North Carolina Central Law Review

Volume 13
Number 1 *Volume 13, Number 1*

Article 5

10-1-1981

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# EVIDENTIARY PROBLEMS IN MULTIPLE DEFENDANT CASES: HOW TO PLAN FOR AND DEAL WITH THEM

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## I. INTRODUCTION

Virtually every criminal defense lawyer will be called upon to try several multiple defendant cases each year. The courts favor such trials as being more efficient than individual trials.[1] The prosecution favors them because defendants against whom the evidence may not be as strong become more "convictable" when they are tried together with clearly guilty defendants. Often, defense motions for severance are denied and the defense attorney is forced to try his case with one or more other attorneys. Despite the strategic problems in multiple defendant cases, the defendant is not helpless, as a joint trial creates numerous

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This article was developed from materials originally presented at a seminar entitled "Evidence—Techniques and Strategies for the Civil and Criminal Trial Lawyer," sponsored by the North Carolina Academy of Trial Lawyers on March 6, 1981 in Greensboro, N.C. The author and the editors of the *North Carolina Central Law Journal* are grateful to the Academy for permission to use those materials in the preparation of this article.

1. The Supreme Court has recognized this as one justification for joint trials: "Joint trials do conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial." Bruton v. United States, 391 U.S. 123, 134 (1968).

evidentiary problems for the prosecution. The defense attorney may anticipate these problems, advance his clients' arguments forcefully, and gain leverage with the prosecution that would never be available in a solo trial.[2]

## II. *BRUTON* AND THE CONFRONTATION CLAUSE

In the 1968 case of *Bruton v. United States*,[3] petitioner and a co-defendant, Evans, were indicted for armed postal robbery. At their joint trial a postal inspector testified that Evans had confessed that he and Bruton committed the robbery. Evans did not testify at the trial. Both defendants were convicted.[4] On appeal, the Supreme Court reversed petitioner Bruton's conviction. The Court held that the introduction of Evans' statement at the trial violated Bruton's sixth amendment right to confront the witnesses against him.[5] The Court stated that a major reason behind the confrontation clause of the sixth amendment[6] is to allow a criminal defendant the opportunity to cross-examine the witnesses against him. Bruton was denied this right when Evans' statement was introduced into evidence and Evans himself did not testify.

*Bruton* does not apply when the co-defendant who made the confession testifies at a joint trial and is subject to cross-examination.[7] The *Bruton* problem arises when a witness testifies regarding an out-of-court statement made by a co-defendant that incriminates the defendant. Where the witness is the co-defendant who made the statement, the defendant will have an opportunity to cross-examine him, and the

2. It is assumed in this article that joint trials are always disadvantageous. Such is obviously not always true. Many features of a joint trial may dictate a preference for being tried with other defendants. An obvious factor would be the possibility of pooling peremptory challenges with other defendants. Another consideration would be the possibility of a mistaken in-court identification when the government witness must choose among numerous defendants. Lastly, a defense attorney may prefer to try the case with a co-defendant when his client's culpability is less than that of his co-defendant. If the client is convicted, the contrasting degrees of culpability could be used to mitigate punishment.

3. 391 U.S. 123 (1968).

4. *Id.* at 124. Evans' conviction was later reversed by the Court of Appeals for the Eighth Circuit. On April 8, 1966, a police officer obtained a confession from Evans during interrogation without giving Evans any preliminary warnings and in the absence of counsel. The police informed the postal inspector who later obtained an oral confession from Evans expressly implicating Bruton in the crime. The court of appeals held that both confessions were inadmissible under Miranda v. United States and Westover v. United States, 384 U.S. 436 (1966). Evans v. United States, 375 F.2d 355 (8th Cir. 1967). On retrial, Evans was acquitted. 391 U.S. at 124.

5. 391 U.S. at 126.

6. The confrontation clause of the sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. CONST. amend. VI.

7. United States v. Howard, 590 F.2d 564 (4th Cir. 1979); Baldwin v. Blackledge, 330 F. Supp. 183 (E.D.N.C. 1971); State v. Jones, 280 N.C. 322, 185 S.E.2d 858 (1972).

requirements of the confrontation clause will be met.[8]

Even if the co-defendant who made the incriminating statement is tried separately from the defendant or is otherwise not subject to cross-examination at trial, *Bruton* may be inapplicable to avoid the introduction of the incriminating statement into evidence. In *California v. Green*[9] the Supreme Court held that the otherwise valid[10] introduction of a prior incriminating statement will not violate the confrontation clause if defendant's counsel has an opportunity to cross-examine the declarant at trial.[11] The Court further stated that the statement would have been admissible even if the declarant had not appeared as a witness at the trial because the incriminating statement had been made at a preliminary hearing where the defendant's counsel had ample opportunity to cross-examine the declarant.[12] In *Green*, sixteen-year-old Porter was arrested for selling narcotics to an undercover agent. After he was taken into police custody, Porter named Green as his supplier. Later, at Green's preliminary hearing, Porter again named Green as his supplier. Green's privately retained counsel was present at the hearing and cross-examined Porter extensively. At Green's trial, Porter's testimony was evasive. He testified that he had taken "acid" at the time he obtained the maijuana and could not remember how he had come by it. The prosecution used Porter's prior inconsistent statement to "refresh his memory."[13] Under the California evidence code[14] the statement was admitted as substantive evidence. The California Supreme Court reversed Green's conviction and held the California evidence statute unconstitutional under the confrontation clause of the sixth amendment. The United States Supreme Court reversed the California court and held that the statute was constitutional. Under *Green*, when a co-defendant's incriminating statement is introduced, the first question is whether the statement is admissible under the law of hearsay. If the answer to that question is no, of course the statement cannot be introduced into evidence. If the statement falls within a hearsay exception, the next question is whether the statement violates the defendant's rights under the confrontation clause. If the defendant's counsel has

8. California v. Green, 399 U.S. 149 (1970).

9. *Id.*

10. The out-of-court statement was admitted under a California Evidence Code provision that provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing . . ." CAL. EVID. CODE § 1235 (1966). Out-of-court statements and confessions offered at joint trials are fraught with hearsay problems and the defense attorney should always attempt to first exclude an out-of-court statement as hearsay.

11. 399 U.S. at 158.

12. *Id.* at 165.

13. *Id.* at 151-52.

14. CAL. EVID. CODE § 1235 (1966).

the opportunity to cross-examine the witness who made the statement, there is no violation of the confrontation clause. The opportunity to cross-examine may exist either at the trial or at the time the statement was originally made. In *Green*, since the defendant's counsel had an opportunity to cross-examine Porter both at the preliminary hearing when the statement was first made and later at Green's trial, there was no violation of the confrontation clause.

