POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Survey of Criminal Law Approved for Credit Toward California Criminal Law Specialization: #172-- The Alameda County District Attorney's Office is a State Bar of California Approved MCLE Provider.

Week Of	Topic	Guest	30 min
April 8, 2019	**Joinder of Defendants:** *Aranda/Bruton* **Update on** *Duenas*		General

Penal Code section 1098 states: "When two or more defendants are charged with any public offense, whether felony or misdemeanor, they must be tried jointly, *unless* the court orders otherwise.

The P&A of March 25, 2019 addressed five of the six factors which the California Supreme Court in *People .v Massie* (1967) 66 Cal.2d 899, 916-917, stated should be considered in determining whether to sever defendants and order separate trials.

This week's P&A discusses the sixth *Massie* factor which is "an incriminating confession," in other words, the *Aranda*/*Bruton* issue. *Aranda*/*Bruton* is a complex topic and this P&A offers an overview of the law and observations on how statements can be redacted. For a thorough and much lengthier compilation on all issues related to *Aranda*/*Bruton,* readers should consult Jeff Rubin's *Inquisitive Prosecutor's Guide*, October 7, 2016.

I. The U.S. Supreme Court Cases[1]

The following Supreme Court cases frame the Sixth Amendment right to confrontation:

A. *Bruton v. United States* (1968) 391 U.S. 123

1. Bruton and Evans were tried jointly for armed robbery. Evans gave a confession to the law enforcement officer that also implicated Bruton. At trial, Evans did not testify, but his confession was read to the jury by the law enforcement officer. The trial court gave a limiting instruction to the jury that the confession could be used only against Evans.

2. The United States Supreme Court held that defendant Bruton was denied his Sixth Amendment right of confrontation when the confession, which named and incriminated Bruton, was admitted. The Supreme Court held that even though the jurors were instructed not to consider the confession against

[1] To the extent *People v. Aranda* required 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. (*People v. Capistrano* (2014) 59 Cal.4th 830, 868, fn.10.)

Bruton, "where the powerfully incriminating extrajudicial statements of a codefendant who stands accused side-by-side with the defendant are spread before the jury in a joint trial" the risk is too great.

B. *Richardson v. Marsh* (1987) 481 U.S. 200

1. Three years after *Bruton*, the United States Supreme Court in *Richardson v. Marsh* limited the application of *Bruton*. The Supreme Court stated that *Bruton* extends only to confessions that are not only "powerfully" incriminating, but that are also facially incriminating. In *Bruton*, the co-defendant's confession specifically named *Bruton*.

2. In *Richardson*, by contrast, the co-defendant's confession presented at trial had been redacted to omit all reference to the defendant's existence. There was no indication in the confession that anyone other than the co-defendant and a third accomplice had participated in the crimes. The jury was instructed not to consider the co-defendant's statement against the defendant. However, the defendant was linked to the crime through references the jury made as evidence was later presented at trial, including the defendant's own testimony when she took the stand.

3. The Supreme Court in *Richardson* declined to extend *Bruton* beyond facially incriminating confessions. Here, the redacted confession was not incriminating on its face, but only when linked to other evidence. The Supreme Court said "the Confrontation Clause is not violated by 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.)

C. *Gray v. Maryland* (1998) 523 U.S. 185

1. In *Gray v. Maryland*, the defendant and a codefendant name Bell were charged with murder. Bell gave a confession to the police that he and Gray and a third person who was not charged had participated in a beating in which the victim was killed. Only Bell and the defendant were on trial. At trial, a police officer read Bell's confession into evidence, but said the word "delete" or "deleted" whenever the defendant Gray's name or the third party's name appeared in Bell's confession. Immediately after the police detective finished reading Bell's confession, the prosecutor asked the officer, "After Mr. Bell gave you that information, you subsequently were able to arrest Mr. Gray, right?" The officer said yes. The prosecutor introduced into evidence written copy of Bell's confession with the names of the defendant Gray and the third party omitted, leaving in their place blank spaces, separated by commas.

