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Sixth Amendment; Right of Confrontation Limitations on the Bruton Rule; Parker v. Randolph

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EVIDENCE

Sixth Amendment • Right of Confrontation
Limitations on the Bruton Rule
Parker v. Randolph, 99 S. Ct. 2132 (1979).

IN SOME joint criminal trials the right of one defendant to refrain from self incrimination may come into conflict with the right of another defendant to confront the witnesses against him. The problem arises when one defendant refuses to testify at trial after having made a voluntary, out of court statement which tends to implicate a second defendant. The rules of evidence allow the statement to be introduced at trial only against the party making it; its use against the implicated defendant is excluded as hearsay.[1] The rules also provide for the court to instruct the jury on the limited admissibility of the statement.[2]

But will the jury be able to disregard the statement in weighing the evidence pertaining to the second defendant, yet give the statement appropriate force as to the maker? Has the admission into evidence of the out of court statement, even in its limited application, effectively circumvented the defendant's right to confront the witnesses against him, established and secured by the confrontation clause of the sixth amendment to the Constitution?[3]

In *Bruton v. United States*[4] the Supreme Court decided that instructions to the jury to limit application of evidence were inadequate protection for this fundamental right of confrontation. However, in *Parker v. Randolph*[5] the Court seems to place limitations on the *Bruton* rule[6] that jury instructions are not adequate to protect one's sixth amendment rights, at least in those cases where both defendants have confessed and the confessions are mutually consistent and supportive.

The decision of the Supreme Court in *Bruton*[7] was strong support for a defendant's right to confront witnesses against him at trial. There, the Court held that the admission into evidence of a non-testifying defendant's confession which implicated a codefendant deprived the latter of his sixth amendment rights, even though the jury was instructed to disregard the

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[1] FED. R. EVID. 801.

[2] FED. R. EVID. 105.

[3] U.S. CONST. amend. VI, states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

[4] Bruton v. United States, 391 U.S. 123 (1968).

[5] 99 S. Ct. 2132 (1979).

[6] A thorough discussion of the *Bruton* case can be found in the following: Comment, 26 U. MIAMI L. REV. 755 (1972); Note, 76 DICK. L. REV. 354 (1972); Note, 8 WASHBURN L.J. 381 (1969).

[7] 391 U.S. 123 (1968).

confession as hearsay evidence in their consideration of the guilt or innocence of the codefendant.[8] The conclusion of the Court was that "we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination."[9]

With its decision in *Parker v. Randolph*,[10] the Court has made a pragmatic interpretation of the *Bruton* rule in an effort to clarify its application by state and federal courts. In *Randolph* the Court backed away from a rigid construction of the right to confront witnesses and, under the circumstances of the case, found no error in allowing a non-testifying codefendant's confession into evidence against the maker where it had been redacted[11] and the jury instructed to disregard it as to any other defendant. The Court distinguished *Randolph* from *Bruton* by noting that the defendants claiming *Bruton* error in their convictions had themselves made voluntary confessions which were properly admissible against them, and therefore the possible impact on the jury of a codefendant's confession was believed not so devastating or vital as to require reversal.[12] The bottom line seems to be that a defendant's free and voluntary interlocking confession[13] is so overwhelmingly inculpatory as to make the possibility that a jury will not disregard hearsay evidence upon the instruction of the court of little concern, i.e., harmless.

The circumstances in *Randolph* are reminiscent of the more colorful days of the old west when a card cheat was fair game for anyone.[14] The main characters, Randolph, Pickens and Hamilton, were enlisted to conduct a robbery of a poker game by one of the players, Robert Wood. Wood, not exactly a neophyte at cards, was convinced that the other player, a professional gambler from Las Vegas named Douglas, had cheated him in the course of several earlier games. Wood decided to stage a robbery to recoup his losses and, seeking assistance, recruited Hamilton who worked for his brother, Joe Wood. Hamilton, in turn, obtained the services of Randolph and Pickens just prior to the robbery. The last game was con-

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[8] 391 U.S. at 126.