*Bruton* has also been held inapplicable when the incriminating statement is admitted at a joint trial but the portion referring to the defendant is effectively deleted,[15] or when it is admitted at a bench trial.[16] The Supreme Court in *Bruton* recognized that it may be impossible for a jury to put evidence they have heard, but should not consider, out of their minds during their deliberation. Thus, limiting instructions may be inadequate to protect the defendant once the inadmissible statement has been presented to the jury.[17] This problem would not arise where the defendant is tried before a judge sitting as the trier of fact.

Courts have also held that, although *Bruton* may technically apply, where the incriminating statement is not "especially incriminating" and other evidence of guilt is overwhelming, *Bruton* will not serve to exclude a prior incriminating statement.[18] In the North Carolina case of *State v. Squire*,[19] an officer testified at a joint trial for first degree murder regarding an incriminating statement made by a co-defendant.[20] The court recognized that the introduction of the incriminating statement violated the *Bruton* rule because the declarant did not testify at the trial. The court found that the introduction of the statement, followed by a limiting instruction by the trial judge, was harmless error and did not warrant reversal of the defendant's conviction.[21] Quoting from the Supreme Court case of *Lutwak v. United States*,[22] the court stated, "Like any other defendant, Seaborn [petitioner] was 'entitled to a fair trial, not a perfect one.' "[23] The court also quoted from the opinion of Justice Rehnquist in *Schneble v. Florida*:[24]

> 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

15. United States v. Grant, 549 F.2d 942 (4th Cir. 1977); State v. Mathis, 13 N.C. App. 363, 185 S.E.2d 450 (1971). *See* notes 56-57 and accompanying text, *infra*.

16. United States v. Pickney, 611 F.2d 176 (7th Cir. 1979).

17. 391 U.S. at 128-29.

18. Schneble v. Florida, 405 U.S. 427 (1972); Mathews v. Bounds, 367 F. Supp. 77 (E.D.N.C. 1973); State v. Squire, 292 N.C. 494, 234 S.E.2d 563 (1977). *See* notes 106-07 and accompanying text *infra*.

19. 292 N.C. 494, 234 S.E.2d 563 (1977).

20. *Id.* at 506, 234 S.E.2d at 570.

21. *Id.* at 510, 234 S.E.2d at 572.

22. 344 U.S. 604 (1953).

23. 292 N.C. at 508, 234 S.E.2d at 571 (quoting 344 U.S. at 619).

24. 405 U.S. 427 (1972).

> criminal conviction. In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.[25]

The North Carolina court followed the standard of proof set out in *Schneble* and held that the record as a whole must prove the error harmless beyond a reasonable doubt.[26]

### A. *Pre-trial Procedure in Raising* Bruton *Questions*

The first task is to determine whether there will be co-defendants in the trial. In North Carolina, that task is easy. Although each defendant must be charged in a separate pleading, the prosecutor must file a written motion to join two or more defendants for trial.[27] In federal court, two or more defendants can be charged in the same indictment and then tried together.[28]

The next task is to determine whether any *Bruton*-type statements are in the hands of the prosecution. The following request or one similar should be in the defendant's request or motion for discovery:

> Defendant requests the disclosure prior to trial of any out-of-court statements by any co-defendant which inculpate or have a tendency to inculpate him. The production of such statements prior to trial is necessary in order that the defendant may move pursuant to [§ 15A-927(c)(1)] [Rule 14] for severance.

This request will put the prosecution on notice that the defendant is seeking *Bruton*-type statements; if the prosecution does not comply, the defendant has laid the necessary groundwork for a mistrial. If the prosecution has such statements, it will undoubtedly produce them; however, federal prosecutors have the option of submitting the statements to the court *in camera* for inspection.[29]

The next step is to file a motion for severance under North Carolina General Statute section 15A-927(c) or Rule 14 of the Federal Rules of Criminal Procedure. A motion in state court generally must be filed prior to arraignment. It will be a rare case in which the defendant will

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25. 292 N.C. at 508, 234 S.E.2d at 571 (quoting 405 U.S. at 430).
26. 292 N.C. at 510, 234 S.E.2d at 572.
27. N.C. GEN. STAT. § 15A-926(b) (1978).
28. FED. R. CRIM. P. 8.
29. FED. R. CRIM. P. 14 provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election of separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce at the trial.

know at the time of arraignment whether there are *Bruton*-type statements in the hands of the prosecution. As a precaution in cases where *Bruton* problems are expected, the defense attorney should file a motion prior to arraingment asking for extra time to file motions for a severance. In the motion, a hearing on the issue of severance should be requested prior to trial.[30]

After the severance motion is filed, the prosecutor has four choices if the introduction of a statement would violate *Bruton*: separate trials for the defendants; joint trial in which the statement is not admitted into evidence; joint trial at which the statement is admitted into evidence after all references to the moving defendant have been deleted so that the statement will not prejudice him;[31] or joint trial at which the original statement is admitted without change. If the prosecutor elects either of the first two, the defendant has usually won a victory. Most defense lawyers prefer to avoid the problems associated with joint trials, and the exclusion of any inculpating evidence is a victory.

If the prosecutor elects to "redact" the statement and proceed with a joint trial, the defense attorney is faced with several choices. Should he or she become involved in the process of cleansing the co-defendant's statement? Should the court become involved? Or should the burden be on the prosecutor or his witness?[32] The answer depends to a large extent upon the state of the evidence. If the evidence against the defendant is not overwhelming and a skillful editing of the statement would remove very damaging evidence, it is often better to do the work for the prosecutor. The main drawback to active involvement by the defense attorney is the possibility of approving the introduction of the redacted statement and waiving errors for appeal. Otherwise, it is best to let the prosecutor shoulder the burden. It is a rare policeman who can effectively delete all references to the defendant. Unless the prosecutor writes out the script for the witness, the chance of error is high.

### B. *Procedure at a Joint Trial*

If the prosecution has failed to acknowledge that there are *Bruton*-type statements in the case and the defense attorney has suspicions to the contrary, he or she should renew the request for discovery at the beginning of the trial to protect the record for appeal. Of course, this again puts the prosecutor on notice that he is about to walk into a trap, but the defense attorney should err on the side of protecting the record

30. United States v. Glover, 506 F.2d 291, 299 (2d Cir. 1974).

31. N.C. GEN. STAT. § 15A-927(c)(1) (1978); Close v. United States, 450 F.2d 152 (4th Cir.), *cert. denied*, 405 U.S. 1068 (1971). *See* notes 56-57 and accompanying text *infra*.

