

#### **4.20 *Bruton*: A Defendant's Statement Implicating Codefendant**

**(1) In a joint trial of codefendants accused of committing a crime, a statement of a nontestifying defendant implicating a codefendant in the commission of the crime is, as to the codefendant, hearsay, and, except as provided in subdivision two, under the Sixth Amendment's Confrontation Clause or New York common law, it is error to introduce the hearsay statement of a nontestifying defendant that inculcates a codefendant in the crime even if the jury is given a limiting instruction to disregard the inculpatory, hearsay statement of the defendant, and even if the codefendant's own statement is admitted and recites essentially the same facts the nontestifying defendant recites.**

**(2) In a joint trial of defendants, a statement of a defendant implicating a codefendant is admissible when the statement(s) meet the requirements of the exception for hearsay statements of a coconspirator (Guide to NY Evid rule 8.09).**

**(3) The remedies for an anticipated introduction of a nontestifying defendant's statement against a codefendant include: (a) the prosecution may forego use of the defendant's statement; (b) separate trials; (c) a single trial, with a jury for each defendant, albeit multiple juries are the exception, not the rule, and are to be used sparingly; and (d) redaction of references to the codefendant may be made in the defendant's statement pursuant to subdivision four.**

**(4) In a joint trial, a statement of a defendant that does not implicate a codefendant is admissible against the defendant, with an appropriate limiting instruction that the statement is admitted only against the defendant; accordingly, in a joint trial a statement of a nontestifying defendant that implicates a codefendant is admissible if the portions implicating**

**the codefendant are effectively redacted without prejudice to the defendant or codefendant. The defendant is prejudiced when portions of the statement that are exculpatory or would otherwise support the defense are redacted. The codefendant is prejudiced when the redaction allows for the identification of the codefendant in the defendant's incriminating statement. The burden of effective redaction rests heavily upon the prosecution.**

**(5) A motion to sever defendants for trial or at a joint trial, an objection to the introduction of a defendant's statement inculcating a codefendant preserves an appellate challenge as a matter of law to the correctness of a decision denying severance or admitting the codefendant's statement whether in redacted form or not.**

#### **Note**

**Subdivision (1)** summarizes the holding of *Bruton v United States* (391 US 123, 137 [1968]), and includes the holding of *Cruz v New York* (481 US 186, 190 [1987]) that the nontestifying codefendant's statement is inadmissible even though the defendant who was implicated in the codefendant's statement also made a statement that "recited essentially the same facts" as those of the nontestifying codefendant. If, however, the defendant who is implicated in the codefendant's statement fully "adopted" the codefendant's statement as his or her own, then both statements are admissible with proper instructions. (*People v Woodward*, 50 NY2d 922, 923 [1980] [the defendant adopted the codefendant's statement when, after the police read the codefendant's statement to him, he said "Yes, that is what happened".]) The *Woodward* jury was "advised that [the codefendant's] statement was only 'binding' upon him, and therefore, would not have used it with respect to defendant unless they found that he had in fact adopted it as his own." (*Id.*) "Even at a separate trial, [*Woodward* noted], the [codefendant's] statement would have been admissible since the jury could find that [the defendant] had adopted it as his own." (*Id.*; see Guide to NY Evid [GNYE] rule 8.05, Admission by Adopted Statement [rev June 2022].)

As stated in the rule's definition, *Bruton* applies to a statement of a "nontestifying" defendant implicating a codefendant in the commission of the

crime. *Bruton*'s exclusionary rule is not violated when the defendant who made a statement inculcating a codefendant testifies at the joint trial. (*People v Anthony*, 24 NY2d 696, 702-703 [1969] ["*Bruton* was directed at extrajudicial statements not subject to cross-examination by the defendant who is implicated by them and the evil sought to be obviated by *Bruton* is not present where the codefendant who made the statement takes the stand and thereby provides the defendant with the opportunity to exercise his Sixth Amendment right to confrontation"]; *People v Griffin*, 48 NY2d 998, 1000 [1980] [any objection to the denial of a motion to sever "was obviated when the codefendant testified"]; see *Nelson v O'Neil*, 402 US 622, 629-630 [1971] ["where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments"].) An opportunity to cross-examine the codefendant at a pretrial suppression hearing or preliminary hearing does not suffice to warrant the introduction at a joint trial of the codefendant's statement inculcating a defendant. (*People v Rosario*, 51 NY2d 889, 890 [1980] [suppression hearing]; *People v Berzups*, 49 NY2d 417, 426 [1980] [preliminary hearing].)