[9] *Id.* at 123.

[10] 99 S. Ct. 2132 (1979).

[11] Redaction is an editing process to reduce the impact of a statement on other defendants against whom the statement is inadmissible. Names, references to personal characteristics and other identifying phraseology in the statement are either erased or replaced with non-specific language. Whether a redacted statement is effective or not is, of course, known only by the jury.

[12] 99 S. Ct. at 2140.

[13] Interlocking confessions are those in which the facts are consistent, one with the other, and provide similar inferences.

[14] The facts of the case were gleaned from a number of sources, including the Supreme Court opinion; Randolph v. Parker, 575 F.2d 1178 (6th Cir. 1978); Petition and Briefs, Parker v. Randolph (Law Reprints, Criminal Law Series, Vol. 10, No. 23, 1978/1979 term).

ducted on schedule between the two principals with Joe Wood and one Tommy Thomas as spectators.

With the game in progress, Joe Wood, on the pretext of bringing some beer, left to pick up the three accomplices. Douglas was apparently suspicious and, upon Joe's return, brought a shotgun to the table. The presence of the gun precipitated action by Joe Wood. He pulled his gun on Douglas from behind and ordered him to the floor. Giving Robert the gun, Joe then went to get the three recruits to complete the robbery as planned.

Moments before the four returned to the scene of the game, Robert Wood shot and killed Douglas as he attempted to reach a pistol in his belt. Together then for the first time, the five men gathered up the money and fled into the night, leaving the spectator, Thomas, at the scene with the body of Douglas. When apprehended by the police, all defendants but Joe Wood voluntarily made statements expressing their involvement in the crime.

The five were jointly tried in the Criminal Court of Shelby County, Tennessee for the crime of murder during the commission of a robbery.[15] Only Robert Wood took the witness stand at trial, where he pleaded self-defense. The extrajudicial statements of the other four—Robert Wood, Hamilton, Pickens and Randolph—were subjected to a program of redaction[16] and admitted through testimony of police officers. The court instructed the jury to consider each confession only against the maker. On July 25, 1972 all were found guilty and sentenced to life in the state penitentiary.

Appeals were taken to the Court of Criminal Appeals of Tennessee where in June 1974 the convictions of all five defendants were reversed.[17] The Tennessee Supreme Court granted the state a writ of certiorari and in December 1975 rendered a per curiam opinion reversing the Court of Criminal Appeals and affirming all five convictions.

Pickens and Randolph, later joined with Hamilton, obtained a writ of habeas corpus and their case was heard by the federal district court in Memphis. In a memorandum decision, the district judge found that the rights of each of the three petitioners, as defined by the rule of *Bruton*, had been violated and that the effect could not be adjudged harmless error.[18] The Court of Appeals for the Sixth Circuit affirmed the district

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[15] TENN. CODE ANN. § 39-2402. (Bobbs-Merrill Cum. Supp. 1979). This is the Tennessee version of a felony murder statute.

[16] 99 S. Ct. at 2136 n.3.

[17] It is possible that concern over the Tennessee felony murder statute was a factor in the reversal. *See* Petition and Briefs, *supra* note 14.

[18] 99 S. Ct. at 2136.

court's decision on May 19, 1978.[19] The State of Tennessee then obtained a writ of certiorari from the Supreme Court.[20]

The Court's stated purpose in granting certiorari was to resolve the differences existing between the circuit courts in the application of the *Bruton* rule.[21] In the decade subsequent to the decision in *Bruton* some circuits had developed an exception to the rule, admitting a confession which inculpated another defendant who had also confessed.[22] Other circuits continued to adhere to a strict interpretation of *Bruton*. The basis of such holdings was the belief that the sixth amendment rights were *per se* denied by the admission of hearsay evidence even if clearly and vigorously limited in application.[23]

The problem the Court attempted to solve was to identify the point of equilibrium among the three relevant factors of, one, the defendant's right to confront adverse witnesses; two, the jury's ability to follow judicial instruction regarding hearsay testimony; and, three, the economy and efficiency of joint trials. By its decision in *Randolph,* the Court has adjusted the point of equilibrium further away from the sixth amendment right of confrontation than it had after *Bruton*.

