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A CONFRONTATION CLAUSE CONUNDRUM: RESOLVING THE CIRCUIT SPLIT OVER PRESERVATION OF *BRUTON* ISSUES FOR APPEAL

Jake Morrison*

INTRODUCTION

The Sixth Amendment's Confrontation Clause guarantees the right of the accused, in all criminal prosecutions, "to be confronted with the witnesses against him."[1] As the Supreme Court has repeatedly recognized, the primary interest secured by this clause is the right of the accused to cross-examine witnesses.[2] However, interesting problems arise in the context of cases involving multiple defendants. In many multi-defendant cases, one of the defendants will have made incriminating statements that the government would like to introduce at the joint trial, and incriminating statements made by one defendant will often have the ancillary effect of also incriminating the other defendants in the case. Furthermore, because of the Fifth Amendment's protection against compulsory self-incrimination, the defendant who made the incriminating statement cannot be compelled by his co-defendant(s) to take the stand and subject himself or herself to cross examination probing the reliability of the statement.[3]

In *Bruton v. United States*, the Supreme Court reversed a defendant's conviction because the government had introduced a co-defendant's confession at

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[1] U.S. CONST. amend. VI.

[2] *See, e.g.*, Douglas v. Alabama, 380 U.S. 415, 418 (1965).

[3] U.S. CONST. amend. V.

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their joint trial.[4] The Court held that the Confrontation Clause is violated by the introduction of an incriminating out-of-court statement by a non-testifying co-defendant, even if the court gives a limiting instruction that the jury may consider the statement only against the declarant.[5] Such an instruction, the Court held, was not an "adequate substitute for petitioner's constitutional right of cross-examination" under the Sixth Amendment.[6] Citing *Bruton*, defendants now often move to sever their trials from those of their co-defendants on the grounds that the government's plan to offer a co-defendant's incriminating statement at trial will violate the holding of *Bruton* and their rights under the Confrontation Clause.[7] In many cases, courts have denied motions to sever after the government offers to redact portions of a defendant's statement which tend to incriminate his or her co-defendant(s).[8]

The standards used for evaluating whether a proposed redaction is sufficient to remedy any Confrontation Clause concerns are fairly well-established.[9] But the circuits have split on the separate procedural question of whether a defendant's initial motion to sever is sufficient to preserve a substantive *Bruton* objection for appeal if defense counsel fails to subsequently re-object to the admission of the statement at trial.[10] In this Note, I analyze whether a pre-trial motion to sever should be sufficient to preserve *Bruton* objections for appeal. I argue that historical, jurisprudential, and policy considerations support the argument that a motion to sever under *Bruton* should be sufficient to preserve the substantive issue for appeal, provided the trial court "categorically denies" the motion to sever based on a conclusion that the statement in question is not incriminating.

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[4] Bruton v. United States, 391 U.S. 123, 137 (1968).

[5] *Id.*; *see also* United States v. Ford, 761 F.3d 641, 652 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 771 (2014).

[6] *Bruton*, 391 U.S. at 137.

[7] *See, e.g.*, United States v. McLaughlin, No. 3:CR-12-0179, 2013 WL 996266, at *1 (M.D. Pa. Mar. 13, 2013).

[8] *See, e.g.*, Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 HOUS. L. REV. 1003, 1072 (2003) ("[I]n order to satisfy the *Bruton* Confrontation Clause concerns, a confession of one defendant offered at a joint trial must not indicate in any way that there were other actors in the criminal enterprise who may now be on trial.").

[9] *See, e.g.*, *Ford*, 761 F.3d at 654.

[10] *Id.* at 653 (stating that the circuits that have considered whether a motion to sever preserves a *Bruton* objection have split on the answer).