2. In *Gray*, the Supreme Court said it was addressing a redaction that was obviously being used as a substitute for the defendant's name. The Supreme Court stated that this kind of redaction, which replaces a defendant's name with a blank space or the word "deleted" or some of similar symbol "still falls within *Bruton*'s protective rule, even if the judge gives a proper limiting instruction." (*Id*. at p. 192.)

3. The Supreme Court said these kinds of redactions obviously refer directly to somebody, often obviously the defendant, and involved inferences the jury would make immediately, "even if the

confession was the very first item introduced at trial." (*Id.* at p. 126.)

II. The Limitations of the *Bruton* Rule

As a result of these three cases, *Bruton* is limited to a joint trial in which a codefendant names and incriminates another defendant in the trial, and that defendant is asserting his or her Sixth Amendment right of confrontation. As Jeff points out in his IPG, the Supreme Court in *Gray* essentially expanded the definition of "facially incriminating" to include statements where the defendant is not identified by name, but is clearly identifiable on the face of the statement.

In these situations, the *Bruton* rule requires severance of the trial or redaction of the nontestifying codefendant's statement that implicates the other defendant in a joint trial. As will be discussed later in this P&A, the Supreme Court in *Crawford v. Washington* (2004) 541 U.S. 36 later distinguished between testimonial and nontestimonial statements for this purpose.

III. Circumstances of Admission of Unredacted Statements that Do Not Violate the *Bruton* Rule

A. Certain Hearsay Exceptions

There are certain hearsay exceptions that can be used to admit testimonial hearsay statements of one defendant in a joint trial without redaction and without violating the *Bruton* rule.

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

a. In *People v. Jennings* (2010) 50 Cal.4th 616, police interviewed two defendants together and obtained statements from each one and the other agreed the statement was correct, thus qualifying as adopted admissions under Evidence Code section 1221. The Supreme Court in J*ennings* stated an adoptive admission can be admitted into evidence without violating the Sixth Amendment right to confrontation because once the defendant has expressly or impliedly adopted the statements of another, the statements become his own admissions. (*Id*. at pp. 661-662.) The Supreme Court said, "Stated another way, when a defendant has adopted a statement as his own, the defendant himself is, in effect, the declarant." (*Id*. at p. 662.) The Supreme Court stated. "Accordingly, no confrontation right is impinged when those statements are admitted as adoptive admissions without providing for cross examination of the declarant." (I*d.* at pp. 661-662

2**. Forfeiture by Wrongdoing, Evidence Code section 1390**: " [T]he statement is offered against the 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."

a. The rationale here is that while the statements are testimonial and the defendant is not testifying, he has forfeited his right, based on equitable reasons, to claim the right to confront

witnesses under the Sixth Amendment.

3. **The Rule of Completeness, Evidence Code section 356**: When part of a conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the adverse party.

a. "Section 356 is "founded on the equitable notions that a party who elects to introduce a part of a conversation is precluded from objecting on Confrontation Clause ground to introduction by the opposing party of other parts of the conversation necessary to make the entirety of the conversation understood."

B. An Unredacted Statement Offered for a Nonhearsay Purpose

1. Nonhearsay statements do not implicate the Confrontation Clause. The California Supreme Court in *People v. Sanchez* (2016) 63 Cal.4th 665, stated: "The Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'" (*Id.* at p. 674, citing *Crawford v. Washington* (2004) 541 U.S. 36, 59, fn. 9.)

C. Admission of the Codefendant's Statement in a Defendant's Separate Trial

1. The *Aranda/Bruton* rule applies *only* when "an out of court confession of one defendant . . . incriminates not only that defendant but the other defendant jointly charged." (*People v. Combs* (2004) 34 Cal.4th 821, 841.) Thus if the defendants are not charged in a joint trial, *Aranda/Bruton* is not applicable.

D. Admission of Co-Defendant's Unredacted Statement Implicating the Defendant at Joint Trial if Co-Defendant Takes the Stand

1. "A codefendant's extrajudicial statement implicating another defendant need not be excluded when the codefendant testifies and is available for cross-examination." (*People v. Hoyos* (2007) 41 Cal.4th 872, 896.)

IV. <u>Redacting the Codefendant's Statement</u>

By redacting the statement of the co-defendant in a joint trial which incriminate the defendant, the problems of hearsay and confrontation clause issues can be avoided. Below are general suggestions and reference to cases. *Jeff Rubin in his IPG devotes substantial discussion to the topic of how to redact*, which is a challenging subject.