A historical review of the Court's treatment of the above relationships is necessary if the effects of *Randolph* are to be fairly assessed.

Confidence in the ability of the jury to follow judicial instructions was a major factor in the Court's holding in *Delli Paoli v. United States*[24] in 1957. In that case, where the confession of a codefendant was admitted solely against the maker, without redaction but accompanied by a series of clear admonishments by the trial judge limiting the application, the Court did not find reversible error. Relying on, "a basic premise of our jury system that the court states the law to the jury and the jury applies that law to the facts as the jury finds them,"[25] the admission of the confession was considered merely cumulative to the other uncontradicted testimony indicting the defendant. Thus, where the case against the defendant was independently sound, exclusionary instructions were considered sufficient to protect the defendant's rights against hearsay evidence.[26]

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[19] Randolph v. Parker, 575 F.2d 1178 (6th Cir. 1978).
[20] 439 U.S. 978 (1978).
[21] 99 S. Ct. at 2137.
[22] *Id.* n.4.
[23] *Id.*
[24] Delli Paoli v. United States, 352 U.S. 232 (1957).
[25] *Id.* at 242.
[26] 5 J. WIGMORE, EVIDENCE § 1364 (Chadbourn rev. 1974). The hearsay evidence rule is well understood to "prohibit the use of a person's assertion as equivalent to testimony to the fact asserted, unless the assertor is brought to testify in court on the stand, where he may be probed and cross-examined."

The Court further recognized that the circumstances of the case would determine whether a separate trial would be required to eliminate any undue influence on the jury from the admission into evidence of the codefendant's confession. The discretion of the trial judge was considered a satisfactory safeguard.

The dissent by Justice Frankfurter in *Delli Paoli* (joined by Justices Black, Douglas and Brennan) opposed leaving such a potentially crucial decision to the trial judge[27] and offered that the government "should not have a windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds."[28]

Delli Paoli was expressly overruled by the decision in *Bruton* in 1968 and Justice Brennan, a dissenter in *Delli Paoli,* delivered the opinion of the *Bruton* court.[29] The circumstances in *Bruton* were such that the confession of the nontestifying codefendant, one Evans, which was admitted against him at trial, was, on appeal, declared inadmissible based on *Westover v. United States*[30] and *Miranda v. Arizona.*[31] Evans was acquitted upon retrial. However, the appeals court, relying on *Delli Paoli* and placing confidence in the jury's ability to disregard the confession, affirmed codefendant Bruton's conviction, and ruled that the admission into evidence of the confession was harmless in the face of "uncontradicted testimony [which] provided the jury with convincing proof of Bruton's participation in the crime."[32] The court further noted that Bruton never moved for severance and a separate trial as then provided for by Rule 14 of the Federal Rules of Criminal Procedure.[33] The Supreme Court granted certiorari to reevaluate *Delli Paoli,* responding to arguments that allowing the conviction of Bruton to stand, "may be to place too great a strain upon the *Delli Paoli* rule. . . ."[34]

The reversal of *Delli Paoli* by *Bruton* was a reflection of the Court's reluctance to trust the sixth amendment rights of a defendant to the jury, even where the defendant might have avoided the potential prejudice by requesting a separate trial. While noting that the benefits of joint trials — conservation of funds, convenience of witnesses and more timely trials — were valid, the Court agreed with the assessment of Judge Lehman of the

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[27] 352 U.S. at 247.

[28] *Id.* at 248.

[29] 391 U.S. 123 (1968).

[30] Westover v. United States, 384 U.S. 494 (1966).

[31] Miranda v. Arizona, 384 U.S. 436 (1966).

[32] Evans v. United States, 375 F.2d 355 (8th Cir. 1967).

[33] FED. R. CRIM. P. 14. A motion for severance would have caused an *in camera* review of Evans' confession.

[34] 391 U.S. at 126.

