

CARLSONS' corner

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Professor Ronald L. Carlson
University of Georgia
School of Law



Michael S. Carlson
Assistant District Attorney
Augusta Judicial Circuit

Bruton v. United States: A Guide for Georgia Trial Practitioners

By Ronald L. Carlson, Michael S. Carlson, and William M. Fleming

Whether counsel is a veteran of the criminal courts or an injury lawyer appointed by the judge to defend an accused, the intricacies of confession law are challenging. With more and more of the private bar being pulled into defense of criminal cases during tight economic times, legal principles controlling confessions are paramount considerations. Often a couple of defendants are tried together. When can the confession of one of the parties be used to convict the other? Will a Georgia judge allow prosecutors to whipsaw one defendant with the careless words of his friend? This article, along with the latest Georgia cases, provides a thumbnail survey of these critical issues.

I. Fundamental Assumptions

If we assume that defendants Curly and Moe bungle a robbery, and that Moe decides to talk to the police after his arrest, the subject dealt with in this article looms large. At trial, Moe behaves quite differently than when he spilled everything to the police. He decides not to testify. The prosecutor, however, is undaunted. At trial, he calls to the stand the chief of detectives who interrogated Moe right after Moe's arrest. The officer assures judge and jury that Moe was given all of his *Miranda* rights before he talked. The prosecutor then asks the detective to read to the jury from Moe's written account of the robbery, including the part about how Curly masterminded the job. As the chief of detectives reads into the record Moe's confession, Curly's lawyer goes ballistic when the detective reaches the part about Curly.

Will Curly's objection be sustained? Yes, say the cases, absent special circumstances. Under most decisions, the custodial statement of a non-testifying defendant cannot be introduced to inculcate a codefendant at a joint jury trial. This is the rule of *Bruton v. United States*.¹ The heart of the ruling holds that the right to confront one's accuser is violated when a custodial statement made by defendant A that inculcates defendant B is introduced at the joint trial of A and B. The Sixth Amendment precludes the use of a non-testifying codefendant's statement in a joint trial of two or more defendants. The party against whom the confession is used cannot cross-examine his accuser, a fellow defendant, because the latter elects to

avoid testifying. The Sixth Amendment will not tolerate this sort of deprivation of the vital right of cross-examination. Georgia courts specifically apply the formula which was embraced by the United States Supreme Court in the *Bruton* case.²

There are a few fundamental precepts. In order for a statement to be excluded under a *Bruton* analysis, it must directly inculcate another defendant.³ If such statement, standing alone, does not directly inculcate, then *Bruton* would not apply, and the statement would not be rendered inadmissible.⁴

II. Exceptions

While the *Bruton* rule effected reversal of numerous convictions when prosecutors violated it, several exceptions have developed. These include situations where the defense (as opposed to the prosecutor) introduces the cross-implicating statement, cases in which the confessing codefendant testifies, prosecutorial employment of the cross-implicating confession in a joint bench trial,⁵ and others.

A. Codefendant Testifies

The testimony of one defendant removes any ability for the codefendant to claim that he was not adequately afforded his Sixth Amendment right to confront the speaker.⁶ When the party who authored the statement takes the stand, he becomes a target for cross-examination. A codefendant can ask the testifying party about that party's pretrial statement. This development removes the bar to prosecutorial introduction of the confession. Georgia courts provide that when the defendant who made the cross-inculcating custodial statement testifies, the Confrontation Clause problems attendant to *Bruton* are resolved.⁷

B. Impeachment

When one of the defendants testifies and in so doing contradicts his pretrial account of the crime, he may be impeached. This prior inconsistent statement impeachment is often accomplished by reference to or introduction of the testifying defendant's confession.

The impeachment is allowed from the pretrial writing, and this is true even if the writing is a cross-inculcating, custodial confession.⁸ According to the Georgia Supreme Court, once a defendant takes the witness stand, he then fully subjects himself to a thorough and sifting cross-examination. This includes the prosecutor's right to confront the accused with a custodial statement in which he identifies his codefendant.⁹

C. Defense Introduction of Statement

In the case of many constitutional guarantees, a defendant can waive rules designed to protect him. In similar fashion, a defendant may be stopped from raising *Bruton* complaints if he is the one who offers another defendant's written statement into evidence. The accused will occasionally elect to introduce a codefendant's statement as a matter of trial strategy, even though it marginally incriminates the sponsor of the evidence.