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I. THE HISTORY OF *BRUTON* AND THE CONFRONTATION CLAUSE

Before analyzing the narrow issue of preserving *Bruton* objections for appeal, it is important to understand the relevant history underpinning *Bruton* and the Court's Confrontation Clause jurisprudence. As the Supreme Court noted in *Crawford v. Washington*, the chief evil which the Confrontation Clause was adopted to address was the civil-law practice, partially adopted in England, of allowing statements obtained from pre-trial, *ex parte* examinations of witnesses to be read into evidence against the accused without the opportunity for cross-examination at trial.[11] With the Confrontation Clause, the framers sought to bring the American judicial system in line with the common law tradition of live testimony in an adversarial setting and reject the civil law practice of *ex parte* examination by judicial officials.[12] As a result, the right to cross-examine witnesses has traditionally been viewed as the core protection afforded by the Sixth Amendment.[13]

In the context of multi-defendant trials and the admissibility of incriminating statements made by co-defendants, courts have had to wrestle with additional considerations about how to apply the protections of the Confrontation Clause. Generally speaking, statements made by defendants and their co-conspirators are, under Federal Rule of Evidence 801(d)(2)(E), not excluded by the hearsay rule.[14] The more difficult question for the courts has been determining if and when the Confrontation Clause would be violated by the admission of a co-defendant's incriminating statement at a joint trial with his or her co-defendants when the statement was not made in the "furtherance of a conspiracy."[15] Most commonly, this scenario has arisen in cases involving one defendant's confession to police after the crime has been completed and the conspiracy has been terminated. The primary questions in these situations are (1) whether that statement can be used at a joint trial against several defendants where the statement may incriminate the other defendant(s), and (2) whether the Fifth Amendment can be invoked by the declarant-

[11] Crawford v. Washington, 541 U.S. 36, 50 (2004).

[12] *See id.* at 43; *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *373–74 (explaining the benefits of live testimony in the presence of a judge).

[13] *See* Douglas v. Alabama, 380 U.S. 415, 418 (1965).

[14] FED. R. EVID. 801(d)(2)(E).

[15] *Id.*

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defendant to deny his or her co-defendant an opportunity to cross-examine him or her.

In 1957, the Supreme Court addressed the admissibility of any such evidence directly in *Delli Paoli v. United States*.[16] In *Delli Paoli*, five co-defendants were convicted of unlawfully distributing alcohol in unstamped containers in order to avoid paying taxes.[17] At trial, the government sought to introduce a confession by one of the defendants, given to police in the presence of his attorney after the termination of the conspiracy.[18] By this point, the Supreme Court had already decided that a statement made by a co-conspirator after a conspiracy had terminated was *not* admissible against his or her co-defendant under Federal Rule of Evidence 801(d)(2)(D)—the hearsay exception for statements "made by the party's agent or employee on a matter within the scope of that relationship and while it existed."[19] But in *Delli Paoli*, the Court asked whether the evidence could be introduced against the defendant *who made the statement* at a joint trial, with a limiting instruction directing the jury to not consider the confession as evidence against his or her co-defendant(s).[20] The Court concluded that it could, so long as it was offered only against the declarant and the limiting instruction was given.[21] Explaining its decision, the Court wrote that, "[u]nless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense."[22]

However, in 1965, the Court decided two cases that laid the foundation for overruling *Delli Paoli*. First, in *Pointer v. Texas*, a case addressing the question of whether the Confrontation Clause should be incorporated against the States via the Fourteenth Amendment, the Court made clear that the right to cross-examination was

[16] Delli Paoli v. United States, 352 U.S. 232 (1957).

[17] *Id.* at 233.

[18] *Id.*

[19] FED. R. EVID. 801(d)(2)(D); *see Delli Paoli*, 352 U.S. at 237 (citations omitted); Krulewitch v. United States, 336 U.S. 440, 442–43 (1949).

[20] *Delli Paoli*, 352 U.S. at 237.

[21] *Id.*

[22] *Id.* at 242.

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an integral part of the rights guaranteed by the Confrontation Clause.[23] In *Pointer*, the victim in a robbery case had moved to California and became unavailable prior to the defendants' trial.[24] The prosecution provided evidence that the victim had moved and did not intend to return, and then, over defense objections, entered into evidence the transcript of the victim's previous testimony at the preliminary hearing.[25] The two defendants had represented themselves at the hearing, and only one of them had made any attempt to cross-examine the victim.[26] Overturning their convictions, the Court held that the "right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment."[27] The Court then determined that the right to confront witnesses against oneself necessarily included the right to cross-examine those witnesses.[28] Accordingly, it held that the introduction of the victim's preliminary hearing transcript violated that right in this case.[29]

Furthermore, in *Douglas v. State of Alabama*, the Court addressed the question of whether the Confrontation Clause was violated when a prosecutor called an alleged co-conspirator as a hostile witness in the defendant's trial and, as the co-conspirator repeatedly invoked the Fifth Amendment, proceeded to read the witness' prior incriminating statements aloud under the "guise of cross-examination to refresh [his] recollection."[30] Because the witness was invoking his right against self-incrimination, the defense was effectively unable to question him.[31] The Court found

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[23] Pointer v. Texas, 380 U.S. 400, 403 (1965).