**Subdivision (2)**, allowing for the introduction of coconspirator statements in a joint trial of codefendants, embodies the holdings of *United States v Nixon* (418 US 683, 701 [1974] ["Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy"]); *Dutton v Evans* (400 US 74 [1970]); and *People v Rastelli* (37 NY2d 240, 242-245 [1975]) (see GNYE rule 8.09, Coconspirator Statement).

**Subdivision (3)** is derived from *People v Ricardo B.* (73 NY2d 228, 234-235 [1989]), which explained:

"Customarily, when a court is presented with a *Bruton* problem because of inculpatory out-of-court statements by one or both codefendants, it has the option of (1) deleting references to the codefendant in the statement, (2) seeking the consent of the People to a joint trial without the evidence or (3) ordering separate trials . . .

"It should be clear, however, that multiple juries are the exception, not the rule . . . Multiple juries are to be used sparingly and then only

after a full consideration of the impact the procedure will have on the defendants' due process rights and after thorough precautions have been taken to protect those rights.”

(*See Krivoi v Chappius*, 573 F Supp 3d 816, 829 n 7 [ED NY 2021] [“It remains nothing less than astonishing that after undergoing the extensive precaution of holding trial before two juries, the State elicited, and the trial court permitted over defense objection, . . . testimony in seeming violation of Petitioner’s Confrontation Clause rights”], *affd* 2022 WL 17481816, 2022 US App LEXIS 33634 [2d Cir, Dec. 7, 2022, 21-2934-pr]; *cf. People v Warren*, 20 NY3d 393 [2013] [in a simultaneous trial of codefendants, one before a jury and the other before the court, the court erred when it denied the application of the defendant being tried before a jury to have the testimony of the defendant being tried by the court to be given outside the presence of the jury].)

**Subdivision (4)** allows for the admission of a nontestifying defendant’s statement that implicates a codefendant in the crime if the statement can be redacted “without prejudice to declarant or nondeclarant” (*People v Boone*, 22 NY2d 476, 486 [1968]). And “the burden of ‘effectively redacting is one which rests heavily upon the prosecution’ (*People v Boone*, 22 NY2d 476, 486)” (*People v Smalls*, 55 NY2d 407, 416 [1982]).

The series of Court of Appeals cases detailing flawed redactions begins with *People v La Belle* (18 NY2d 405, 410 [1966]), decided more than a year before *Bruton*. In *La Belle*, the Court determined that a redaction of the declarant’s statement was flawed because the remaining portions of the statement “not only eliminated prejudicial reference to [the codefendant] but also eliminated those portions of the statement tending to exculpate [the declarant]” (*id.*). Subsequently, in *People v Mahboubian* (74 NY2d 174 [1989]), the Court added that the redacted words need not be “ ‘exculpatory’ [of the declarant] in the strictest sense,” to warrant a finding that the declarant was prejudiced by a redaction that harmed the declarant’s defense. (*Mahboubian* at 188 [the redacted words “supported” the declarant’s defense “and if believed, it explained much of the evidence against him”].)

While redaction of a codefendant’s statement may appear sufficient on the face of the statement, events at trial, including a “slip-of-the-tongue” reference to the defendant as the person referred to in the codefendant statement, can nullify the purpose of redaction (*People v Lopez*, 68 NY2d 683, 685 [1986]). In *People v Burrelle* (21 NY2d 265, 269 [1967]), a case also decided before *Bruton*, the Court found that

“whatever protection from prejudice” the redaction (substituting “X” for an implicated defendant) provided, it “was vitiated by the testimony of an assistant district attorney and two police officers who, in testifying as to the taking of these statements, recounted how ‘Fats’, ‘Slim’ and ‘Shorty’ [the nicknames of the defendants that appeared to match their build] were implicated in the crime by the various declarants [and] the persons referred to initially as ‘X’ were now unmistakably identifiable to the jury.”

