



## Touro Law Review

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Volume 12  
Number 3 *New York State constitutional  
Decisions: 1995 Compilation*

Article 5

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1996

### Cross-Examination

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#### Recommended Citation

(1996) "Cross-Examination," *Touro Law Review*. Vol. 12 : No. 3 , Article 5.  
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol12/iss3/5>

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## SUPREME COURT, APPELLATE DIVISION

## THIRD DEPARTMENT

People v. Wilbur<sup>72</sup>  
(decided October 12, 1995)

Defendant, Jack Wilbur, was convicted of criminal possession of stolen property in the third and fourth degree and was sentenced to concurrent prison terms of two to six and one to three years.<sup>73</sup> defendant appealed and claimed that the admission of his co-defendant's pretrial statement and grand jury testimony violated his right to confront all witnesses against him, pursuant to the Federal<sup>74</sup> and New York State<sup>75</sup> Constitutions.<sup>76</sup> The Appellate Division, Third Department, reversed the decision of the trial court and held that not allowing the defendant to confront his co-defendant at trial did not constitute harmless error because the co-defendant's pretrial statement and grand jury testimony undoubtedly had a prejudicial effect upon the jury.<sup>77</sup>

A Washington County dairy farmer, Leon Walker, created an agreement with the defendant to purchase his cattle.<sup>78</sup> The defendant kept his cows at a farm in Vermont and had his cows marked with two multi-colored ear tags.<sup>79</sup> Another Washington County dairy farmer, David Perry, kept some of his cows at the same farm in Vermont and had each cow marked with four ear tags.<sup>80</sup> Defendant, along with Leon Walker's farm hands Jeremy Younger and co-defendant Lawrence Burch, herded and

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72. 632 N.Y.S.2d 293 (App. Div. 3d Dep't 1995).

73. *Id.* at 294.

74. U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id.*

75. N.Y. CONST. art. I, § 6. This section provides in pertinent part: "In any trial in any court whatever the party accused shall be allowed to . . . be confronted with the witnesses against him." *Id.*

76. *Wilbur*, 632 N.Y.S.2d at 294-95.

77. *Id.* at 295.

78. *Id.* at 294.

79. *Id.*

80. *Id.*

transported forty cows from the Vermont farm to Walker's farm, pursuant to the defendant's agreement with Walker.<sup>81</sup> After the forty cows were transported, Perry noticed that approximately fourteen of his cows were missing from the Vermont farm.<sup>82</sup> After making inquiries around the farming community, Perry learned that his cows were on Walker's farm.<sup>83</sup> Though the four ear tags were removed from Perry's cows, Perry identified his cows on the Walker farm by locating four holes in each of the cows' ears.<sup>84</sup>

On appeal, the defendant argued that the trial court erred in admitting the pretrial statement and the grand jury testimony of his co-defendant Burch.<sup>85</sup> Even though the defendant did not make a timely objection on this point during the trial in order to preserve the issue on appeal, the Third Department decided to discuss the issue "in the interest of justice."<sup>86</sup>

The court began its analysis by stating that the Confrontation Clause of both the State and Federal Constitutions "bars the admission of a codefendant's statement which implicates the defendant" when the co-defendant does not testify and, therefore, is not subjected to cross-examination.<sup>87</sup> Although federal precedent merely implies a harmless error exception to the rule, New York cases decided under the New York Constitution

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* See N.Y. CRIM. PROC. LAW § 470.15(6)(a) (McKinney 1994). Section 470.15(6)(a) provides in pertinent part:

The kinds of determinations of reversal or modification deemed to be made as a matter of discretion in the interest of justice include, but are not limited to, the following:

- (a) That an error or defect occurring at a trial resulting in a judgment, which error or defect was not duly protested at trial as prescribed in subdivision two of section 470.05 so as to present a question of law, deprived the defendant of a fair trial . . . .

*Id.*

87. *Wilbur*, 632 N.Y.S.2d at 294-95.

specifically require a “reasonable possibility” that such evidence had an impact on the jury’s determination of guilt.