32. In State v. Freeman, 28 N.C. App. 346, 229 S.E.2d 238 (1976), the defense attorney reviewed the statement with the prosecutor prior to trial. In United States v. Dorsett, 544 F.2d 687 (4th Cir. 1976), the court and the attorneys edited the statement.

so that the prosecution cannot argue on appeal that the defendant waived a constitutional right.

If there is an acknowledgement of *Bruton*-type statements and the prosecutor is proceeding in a joint trial, the motion for severance should be renewed at the beginning of the trial along with a statement of the reasons a joint trial may threaten the defendant's rights. An affirmative duty is then imposed upon the court to make an inquiry, if it has not already done so, as to the statements intended to be used and to decide what remedial steps are required.[33] When the inculpating, albeit redacted, statement is introduced, a timely objection to the introduction of the statement must be made to protect the record on appeal.[34] Next, the defense attorney should request an instruction that the out-of-court statement is admissible only against the co-defendant who made the statement.[35] If the limiting instruction is requested, it is reversible error for the trial judge to refuse to give it.[36] The defendant must renew the motion for severance "before or at the close of all the evidence" or the error may be waived.[37]

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33. United States v. Truslow, 530 F.2d 257, 261 (4th Cir. 1975). In *Truslow*, the trial court denied a motion for severance in a joint trial of three defendants. The court of appeals reversed the conviction of each of the defendants, stating:

> When it is brought to the attention of the trial court in connection with a severance motion that *Bruton* problems may be caused by statements of co-defendants to be used in a joint trial, the court should make inquiry as to the statements intended to be used and then decide what remedial steps are required. The remedial action may be in the form of the exclusion of the statements at a joint trial, deletion of references to co-defendants against whom the statement or statements are inadmissible, or severance.
>
> . . . .
>
> Since no alternative to severance was considered by the court, the failure to sever requires reversal.

*Id.* at 261-62. The court of appeals did not instruct the trial court which remedial method it should adopt on retrial. *Id.*

34. State v. Wortham, 23 N.C. App. 262, 208 S.E.2d 863 (1974). On appeal to the North Carolina Court of Appeals, defense counsel in *Wortham* contended that an objection appearing in the record was addressed to a long line of testimony preceding the objection. The court of appeals held that although the testimony should have been excluded under *Bruton*, failure to make a timely objection precluded reversal of defendant's conviction on this point. The court stated: "An objection to incompetent evidence ordinarily must be made as soon as the complaining party has the opportunity to learn that the evidence is objectionable, and by failing to object in apt time the party waives the objection." *Id.* at 266, 208 S.E.2d at 866.

35. State v. McEachin, 17 N.C. App. 274, 195 S.E.2d 349 (1973).

36. Where two or more persons are jointly tried, the extrajudicial confession of one defendant may be received in evidence over the objection of his codefendant(s) when, *but only when*, the trial judge instructs the jury that the confession so offered is admitted in evidence against the defendant who made it but is not evidence and is not to be considered by the jury in any way in determining the charges against his codefendant(s).

State v. Lynch, 255 N.C. 584, 588, 146 S.E.2d 677, 680 (1966). *But see* State v. Kessack, 32 N.C. App. 536, 232 S.E.2d 859 (1977) (court of appeals refused to reverse conviction where no limiting instruction was requested).

37. N.C. GEN. STAT. § 15A-927(a)(2) (1978); State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980). Section 15A-927(a)(2) provides: "If a defendant's pretrial motion for severance is overruled, he may renew the motion on the same grounds before or at the close of all the evidence. *Any right to severance is waived by failure to renew the motion.*" (emphasis added).

C. *Other Practice Pointers*

1. If the out-of-court statement of the co-defendant implicating the defendant is admitted at a joint trial, and the co-defendant then takes the stand testifying favorably to the defendant, *Bruton* does not apply even if the co-defendant denies making the out-of-court statement.[38] However, the North Carolina Court of Appeals, in *State v. Slate*,[39] held that in such a case the trial court must instruct the jury that the out-of-court statement is to apply only against the testifying co-defendant. Failure of the court to give the limiting instruction constitutes reversible error.[40]

2. Assume the following facts: A co-defendant gives a statement to an undercover agent that implicates the defendant in a criminal conspiracy. At the joint trial, the co-defendant takes the stand and testifies, under cross-examination by defendant's attorney, that defendant was not involved in the alleged crime. The prosecution may then introduce the incriminating statement to impeach the co-defendant. In *Joyner v. United States*,[41] the court of appeals held that, under those facts, severance was not required. The court reasoned that because the co-defendant was present and testified at the trial, defendant's rights under the confrontation clause were not violated.[42] Moreover, the statement was admissible as substantive evidence under the common law rule that statements made by a co-conspirator are admissible against all other co-conspirators.[43] Therefore, it was not necessary for the court to give an instruction to the jury to use the statement as evidence only against the testifying co-defendant.[44]

3. If the out-of-court statement is admissible against the defendant under some exception to the hearsay rule, some courts have held that *Bruton* is inapplicable. In a footnote in *Bruton* the question was specifically reserved.[45] In the first important North Carolina decision after *Bruton*, Justice Sharp construed this to mean that *Bruton* did not apply if the confession was otherwise admissible against the defendant.[46]

38. Nelson v. O'Neil, 402 U.S. 622 (1971); State v. Jones, 380 N.C. 322, 185 S.E.2d 858 (1972). *See* text accompanying notes 7-14 *supra*.

39. 38 N.C. App. 209, 247 S.E.2d 430 (1978).

40. *Id.* at 212, 247 S.E.2d at 432-33.

41. 547 F.2d 1199 (4th Cir. 1977). *But see* United States v. Payne, 492 F.2d 499 (4th Cir. 1974) (Widener, J., dissenting).

42. 547 F.2d at 1201.

43. *Id.* Although not promulgated at the time this case arose, FED. R. EVID. 801(d)(2)(E) has now codified the common law rule. *See also* notes 70-71 and accompanying text *infra*.

44. 547 F.2d at 1203.

45. 391 U.S. at 128 n.3.

