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# Proposed Standard Instructions on Confessions and Admissions

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*Origin of the Proposed Instructions*

In 1968 the Pennsylvania Supreme Court established a Committee for Proposed Standard Jury Instructions and directed its member judges and lawyers to prepare pattern jury instructions for use in Common Pleas trials. The committee organized itself into three subcommittees: civil instructions, criminal instructions and sociolegal. Reporters for the first two subcommittees were put to work composing draft charges on topics approved by their subcommittees. Recently, the committee decided to make the reporter drafts available to all Common Pleas judges as they are completed. Among the first drafts sent to the judges were those having to do with defendants' confessions and admissions prepared by the author as co-reporter to the criminal instructions subcommittee.[1] They are reprinted here with the permission of the committee. The drafts are of general interest for their own content and for what they presage about the nature of the eventual committee product.

Two goals of standard jury instructions are to reduce research required of court and counsel and to provide specimen charges that are simple and understandable as well as legally correct.[2] To

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1. Martin A. Hecksher, Esquire, of Philadelphia, and the author have been co-reporters to this subcommittee since June 1969.

2. For the history, merits and demerits of pattern instructions and for practical advice on carrying out a pattern drafting project see McBride The Art of Instructing the Jury, §§ 9.01-11.07 (1969).

lighten the research burden at trial, the committee plans to include rather extensive commentary in its final product. Committee notes will cover such matters as suggestions for use, citation of important authority, statements of rationale, explanations for inclusion or omission of particular points and identification of controversial areas of law. The Reporter's Notes which appear below are intended to furnish the material for that kind of commentary.

Procedures and an approach were adopted that should lead to the second goal—charges that are intelligible to the common juror. The reporters are to strive for simplicity, even in their first drafts. They are to look for choice language in pattern instructions furnished by individual Common Pleas judges from their personal charge books and in standard jury instructions published for other jurisdictions. Reporter's drafts will of course be reviewed and revised by their subcommittes and by the full committee.

The sociolegal subcommittee is expected to make an important contribution. This subcommittee is doing research on problems of communication between judge and jury. Its research director, a specialist in psychology and communications, will review the wording of all proposed instructions.

It should be emphasized that the instructions and notes which follow are reporter's drafts and notes only. They have not been through the project's refining process; they do not carry the indorsement of the committee or any of its subcommittees. The drafts obviously do not cover all matters in the confession area which could be the subject of pattern charges. The committee would welcome suggestions for improving these drafts[3] and for adding instructions addressed to any other confession or admission issue which readers have found to arise frequently in practice.[4] Criticism and

3. The drafts were prepared before the decision in Commonwealth v. Camm, 443 Pa. 253, 277 A.2d 325 (1971). *Camm* makes two points which probably should be added to the commentary. First, *Camm* seems to approve the practice of resubmitting *Miranda* issues to the jury, *see* 277 A.2d at 329. Second, *Camm* reminds us that questions of voluntariness are decided ultimately by each juror for himself; the jury does not make a separate, collective decision on voluntariness. Thus in a case where the voluntariness of a confession is in issue the jury is ordinarily free to convict even though some jurors accept while others reject the confession. The only cases in which the jurors must be unanimous on voluntariness in order to convict are those in which the evidence will not support a guilty verdict without the confession.

4. Examples of items which might warrant pattern treatment if they come up often enough at trial are (1) the confession which is obtained from a defendant some time after he makes an inadmissible confession (*see* Commonwealth v. Moody, 429 Pa. 39, 239 A.2d 409 (1968); Commonwealth v. Banks, 429 Pa. 53, 239 A.2d 416 (1968) ) and (2) the confession which is

suggestions may be sent to the author at Dickinson School of Law or to the General Reporter and Secretary of the Committee, Mr. Gilbert G. Ackroyd, Pennsylvania Bar Institute, P.O. Box 1027, Harrisburg, Pennsylvania 17108.

*Text of the Proposed Instructions*

The reporter's drafts relating to confessions and admissions are dated June 1, 1971. Their complete text follows.

3.00 GENERAL REMARKS CONCERNING DEFENDANT'S CONFESSION OR ADMISSION

Instructions 3.01 to 3.05 are to be used when an issue concerning a confession or admission allegedly made by the defendant prior to trial is submitted to the jury. The neutral term "statement" is used in the instructions to denote either a confession or admission. The instructions are pertinent whether the statement is written or oral, and whether, on its face, it purports to incriminate or exculpate the defendant.