New York Court of Appeals in concluding that the "price is to high."[35] In some instances, the argument continues, the risk that juries cannot erase from their minds the confession of a codefendant when evaluating evidence is so great and the consequences so serious that the hazard cannot be corrected by instruction.[36]

The issue of joint or separate trials in those instances where a confession could prejudice another defendant has been reviewed in connection with the *Bruton* and *Delli Paoli* decisions.[37] By using the flexibility provided by Criminal Rule 14, as amended, the trial judge can evaluate *in camera* confessions that are to be offered into evidence, and determine, if any, the possible prejudicial effects. The court would then be able to eliminate any potential *Bruton* error by severing the defendants for trial, albeit at the previously mentioned costs attendant to separate trials. The options that would be available to the government are to either accept the difficulties of separate trials and proceed on that basis, or to withdraw the confession from evidence against any defendant and rely on other fully admissible evidence. This "sever or exclude" rule,[38] as described in a dissent to *Delli Paoli*, adds to an already heavy responsibility on the trial judge. But, the requirement for another crucial decision should not be catastrophic, and who is in a better position to evaluate the subtle influences that exist in joint trials?

The question remaining after the *Bruton* decision was whether the admission into evidence of a non-testifying codefendant's confession was always to be considered reversible error, or whether the circumstances of the individual case and the trial judge's assessment of them were to be paramount. Could there be harmless *Bruton* error?

The Court had already ruled that a federal constitutional error could be held "harmless" if it was harmless beyond a reasonable doubt.[39] In *Harrington v. California*[40] the Court had another opportunity to define the extent to which it would allow the confrontation clause to operate in joint trials. Over the dissenting opinion of Justice Brennan, the majority view delivered by Justice Douglas, was that, in the face of overwhelming, direct evidence which was distinct from the inadmissible, incriminating confessions of codefendants, the violation of the *Bruton* rule was harmless. The conclusion was that, "unless we say that no violation of *Bruton* can constitute harmless error, we must leave this state conviction undisturbed."[41]

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[35] People v. Fisher, 249 N.Y. 419, 432, 164 N.E. 336, 341 (1928).
[36] 391 U.S. at 137.
[37] *E.g.*, 35 Mo. L. Rev. 125 (1970).
[38] Delli Paoli v. United States, 229 F.2d 319, 324 (2nd Cir. 1956).
[39] Chapman v. California, 386 U.S. 18, 24 (1967).
[40] Harrington v. California, 395 U.S. 250 (1969).
[41] *Id.* at 254.

Justice Brennan's dissent in *Harrington* focuses on the great responsibility the majority decision places on the trial judge who must evaluate whether the constitutional rights of the defendant have been violated and whether such violation was harmless beyond a reasonable doubt.[42] Brennan clearly and consistently supports the concept of an inviolate right to confront a witness without the imposition of any permissible standard of error.

Expanding upon the thrust of the decision in *Harrington*, i.e., the harmless error of the codefendant's confession in the face of other strong independent evidence of guilt, many circuit courts rejected the application of the *Bruton* rule to cases where there were "interlocking" confessions by defendants.[43] Apparently, the Second, Fifth, Seventh, Eighth and Tenth Circuit courts considered the sixth amendment aspects to be overcome by the corrobating statements made by the incriminated defendant.[44] The Third and Sixth Circuits took the other tack and have applied the *Bruton* rule and found error in cases of interlocking confessions.[45] This divergence of opinion in the circuit courts is understandable when one discovers that both "sides" claim support for their positions from Supreme Court decisions in the same cases.[46] While these supporting cases all involved extrajudicial statements of defendants, the circumstances and the timing *vis a vis Bruton* were such that the Court was able to avoid a direct examination of the *Bruton* rule, or was able to distinguish the case from one involving interlocking confessions.

It was, as stated earlier, this divergence of application that led the Supreme Court to grant certiorari in *Randolph*. The majority[47] is very careful in its evaluation of the *Bruton* decision and specifically sets out to broaden the issue from that posed in the petition for certiorari. Not content to merely address the issue of a possible infringement of a defendant's sixth amendment rights, the Court goes to the crux of the problem—can the jury be relied on to follow judicial instruction? The majority believes it is the general rule and not the exception, that juries are to be trusted to

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[42] *Id.* at 256.