[24] *Id.* at 401.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 403.

[28] *Id.* at 404 ("It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him.").

[29] *Id.* at 406 ("Under this Court's prior decisions, the Sixth Amendment's guarantee of confrontation and cross-examination was unquestionably denied petitioner in this case.").

[30] Douglas v. Alabama, 380 U.S. 415, 416–17 (1965) ("Under the guise of cross-examination to refresh Loyd's recollection, the Solicitor purported to read from the document, pausing after every few sentences to ask Loyd, in the presence of the jury, 'Did you make that statement?' Each time, Loyd asserted the privilege and refused to answer, but the Solicitor continued this form of questioning until the entire document had been read. The Solicitor then called three law enforcement officers who identified the document as embodying a confession made and signed by Loyd. Although marked as an exhibit for identification, the document was not offered in evidence.").

[31] *Id.*

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that the defendant's inability to question the witness "plainly denied him the right of cross-examination secured by the Confrontation Clause."[32] Like *Pointer*, the holding in *Douglas* underscored the fact that cross-examination was an integral element of the "confrontation" guaranteed by the Constitution.[33]

Having established that the Confrontation Clause required that a defendant be given the opportunity to cross-examine each and every adverse witness, the Court revisited the holding of *Delli Paoli* in *Bruton v. United States*.[34] *Bruton* involved the conviction of two men, Bruton and Evans, at a joint trial for armed postal robbery.[35] In compliance with *Delli Paoli*, the trial court allowed prosecutors to use Evans' confessions as substantive evidence against him, with a limiting instruction given to the jury directing that Evans' confessions were not to be considered as substantive evidence against Bruton.[36] Both men appealed their convictions to the Eighth Circuit, which reversed Evans' conviction on the grounds that his confession had been improperly admitted into evidence.[37] But the same court affirmed Bruton's conviction because the trial court had instructed the jury to disregard Evans' confession when deciding Bruton's guilt.[38] The Supreme Court granted certiorari to reconsider *Delli Paoli* and overruled it in a decision authored by Justice Brennan.[39] Quoting Justice Frankfurter's dissent in *Delli Paoli*, the Court declared that "[t]he [g]overnment should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds."[40] Because the Court did not believe a jury could effectively disregard Evans' confession when considering Bruton's guilt, and because Bruton could not compel Evans to subject himself to cross-examination about the truth or reliability of the confession, it held that Bruton had been denied

[32] *Id.* at 419.

[33] *Id.* at 420 ("Hence, effective confrontation of Loyd was possible only if Loyd affirmed the statement as his. However, Loyd did not do so, but relied on his privilege to refuse to answer.").

[34] Bruton v. United States, 391 U.S. 123 (1968).

[35] *Id.* at 124.

[36] *Id.* at 124–25.

[37] *Id.*

[38] *Id.* at 124.

[39] *Id.* at 126.

[40] *Id.* at 129 (quoting Delli Paoli v. United States, 352 U.S. 232 (1957) (Frankfurter, J., dissenting)).