Before admitting a defendant's confession or admission in evidence, the court must make its own independent decision that the statement was voluntary and not obtained in violation of constitutional rights. *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 2d 908 (1964). Although Pa. R. Crim. P. No. 323(j) makes the courts' ruling on admissibility final, the rule requires the court to resubmit issues like voluntariness to the jury, sua sponte, whenever raised at trial, *Comm. v. McLean*, 213 Pa. Super. 297, 247 A.2d 640 (1968). See *Comm. v. Frye*, 433 Pa. 473, 252 A.2d 580 (1969), on procedure to be followed when defendant who failed to make timely application to suppress a confession before trial attacks voluntariness at trial.

Rule 323(j) presents problems of interpretation which have not been resolved by the Pennsylvania case law. How much of the current law relating to the exclusion of confessions creates the kind of issues which must go to the jury? The cases tell us that an issue of "voluntariness" must be resubmitted to the jury, but do not make it clear whether a contest concerning compliance with the technical requirements of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966) presents an issue of voluntariness for this purpose. See, e.g., *Comm. v. McLean, supra.* Are there other exclusionary principles not fitting under the rubric of voluntariness which may raise jury issues? Although there is some debate on the point, the Constitution does not seem to compel any particular answer to these questions. See Comment, *The "Reasonable Doubt" Standard in Preliminary Proceedings to Determine the Voluntariness of a Confession*, 42 TEMP. L.Q. 60 (1938). As long as the judge himself decides constitutionally grounded objections to admissibility, state courts may do as they wish about resubmitting any or all of the issues raised by such objections to the jury. The question then is what interpretation the courts of Pennsylvania should give to Rule 323(j).

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the product of fraud or trick by the police not involving coercion in any usual sense and not involving misadvice to the defendant about his legal rights (*see* Commonwealth v. Baity, 428 Pa. 306, 237 A.2d 172 (1968) ).

The committee considered two possible approaches to the interpretation of Rule 323(j). Under the first approach an issue would be resubmitted to the jury only if it is a traditional kind of voluntariness issue, i.e., the typical free choice-coercion type of issue. Under the second approach not only would a traditional voluntariness issue be resubmitted but also any issue arising under newer constitutional rules having some relationship to the subject of voluntariness.

The committee has premised its instructions on the second approach to rule 323 (j). Instruction 3.03 embodies the traditional test of voluntariness in free choice-coercion terms. Instruction 3.04 enlarges the definition and test of voluntariness to include the *Miranda* rules. While this approach requires the court to give detailed instructions in some situations where under the other approach simpler instructions or no instructions at all would be needed, it has significant advantages. It avoids whatever constitutional doubts might exist if *Miranda* issues were not given to the jury, *cf. Comm. v. McLean, supra.* The jury is called on to decide the same issues applying the same rules as the court. The likelihood of real or apparent confusion at the trial as to the issues and governing law is diminished and the defendant has the benefit of the decision of both court and jury on more of the constitutionally based objections to the use of his confession or admission.

On the use of a statement obtained in violation of *Miranda* safeguards to impeach a defendant who testifies in his own behalf, compare *Comm. v. Padgett*, 428 Pa. 229, 237 A.2d 209 (1968) with *Harris v. New York*, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971). In *Padgett*, the Pennsylvania Supreme Court interpreted *Miranda* to forbid such use; in *Harris*, the United States Supreme Court held that *Miranda* does not forbid such use.

### 3.01 Defendant's Confession or Admission: Genuineness

The Commonwealth has introduced evidence of a statement which it claims was made by the defendant. Obviously, words allegedly written or spoken by a defendant should not be used against him unless he actually uttered those words. You may consider as evidence against the defendant, to be judged for truthfulness and weighed along with the other evidence in the case, only so much of the statement as you find was actually made by the defendant.

*Reporter's Note*

This instruction is appropriate for use when there is an issue of whether the defendant in fact made a statement which has been admitted in evidence against him.