46. State v. Fox, 274 N.C. 277, 163 S.E.2d 492 (1968). In *Fox*, Justice Sharp stated:

> [I]n joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must

Numerous North Carolina opinions have followed this rule.[47]

This interpretation of *Bruton* by the North Carolina courts should not be accepted. Although the values served by the hearsay rules and the confrontation clause are similar in many respects, the overlap is far from complete.[48] The primary reason hearsay rules were developed was to assure the *reliability* of evidence.[49] On the other hand, the confrontation clause was designed to protect the defendant's right to confront the witnesses against him. That is the basis of *Bruton*. The Court in *California v. Green* stated that by providing the defendant with a constitutional right to confront the witnesses against him, the confrontation clause:

> (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.[50]

Although these advantages of the confrontation clause will also serve to insure the reliability of evidence, if the co-defendant does not testify, confrontation is denied regardless of whether the goals of the hearsay rules are met.

In *United States v. Alvarez*,[51] the United States Court of Appeals for the Fifth Circuit addressed the introduction of an out-of-court statement under the hearsay exception embodied in Rule 804(b)(3) of the Federal Rules of Evidence. That rule allows the admission of an out-of-court statement if three tests are met: (1) the declarant is unavailable as a witness at trial; (2) the statement is so far contrary to the declarant's interest or so far tends to subject him to criminal liability that

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choose between relinquishing the confession or trying the defendants separately. The foregoing pronouncement presupposes (1) *that the confession is admissible as to the codefendant*, and (2) that the declarant will not take the stand.

*Id.* at 291, 163 S.E.2d at 502 (citations omitted) (emphasis added).

47. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977) (implied admission when defendant heard inculpating statement by co-defendant and did not object); State v. Phifer, 290 N.C. 203, 225 S.E.2d 786, *cert. denied*, 429 U.S. 1050 (1976) (implied admission); State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969) (admissible as a statement in course of and furtherance of conspiracy). In the following cases, the admission of out-of-court statements by co-defendants were held improper but harmless error: State v. Porter, 50 N.C. App. 568, 274 S.E.2d 860 (1981) (spontaneous utterance); State v. Spaulding, 288 N.C. 397, 219 S.E.2d 178 (1975) (insufficient evidence of implied admission). *See also* United States v. Roberts, 583 F.2d 1173 (10th Cir. 1979); United States v. Truslow, 530 F.2d 257, 262-63 (4th Cir. 1975); United States v. Payne, 492 F.2d 449 (4th Cir. 1974) (Widener, J., dissenting).

48. California v. Green, 399 U.S. 149, 155-56 (1970).

49. D STANSBURY, NORTH CAROLINA EVIDENCE § 139 at 464 (Brandis rev. 1973).

50. 399 U.S. 149, 158 (1970).

51. 584 F.2d 694 (5th Cir. 1978).

"a reasonable man in his position would not have made the statement unless he believed it to be true"; and (3) if the statement is offered at a criminal trial to exculpate the defendant, there are corroborating circumstances that clearly indicate the trustworthiness of the statement. The court in *Alvarez* held that the sixth amendment requires at a minimum that inculpatory statements (as well as exculpatory statements mentioned in the federal rule) against penal interest be corroborated by circumstances clearly indicating the trustworthiness of the statement.[52] Having disposed of the case by its interpretation of Rule 804, the court did not reach the confrontation issue.

Two years later, in *United States v. Sarmiento-Perez*,[53] the fifth circuit, relying on *Alvarez*, held that the custodial confession of a separately tried co-conspirator, insofar as it directly implicated the defendant in the criminal conduct charged, was not trustworthy or reliable evidence against the defendant for the purposes of the "statement against penal interest" exception to the hearsay rule.[54] The court in *Sarmiento-Perez* stated:

> When inculpatory hearsay is sought to be admitted into evidence under the aegis of a recognized exception to the hearsay rule, the right to confront and cross-examine the declarant is being asked to yield to another legitimate interest in the criminal trial process: the recognition that the trier of fact should be afforded the opportunity to consider relevant hearsay that is *sufficiently trustworthy*. Nevertheless, the consequent denial or diminution of so essential and fundamental a confrontation value as the opportunity to cross-examine demands that the competing interest to which that value yields be "closely examined."[55]

Under *Sarmiento-Perez* and *Alvarez*, when hearsay evidence, admitted under the hearsay exception for statements against interest, conflicts with the confrontation clause, the court should examine both the evidence and the circumstances surrounding its making to determine if it is sufficiently trustworthy to overcome the defendant's sixth amendment right to confrontation. The same argument should also apply to out-of-court statements that are offered against the defendant under other hearsay exceptions.

4. If a redacted statement is to be introduced at trial, the defense counsel should make sure that all references to the defendant have

52. *Id.* at 701.

53. 633 F.2d 1092 (5th Cir. 1980).

54. *Id.* at 1103. The court noted that a reasonable person already arrested and in police custody may well be motivated to misrepresent the role of others in the criminal enterprise to shift the blame away from himself. *Id.*

55. *Id.* at 1100.

been effectively deleted. What constitutes an effective redaction? Consider the following out-of-court statement by a co-defendant:

> We had planned to rob the bank for several months. We wanted to rob it on Friday when there would be more money. John waited outside while I went into the bank. After I got the money, we drove to my mother's house.

Assume that John is the defendant and the prosecution intends to offer the statement through an F.B.I. agent. Which of the following redactions is applicable?

> We had planned to rob the bank for several months. We wanted to rob it on Friday when there would be more money. [Blank] waited outside while I went into the bank. After I got the money, we drove to my mother's house.

or

> [I] had planned to rob the bank for several months. [I] wanted to rob it on Friday when there would be more money. I went to the bank. After I got the money, [I] drove to my mother's house.

The second alternative is clearly more favorable to the defendant. If there are only two persons being tried, the first alternative, the use of the word "blank" in place of the defendant's name, is extremely incriminating. The use of "we" likewise invites an association of the defendant and co-defendant. There is nothing in the second alternative which, standing alone, implicates the defendant. A redaction similar to the first was used at trial in *United States v. Danzey*.[56] The Second Circuit Court of Appeals found the introduction of the redacted statement to be prejudicial to both defendants in the joint trial because the jury would be tempted to "fill in the blank" with the name of the co-defendant. The court recommended a version of the second redaction, stating that it would be more in line with the meaning of *Bruton*.[57]

5. In 1979, the United States Supreme Court attempted to restrict further the application of *Bruton* in *Parker v. Randolph*.[58] In *Parker*, three defendants gave oral confessions to a police officer after their arrests. At their joint trial, the confessions were admitted into evidence through police testimony. The Court, in a plurality opinion[59] written by Justice Rehnquist, held that there is no error in admitting an inculpating statement by a co-defendant when the defendant has confessed and his confession "interlocks" with or supports the confession of the co-defendant. It must be emphasized that *Parker* is a plurality opinion.

