e.g., *People* v. *Jennings*** (2010) 50 Cal.4th 616, 655- 663; ***People* v. *Castille*** (2005) 129 Cal.App.4th 863, 868-874; **see also *People* v. *Gamache*** (2010) 48 Cal.4th 347, 384 [joint statement of three defendants].)

The interviewing officer should make it clear to the defendants that if they have any objections to what the other defendant is saying to speak up so that if one had wanted to disagree "with what the other said, it is reasonable to assume that he would have said so." (***People* v. *Osuna*** (1969) 70 Cal.2d 759, 765).

The interviewing officers should also make sure each defendant has expressly or impliedly adopted the statements of the others so it is clear that (i) the statements will be admissible to each defendant as an "adoptive admission" and (ii) each defendant's statement will become part of the "circumstances surrounding" the co-defendant's statement. For example:

Officer: "What did Smith do after Jones shot the clerk?"

Jones: "Smith said, 'I think I killed him' and then we ran."

Officer: "Let's break that up. Mr. Smith, do you agree with Mr. Jones that you said, 'I think I killed him?'"

Smith: "Yes."

Officer: "Okay, now do you agree with Mr. Jones that you and he then ran?"

Smith: "Yes. But Jones started running before I did."

Officer: "Okay, Mr. Jones, do you agree that you began running before Smith?" Etc., etc. etc.

*__Editor's note__: This type of statement is sometimes referred to as a "Lacer" statement in recognition of retired Oakland Police Department Captain Ralph Lacer who many believe pioneered the approach. Captain Lacer was the person who interviewed the three defendants in the case of ***People* v. *Castille*** (2005) 129 Cal.App.4th 863.

So long as each of the statements made during the interview by the defendants represents a genuine admission or adoptive admission, the entire statement should be admissible over Confrontation Clause and ***Bruton*** objections in a joint trial without having to redact the statement. (**See *People* v. *Jennings*** (2010) 50 Cal.4th 616, 660-662; ***People* v. *Castille*** (2005) 129 Cal.App.4th 863,868; **see also *People* v. *Osuna*** (1969) 70 Cal.2d 759, 765 [there is no ***Aranda–Bruton*** error when conversation among codefendants was admitted under adoptive-admission rule]; this IPG memo, section 5-b-i at pp. 29-30 [for a further discussion of why testimonial statements falling into the adoptive admission hearsay exception are admissible in a joint trial over a ***Bruton*** objection].)

An alternative way of possibly using the adoptive admission exception to avoid violating the ***Bruton*** rule is for an officer to play the entire tape-recorded statement of one defendant to the other defendant and ask if the statement is true and then do the reverse.

Of course, whether or not to try and obtain a Lacer statement will be dictated by how consistent the individual statements of each defendant turn out to be. The more inconsistent, the less likely a joint statement utilizing the adoptive admission exception will be successful. In addition, once the defendants are sitting down facing one another, they may have a change of heart about cooperating in giving a joint statement.

Know though that if an officer sits the two defendants down together and one turns to the other and says, "Don't say a word" or "Don't say anything", at least *that* statement may potentially be used in a joint trial against the declarant. (**See *United States* v. *Lopez-Lopez*** (1st Cir. 2002) 282 F.3d 1, 13 [upholding the admission in a joint trial of one defendant telling the other defendant not to answer the question (albeit subject to a limiting instruction) because it was not "powerfully incriminating"].)

**NEXT EDITION: WE RETURN WITH A SHORTER PODCAST AND A MEMO OF MORE REASONABLE LENGTH AS WE COVER SOME OF THE NEWER APPELLATE COURT CASES.**

**ETA: OCTOBER 21, 2016**



Suggestions for future topics to be covered by the Inquisitive Prosecutor's Guide, as well as any other comments or criticisms, should be directed to Jeff Rubin at (408) 792-1065.