In any case where there is an issue of whether a defendant made a statement, what words he used, or what he meant by the words used, the court should point out the issues to the jury and

give such instructions (e.g., instructions on credibility of witnesses) as may be appropriate, *cf. Comm. v. Giovanetti*, 341 Pa. 345, 19 A.2d 119 (1941). In *Giovanetti*, the Commonwealth called a single detective who testified that the defendant had made certain ambiguous but potentially damaging oral admissions; the defendant denied making such admissions. Dean Laub reads *Giovanetti* to require special instructions in the case of a denied confession only where its proof rests on the testimony of one person, Laub, *Pennsylvania Trial Guide*, §§ 169.3, 169.4 (1959).

### 3.02 Defendant's Confession or Admission: Voluntariness, Introductory Remarks

The Commonwealth has introduced evidence of a statement which it claims was made by the defendant. Before you may consider the statement as evidence against him, you must find that the statement was in fact made by the defendant and that it was voluntary. Otherwise, you must disregard it. You must not allow the fact that I admitted the statement in evidence to influence you in any way.

The word "voluntary" has a special meaning in the law. I will tell you the legal standards by which you must determine the question of voluntariness.

*Reporter's Note*

This instruction and succeeding instructions through 3.05 are appropriate for use when there is an issue of whether the defendant voluntarily made a statement which has been admitted in evidence against him. These instructions do not cover all of the issues which may arise in connection with voluntariness, only some of the more common ones. The court should use special care in tailoring these and any other instructions on voluntariness to meet the issues actually raised by the evidence.

When voluntariness is an issue, the prosecution has the burden of proving it by a preponderance of the evidence, *Comm. ex. rel Butler v. Rundle*, 429 Pa. 141, 239 A.2d 426 (1968). For arguments that the burden should be proof beyond reasonable doubt, see Comment, *The "Reasonable Doubt" Standard in Preliminary Proceedings to Determine the Voluntariness of a Confession*, 42 Temp. L.Q. 60 (1968).

The court should take care that its own decision on the voluntariness question does not improperly influence the jury. It is good practice for court and counsel to refrain from telling the jury that the court also passes on voluntariness, *cf. State v. Ford*, 111 N.J. Super. 11, 266 A.2d 599 (1970).

### 3.03 Defendant's Confession or Admission: Basic Test of Voluntariness

The basic test of voluntariness is this: To be voluntary a statement must be the product of a rational mind and a free will. The defendant must have a mind capable of reasoning about whether

to make a statement or say nothing and he must be allowed to use it. The defendant must have sufficient will power to decide for himself whether or not to make a statement and he must be allowed to make that decision. Now this does not mean that a statement is involuntary merely because a defendant made a hasty or a poor choice and might have been wiser to say nothing. Nor does it mean that a statement is involuntary merely because it was made in response to searching questions. It does mean, however, that if a defendant's mind and will are confused or burdened by promises of advantage, threats, physical or psychological abuse, or other improper influences any statement which he then makes is involuntary.

*Reporter's Note*

This instruction is appropriate for use when there is a voluntariness issue of the traditional type, i.e., when there is a "free choice" or "coercion" question. See Reporter's Note following Instruction 3.02 for further suggestions on use.

The basic test stated here is largely a paraphrase of language from *Comm. ex. rel. Butler v. Rundle*, 429 Pa. 141, 239 A.2d 426 (1968). The court in *Butler* itself quoted the following from Justice Frankfurter's opinion in *Culombe v. Connecticut*, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed. 2d 1037 (1961):

> Is the confession the product of an essentially free and unconstrained choice by the maker. If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self determination critically impaired the use of his confession offends due process . . . . The line of distinction is that at which governing self direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.

3.04 DEFENDANT'S CONFESSION OR ADMISSION: COMPLIANCE WITH MIRANDA

(1) (Although it might seem to meet the basic test of voluntariness) a statement is not voluntary if it was obtained from the defendant in violation of his constitutional rights.

(2) The Constitution requires that a person (who is in custody) (who is deprived of his freedom of action in any significant way) (who is the object of an investigation which has begun to focus on him as a suspect) must be given certain warnings before he is questioned by law enforcement officers. He must be warned first that he has a right to remain silent; second, that anything he says can be used against him in court; third, that he has a right to consult with an attorney of his own choice and to have the attorney present

while he answers any questions; and fourth, that if he is unable to afford an attorney one will be provided for him at no cost before he is asked any questions. The warning must make each of these four points clearly and unmistakably although the warning does not have to be in the same words I just used. If such a warning is not given, any statement which the suspect makes when questioned will be obtained in violation of his constitutional rights and will be involuntary.