[43] *See* note 13, *supra.*

[44] *See, e.g.*, United States ex. rel. Catanzaro v. Mancusi, 404 F.2d 296 (2d Cir. 1968); Mack v. Maggio, 538 F.2d 1129 (5th Cir. 1976); United States v. Spinks, 470 F.2d 64 (7th Cir. 1972); United States v. Walton, 538 F.2d 1348 (8th Cir. 1976); Metropolis v. Turner, 437 F.2d 207 (10th Cir. 1971).

[45] *See, e.g.*, United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976); Hodges v. Rose, 570 F.2d 643 (6th Cir. 1978). The Ninth Circuit impliedly adopted this position in Ignacio v. Guam, 413 F.2d 513 (9th Cir. 1969).

[46] *See, e.g.*, Brown v. United States, 411 U.S. 223 (1973); Harrington v. California, 395 U.S. 25 (1969); Hopper v. Louisiana, 392 U.S. 658 (1968); Robert v. Russell, 322 U.S. 293 (1968). The Court is careful to clarify its position re prior decisions and argues that *Randolph* is consistent with them and with the requirements of the sixth amendment.

[47] The *Randolph* opinion was written in three parts by Justice Rehnquist, joined by Chief Justice Burger and Justices Stewart and White. Justice Blackmun concurred in Parts I and III but filed a separate opinion, concurring in part and in the judgment. Justice Stewart filed a dissent which was joined by Justices Brennan and Marshall, while Justice Powell took no part in the case.

properly follow the instructions provided as an integral part of the trial.[48] This is the "rule" that provides the basis for our system of jurisprudence. The Court's decision in *Bruton,* where the jury was given instructions which if not followed would have proven devastating to the defendant, is defined by the *Randolph* court to be an exception to the rule, one to be followed in those special situations where the "practical and human limitations of the jury system cannot be ignored."[49] If one is convinced that the Court intended *Bruton* to be an exception, it follows that the decision in *Randolph* is but another application of the general rule to those cases where the evidence against a defendant is considered sufficient apart from the hearsay testimony which the jury is instructed to disregard.

Such instances include, of course, those times where the defendant also has made voluntary inculpatory statements that stand unchallenged before the jury. "We therefore hold that the admission of interlocking confessions with proper limiting instructions conforms to the requirements of the Sixth and Fourteenth Amendments to the United States Constitution."[50]

It is not made clear what other circumstances, if any, would warrant a similar conclusion.

The dissenting opinion in *Randolph*[51] views the decision from the opposite pole: that *Bruton* is the general rule to be followed and that the *Randolph* case offers nothing more than a vaguely defined exception to it. Even the concurring opinion of Justice Blackmun[52] makes a strong argument against the lack of specificity in the phrase "interlocking confessions" and that future courts will have to grapple with that ill-defined test. The dissenters are also concerned with the distinction between "no error" and "harmless error." Referring to the lower court decisions that *Bruton* error in *Randolph* was not harmless,[53] the minority is reluctant to challenge that result. Their strong view of the vital importance of the sixth amendment rights of defendants, coupled with their assessment of the capability of juries, compels that they find some error. This approach would always deny the government the opportunity to introduce into evidence in a joint trial the confessions of one non-testifying defendant if that confession could be construed by a jury so as to implicate others. The alternative of separate trials would be required.

Notwithstanding, the convictions of Randolph, Pickens, and Hamilton

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[48] 99 S. Ct. at 2137 n.7.

[49] *Id., quoting* Bruton v. United States, 391 U.S. at 135.

[50] 99 S. Ct. at 2140. For application of sixth amendment rights to the states, *see* Pointer v. Texas, 380 U.S. 400 (1965).

[51] 99 S. Ct. at 2143.

[52] *Id.* at 2141.