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56. 594 F.2d 694 (5th Cir. 1978).
57. *Id.* at 918-19.
58. 442 U.S. 62 (1979).
59. Justice Blackmun joined only parts I and III of the opinion. With Justice Powell not participating in the decision, the Court divided 4-1-3 over section II.

Justice Blackmun, concurring in the result, found that any violation of *Bruton* was harmless error under the facts of the case. Justice Blackmun objected, however, to doing away with the harmless error determination any time the co-defendants have made interlocking confessions, as suggested by Justice Rehnquist. Justice Blackmun stated that although the confessions may not be inconsistent, the confession of a co-defendant may be very incriminating to the defendant even though he has also confessed. Justice Blackmun recommended that future cases be decided on a case-by-case basis and that confessions of a co-defendant be excluded unless the error is harmless beyond a reasonable doubt.[60]

The dissenting opinion of Justice Stevens marshals numerous arguments that can be used by defense attorneys to distinguish the decision in *Parker*. Justice Stevens stated that a per se rule against the applicability of the *Bruton* doctrine when all co-defendants have given admissible confessions is violative of the defendant's rights under the confrontation clause. He argued that the plurality erroneously assumed the reliability of the confessions of the co-defendants. He felt a determination of whether the confession is reliable should be made before it is admitted.[61] He also stated that the defendant's failure to take the stand to rebut his own confession should not be a factor favoring the admission of a co-defendant's confession; the defendant's rebuttal of his own confession will not dilute the effect of a co-defendant's confession, and requiring the defendant to take the stand would force him to relinquish his constitutional right to silence in order to protect his right to confrontation.[62] Justice Stevens pointed out the error in assuming that, because all co-defendants made confessions, the jury would be better able to follow the trial judge's instructions to disregard a co-defendant's confession in evaluating defendant's guilt.[63] Finally, Justice Stevens stated that the plurality disregarded the *Bruton* doctrine in ruling that the prejudice to the defendant from the introduction of a co-defendant's confession was entirely cured if the nontestifying defendant also made an admissible confession. Justice Stevens noted that the defendant in such a case is still saddled with all the inaccuracies which may be in the co-defendant's statement without the protection of cross-examination.[64]

6. If a *Bruton* error occurs at trial, a limiting instruction is ineffective to erase from the minds of the jury the effects of the prejudicial

60. 442 U.S. at 77.

61. *Id.* See notes 54-55 and accompanying text *supra*, for a discussion of the applicability of whether evidence is reliable to the *Bruton* doctrine.

62. 442 U.S. at 78.

63. *Id.* at 84.

64. *Id.* at 85.

testimony.[65] As stated by Justice Jackson in *Krulewitch v. United States*,[66] "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction . . . ."[67] The defense attorney should seek a new trial whenever a *Bruton* error has occurred even if the trial judge gave a limiting instruction.[68]

7. New trials are rarely granted on the basis of *Bruton* errors. There are few North Carolina and fourth circuit opinions granting new trials.[69] Despite the fact that new trials are rarely granted on the basis of *Bruton* errors, the case provides a very effective weapon for the defense. There is no way to measure the number of cases in which prejudicial joinder has been avoided, damaging evidence excluded, or an acceptable plea bargain struck because of the *Bruton* problems faced by the prosecution. The key to effective use of *Bruton* remains, however, the building of a proper foundation prior to and during the trial.

## III. CONSPIRACY TRIALS

It is well known that declarations made by co-conspirators in furtherance of and during the course of the conspiracy are admissible at trial, if there is independent proof of the existence of the conspiracy and the connection of the defendant and the declarant with it. Such declarations may be used against any member of the conspiracy.[70] The conspiracy charge has been called the "darling of the modern prosecutor's nursery,"[71] in part because statements made during the course of and in furtherance of a conspiracy are not considered hearsay. Federal prosecutors have used the conspiracy offense most effectively in drug and white collar cases. State prosecutors have not overwhelmingly embraced the conspiracy charge, as is evidenced by the relatively few state decisions on conspiracy.

### A. *Pretrial Discovery*

Rule 16 of the Federal Rules of Criminal Procedure and section 15A-903(a) of the North Carolina General Statutes provide that the

65. State v. Singleton, 244 S.E.2d 440 (1978).

66. 336 U.S. 440 (1948).

67. *Id.* at 453 (Jackson, J., concurring).

68. Some violations of *Bruton* have been considered harmless error by the courts. See notes 106-07 and accompanying text *infra*.

69. *E.g.*, United States v. Truslow, 530 F.2d 257 (4th Cir. 1975); State v. Heard, 285 N.C. 167, 203 S.E.2d 826 (1974); State v. McEachin, 17 N.C. App. 634, 195 S.E.2d 349 (1973); State v. Justice, 3 N.C. App. 363, 165 S.E.2d 47 (1969); State v. Williams, 275 N.C. 77, 165 S.E.2d 481 (1969); State v. Fox, 274 N.C. 277, 163 S.E.2d 492 (1968).

70. FED. R. EVID. 801(d)(2)(E); 2 D. STANSBURY, NORTH CAROLINA EVIDENCE § 173 at 24-25 (1973).

71. Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925).

defendant should be provided with a copy of any statement made by the defendant which will be offered at trial. The conspiracy charge can provide extra discovery to the defendant because all conspirators are considered agents of all co-conspirators. The statement of any one conspirator is attributable to all other conspirators and admissible at trial against all other conspirators. Under this theory, the co-conspirators' statements become the defendant's statement and should be discoverable by the defendant.[72]

B. *Independent Proof: Practice and Procedure*

Before the hearsay will be admissible against a defendant, there must be sufficient independent evidence of the existence of the conspiracy and the connection of the defendant and the declarant to it. The fourth circuit has stated the standard of proof in varying ways. The conspiracy need not be proven at the preliminary stage beyond a reasonable doubt. "The government can discharge its duty by introducing substantial independent evidence of the conspiracy [or] at least enough to take the question to the jury."[73] Other statements of the standard of proof have included "prima facie proof of the conspiracy"[74] or proof by a "fair preponderance" of independent evidence.[75] In North Carolina, the state must establish a "prima facie" case of conspiracy by independent evidence before introducing the hearsay statements of co-conspirators.[76] The standard of proof is unimportant in most cases because the prosecution is usually able to establish that a conspiracy existed. Who will decide this issue and when it will be decided are the more important questions.

The initial determination of whether the prosecution has presented sufficient evidence, independent of the hearsay itself, of the existence of the conspiracy and the connection of the defendant with it will be made by the trial judge. The question usually arises in the midst of the trial when the prosecution attempts to introduce a hearsay statement by a co-conspirator and the defendant objects. What should the judge do then?