(3) After the warning is given, the officers may question the suspect without having an attorney present if, but only if, the suspect understands the warning and knowingly, intelligently, and freely waives his right to remain silent and his right to an attorney. When can it be said that a suspect waives these rights? A suspect does not waive his rights to silence and to an attorney unless, understanding these rights, he is willing to give them up and indicates clearly to the questioners that he has decided to give up these rights. A suspect does not waive his rights to silence and to an attorney if he is tricked, threatened, or talked into giving up these rights. Unless a suspect has waived his rights to silence and to an attorney, it is improper for law officers to question him. If they do question him, any statement he makes will be obtained in violation of his constitutional rights and will be involuntary.

(4) Even though a suspect may at one point waive his rights to silence and to an attorney, he may withdraw, that is, he may take back, his waiver at any time. He does not have to use any special words. It is enough if he indicates that he does not wish to be questioned further or that he wants an attorney. If he does this, the questioning must stop immediately. Any statement obtained by questioning a defendant after he has withdrawn an earlier waiver will be obtained in violation of his constitutional rights and will be involuntary.

*Reporter's Note*

This instruction is appropriate for use when there is an issue of whether a statement was obtained from the defendant in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). See Reporter's Note following Instruction 3.02 for further suggestions on use. For a restatement of many of the requirements of *Miranda*, see *Comm. v. Leaming*, 432 Pa. 326, 247 A.2d 590 (1968). On the subject of whether *Miranda* warnings are needed when a suspect is questioned about a non-felony offense, see *Comm. v. Bonser*, 215 Pa. Super. 452, 258 A.2d 675 (1969).

As subdivision (2) indicates, *Miranda* warnings are required only when a defendant is interrogated while in custody or otherwise deprived of his freedom or while the object of an investigation which has focused on him. No warnings are required unless there is questioning by the police. Thus a statement which is volunteered in the sense that it is given without any questioning or prompting is admissible even though unwarned, *Comm. v. Yount*, 435 Pa. 276, 256 A.2d 464 (1969) (spontaneous statement by a per-

son who surrendered himself at police station lost its volunteered character when police interposed questions). In some cases it may be necessary to define the term "questioning" for the jury so they may determine whether particular remarks made by the police to the defendant or other police conduct constituted an interrogation. *Comm. v. Simala*, 434 Pa. 219, 252 A.2d 575 (1969) suggests that any police conduct calculated to, expected to, or likely to evoke admissions is questioning which must be preceded by a warning. On what constitutes police questioning, see also *Comm. v. Brown*, 438 Pa. 52, 265 A.2d 101 (1970) (officer made remarks about victim's condition) and *Comm. v. Bordner*, 432 Pa. 405, 247 A.2d 612 (1968) (hospitalized defendant questioned by his parents in presence of police).

No warning is required unless the defendant is in custody (or otherwise deprived of freedom) *or* unless the investigation has focused on him as a suspect, *Comm. v. Frye*, 433 Pa. 473, 252 A.2d 580 (1969). Although it could be argued that the United States Supreme Court in *Miranda* substituted the test of custody or its equivalent for *Escobedo's* (378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977 (1964)) more elusive test of focus, the Pennsylvania courts use custody and focus as alternative tests. If the defendant is in custody, he must be warned even though the investigation has not focused on him and even though he is in custody for some reason unrelated to the crime about which he is questioned, *Comm v. Simala, supra.*

In some cases it may be necessary for the court to define the concept of custody or focus in its instructions to the jury. On what constitutes custody and what constitutes focus for *Miranda* purposes compare *Comm. v. Bordner, supra,* with *Comm. v. Frye, supra.* For a comprehensive treatment of the topic "what constitutes custodial interrogation" for *Miranda* purposes see Annot., 31 ALR3d 565 (1970).