D. Bench Trials

The *Bruton* rule seeks to safeguard a defendant from being convicted by unreliable accusations from a codefendant. The jury might be misled. Bench trials are another matter. By many cases, *Bruton* does not apply. Courts explain the rationale underlying this exception to *Bruton* by holding that the presiding judge in a bench trial is not susceptible to a statement's prejudicial effect. In both federal and state tribunals, *Bruton* has been recognized to be inapplicable in judge-only adjudications.¹⁰ A trial judge can receive a confession in which one defendant inculcates the other. In the robbery trial of A and B, for example, the judge can listen to A's confession even though B is also named as a perpetrator. The judge is trusted to absorb the self-incriminating part against A and to disregard any of A's accusations against B. The court must consider the evidence contained in the statement only against the speaker, and not the other person.

Georgia appellate courts do not appear to have directly faced the issue of the applicability of *Bruton* in bench trials. In making other *Bruton*-related decisions, however, federal precedents have been favorably cited in Georgia cases.¹¹ In addition, Georgia jurisprudence makes clear that in both civil and criminal cases, non-jury settings allow more evidence to be introduced than when a jury is involved.¹² Accordingly, it is likely that when this issue is directly addressed, the impact of federal opinions will cause *Bruton* to be held inapplicable in Georgia bench trials. The *Bruton* court based its reasoning on the fact that despite limiting instructions to the contrary, the jury could not be relied upon to disregard completely the confessing defendant's statement when considering the other defendant's guilt. However, "there is a presumption that a judge in a bench trial has no difficulty in disregarding inadmissible evidence in reaching his verdict."¹³

E. Co-Conspirators and Pre-Custodial Statements

The *Bruton* rule rests on the inherent unreliability of custodial confessions, statements taken from an accused by police officers. Declarations prior to an arrest, like remarks made by one to a friend in a tavern, are deemed to be reliable evidence. A witness to the conversation can testify about it, and this holds true even if the speaker incriminates not only himself but his partner as well. Even broadly

incriminating statements made by a suspect to an acquaintance, particularly where they were made prior to arrest, have been deemed to fall outside of *Bruton*'s reach, and are often admissible.¹⁴ Suppose an accused person has conspired with others to commit a crime. Before arrest he talks in a careless fashion, incriminating himself and others. At trial, the speaker does not testify. Georgia courts have approved admission of pretrial remarks made by a non-testifying codefendant inculcating other defendants, which remarks were overheard by deputies prior to the termination of the conspiracy.¹⁵

Because a co-conspirator can implicate his partner up until the end of the conspiracy, an important issue relates to the duration of conspiracies. When does a conspiracy end? The federal doctrine of conspiracy holds that conspiracies exist until the objective of the conspiracy terminates in either success or failure.¹⁶ Although some courts (including Georgia) indicate that the concealment phase may continue after arrest, the United States Supreme Court takes a narrower approach for federal courts.¹⁷

However, Georgia's law of conspiracy and its duration is a broad one. The Georgia Supreme Court held that "the enterprise may not be at an end so long as the concealment of the crime or the identity of all the conspirators has not been disclosed. Acts and declarations of such undisclosed conspirators, looking to the concealment of identity and the suppression of evidence, are admissible against other conspirators."¹⁸

F. Redaction

Redaction is the process whereby a written statement of a witness is edited to remove or disguise any improper or impermissible references. Redaction has been specifically approved as acceptable in modifying written statements to meet constitutional confrontation requirements.¹⁹

In the *Bruton* context, a prosecutor will "redact" one defendant's confession by blocking out the codefendant's name. Some redactions go further and expurgate any reference to the codefendant. Redaction is not panacea. Too often it is ineffectually accomplished and reversible error results. Redactions which replace a proper name with an obvious blank or the word "delete" continue to notify the jury of the presence of the non-confessing defendant. If such a defendant continues to have a finger of guilt pointed at him by an incompletely or ineffectively redacted statement, he can readily claim a *Bruton* violation.²⁰

What if a prosecutor effectively redacts, but goes beyond hiding a defendant's identity and redacts part of a statement favorable to the defendants? Under federal law, statements may not be redacted in a fashion which would violate the "rule of completeness."²¹ Similarly, Georgia courts require that relevant or exculpatory material cannot be redacted from a defendant's written statement.²²

G. Interlocking Statements

In a joint crime, what if both defendants confess? Moreover, what if both of the defendants' statements mirror each other? Written confessions by two or more defendants wherein they agree on the facts or agree on the issue of criminal liability are said to "interlock."