The judge may turn to the prosecutor and say that he has not heard sufficient independent evidence of the conspiracy and the necessary

72. In United States v. Turkish, 458 F. Supp. 874, 882 (S.D.N.Y. 1978), the court ordered the production of all statements made by co-conspirators whom the government did not intend to call as witnesses. *Id.* The court noted that under 18 U.S.C. § 3500 (1976), the government need not produce statements of those co-conspirators who would appear as witnesses at trial. *See* United States v. Percevault, 490 F.2d 126 (2d Cir. 1974).

73. United States v. Anderson, 611 F.2d 504, 510 (4th Cir. 1979) (quoting United States v. Stroupe, 538 F.2d 1063, 1065 (4th Cir. 1976)).

74. United States v. Vaught, 485 F.2d 320, 323 (4th Cir. 1973).

75. United States v. Jones, 542 F.2d 186, 203 (4th Cir. 1976).

76. State v. Miley, 291 N.C. 431, 230 S.E.2d 537 (1976).

connections of the defendant to it. He could then tell the prosecutor to proceed with his evidence deleting the hearsay. The hearsay would be admitted only after the necessary showing had been made. This is clearly the preferred method.[77]

In the alternative, the judge could ask the prosecutor for a proffer of the independent evidence which he intends to introduce. In the past, the judge would have overruled the defense counsel's objection to the hearsay evidence and given an instruction similar to the following to the jury:

> Members of the jury, the government is presenting evidence of statements made by persons other than the defendant. I instruct you that you may consider the statements against the defendant if you find from other evidence independent of the statements that a conspiracy existed and that the defendant was one of its members, provided such statements were knowingly made by a co-conspirator during the continuance of such conspiracy and in furtherance of some object or purpose of the conspiracy.[78]

By so doing the court would be allowing the introduction of the evidence upon the promise of the prosecution to "connect it up" with independent evidence later in the trial.[79] If such evidence was forthcoming, there would be no prejudice to the defendant from the offer of proof. If, however, the judge concluded at the close of the trial that there was insufficient independent evidence, no amount of limiting instruction would erase the hearsay evidence from the jurors' minds.[80] A mistrial on the defendant's motion would then be merited.[81]

It now appears that in federal courts the determination of whether the hearsay should be admitted and considered is solely within the discretion of the trial court. This radical change, which has occurred in the past five years,[82] is based on Rule 204(a) of the Federal Rules of Evidence, which provides that preliminary questions concerning the

77. United States v. James, 590 F.2d 575, 582 (5th Cir. 1979) (en banc).

78. In United States v. Apollo, 476 F.2d 156 (5th Cir. 1973), the court held that such a cautionary instruction was necessary whenever testimony regarding declarations of co-conspirators is admitted. Defendant's conviction was reversed on the grounds that the conspiracy was established by only marginally sufficient non-hearsay evidence. *Id.* at 162-63. In 1979, the fifth circuit revised the procedures adopted in *Apollo*. The Federal Rules of Evidence became effective in 1975. Rule 104 allows the admission of evidence subject to the condition that its relevancy will be established by later evidence. Pursuant to that rule, the court, in United States v. James, 590 F.2d 575 (1979), held that the judge alone should make the determination of whether the hearsay evidence of a conspiracy has been sufficiently established by independent evidence to become admissible. *Id.* at 580. "The jury is to play no role in determining the admissibility of evidence." *Id.*

79. State v. Tilley, 292 N.C. 132, 232 S.E.2d 433 (1977).

80. See text accompanying note 67 *supra*.

81. United States v. Stanchich, 550 F.2d 1294, 1298 (2d Cir. 1977).

82. United States v. Petroziello, 548 F.2d 20 (1st Cir. 1977); E. DEVITT & D. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 27.06 (Supp. 1980).

admissibility of evidence "shall be determined by the court."[83] Ideally, however, the court should admit the evidence only if the proper showing has been made. There would then be no need to instruct the jury to disregard evidence it has already heard.

The en banc decision of the fifth circuit in *United States v. James*[84] is extremely important to defense attorneys. The majority opinion recognized that the preferred order of proof would be one in which non-hearsay proof of conspiracy is received first. The court should not receive any hearsay declarations unless the government has made a prima facie showing of the existence of the conspiracy and the defendant's involvement with it. The court, however, retains discretion to receive evidence subject to being connected. If the hearsay evidence is received subject to being connected up, the defendant may move for exclusion of the evidence *at the close of the government's case in chief.* If the court is unable to find by a preponderance of evidence (1) that a conspiracy existed, (2) that the declarant and defendant were both members of the conspiracy and had not withdrawn at the time of the declaration, and (3) that the declaration was made pursuant to the conspiracy, the evidence should be excluded and the court should consider a new trial.[85]

Although the majority opinion calls for a determination of the admissibility of the evidence at the end of the trial, the concurring opinions in *James* emphasize that the trial judge has considerable discretion as to order of proof.[86] The defense attorney should urge the judge at a pretrial conference to adopt the rule that the hearsay will not be admitted until the existence of the conspiracy and other matters are proven by independent evidence. If the judge insists on allowing the prosecution to "connect up" the evidence, the defense attorney should consider filing a motion for a pretrial determination of such matters, known as a *James* hearing. The following language is from such a motion recently filed in *United States v. DiBenedetto:*[87]

> The *James* en banc decision suggests the propriety of proceeding on a pretrial evidentiary hearing where there is the suggestion of a great deal of prejudice being played upon one or more defendants as the result of proceeding to trial upon the polled representation by government counsel that he or she will tie up or connect up a sufficient predicate to admit hearsay statements on a co-conspirator exception basis.

83. *See* United States v. Jones, 542 F.2d 186 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976).
84. 590 F.2d 575 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917 (1979).
85. *Id.* at 582-83. When considering whether a new trial is warranted, the judge must decide whether a cautioning instruction to the jurors to disregard what were hearsay statements can cure the prejudice arising from the erroneous admission of the alleged co-conspirator's statements implicating the defendant. *Id.* at 583.
86. *Id.* at 583 (Gee, J., concurring); *Id.* at 585 (Tjoflat, J., concurring).
87. No. 81-10 (D.S.C. ).