The Pennsylvania courts have not completely settled the applicability of *Miranda* to situations where an undercover agent of the police seeks admissions from a person who is in custody or on whom the investigation has focused. Obviously, if *Miranda* applies, undercover agents would be useless in those situations. The United States Supreme Court has in effect said that *Miranda* warnings need not be given by an undercover agent before the suspect is arrested regardless of how intensively the investigation has focused, see *Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed. 2d 374 (1966). *Miranda* and *Escobedo* are concerned with dangers of coerced self incrimination and with the right to counsel which exists during the prosecution. Questioning by an undercover agent presents no risk of coercion; the prosecution can hardly be said to have begun before arrest. The Supreme Court has declined to pass on the propriety of police use of undercover agents to obtain unwarned admissions from suspects who are already in custody, *People v. Miller,* 392 U.S. 616, 88 S.Ct. 2258, 26 L.Ed. 2d 1332 (1968). The Pennsylvania Supreme Court, however, has ruled that once the preliminary hearing takes place the prosecution has clearly begun and surreptitious questioning of a defendant by a police

agent violates his right to counsel whether he is in custody or free, *Comm. ex rel. Johnson v. Rundle,* 440 Pa. 485, 270 A.2d 183 (1970).

*Miranda* does not decree that one specific version of the required warning is the only acceptable version. The Supreme Court in fact used different language at several points in its opinion when stating the content of the warning. The Pennsylvania Supreme Court reads *Miranda* to permit deviation from warning formulations prescribed therein provided the offered version is more likely to give a suspect a better understanding of his constitutional rights and a heightened awareness of the seriousness of his situation, *Comm. v. Singleton,* 439 Pa. 185, 266 A.2d 753 (1970) (warning that any statement given could be used *for* or against the accused does not comply with *Miranda*).

*Comm. v. Leaming, supra,* contains a restatement of the minimum *Miranda* warnings; *Comm. v. Franklin,* 438 Pa. 411, 265 A.2d 361 (1970) contains an example of a more elaborate and thorough warning. A warning which does not allude to free counsel may suffice if the defendant had an attorney or ample funds. *Comm. v. Yount, supra,* explores this narrow exception to normal warning requirement.

As subdivisions (3) and (4) indicate, the Commonwealth has the burden of proving not only that a warning was given but that the defendant understood and waived his rights. Although there is some support for the doctrine that the only valid waiver of rights is an express verbal waiver by the defendant, the committee has predicated the instructions on the view that a valid waiver may result from other conduct of the defendant, compare *United States v. Hayes,* 385 F.2d 75 (4th Cir. 1967), with *Sullins v. United States,* 389 F.2d 985 (10th Cir. 1968). The burden of proving waiver is however a heavy one; it is not satisfied by proving merely that defendant was silent during and after the warning and eventually confessed, *Comm. v. Goldsmith,* 438 Pa. 83, 263 A.2d 322 (1970). For general treatment of the *Miranda* waiver principles, see *Comm. v. Taper,* 434 Pa. 71, 253 A.2d 90 (1969) and *State v. McKnight,* 52 N.J. 35, 243 A.2d 240 (1968) (waiver may be valid even though defendant was unwise to talk to police without counsel). For a case on the propriety of soliciting a statement from a defendant who had previously invoked his right to counsel, see *Comm. v. Franklin, supra.*

### 3.05 Confession or Admission: Concluding Instructions on Voluntariness and Weight

(1) In deciding (whether the statement was voluntary under the basic test) (whether the defendant was given and understood the warning required by the Constitution and waived his right to remain silent and his right to an attorney), you should weigh all the facts and circumstances surrounding the making of the statement including the sex, age, intelligence, personality, education, experience, and mental and physical state of the defendant, how the defendant was treated, the time, place, and conditions under which the statement was made, and what was said and done by the defendant, by the persons who questioned him, and by anyone else present.

(2) You should not consider any seeming truthfulness of the statement as evidence that it was voluntary.

(3) If you find that the defendant made the statement voluntarily (that is, that the statement was voluntary under the basic test and not obtained in violation of his constitutional rights) you may then consider the statement as evidence against him. You should consider the facts and circumstances surrounding the making of the statement, along with all other evidence in the case, in judging its truthfulness and deciding how much weight, if any, the statement deserves on the question of guilt or innocence.

*Reporter's Note*

These instructions are appropriate for use when an issue concerning any aspect of voluntariness is given to the jury. For other suggestions on use, see Reporter's Note following Instruction 3.02.