Similarly, in *People v Jackson* (22 NY2d 446, 449-450 [1968]) an “attempted redaction [substituting a letter of the alphabet for each codefendant implicated in the statement] proved a monumental failure. There were frequent and blatant lapses not only during the taking of the testimony but in the court’s own instructions [in apparently marshalling the evidence]. In point of fact, one of the witnesses, on cross-examination by [one defendant’s] counsel, identified ‘X’ as the defendant Jackson. Thus, the name of each defendant and the letter assigned to him were so interchanged as to make it perfectly plain to the jurors [who the letters stood for].” (*Accord People v Baker*, 23 NY2d 307, 318 [1968] [redaction (by substitution of letter “X”) was flawed in that it “was a simple matter for the jury” to determine who the “X” was]; *People v Wheeler*, 62 NY2d 867, 869 [1984] [redaction of the defendant’s name and the substitution of “(deletion)” was insufficient: “Given that the two brothers (the defendants) were being tried for the crime together, we believe the confession could only be read by the jury as inculcating defendant”].)

The Supreme Court first addressed the question of redaction in 1987 in *Richardson v Marsh* (481 US 200 [1987]). There the defendant’s “confession was redacted to omit all reference to [the codefendant]—indeed, to omit all indication that *anyone* other than [a codefendant who was not on trial] and [the declarant] participated in the crime.” (*Richardson* at 203.) The Court held that irrespective of whether the codefendant was “linked to the confession by evidence properly admitted against him at trial,” the “Confrontation Clause is not violated by the admission of a nontestifying codefendant’s confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant’s name, but any reference to his or her existence.” (*Id.* at 202, 211.)

*Richardson* left unanswered the question of the validity of a redaction that replaced the name of the codefendant “with a symbol or neutral pronoun” (*Richardson* at 211 n 5). Years later, *Gray v Maryland* (523 US 185 [1998]) addressed that question. In *Gray*, the defendant’s confession was redacted “by substituting for the [codefendant’s] name in the confession a blank space or the

word ‘deleted’ ” (*Gray* at 188). The Court believed “that, considered as a class, redactions that replace a proper name with an obvious blank, the word ‘delete,’ a symbol, or similarly notify the jury that a name has been deleted are similar enough to *Bruton*’s unredacted confessions as to warrant the same legal results” (*Gray* at 195). In *Gray*’s words: “the redacted confession with the blank prominent on its face . . . ‘*facially* incriminat[es]’ the codefendant” (*id.* at 196, quoting *Richardson* at 209).

In 2016, in *People v Ceden*o (27 NY3d 110, 119-121 [2016]), the Court of Appeals considered *Richardson* and *Gray*:

“This Court’s decision in *People v Wheeler* (62 NY2d 867 [1984]) . . . anticipated both *Gray* and *Richardson*. In *Wheeler*, we recognized—as did the Supreme Court in *Richardson*—that, if a codefendant’s ‘confession . . . can be effectively redacted so that the jury would not interpret its admissions as incriminating the nonconfessing defendant, it may be utilized at the joint trial’ (*Wheeler*, 62 NY2d at 869). Further, as in *Gray*, we held that merely replacing a defendant’s name with the word ‘deletion’ is not an effective redaction that would render admissible a codefendant’s statement implicating a defendant (*see id.* at 869).”

On its facts, the written statement in *Ceden*o which “simply replaced with a large blank space” the “identifying description of defendant” was “not effectively redacted . . . Rather, the statement, with large, blank [spaces] prominent on its face, . . . *facially* incriminat[ed] a codefendant because it involve[d] inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial.” (*Ceden*o at 120 [internal quotation marks and citations omitted].)

In 2023, a divided Supreme Court, in *Samia v United States* (599 US 635 [2023]), expanded the type of redactions that were permissible. In that case, the defendant’s confession which implicated Samia was redacted to substitute “other person” for Samia’s name. The majority believed that, with a limiting instruction, the substitution of “other person” sufficiently sanitized the confession’s inculpation of Samia, unlike, they opined, the substitution of a “blank” space or the word “deleted” that was disapproved in *Gray*. To the dissenters, “that distinction makes nonsense of the *Bruton* rule. *Bruton*’s application has always turned on a confession’s inculpatory impact.” (*Samia*, 599 US at 663 [Kagan, J., dissenting].) *Samia* allows confessions that “replace a defendant’s name with another placeholder . . . no matter how obvious the reference to the defendant.” (*Id.* at 659 [Kagan, J., dissenting].)