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his Sixth Amendment right to confront the witnesses against him.[41] In other words, the Court held that the rule which had been established in *Delli Paoli* did not effectively guard Bruton against having the words of his co-defendant used against him without an opportunity for cross-examination, and thus denied him the protections afforded by the Confrontation Clause.[42]

The rule which emerged from *Bruton*'s holding—and which has remained in effect ever since—is that the Confrontation Clause is violated by the introduction of an incriminating out-of-court statement by a non-testifying co-defendant, even if the court gives a limiting instruction that the jury may consider the statement only against the co-defendant.[43] This holding represented vindication for Justice Jackson's general view, first espoused in his 1949 concurring opinion in *Krulewitch v. United States*, that the Court should shed "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . ."[44] This was an assumption that, Jackson claimed, "all practicing lawyers know to be unmitigated fiction."[45]

Citing *Bruton*, defendants will now often move to sever their trials from those of their co-defendants on the grounds that the government's plan to offer a co-defendant's incriminating statement at trial will violate the holding of *Bruton*.[46] In many cases, courts have denied motions to sever after the government offers to redact portions of a defendant's statement that tend to incriminate his or her co-defendant(s).[47] This approach to addressing *Bruton* concerns has become common in state, as well as federal, cases.[48] In these situations, the government will often

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[41] *Id.* at 126.

[42] *See id.*

[43] *Id.*; *see also* United States v. Ford, 761 F.3d 641, 652 (6th Cir.), *cert. denied*, 135 S. Ct. 771 (2014).

[44] *Bruton*, 391 U.S. at 129 (quoting Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)).

[45] *Id.*

[46] *See, e.g.*, United States v. McLaughlin, No. 3:CR-12-0179, 2013 WL 996266, at *3 (M.D. Pa. Mar. 13, 2013).

[47] *See, e.g.*, United States v. Ford, 761 F.3d 641, 654 (6th Cir.), *cert. denied*, 135 S. Ct. 771 (2014) (recognizing that courts have often denied motions to sever under *Bruton* in exchange for an offer by the government to redact problematic portions of a co-defendant's statements).

[48] *See, e.g.*, People v. Johnson, No. 2000-0555 A & B, 2001 WL 36123141 (Monroe Cnty. Ct. June 8, 2001) ("Unless the implicating references can be effectively deleted without prejudice to the defendant whose statement the People seek to admit, the statement is not admissible except where separate trials are held.").

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assert that a statement is capable of redaction in its reply to a defendant's motion to sever.[49] To illustrate how this approach works, consider *Commonwealth v. Pal*, a recent Pennsylvania case.[50] In an order denying Pal's motion to sever, the Court wrote:

> To resolve Pal's *Bruton* challenge, hearsay objections and unfair prejudice concerns, the Commonwealth has agreed to omit any express or implied reference to Pal in the jailhouse informant's testimony and statement, and to limit the use of that evidence to Dominick's admissions concerning his own incriminating conduct. In light of that stipulation to utilize the informant's proof only in that manner, Pal's objections are without merit and his motion for severance will be denied.[51]

This approach finds support in the holding of *Bruton*, which suggested that the prosecution could find "alternative ways" of eliminating the risk of incrimination posed by admitting a co-defendant's incriminating statements.[52]

In *Gray v. Maryland*, the Supreme Court settled the question of what was required for a redaction to be sufficient to satisfy *Bruton*.[53] *Gray* involved the trial of two men, Anthony Bell and Kevin Gray, accused of beating a woman to death.[54] Interrogated by Baltimore police, Bell gave a confession that implicated both him and Gray in the crime.[55] At trial, when the police detective read defendant Bell's

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[49] *See, e.g.*, Government's Opposition to Defendant Sutton's Motion to Sever Defendants' Trials; Memorandum of Points & Authorities at 1, United States v. Sutton, No. CR 07-602-GAF, 2007 WL 4429964 (C.D. Cal. Oct. 22, 2007) ("For the reasons set forth below, the Court should deny defendant's motion for severance and his alternative motion for the exclusion of [the] co-defendant['s] . . . statement. [The] [c]o-defendant['s] . . . statement may be redacted in such a way as to permit its introduction without violating defendant's Sixth Amendment right to confrontation.").

[50] Commonwealth v. Pal, Nos. 13CR2269, 13CR2273, 2014 WL 1577521, at *1 (C.P. Lackawanna Cnty. Apr. 17, 2014).

[51] *Id.*

[52] Bruton v. United States, 391 U.S. 123, 133–34 (1968) ("Insofar as this implies the prosecution ought not to be denied the benefit of the confession to prove the confessor's guilt, however, it overlooks alternative ways of achieving that benefit without at the same time infringing the nonconfessor's right of confrontation.").