> Notwithstanding the fact that the court may later admonish the jury to disregard statements which are judicially determined not to apply to the defendant, experiences taught that such admonitions or directions from the court are not only unworkable, but rather enhance the prejudice by pointing out for a second time the nature of the government's proof.
>
> The defendant would respectfully suggest that a pretrial evidentiary hearing be held at which the government be required to establish its burden of proof of admissibility by offering testimony as to the participation of each of the individuals pursuant to the "conspiracy." In this way, the court can make a decision as to the admissibility of co-conspirator or co-defendant's statements pursuant to Federal Rule of Evidence, Rule 801. This pretrial hearing will also avoid the unnecessary potential for re-trial if in fact the defendant is prejudiced by his or her independent acts, deeds, or declarations. It would further avoid unnecessary interruptions during the course of the trial for admonitions by the court pending the government's "tying up" of the proof as to an individual defendant.
>
> WHEREFORE, the defendant respectfully requests this Honorable Court to conduct a pretrial "James" hearing.[88]

The defendant will not always benefit from a pretrial hearing to determine the sufficiency of the independent proof. As noted above, the defendant usually would prefer to force the prosecution at trial to produce its independent evidence before the hearsay is admitted. In certain cases, this procedure will create inordinate problems for the prosecution. A pretrial hearing may give the prosecution a chance to "practice" its witnesses and prepare them for actual trial examination. On the other hand, it may be a discovery device for the defense. It may also give the defense attorney leverage over the prosecutor. If the prosecution resists the request, ground work is laid for error at the trial. If the prosecution successfully resists the pretrial hearing and later fails to present the requisite independent evidence to "connect up" hearsay evidence, after the judge has allowed the presentation of hearsay based on the representation of the prosecutor that he will do so, the defendant's hand in making a motion to dismiss or for a mistrial is considerably strengthened. The argument is simply that the prosecution declined to test its evidence in a manner which would avoid any prejudice to the defendant and should not be held accountable for a situation of its own making.

The recent case of *United States v. Grassi*[89] illustrates the dislike trial judges have for pretrial *James* hearings. The fifth circuit in *Grassi* explained the mechanics of a *James* hearing as follows:

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88. *Id.*

89. 616 F.2d 1295 (5th Cir. 1980).

> Evidence submitted at a *James* hearing for the purpose of proving a conspiracy must, of course, be free from hearsay objection; otherwise, a co-conspirator's hearsay might bootstrap itself into admissible evidence. Moreover, in order to protect the defendant from the admission of prejudicial hearsay on the basis of threadbare evidence of conspiracy, the judge must decide at the conclusion of the *James* hearing whether the independent evidence linking the defendant to the conspiracy is substantial. If a co-conspirator's extrajudicial declaration is admitted into evidence, the judge must reconsider its admissibility at the conclusion of the trial. *His second decision, however, is to be made by a higher standard:* whether the prosecution, through independent evidence, has demonstrated the defendant's participation in a conspiracy by a *preponderance of the evidence*. If the prosecution has not prevailed on this point, the judge must decide whether a cautionary instruction will cleanse the record of prejudice or whether a mistrial is required.[90]

At the beginning of Grassi's hearing the trial judge "urged the prosecution to move quickly and to present no more than the 'threshold basis for invocation of the co-conspirator rule."[91] Either because of a lack of evidence or a desire to pacify the judge in a hurry, the prosecution failed to present substantial evidence of Grassi's connection with the conspiracy. The fifth circuit refused to consider the incriminating statements of co-conspirators and dismissed the charge based upon insufficiency of evidence.[92]

### C. *Proof of the Conspiracy*

Although substantive conspiracy law is outside the scope of this article, the rules of evidence are closely connected to such laws and cannot be separated. In cases involving a conspiracy, the defendant may be ultimately able to exclude the hearsay statements of co-conspirators where the prosecution presents insufficient evidence of the defendant's connection to the conspiracy.

*United States v. Stroupe*[93] is an excellent example of the defendant's use of the rule requiring independent proof of the conspiracy and the defendant and declarant's connection to it. In that case, government agents sought to purchase amphetamines from Randy Wright. While the agents were in Wright's home, he made a phone call to inquire about purchasing the drugs for the agents. The agents did not identify the person whom Wright called except that Wright used the name "Wayne." Wright told the agents the drugs would be available that afternoon. When the agents later returned to Wright's home he placed

90. *Id.* at 1300 (citations omitted) (emphasis added).
91. *Id.* at 1301.
92. *Id.* at 1301-02.
93. 538 F.2d 1063 (4th Cir. 1976).

a similar call to "Wayne," and told the agents they had to go somewhere else to pick up the drugs. Wright took the agents to a trailer which Wayne Stroupe leased. He went in briefly, leaving the agents to wait in the car. Wright then came out with Stroupe and a young woman. When he got back in the car he gave the agents a plastic bag containing amphetamines and told the agents that Stroupe was his "supplier." As the agents and Wright drove away, Stroupe waved to them.[94] Stroupe was later charged with several narcotics violations including conspiracy to distribute amphetamines. At trial, an agent offered Wright's out-of-court statement as substantive evidence against Stroupe. The statement was admitted under the conspiracy exception and Stroupe was convicted.

The government argued on appeal that the evidence was sufficient to prove the conspiracy so that later statements tying Stroupe to the conspiracy were properly admissible. The court found this position "untenable" on the evidence presented by the government. The court stated that Stroupe's involvement in the conspiracy could only have been established if Wright's statement was accepted.[95] The opinion is an unusual example of an appellate court being willing to carefully sift through the trial evidence.[96]

More recently, in *United States v. Gresko*,[97] the court found insufficient evidence to connect the defendant with an established conspiracy. The evidence presented which would have tied the defendant to a conspiracy to bribe a public official was the hearsay statement of a co-conspirator. Since there was no independent evidence to connect him to the conspiracy, the Fourth Circuit Court of Appeals held that the hearsay statement was improperly admitted and that a judgment of acquittal should have been granted.

### D. *Proof of "During the Course of the Conspiracy"*

Before the co-conspirator's declaration will be admissible against the defendant, the prosecution must show that the declaration was made during the course of the conspiracy. The statements must not be made prior to the formation of the conspiracy, after the conspiracy has terminated, or after the defendant or declarant has withdrawn.[98]

94. *Id.* at 1064.
95. *Id.* at 1065.
96. The more recent case of United States v. Docket, 659 F.2d 15 (4th Cir. 1981) involved facts similar to those presented in *Stroupe*. But in *Docket* the court of appeals, in a two page opinion, merely recited the facts as presented by the prosecution and held that the conspiracy had been proven by independent evidence. 659 F.2d at 17. *Docket* demonstrates the general unwillingness of appellate courts to examine carefully the facts of a case.
97. 632 F.2d 1128 (4th Cir. 1980).
98. State v. Tilley, 292 N.C. 132, 232 S.E.2d 433 (1977).

