People v. Washington, An Important Confrontation Case

By: Dana Grimes, CASD President

"Once partners in crime recognize that the 'jig is up,' they tend to lose any identity of interest and immediately become antagonists, rather than accomplices."- *Lee v. Illinois* (1986) 476 U.S. 530, *544-45.

In criminal trials, the issue of the out of court admissions and confessions of codefendants comes up frequently… and more frequently the more codefendants there are. As Justice Scalia pointed out in *Richardson v. Marsh*, "…indeed the probability of confession increases with the number of participants, since each has a reduced assurance that he will be protected by his own silence." (1987) 481 U.S. 200, *209-10.

Under the Aranda/Bruton doctrine, a trial court may not allow a jury in a joint criminal trial of a defendant and codefendant to hear the unredacted confession of the codefendant that also directly implicates the defendant, even if the jury is instructed not to consider the confession as evidence against the defendant. (*People v. Aranda* (1965) 63 Cal.2d 518, **529-531, abrogated in part by Ca. Const., art. I, §28, subd. (d); *Bruton v. United States* (1968) 391 U.S. 123, **128-136.)

There are three main reasons for the Aranda/Bruton caselaw. First, statements by one defendant that incriminate another are thought to be unreliable because of the strong incentive to shift blame. Second, despite their questionable reliability, a jury tends to over-value statements by a codefendant. Third, and most important, a defendant who is incriminated by a codefendant's statement will be unable to confront and cross-examine the codefendant because the codefendant has the right to remain silent at his own trial.

Since the decision of *People v. Aranda*, (1965) 63 Cal.2d 518, almost all such statements are excluded from evidence. *People v. Washington*, (2017) 15 Cal. App. 5th 19, changes that. With the ability to use such statements in court, DAs will file charges in some cases where a statement by a co-defendant provides needed evidentiary support. In other words, as USD Professor Shaun Martin puts it, *Washington* is "an opinion that decides to ditch a central constitutional principle that's stood for over half a century."

Facts of People v. Washington

At midnight on a Saturday night in November 2014, defendant Michael Shane Washington walked into the Avalon Gardens housing complex in Los Angeles, knocked on the door of an apartment, asked the 20-year-old man who answered, "Where you from?," and when the man responded, "Avalon," defendant shot him through the chest and killed him.

Defendant was at the time a member of the 89 Family Swans street gang, which is affiliated with the Bloods. The Avalon Gardens Crips gang claimed the Avalon Gardens housing complex as its territory, and the victim's response to defendant's question indicated that the victim was aligned with the Avalon Gardens Crips. The 89 Family Swans and the Avalon Gardens Crips are rivals.

Defendant was with two others, Keon Scott and Kevin Kendricks, at the time of the shooting. Scott and Kendrick were members of the West Side Piru street gang, which is a Bloods street gang allied with the 89 Family Swans.

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Defendant Washington, who went by the name Shaggy, was arrested minutes after the shooting while fleeing from the Avalon Gardens housing complex. He was wearing red shorts, a color affiliated with the Bloods street gang. He was also carrying a gun with cartridges that matched the cartridge found near the victim's body.

Scott and Kendricks were also arrested soon after the shooting and were placed in the same jail cell along with a hidden recording device. During the 55 hours they were in the cell, they made several statements implicating themselves and defendant in the shooting: At one point, Kendricks said, "That n***a said, 'Blood, where you from?' He said, 'I'm from Avalon'"; in another exchange, Scott asked, "Did you even see where he hit them though?" and Kendricks responded, "In the chest." Scott commented, "like I ain't trying to throw Shaggy under the bus like that, but he threw his self under the bus."

The trial court admitted snippets of the jailhouse recordings of Scott's and Kendrick's conversation, but only against Scott and Kendricks; the court expressly instructed the jury not to consider the recordings against defendant Washington.

Defendant took the stand in his own defense. Contradicting his post arrest statement, defendant testified that he had traveled to Los Angeles with Scott and Kendricks to see if he could stay with his cousin; that he brought the gun with him; that the three of them went to the Avalon Gardens housing complex to buy marijuana; that a 20-year-old man was on one apartment's porch; he asked the man, "Where you from?"; that the 20-year-old man became "very aggressive" when Scott and Kendricks rounded a corner and came into view; and that defendant responded by firing off a single shot in a random direction as he fled.

The court instructed the jury on first and second degree murder, on voluntary manslaughter due to imperfect self-defense, and on perfect self-defense. The jury convicted defendant of first degree murder and found true all of the firearm and gang allegations.

The trial court sentenced defendant Washington to prison for 51 years to life. The court imposed a base sentence of 25 years to life for first degree murder, plus an additional 25 years to life for the firearm enhancement, plus one additional year for the prior prison term.