A. The Safest Way to Redact

1. The safest way to redact a co-defendant's statement that incriminates the defendant is to follow

the example of the Supreme Court *in Richardson v. Marsh* (1987) 481 U.S. 200, 203, and omit *all* reference to the existence of the defendant. Our Supreme Court in *People v. Stevens* (2007) 41 Cal.4th 182, 199, said that when a statement contains no evidence against the defendant, it cannot implicate the confrontation clause.

B. When Multiple Defendants are Involved

1. The Supreme Court *in Gray v. Maryland* (1998) 523 U.S. 185, 196, provided some guidance here. The Supreme Court observed that the following redaction was improper. "Question: Who was in the group that beat Stacey? Answer: Me, deleted, deleted, and a few other guys." As the Supreme Court pointed out, the jury would have known immediately that "deleted" referred to the defendant Gray.

2. However, the Supreme Court found this next redaction proper: "Question: Who was in the group that beat Stacey? Answer: Me and a few other guys." The defendant was not identified as the one of the perpetrators and the statement did not IMPLY the defendant was one of the perpetrators.

C. Neutral Pronouns

1. In *People v. Fletcher* (1996) 13 Cal.4th 451, the California Supreme Court addressed the issue of whether a defendant's name could be replaced by a neutral pronoun, in other words, a broader type of redaction than the obvious deletion of the *Gray* case. The *Fletcher* court held that "editing a nontestifying codefendant's extrajudicial statement to substitute pronouns or similar neutral terms for the defendant's name will not invariably be sufficient to avoid violation of the defendant's Sixth Amendment confrontation rights. Rather, 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. Fletcher*, supra, 13 Cal.4th at p. 468.) The *Fletcher* court said that redactions that employ "nonidentifying terms 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.)

2. As Jeff Rubin point out in his IPG, the United States Supreme Court's decision in *Gray* suggests 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 any other evidence to be introduced at trial, so to the extent that *Fletcher* (which predated the *Gray* case) permits consideration of other evidence presented at trial, *Fletcher* is not consistent with U.S. Supreme Court authority. Jeff points out that nevertheless, the California Supreme Court continues to cite *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 trial." (*People v. Burney* (2009) 47 Cal.4th 203, 231.)

D. Deletions that Prejudice the Declarant Codefendant

1. The *Aranda/Bruton* problem is not solved by redacting an extrajudicial statement to delete

reference to the defendant if doing so result in distortion that prejudices the codefendant. As the Supreme Court stated *in People v. Gamache* (2010) 48 Cal.4th 347, 379, "Severance may be necessary when a defendant's confession cannot be redacted to protect a codefendant's rights without prejudicing the defendant. [Citation] A defendant is prejudiced in this context when the editing of his statement distorts his role or makes an exculpatory statement inculpatory."

V. Options When Redaction Won't Work and Admission of the Codefendant's Statement Will Violate *Bruton*

The prosecutor's choices if the statement cannot be adequately redacted to protect the interest of all defendants:

A. Do Not Use the Statement

B. Agree to Separate Trials

"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.)

C. Request Dual Jury Panels for a Single Trial

When dual juries are used, and evidence of the codefendant's confession is received, the jury for the defendant is removed from the courtroom. The cases are argued to each other in the other's absence. The Supreme Court has approved dual juries as a method that conserves the judicial and prosecutorial resources and avoids the inconvenience and trauma to witnesses.

VI. Impact of *Crawford v. Washington*

Before the decision of the United States Supreme Court in *Crawford v. Washington* (2004) 541 U.S. 36, the Supreme Court had construed the Sixth Amendment right of confrontation as allowing the admission of hearsay so long as it was reliable hearsay. In *Bruton v. United States* (1968) 391 U.S. 123, the hearsay statement of the nontestifying codefendant did not qualify for admission against the defendant under any hearsay statement and it was "clearly inadmissible against the defendant under traditional rules of evidence."

Now under the decision of *Crawford v. Washington*, when the declarant of the hearsay is not testifying, the test for admissibility of hearsay under a Confrontation Clause objection does not turn on whether the hearsay is reliable but on whether it is "testimonial."