In *Bruton v. United States*,<sup>88</sup> the petitioner in a joint trial was convicted of armed postal robbery.<sup>89</sup> During the trial, a postal inspector took the stand and stated that the petitioner’s co-defendant, Evans, confessed that he and petitioner were the culprits responsible for the armed robbery.<sup>90</sup> Evans did not take the stand during the trial; therefore, petitioner was not able to cross-examine him as to this confession.<sup>91</sup> The Court of Appeals for the Eighth Circuit affirmed the petitioner’s conviction based on the trial judge’s limiting instruction to the jury, telling the jury members to disregard the confession against the petitioner in determining his innocence or guilt.<sup>92</sup> In affirming the petitioner’s conviction, the Eighth Circuit relied on the rule established in *Delli Paoli v. United States*<sup>93</sup> which allows a court to admit into evidence admissions made by co-conspirators provided that a limiting instruction is given to the jury that such admission should not be used against the petitioner.<sup>94</sup> The United States Supreme Court in *Bruton*, however, overruled the rule regarding co-conspirator admissions set forth in *Delli Paoli*.<sup>95</sup> The Court

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88. 391 U.S. 123 (1968).

89. *Id.* at 124.

90. *Id.*

91. *Id.* at 136.

92. *Id.* at 124-25.

93. 352 U.S. 232 (1957). In *Delli Paoli*, five co-defendants were convicted of conspiring to deal unlawfully in alcohol. *Id.* at 233. The Court admitted into evidence an admission by one of petitioner’s co-conspirators which implicated the petitioner. *Id.* The Court instructed the jury that such evidence was only to be used in determining the guilt of Whitley, one of petitioner’s co-defendants, and not any other co-defendant. *Id.* at 233-34. The Court held that the co-conspirator’s admission was properly admitted and stated that “when such a declaration is made by a conspirator after the termination of the conspiracy, it may be used only against the declarant and under appropriate instructions to the jury.” *Id.* at 237.

94. *Id.*

95. *Bruton*, 391 U.S. at 126. The Court stated:

[B]ecause of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner’s guilt, admission of Evans’ confession in this

stated that such evidence is unreliable and that “[t]he unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination.”<sup>96</sup> The majority of the Supreme Court concluded by stating that “in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner’s constitutional right of cross-examination. The effect is the same as if there had been no instruction at all.”<sup>97</sup>

Though the Supreme Court did not specifically state an exception to the rule elaborated in *Bruton*, a harmless error exception can be read into the decision based upon the circumstances of the specific case. The Court stated that “[t]o argue, in this situation, that [petitioner’s] conviction should nevertheless stand may be to place too great a strain upon the [*Delli Paoli*] rule-at least, where, as here, the other evidence against [petitioner] is not strong.”<sup>98</sup> The Court also noted that the co-defendant’s confession “added substantial, perhaps even critical, weight to the Government’s case in a form not subject to cross-examination.”<sup>99</sup> The Court finally indicated that the incriminating statements were “devastating” to the defendant’s case.<sup>100</sup>

The New York State courts generally adhere to the rule in *Bruton*. However, the New York courts specifically state that “if there is no reasonable possibility that such erroneously admitted evidence contributed to the conviction, the error is considered harmless and does not warrant reversal.”<sup>101</sup> In *People v. Hamlin*<sup>102</sup> all three defendants executed written confessions of

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joint trial violated petitioner’s right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. We therefore overrule *Delli Paoli* and reverse.

*Id.*

96. *Id.* at 136.

97. *Id.* at 137.

98. *Id.* at 126 (emphasis added).

99. *Id.* at 128.

100. *Id.* at 136.

101. *Wilbur*, 632 N.Y.S.2d at 295.