[53] Gray v. Maryland, 523 U.S. 185, 185 (1998).

[54] *Id.*

[55] *Id.* at 188.

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confession into evidence, he substituted the words "deleted" or "deletion" for Gray's name.[56] The question presented in *Gray* was whether it was sufficient for the government to redact a co-defendant's statement by merely removing the defendant's name, replacing it with a blank space or the word "deleted."[57] In a 5-4 decision, the Court held that it was not.[58] Thus, the Court in *Gray* made it clear that, for a redaction to satisfy the requirements of *Bruton*, it must *effectively* eliminate the incriminating effect to the declarant's co-defendant.[59] This holding serves to further underscore *Bruton*'s concern with the practical impact of statements introduced in this context, as well as the Court's desire to avoid safeguarding constitutional rights with formalistic legal fictions which a jury is likely to see through (i.e. instructions to disregard, redaction of defendant's name only, etc.).

After *Bruton*, it is generally settled law that the Confrontation Clause is potentially implicated whenever the government seeks to introduce a co-defendant's incriminating statement, not made in furtherance of a conspiracy, at a joint trial for two or more defendants.[60] An incriminating statement made by one defendant that is not made in furtherance of a conspiracy cannot be offered as substantive evidence against his or her co-defendant(s).[61] If the government wishes to introduce the incriminating statement against the declarant at the joint trial, the statement is only admissible if it is sufficiently redacted to avoid incriminating the non-declarant defendant(s).[62] It should be noted that many courts take a narrow view of which statements tend to "incriminate" the non-declarant defendant, and they will admit statements unless they clearly inculpate the non-declarant defendant.[63] However, for

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *See id.*

[60] Bruton v. United States, 391 U.S. 123 (1968).

[61] *See id.*

[62] *Gray*, 523 U.S. at 192.

[63] *See* United States v. Sarracino, 340 F.3d 1148, 1160 (10th Cir. 2003) ("We have noted, however, that the exception created by *Bruton* is a narrow one. '*Bruton* applies only in those few contexts where the statement is so inculpatory as to the defendant that the practical and human limitations of the jury system cannot be ignored.'" (quoting United States v. Rahseparian, 231 F.3d 1267, 1277 (10th Cir. 2000) (internal quotation marks omitted), *cert. denied*, 532 U.S. 974 (2001)), *cert. denied sub nom.* Theresposy v. United States, 540 U.S. 1131 (2004).

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purposes of discussing the procedural issue which is the subject of this Note, it is not necessary to precisely define the outer limits of *Bruton*'s exception.

We can glean an important and relevant lesson from the history of *Bruton* and Confrontation Clause jurisprudence—the right to cross-examine witnesses has long been viewed as a fundamental part of our adversarial judicial system.[64] Indeed, as Justice Scalia recognized in *Crawford v. Washington*, "[t]he right to confront one's accusers is a concept that dates back to Roman times."[65] In crafting procedural rules for enforcing this right, courts should be mindful of their historically fundamental nature, and, when not bound by other concerns, ensure that these rules err on the side of allowing defendants to enforce their right, both at trial and on appeal.

II. ANALYZING THE CIRCUIT SPLIT OVER *BRUTON* ISSUE PRESERVATION

It is against this historical backdrop that I will analyze the as-of-now unresolved procedural question of what a defendant must do to properly preserve objections to the admissibility of a co-defendant's statements under *Bruton*. The circuits have split on whether a defendant's pre-trial motion to sever his or her trial on *Bruton* grounds should be sufficient to preserve an objection to the statements themselves on appeal, or whether a defendant should have to object separately to the admissibility of the statements at trial.[66] The circuit courts have offered a number of different rationales for their varying positions on this question.

Several circuit courts have taken the restrictive view that the *Bruton* issue is forfeited when a defendant only makes a pre-trial motion to sever under *Bruton* and fails to later object to the admission of the co-defendant's statements at trial.[67] In *United States v. Jobe*, the Fifth Circuit reviewed a defendant's *Bruton* claim for plain error when the defendant failed to object to the statement at trial.[68] While the court did not discuss the preservation issue in significant depth, it found that the issue had

[64] Chambers v. Mississippi, 410 U.S. 284, 294 (1973) ("The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.").