Historically, it was argued that interlocking statements did not offend *Bruton* because such confessions contained particularized guarantees of trustworthiness. In earlier days, admission of such “interlocking statements” to convict the defendants was seen as proper or at worst, “harmless error.”²³ However, after *Cruz v. New York*,²⁴ there was a change of direction. In *Cruz*, the confessions of both defendants interlocked on the commission of the crime and the identity of the perpetrators. Despite the interlocking aspects, *Cruz* held that the *Bruton* rule was violated and that the admission of the statements was error. Georgia has followed *Cruz* to the extent that the interlocking exception no longer applies. The Supreme Court of Georgia has held that when such a statement is offered, its interlocking characteristics will not justify admissibility.²⁵

III. Severance

Bruton concerns joint trials. The federal and Georgia rules of severance have significant import in approaching *Bruton*-type cases. Under the federal scheme, two or more defendants may be charged together if they are alleged to have participated in the same act or series of acts.²⁶ If it appears that a defendant or the government is prejudiced by the joinder of defendants, the court may grant severance.²⁷

Georgia mandates severance in death penalty cases but permits trial courts to exercise discretion in all others.²⁸ Denial of severance is not an abuse of discretion unless prejudice which is suffered amounts to a denial of due process.²⁹ As a rule, one or more members of a group of jointly indicted defendants will raise the severance issue by moving for a separate trial. The burden is on the moving party to make a clear showing of prejudice.³⁰

One ground for severance may be that the prosecution seeks to offer a confession against one defendant which implicates others. Often this will mandate severance. However, if a codefendant’s statement inculcating another accused party is properly redacted, the trial court is not required to sever the cases. In addition, if a codefendant’s statement does not, standing alone, inculcate another defendant, the statement is admissible and severance is not required.³¹

IV. Unavailable Declarants

As has been observed, when one of two joint defendants confesses and then refuses to testify, the prosecution cannot introduce the confessing defendant’s statement at the joint trial of both defendants. *Bruton* targets situations where the confessing defendant’s oral or written statements blame the other party, and such references cannot be appropriately redacted. Under Georgia law, the refusal of one of the defendants to take the stand is a key. If a defendant refuses to testify at trial, the statement of this codefendant made while in custody lacks “particularized guarantees of trustworthiness.” Admission of such a confession into evidence is denied.³²

V. Jury Issues

In situations where a confession by one defendant is redacted to exclude reference to a codefendant, are special jury charges mandated? Under federal standards, a trial court must instruct the jury to consider a redacted confession only against the codefendant who made the statement.³³ Georgia’s statutes follow a similar mode

of analysis when they state “[t]he confession of one joint offender or conspirator made after the enterprise is ended shall be admissible only against himself.”³⁴ Cautionary instructions which admonish the jury to consider the statement only against the declarant are deemed to be required by the Sixth and Fourteenth Amendments³⁵

VI. Appellate Standards

On appeal, federal courts evaluate *Bruton* violations in order to determine whether any trial error in the introduction of statements was “harmless.” In the case of Confrontation Clause violations, a conviction must be reversed unless the reviewing court is persuaded beyond a reasonable doubt that the error was harmless.³⁶

Georgia appellate courts analyze *Bruton* violations under a “harmless beyond a reasonable doubt” standard.³⁷ Pursuant to this framework, if overwhelming evidence exists supporting the conviction (apart from any *Bruton*-tainted statement), the lower court’s error in admitting the statement will be considered “harmless beyond a reasonable doubt.”

VII. Conclusion

After its announcement, the *Bruton* decision spawned exceptions and distinctions which boggle the mind. Hopefully, the terse exposition of these issues in this article will illuminate the path for the lawyer drawn into criminal court in joint defendant situations.

Endnotes

¹ 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). See *United States v. Doherty* 233 F.3d 1275, 1281 (11th Cir. 2000).

² *Fetty v. State*, 268 Ga. 365, 489 S.E.2d 813 (1997).

³ *United States v. Brazel*, 102 F.3d 1120, 1140 (11th Cir. 1997). See also *Clark v. State*, 226 Ga. App. 176, 179, 486 S.E.2d 393, 397 (1997).

⁴ *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984) cert. denied, 471 U.S. 1117, 105 S.Ct. 2362, 86 L.Ed.2d 262 (1985); *Butler v. State*, 270 Ga. 441, 511 S.E.2d 180 (1999); *Owen v. State*, 266 Ga. 312, 467 S.E.2d 325 (1996).

⁵ 9 Fed. Proc., L. Ed. § 22:1321 (1993).

⁶ *Richardson v. Marsh*, 481 U.S. 200 (1987); *United States v. Palow*, 777 F.2d 52 (1st Cir. 1988) cert. denied, 488 U.S.946, 109 S.Ct. 376, 102 L.Ed.2d 365.