The prosecution often attempts to introduce statements by co-conspirators made after their arrest, arguing that such statements are admissible under the conspiracy exception. This is clearly wrong. The conspiracy ends for the declarant when he is arrested. The fourth circuit held in *United States v. Blackshire*[99] that such statements are not admissible because they are not made in furtherance of the conspiracy nor during its continuance. However, short of an arrest, courts will not presume that the conspiracy has ended unless its termination is affirmatively shown.[100]

### E. *Proof of "In Furtherance of the Conspiracy"*

Practically, this is an extremely difficult requirement to enforce. The declaration must have been made "in furtherance" of the conspiracy but need not in fact have advanced the conspiracy. Many courts equate "in furtherance" with "in the course of."[101] Most statements which are made by a co-conspirator during the course of the conspiracy will also be found to have been in furtherance of the conspiracy. Regardless, the argument that the statement was not made in furtherance of the conspiracy should not be overlooked by the defense attorney. It may be persuasive in some cases.

### F. *The Conspiracy Exception and the Confrontation Clause*

Does the admission of a co-conspirator's statements when the co-conspirator does not testify violate the confrontation clause? The Supreme Court has said that a violation of the confrontation clause may exist even though the statements in issue were admitted under an arguably recognized hearsay "exception."[102]

Many attorneys have assumed that the Supreme Court decision in *Dutton v. Evans*[103] resolved the issue. In *Dutton*, the co-conspirator Williams returned to his cell after arraignment and stated to his cellmate, Shaw: "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." Shaw appeared as a witness at trial and testified as to that statement. Evans challenged his conviction on the grounds that the introduction of Williams' statement violated his right to confront the witnesses against him. The Supreme Court held that Shaw's testimony concerning the statement did not violate the confrontation clause even though Williams did not testify.[104] Under Geor-

99. 538 F.2d 569, 571 (4th Cir. 1976).
100. Joyner v. United States, 547 F.2d 1199, 1203 (4th Cir. 1977).
101. *See* United States v. Sapperstein, 312 F.2d 1199, 1203 (4th Cir. 1977).
102. California v. Green, 399 U.S. 149, 155-56 (1970). *See* notes 9-14 and accompanying text *supra*.
103. 400 U.S. 74 (1970).
104. *Id.* at 88.

gia law, contrary to the federal rule, the statements of a co-conspirator are admissible even if the conspirators are engaged in nothing more than concealment of the criminal enterprise.[105]

The *Dutton* opinion should not, however, be read as foreclosing objections to hearsay based upon the confrontation clause. It may well be limited to the facts of the case. The Court said that the confrontation clause was not violated because the hearsay evidence was neither "crucial" nor "devastating,"[106] because Evans had an opportunity to cross-examine Shaw, and because there were "indicia of reliability" for the statement.[107] Finally, the Court found that the application of the Georgia rule under the circumstances of the case did not violate the sixth amendment.[108] At most, *Dutton* should be read to indicate that when the out-of-court statement is not particularly damaging and the circumstances of its utterance indicate its reliability, the defendant has the burden of indicating in what manner the declarant's live testimony would have prevented the prejudice created by the declarant's absence at the trial.[109]

The *Bruton* objection itself is compelling where the co-conspirator who made the incriminating statement does not testify. The defense attorney can argue that the court has admitted testimony which may be entirely unreliable. One commentator has noted the inherent unreliability of hearsay statements implicating an alleged co-conspirator in the conspiracy:

> The invocation of a name may be gratuitous, may be deliberately false in order to gain advantages for the declarant greater than those that would flow from naming a real participant or no one at all, may be a cover for concealment purposes . . . or may represent an effort to gain

105. GA. CODE § 38-306 (1954), in effect at the time of the decision in *Dutton*, provided: "After the fact of the conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." The Georgia Supreme Court, on appeal, upheld the introduction of the statement, stating:

> The rule is that so long as the conspiracy to conceal the fact that a crime has been committed or the identity of the perpetrators of the offense continues, the parties to such conspiracy are to be considered so much a unit that the declarations of either are admissible against the other.

Evans v. State, 222 Ga. 392, 402, 150 S.E.2d 240, 248 (1966).

106. Other reasons offered by the Court for finding no violation of the confrontation clause were that there was no misuse of a confession, neither prosecutorial misconduct nor negligence, no use of a paper transcript, and the case did not involve a joint trial. *Id.*

107. Facts which the Court considered "indicia of reliability" were: (1) Williams' statement contained no express assertion of past fact; (2) Williams' knowledge of the identity of others involved in the crime was well established by other independent evidence; (3) it was highly unlikely that Williams' statement was based on faulty recollection; and (4) Williams had no reason to lie to Evans and the circumstances under which he had made the statement indicated its truthfulness. *Id.* at 88-89.

108. *Id.* at 83.

109. United States v. Leonard, 494 F.2d 955, 984 (D.C. Cir. 1974) (Bazelon, C.J., concurring and dissenting).

some personal revenge.[110]

Further, there is authority in the fourth circuit for a *Bruton* objection in conspiracy trials. In *Joyner v. United States*,[111] the court noted that the trial court had wisely sustained an objection to the co-conspirator's statement due to *Bruton*.[112] In *United States v. Truslow*,[113] the court made the following observation: "The United States contends that Bruton does not apply to conspiracy cases. From what has been said, it is apparent that we are of the opinion that it may."[114]

Finally, in a concurring and dissenting opinion in *United States v. Payne*,[115] Judge Widener noted that the Supreme Court"[had] never considered in the context of admissibility of evidence in a federal court whether or not the statement of a co-conspirator, uttered pursuant to and in furtherance of the conspiracy, is in conflict with the confrontation clause."[116]

With this springboard, the objection should be made in every conspiracy case in which a co-conspirator's statements are offered in the absence of the declarant. In all likelihood, it will take the prosecution and the court by surprise. The defense attorney should be prepared to demonstrate why the inability to cross-examine the particular co-conspirator in his case strongly suggests that the jury will receive unreliable evidence.

110. Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1396 (1972).

111. 547 F.2d 1199 (4th Cir. 1977).

112. *Id.* at 1202 n.5. This objection came where the prosecution offered testimony concerning prior statements before the co-conspirator who made the statements had taken the stand. The court noted that once the declarant took the stand to testify, the *Bruton* objection was "no longer seasonable." *Id.*

113. 530 F.2d 257 (4th Cir. 1975).

114. *Id.* at 262-63.

115. 492 F.2d 449 (4th Cir. 1974).

116. *Id.* at 457 n.6A.