[65] Crawford v. Washington, 541 U.S. 36, 43 (2004).

[66] *See* United States v. Ford, 761 F.3d 641, 654 (6th Cir. 2014) (acknowledging the existence of a circuit split on this question and declining to "wade into this circuit split" under the circumstances of the case).

[67] *See* United States v. Jobe, 101 F.3d 1046 (5th Cir. 1996), *cert. denied sub nom*. Sutton v. United States, 118 S. Ct. 81 (1997).

[68] *Id.* at 1068.

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not been properly preserved, despite the fact that the defendant had earlier moved to sever the joint trial.[69] Applying the plain error standard, the court found that any potential *Bruton* error was harmless in light of the other admissible evidence.[70]

Subsequently, in *United States v. Turner*, the Eleventh Circuit dealt with the question more thoroughly in a slightly different context.[71] In *Turner*, defense counsel failed to either make a motion to sever pre-trial or to contemporaneously object under *Bruton* to the testimony at issue, but did make a motion to sever the next day.[72] In rejecting Turner's appeal, the court explicitly held that a motion to sever was insufficient to preserve the *Bruton* objection for appeal.[73] To support this conclusion, the court cited the two policy justifications for requiring contemporaneous objections, which it believed were implicated: (1) ensuring that trial courts have an opportunity to avoid errors that might otherwise necessitate time-consuming re-trial; and (2) preventing counsel from "sandbagging" the courts by withholding a valid objection in order to obtain a new trial when the error is raised on appeal.[74] "By failing to interpose a timely objection during the direct examination of either witness," the court wrote, "the defense provided the district judge with no timely opportunity to avoid serious error that might otherwise have necessitated a time-consuming re-trial."[75]

Turner provides what seems to be the most thorough defense of the position that a motion to sever should *not* be considered sufficient to preserve a *Bruton* objection when counsel does not later object to the co-defendant's statements at trial. However, it is worth pointing out that *Turner* was a unique case in ways that implicated the policy concerns behind its decision more strongly than many of the other cases dealing with this issue.[76] Because the defense counsel in *Turner* did not make a motion to sever under *Bruton* until *after* the objectionable testimony had been

[69] *Id.* at 1066–68.

[70] *Id.*

[71] United States v. Turner, 474 F.3d 1265, 1276 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 867 (2008).

[72] *Id.* at 1271–72.

[73] *Id.* at 1275.

[74] *Id.* at 1276 (citing United States v. David, 83 F.3d 638, 644–45 (4th Cir. 1996)).

[75] *Id.*

[76] *Id.*

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elicited, the district court had absolutely no "opportunity to avoid serious error."[77] If a motion to sever could preserve the *Bruton* issue in this context, defense attorneys truly could "sandbag" trial courts into committing errors necessitating a time-consuming re-trial.[78] This is less true in the more typical context, where defense counsel has moved to sever under *Bruton* prior to trial. In that situation, the trial court is, at a minimum, put on notice that defense counsel believes there is a potential *Bruton* problem with statements the prosecution intends to offer into evidence. Furthermore, a pre-trial motion to sever gives the prosecution an opportunity to offer to redact the statement in a way that could avoid improperly incriminating the non-declarant defendant and thus eliminate the *Bruton* issue.

This is the position that has been taken by the circuit courts that have held that a motion to sever on *Bruton* grounds is sufficient to preserve a substantive *Bruton* objection for appeal. In *United States v. Sarracino*, the Tenth Circuit appeared to adopt an extremely permissive standard with respect to *Bruton* issue preservation.[79] While the court did not elaborate significantly on the preservation issue, it held that, where a defendant had made a motion to sever on *Bruton* grounds, it was not necessary for counsel to re-object to the introduction of the co-defendant's statements at trial.[80] The court reasoned that the motion to sever provided the trial court with an adequate opportunity to consider the issue, in marked contrast with situations where a defendant did not object on *Bruton* grounds at all.[81] The court then reaffirmed *Sarracino*'s holding in *United States v. Nash*, stating in a footnote that a motion to sever under *Bruton* is sufficient to preserve *Bruton* objections for appeal.[82]

Moreover, the First Circuit addressed the *Bruton* issue preservation question even more thoroughly in *United States v. Vega Molina*.[83] In *Vega Molina*, the defendant made a pre-trial motion to sever under *Bruton* and subsequently failed to

[77] *Id.*

[78] *Id.*

[79] United States v. Sarracino, 340 F.3d 1148, 1159 (10th Cir. 2003), *cert. denied sub nom*. Theresposy v. United States, 540 U.S. 1131 (2004).