The totality of the circumstances should be considered in determining whether an inculpatory statement or confession was voluntary and whether a suspect was properly advised of and understood the rights and protection granted him by the Constitution and whether his decision not to avail himself of those protections was a knowing and intelligent waiver. *Comm. v. Taper*, 434 Pa. 71, 253 A.2d 90 (1969); Comm. v. Holton, 432 Pa. 11, 247 A.2d 228 (1968); *Comm. ex rel. Joyner v. Brierly*, 429 Pa. 156, 239 A.2d 434 (1968).

The credibility and weight to be attached to the defendant's confession or admission is for the jury. They may believe all, part, or no part of a defendant's statement. *Comm. v. Ewing*, 439 Pa. 88, 264 A.2d 661 (1970).

3.12 JOINT TRIAL, CONFESSION OR ADMISSION ADMISSIBLE AGAINST DEFENDANT MAKING IT ONLY

There is a (further) rule which restricts use by you of the evidence tending to show that defendant ( ) made a statement concerning the crime charged. A statement made before a trial may be considered as evidence only against the defendant who made this statement. Thus you may consider the statement as evidence against defendant ( ) (if you believe he made the statement voluntarily). You must not, however, consider the statement as evidence against (defendant ) (the other defendants); you must not use the statements in any way adverse to (him) (them).

*Reporter's Note*

This instruction is appropriate for use when the court at a joint trial has admitted evidence of a pretrial confession or admission allegedly made by one defendant which explicitly or inferentially

implicates one or more codefendants. Certain of the material in parentheses is pertinent when there are issues as to the genuineness or voluntariness of the alleged statement (see Instructions 3.01 et seq.). Blank spaces should be filled by adding the names of defendants.

The instruction follows from the principle that an out of court confession or admission is hearsay, admissible against the declarant only. The declarant's claim to be an accomplice further taints the statement and is an additional reason for not admitting it as evidence against the codefendant.

The occasion for this type of instruction has been greatly reduced by *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968), made restrospective and applicable to the states by *Roberts v. Russell*, 392 U.S. 293, 88 S.Ct. 1921, 20 L.Ed. 2d 1100 (1968). In *Bruton*, the United States Supreme Court found that the common practice of admitting in a joint trial the confession of one defendant which inculpated a codefendant, with a caution that it was to be used only against the confessor, violated the codefendant's constitutional right to be confronted with the witnesses against himself. Since *Bruton*, the prosecutor who wishes to use the confession of one defendant is generally faced with the alternatives of deleting all references to the codefendant from the confession or else of trying the defendants separately, see A.B.A. Standard for Criminal Justice, Joinder and Severance § 2.3(a) (Approved Draft, 1968).

The alternative of deleting references may present problems. With the run-of-the-mill confession can all risk of prejudice to the nonconfessing defendant be eliminated by any means short of amending the confession to make it appear that the defendant acted alone or with named persons other than the codefendant? So drastic an amendment may be unfair to the Commonwealth or even to the confessing defendant. Less extreme measures would be to require that the codefendant's name be masked or replaced by "John Doe". The Committee expresses no opinion on whether such measures would ordinarily satisfy the *Bruton* doctrine. If the court does admit a confession with deletions or amendments which conceivably might lead the jury to speculate about the original text, the court should give the above instruction.

There are qualifications to the *Bruton* rule pursuant to which a defendant's confession may be admitted in unexpurgated form even though it plainly implicates a codefendant. The *Bruton* prohibition does not apply if the confessing defendant takes the stand and is subject to cross-examination on his confession by the codefendant. In that case there is no denial of the codefendant's constitutional right of confrontation, see *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930 (1970); *Comm. v. Poteet*, 434 Pa. 230, 253 A.2d 246 (1969); *cf. Comm. v. Cheeks*, 429 Pa. 89, 239 A.2d 793 (1968). Nor does the *Bruton* prohibition apply if the confessing defendant takes the stand, denies making the alleged confession and proceeds to testify concerning the underlying facts in a manner favorable to his codefendant, *Nelson v. O'Neil*, 91 S.Ct. 1723. The above instruction will be necessary in such cases.

On joinder and severance of defendants generally see P.L.E. *Criminal Law* § 442-3 (1970).

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