Summary of Ruling in *People v. Washington*

(internal citations omitted)

> ***Unless the codefendant testifies and is subject to cross-examination, the admission of the codefendant's unredacted confession at the joint trial violates the defendant's Sixth Amendment right to confront***

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and cross-examine witnesses. (*Bruton*, at **128-136; *Aranda*, at **529-531.) Has the United States Supreme Court's subsequent narrowing of the Sixth Amendment right to confront and cross-examine witnesses to protect against only "testimonial" statements – as accomplished in *Crawford v. Washington* (2004) 541 U.S. 36 (Crawford) and its progeny—also narrowed the Aranda/Bruton doctrine? We hold that the answer is "yes." We further hold that the admission of the codefendant's unredacted confession with an appropriate limiting instruction does not violate due process… Consequently, we affirm defendant's murder conviction in this case.

…

The Aranda/Bruton doctrine rests exclusively on the Sixth Amendment. *Bruton* itself is grounded on the confrontation clause alone. *Aranda* itself did not view its rule "as constitutionally compelled," but rather as a "judicially declared rule of practice to implement section 1098." However, the voters' enactment in 1982 of the "truth-in-evidence" provision of Proposition 8 overturned all judicially crafted exclusionary rules not compelled by federal constitutional law and, in so doing, abrogated *Aranda*.

….

Both *Bruton* and *Aranda* flirted with the notion that admitting a codefendant's confession under these circumstances might be a denial of due process, but neither case ultimately relied upon due process.

…

The Sixth Amendment right to confront and cross-examine witnesses has evolved since the Aranda/Bruton doctrine came into being. For many years, the confrontation clause barred the admission of any out-of-court statement admitted for its truth if the hearsay declarant was not available for cross-examination, unless the statement bore "adequate 'indicia of reliability'"—that is, unless (1) the evidence fell within a "firmly rooted hearsay exception," or (2) the evidence otherwise had "particularized guarantees of trustworthiness." *Crawford* dramatically reshaped the confrontation clause: It narrowed the clause's reach from all out-of-court statements admitted for their truth to only those out-of-court statements that qualify as "testimonial," but completely barred the admission of such testimonial statements - irrespective of their reliability - absent the defendant's current or prior opportunity to cross-examine the declarant.

The jailhouse conversation between Scott and Kendricks qualifies as nontestimonial under Crawford and its progeny. Whether an out-of-court statement is testimonial turns on whether the "objective evidence" indicates that the statement was obtained for the "primary purpose" of "establishing or proving past events potentially relevant to later criminal prosecution." Under this definition, "statements from one prisoner to another" or "made unwittingly to a government informant" are not testimonial. This case therefore squarely presents the question: Did Crawford's narrowing the reach of the confrontation

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clause have the effect of narrowing the reach of the Aranda/Bruton doctrine?

People v. Washington says yes.

Does *Crawford v. Washington* really support this ruling?

Maybe, maybe not. *Crawford* was decided in 2004. It was written by the late Justice Scalia. As he was fond of doing in his opinions, Justice Scalia went deep into English history to find support for his conclusions. In *Crawford*, he gave historical examples of the need for confrontation, including the execution in 1603 of Sir Walter Raleigh, who was convicted of treason on the basis of a hearsay witness whom he did not have the opportunity to confront. (Raleigh, who defended himself, said, "[Let] my accuser come face to face, and be deposed. Were the case but for a small copyhold, you would have witnesses or good proof to lead the jury to a verdict; and I am here for my life!")

Rehnquist and O'Connor dissented from the core holdings in *Crawford* about testimonial evidence being the basis for Confrontation Clause analysis. Both of these justices are gone, and all 9 current justices are bound by *Crawford* (unless they decide to uproot or prune it.) When this issue gets back in front of the Supremes, there is going to be a lot of argument that even if the confrontation clause does not exclude hearsay statements of codefendants, they are excluded on due process grounds. Some may argue that this is legal hair splitting, but it is not. Do not underestimate the protection of federal due process.

Advice for Trial Counsel

The California Supreme Court has denied review. We do not know whether the appellate attorney has filed for cert, but it is likely that the California Supreme Court, SCOTUS, or both, will weigh in at some point. But it may take a while. In the meantime, trial counsel should preserve the issue.

Appellate lawyer George Schraer recommends we consider the following:

1. Argue that although the statement falls within hearsay exceptions as to the declarant, it is inadmissible against the non-declarant because those exceptions do not apply to him/her.

2. Ask for severance so that the non-declarant's trial is not tainted by the declarant's statement.

3. Ask for a joint trial with separate juries so that the jury deciding the non-declarant's fate does not hear the declarant's statement.

4. Ask for redaction of the statement sufficient to avoid the jury possibly using it against the non-declarant.

5. Draft a limiting instruction telling the jury the statement is to be used only against the declarant and not against the non-declarant.

6. Argue that use of the statement denied the defendant a fair trial and due process.

George Schraer also notes that the underlying rationale of *Bruton* is that a limiting instruction is sometimes ineffective in eliminating prejudice against a non-declarant. It is unclear the extent to which this pragmatic concern factors into a confrontation clause analysis. But *Bruton* suggests it does. If that is true, it is possible courts may consider *Bruton* to be a *sui generis* rule that properly applies confrontation clause considerations in a narrow setting. **TBN**