⁷ *Passmore v. State*, 552 S.E.2d 816 (Ga. 2001); *Boone v. State*, 549 S.E.2d 713 (Ga. App. 2001).

⁸ *United States v. Morgan*, 562 F.2d 1001 (5th Cir. 1977), cert. denied, 434 U.S. 1050.

⁹ *Depree v. State*, 246 Ga. 240, 242, 271 S.E.2d 155, 157 (1980).

¹⁰ *United States v. Cardenas*, 9 F.3d 1139 (5th Cir. 1993), suggestion of rehearing denied, 15 F.2d 1801, cert. denied, 511 U.S. 1134, 114 S.Ct. 2150, 128 L.Ed.2d 876; *Rogers v. McMackin*, 884 F.2d 252, 255 96th

Cir. 1989); 9 Fed. Proc., L.Ed. § 22:1321 (1993).

¹¹ *Owens v State*, 193 Ga. App. 661, 388 S.E.2d 712 (1989); *McDonald v State*, 210 Ga. App. 689, 436 S.E.2d 811 (1993).

¹² *Superior Farm Management v. Montgomery*, 270 Ga. 615, 513 S.E.2d 215 (1999).

¹³ *Cardenas*, 9 F.3d at 1154, 1155.

¹⁴ *Jones v. State*, 268 Ga. 84, 453 S.E.2d 716 (1995).

¹⁵ *Reid v. State*, 210 Ga. App. 783, 787, 437 S.E.2d 646, 650 (1993).

¹⁶ *United States v. Vonniell*, 869 F.2d 1264 (9th Cir. 1989).

¹⁷ *Dutton v. Evans*, 400 U.S. 74, 81 (1970). Although Georgia extends conspiracies beyond the federal pattern, even in Georgia a conspirator's post-arrest statement to police incriminating a co-conspirator terminates the conspiracy. *Fetty v. State*, 268 Ga. 365, 489 S.E.2d 813 (1997).

¹⁸ *Mitchell v. State*, 86 Ga. App. 292, 71 S.E.2d 756 (1952). See *Knight v. State*, 239 Ga. 594, 238 S.E.2d 390 (1977).

¹⁹ *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987); *White v. State*, 270 Ga. 804, 514 S.E.2d 14 (1999). But redaction must be effective. *Gray v. Maryland*, 523 U.S. 185 (1997).

²⁰ *United States v. Gonzalez*, 183 F.3d 1315 (11th Cir. 1999); *Davis v. State*, 272 Ga. 327, 528 S.E.2d 800 (2000); *Borders v. State*, 270 Ga. 804, 514 S.E.2d 14 (1999).

²¹ *United States v. Range*, 94 F.3d 614 (11th Cir. 1996).

²² See *Brown v. State*, 264 Ga. 803, 450 S.E.2d 821 (1994); *Reeves v. State*, 168 Ga. App. 737, 310 S.E.2d 285 (1983); O.C.G.A. § 24-3-8.

²³ *Cochran v. State*, 177 Ga. App. 471, 339 S.E.2d 749 (1986).

²⁴ 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987).

²⁵ *Hanifa v. State*, 269 Ga. 797, 505 S.E.2d 731 (1998). *Cruz* has been followed in subsequent decisions. *York v. State*, 242 Ga. App. 281, (2000).

²⁶ Fed. R. Crim. Proc. 8(b).

²⁷ Fed. R. Crim. Proc. 14.

²⁸ O.C.G.A. § 17-8-4.

²⁹ *Passmore v. State*, 552 S.E.2d 816, 818 (2001); *Carroll v. State*, 147 Ga. App. 332, 248 S.E.2d 702 (1978).

³⁰ *Stovall v. State*, 236 Ga. 840, 225 S.E.2d 292 (1976). See *Gooch v. State*, 249 Ga. App. 643, 549 S.E.2d 724 (Ga. App. 2001).

³¹ *Owens v. State*, 193 Ga. App. 661, 388 S.E.2d 712 (1989).

³² *Lilly v. Virginia*, 527 U.S. 116 (1999).

³³ *Richardson v. Marsh*, 481 U.S. 200 (1987). Of course, before a confession is received against any defendant, the court may be required to determine whether it is voluntary as well as untainted under the *Miranda* doctrine.

³⁴ O.C.G.A. 24-3-52.

³⁵ *Bryant v. State*, 270 Ga. 266, 507 S.E.2d 451 (1998).

³⁶ *United States v. Doberty*, 233 F.3d 1275 (11th Cir. 2000).

³⁷ *Gooch v. State*, 549 S.E.2d 724 (Ga. App. 2001); *Dorsey v. State*, 546 S.E.2d 275 (Ga. 2001).