The Supreme Court in *People v. Sanchez* (2016) 63 Cal.4th 665, 680, 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."

As a result of *Crawford,* whether the Sixth Amendment right to confrontation (and thus *Bruton*) applies depends on whether a statement is testimonial. Under *Crawford,* the Sixth Amendment no longer bars the use of *nontestimonial* statements to incriminate the codefendant. (Jeff Rubin also points out that the *Crawford* decision did not impact the general rules relating to how statements must be redacted.)

VII. *People v. Cortez* (2016) 63 Cal.4th 101: The Confrontation Clause Does *Not* Apply to Nontestimonial Statements

A. Facts

1. Cortez was driving and Bernal was the passenger when they saw two men crossing the street, who they believed were rival gang members. Cortez called out to them and asked where they were from. When the men didn't answer, Cortez said, "Let them have it." Bernal got out of the car and began firing, killing one of the men. (*Id*. at pp. 105-106.) The next day, Bernal went to the apartment of his nephew (Tejada) and told him what had happened, recounting his actions as well as those of *Cortez*. Tejada then went to the police, who taped his statement, which was played for the jury at trial. (*Id*. at p. 107.)

2. Cortez unsuccessfully raised several arguments in the Supreme Court as to the admission of Bernal's statements to Tejada. Relying on *Aranda/Bruton*, Cortez argued the admission of Bernal's statements to his nephew violated her Sixth Amendment right to confront and cross-examine witnesses. (*Cortez*, at p. 129.) The court rejected that argument, holding, among other reasons, that based on the "unequivocal" holding of *Davis v Washington* (2006) 547 U.S. 813 " 'the confrontation clause applies only to testimonial hearsay statements and not to [hearsay] statements that are nontestimonial' " The Supreme Court said Bernal's statements to his nephew in the nephew's apartment were "unquestionably nontestimonial." The Supreme Court said the Sixth Amendment therefore did not apply and Cortez's confrontation clause claim fails. (*Id*. at p. 129.)

● Update on *People v. Duenas* (2019) 30 Cal.5th 1157

In a recent P&A, we discussed *People v. Duenas*. This case concerned the inability of a defendant the court facilities and operations fees imposed on her as well as the restitution fund fine required under Penal Code section 1202.4. The opinion in *Duenas* was not particularly clear as to the respective burdens of proving inability to pay.

In *People v. Castellano* (2019) 33 Cal.App.5th 485, the Court of Appeal provides some clarification. "A defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court. In doing so, the defendant need not present evidence of potential adverse consequences beyond the fee or assessment itself, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections. (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1168-1169) The trial court then must consider all relevant factors in determining

whether the defendant is able to pay the fines, fees and assessments to be imposed. Those factors may include, but are not limited to, potential prison pay during the period of incarceration to be served by the defendant. If the trial court determines a defendant is unable to pay, the fees and assessments cannot be imposed; and execution of any restitution fine imposed must be stayed until such time as the People can show that the defendant's ability to pay has been restored. (*Id.* at pp. 1168-1169, 1172.)"

"This procedure is already standard in other contexts in which a litigant seeks relief or assistance based on his or her financial condition. A litigant seeking fee waivers, for instance, must complete an application for an initial fee waiver with information supporting his or her claim to be exempt from filing fees on the basis of his or her financial condition, such as receipt of certain public benefits, income below the federal poverty guidelines, or the inability to pay court fees without using moneys that normally would pay for the common necessaries of life for the applicant and his or her family. (Gov. Code, §§ 68632, 68633.) S similarly, when a defendant requests, pursuant to Government Code section 27706, subdivision (a), to be represented by the public defender because he or she cannot afford to retain counsel, the trial court may require the defendant to file a financial statement to assist the court in making the final determination whether the defendant is financially able to employ counsel and qualifies for the services of the public defender. (Gov. Code, § 27707.)"

Note: There are currently four legislative bills pending in response to the *Duenas* opinion or relating to the payment of court fines generally.

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to P&A author Mary Pat Dooley at (510) 272-6249, marypat.dooley@acgov.org. Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.

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