[53] Randolph v. Parker, 575 F.2d at 1183.

as decided initially by the Criminal Court of Shelby County, Tennessee stand affirmed. Whether or not the Court succeeded in its objective of settling *Bruton* error disputes in the circuit courts is unclear. *Delli Paoli* and *Bruton* were each sound law for eleven years. The question now is to judge the strength and extent of the *Randolph* decision.

There is one thing patently clear in the *Randolph* decision: it neither repudiated *Bruton* nor reinstituted *Delli Paoli*. The Court, in apparently trying to accommodate differing views on the extent of the rights guaranteed by the sixth amendment, the application of the rules on hearsay evidence, and the reliability of juries in following the instructions of the court, may have only stirred rather than clarified some rather murky waters. While clearly saying that a defendant who has himself confessed cannot cry error merely because the court's instructions to disregard the possible inculpating elements in the confession of a non-testifying codefendant may be wholly or partially ignored by the jury, it is just as clearly denying the government an unfettered opportunity to place prejudicial hearsay evidence before a jury without the possibility of committing reversible error.

No one is challenging the constitutional right of a defendant not to take the witness stand if that decision appears to further his interests. And there is no effort to deny the government the right to use an extrajudicial confession against the defendant, provided that it was properly obtained. The use of detailed editing together with proper instructions to the jury mitigates the possible impact on fellow defendants; but these actions cannot be relied upon to totally wipe improper inferences from the juror's mind. But erasure is not required. The jury is only asked to give no weight to that testimony when evaluating the guilt or innocence of other defendants. Similar demands on jurors are made throughout the course of the trial and are not very often challenged.[54] Confidence that the jury will follow all instructions is fundamental to our system, and is, at least, the constitutional equal of the right of confrontation.

The *Randolph* decision does not ignore the sixth amendment but merely reflects a full consideration of all circumstances of the case. The ruling appears to be a purposeful attempt to deny a claim of error in all cases involving interlocking confessions, yet allowing such error when the second defendant has not provided corrobating testimony. Thus, the impact is not so much a return to *Delli Paoli* as a signal that substantial admissions by a defendant cannot and will not be negated by a "legal nicety."[55]

A defendant's trial strategy in a joint trial in which the confession of a non-testifying codefendant is admitted could be to see the trial

[54] In civil cases, judgment N.O.V. might be considered a challenge to the jury's ability to follow instructions.

[55] Metropolis v. Turner, 437 F.2d 207, 208-09 (10th Cir. 1971).

to a conclusion while retaining the right to claim *Bruton* error, if circumstances permitted, and then move for a separate trial. In the great number of cases cited as authority in *Randolph* (including *Bruton*) no motions for separate trials were ever made, thus avoiding use of a direct remedy for abuse of sixth amendment rights. Of course, prior to *Bruton* the courts had largely held that the expected admission of a codefendant's confession was not sufficient grounds for sustaining a motion for severance.[56] One would expect the impact of *Randolph* to result in an increase in the granting of such motions, particularly where the court believes the jury may have unusual difficulty in segregating evidence against defendants in an organized, cogent manner. In the future both defendants and judges may invoke Criminal Rule 14 more freely where the right to confront is in question.

The majority opinion in *Randolph* can be viewed as a pragmatic solution to some overlapping and divergent rights of defendants in joint, criminal trials. On the surface, the Court is warning that while confession may be good for the defendant's soul, it remains "probably the most probative and damaging evidence that can be admitted against him. . . ."[57] and thus, cannot be excluded by claiming a mere technical denial of constitutional rights. On the other hand, there is a limit to the circumstances in which the admission into evidence of a confession by a non-testifying defendant that tends to incriminate another defendant will be deemed harmless by the Court.

It is not obvious what limit the Court has in mind. The legal testing of the *Randolph* decision should thus not be long in coming. The immediate result, however, is additional responsibility on the trial judge to determine whether to instruct the jury to disregard certain testimony or to sever and institute separate trials.

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[56] Note, *supra* note 37, at 128-29.
[57] Bruton v. United States, 391 U.S. at 139.

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