102. 71 N.Y.2d 750, 525 N.E.2d 719, 530 N.Y.S.2d 74 (1988).

their respective parts in the murder of defendant Brown's wife.<sup>103</sup> Only defendant Brown testified during the trial, and defendants Brown and Hamlin both appealed, arguing that they were denied their right to confront adverse witnesses because statements of non-testifying co-defendants were admitted into evidence.<sup>104</sup> The court stated that when considering whether there is harmless error in a *Bruton*-type of case, "the court must determine on the basis of its own reading of the record the probable impact of the codefendant's admissions on the 'minds of an average jury' and whether they were sufficiently prejudicial to defendant to require reversal of the conviction and a new trial."<sup>105</sup> In making the harmless error assessment, the court considered a number of factors: (1) "how comprehensive [the] defendant's statement [was] and whether [defendant's statement] satisfactorily explain[ed] his or her part in the crime without reference to the codefendant's statement," (2) "whether it [was] corroborated or contradicted by other objective evidence," and (3) "whether defendant . . . reiterated it on one or more subsequent occasions."<sup>106</sup> After the court applied these factors to the facts of the case, the majority concluded that there was no "reasonable possibility" that the jury's determination of defendant Hamlin's guilt was influenced by Green and Brown's confessions.<sup>107</sup>

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103. *Id.* at 755, 525 N.E.2d at 721, 530 N.Y.S.2d at 75. Defendant Brown was having problems with his wife and came up with a plan to kill her as well as inherit approximately \$110,000 in life insurance proceeds. *Id.* at 756-57, 525 N.E.2d at 722, 530 N.Y.S.2d at 76. Brown contacted defendant Hamlin and offered him \$5,000 to kill his wife, but Hamlin subsequently "lost his nerve" and brought in defendant Green to help him carry out the murder. *Id.* at 757, 525 N.E.2d at 722, 530 N.Y.S.2d at 76. On the morning of February 2, 1983, the three defendants met at a local food establishment for breakfast, and after finishing their respective meals, Hamlin and Green went to Brown's apartment and stabbed Brown's wife to death. *Id.* at 757, 525 N.E.2d at 722, 530 N.Y.S.2d at 76.

104. *Id.* at 755, 525 N.E.2d at 721, 530 N.Y.S.2d at 75.

105. *Id.* at 758, 525 N.E.2d at 722-23, 530 N.Y.S.2d at 77.

106. *Id.* at 758, 525 N.E.2d at 723, 530 N.Y.S.2d at 77.

107. *Id.* at 758-759, 525 N.E.2d at 723, 530 N.Y.S.2d at 77. The court stated that:

In *Wilbur*, the issue at trial was whether the defendant's possession of Perry's cows was a mistake, or whether it was intentional.<sup>108</sup> The court found that absent the admission of co-defendant Burch's grand jury testimony and pretrial statement, the evidence of guilt against the petitioner was not "overwhelming," and, therefore, such error in the admission of this evidence was not harmless.<sup>109</sup>

In sum, federal and New York law are similar with respect to treatment of Confrontation Clause violations in joint trials where a non-testifying co-defendant incriminates the other co-defendant. Under a federal or state constitutional analysis, the Confrontation Clause bars the admission into evidence of a co-defendant's statement which incriminates the defendant whenever the co-defendant has not been subjected to cross-examination by the defendant. The difference, if any, is merely academic. Under a federal analysis, a harmless error exception is implied.<sup>110</sup> The New York courts, however, specifically state that the standard to determine whether there is a constitutional violation is based upon whether there is no "reasonable possibility" that such

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Hamlin's written confession was detailed, complete, and internally consistent. It was supported by objective evidence establishing that Brown and Hamlin knew each other and that they were together on the day of the crime . . . [Hamlin's guilt] was also corroborated by the recovery of Hamlin's knife from the place where he said he had discarded it and the recovery of blood-spotted money, stolen from the Brown apartment, at a store where Hamlin stated he had spent it. Moreover, Hamlin executed written statements recounting his version of events twice and in both statements the facts critical to establishing his guilt were consistent . . . Based upon [these consistent statements] and the objective corroborating evidence, the proof of Hamlin's guilt was overwhelming and any error in admitting the statements of his codefendant was harmless beyond a reasonable doubt.

*Id.* at 759, 525 N.E.2d at 723, 530 N.Y.S.2d at 77. The court did, however, reverse Brown's conviction because the case against him was primarily based on his confession. *Id.* "The remaining evidence established a strong motive for him to want his wife dead and his efforts to establish an alibi but there was nothing to connect him to the killing except his confession." *Id.*

108. *Wilbur*, 632 N.Y.S.2d at 295.

109. *Id.*

110. *Bruton*, 391 U.S. at 126.