New York’s law of evidence, before *Bruton*, beginning with *La Belle*, was concerned with an effective redaction that did not prejudice the declarant or the person inculcated in the crime. (Cf. John M. Leventhal, *Is Bruton on Life Support in the Aftermath of Crawford v. Washington?*, 43 Am J of Crim L 1, 17 [Fall 2015] [“non-testimonial statements are no longer subject to Confrontation Clause scrutiny, and post-*Crawford* decisions have not applied *Bruton* to non-testimonial statements,” leaving the admissibility of an out-of-court declaration (e.g. to a civilian in a social setting) to a state’s rules of evidence].)

It thus remains to be determined whether New York’s law of evidence, via the Confrontation Clause in the State’s constitution (NY Const, art I, § 6) or in Civil Rights Law § 12, will continue on that path and not allow the substitution of a placeholder, such as “other person” that plainly points the finger at the defendant sitting at the defense table with the declarant of the confession. (See Barry Kamins, *Is ‘Bruton v. United States’ on Life Support in the Aftermath of ‘Samia’?*, NYLJ, July 31, 2023 [“Clearly, the New York Court of Appeals has taken a different view of what constitutes a confession that ‘directly implicates’ a defendant. As a result, it could be argued that New York might reject the analysis found in *Samia*. In the past, the Court of Appeals has interpreted the state Constitution to afford more protection to individual rights than that given by the federal Constitution”]; e.g. *People v Griminger*, 71 NY2d 635, 639 [1988] [“We are not persuaded . . . that the (Supreme Court’s turnabout in the criteria for evaluating hearsay information from an undisclosed informant in the determination of probable cause for a search warrant) provides a sufficient measure of protection”].)

Until the Court of Appeals decides the future direction of New York’s law, this rule reflects the law of New York, as decided by the Court of Appeals before the Supreme Court’s decision in *Samia*.

**Subdivision (5)** sets forth the rule of preservation with respect to an alleged violation of *Bruton* and its progeny. In a judgment rendered before the *Bruton* decision (May 20, 1968), a *Bruton* error could not be ignored because of the failure to object. (*People v Baker*, 23 NY2d 307, 317 [1968] [the *Bruton* error cannot be ignored “since in this pre-*Bruton* case their admission under limiting instructions was proper”].)

Since the date of the decision of *Bruton*, a motion to sever defendants for trial, or an objection to the introduction at a joint trial of a codefendant’s statement inculcating a defendant preserves, as a matter of law, an appellate challenge to the correctness of a decision denying a severance or admitting the codefendant’s statement. (*People v Boone*,

22 NY2d 476, 485 [1968] [“Boone’s motion for a severance saved the question for review”]; *People v Johnson*, 27 NY3d 60, 67 [2016] [a *Bruton* issue was presented as a question of law given that “defense counsel,” as reported in the Appellate Division opinion (123 AD3d 573, 576 [1st Dept 2014]), made a “timely application for preclusion of the codefendant’s grand jury testimony, deletion of all references to defendant, or a severance”]; *People v Smalls*, 55 NY2d 407 [1982] [“where the defendant moved for a severance on the precise basis that he would be prejudiced by the admission of a codefendant’s confession, and the motion is denied because prejudice to defendant can, in the court’s view, be avoided by redaction, and counsel, though participating in the redaction process, continues to object to the entire procedure, we cannot say that the defect has been waived”]; *cf. People v Fernandez*, 72 NY2d 827 [1988] [a claimed *Bruton* error was not preserved as a matter of law for appellate review, citing the statute (CPL 470.05 [2]) that requires a “protest”].)

On appellate review, a *Bruton* error is subject to determination of whether the error was harmless beyond a reasonable doubt (*Harrington v California*, 395 US 250 [1969]; *Brown v United States*, 411 US 223 [1973]; *People v Faust*, 73 NY2d 828, 829 [1988]).