[80] *Id.*

[81] *Id.*

[82] United States v. Nash, 482 F.3d 1209, 1218 n.7 (10th Cir.), *cert. denied*, 552 U.S. 1084 (2007).

[83] United States v. Vega Molina, 407 F.3d 511, 519 (1st Cir.), *cert. denied sub nom*. Zuniga-Bruno v. United States, 546 U.S. 919 (2005).

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object to the admission of the statements at trial.[84] The Court held that the motion to sever was sufficient to preserve the objection, and it applied a *de novo* standard of review.[85] Explaining its decision, the First Circuit noted that the district court had, in the course of denying the defendant's motion to sever, "*categorically* rejected their claim that the redacted statement was powerfully incriminating."[86] Because the district court had categorically denied the motion to sever, the court held that the *Bruton* issues were adequately preserved for appeal.[87] As part of its reasoning, the court drew an analogy between holding that a pre-trial motion to sever could preserve *Bruton* issues for appeal and the now well-established rule that a contemporaneous objection is not required when a trial court has definitively ruled on an issue in response to a motion *in limine*.[88] Of course, the flip side of the First Circuit's position is that if a district court does *not* definitively reject a defendant's *Bruton* claim on the merits, the later failure to contemporaneously object likely would *not* preserve the *Bruton* issue for appeal.[89]

Thus, under current law, a significant circuit split exists on the questions of when and whether a motion to sever is sufficient to preserve a *Bruton* objection. The question, then, is how to best resolve the split and seek consistency on this issue.

III. RESOLVING THE SPLIT: THE "CATEGORICAL DENIAL" STANDARD

The First Circuit's position, articulated in *Vega Molina*, carves out what I think is an attractive approach to resolving this question.[90] Under this approach, a pre-trial motion to sever under *Bruton* would sufficiently preserve the substantive *Bruton* objection for appeal *if* the trial court categorically denies the motion on its merits.[91]

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[84] *Id.* at 519–20.

[85] *Id.* ("On the day preceding the introduction of the redacted confession, the district court denied the appellants' motion to sever their trial from Villega's on the basis of *Bruton*. In the course of that ruling, the district court categorically rejected their claim that the redacted statement was powerfully incriminating. We think that this was adequate to preserve the *Bruton* point.").

[86] *Id.* at 520 (emphasis added).

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *See id.* at 519–20.

[91] *Id.*

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For the purposes of this Note, I will refer to this option as the "categorical denial" standard. I believe that, for a number of reasons, this solution is most consistent with accepted legal principles and best addresses the various fairness and efficiency concerns raised in the circuit courts.

First, the "categorical denial" standard is, as the First Circuit mentioned in *Vega Molina*, consistent with the approach adopted by Federal courts in the motion *in limine* context.[92] This approach reflects Federal Rule of Evidence 103(b) ("Rule 103(b)"), which states that, "once the court rules definitively on the record—*either before or at trial*—a party need not renew an objection or offer of proof to preserve a claim of error for appeal."[93] Pursuant to this subsection, "it is no longer necessary for a party to renew an objection to evidence when the district court has definitively ruled on the party's motion *in limine*."[94]

This language was adopted as part of the 2000 Amendment to Rule 103(b) ("2000 Amendment"). As the advisory committee's notes adopted with the 2000 Amendment point out, prior to the addition of this language, the circuits had split on whether a pre-trial motion *in limine* was sufficient to preserve a substantive objection for appeal.[95] This split occurred along similar lines as the split over *Bruton* issue. Several courts held that a renewal at the time the evidence is to be offered at trial is always required.[96] Others held that renewal is not required if the issue decided is one that (1) was fairly presented to the trial court for an initial ruling, (2) may be decided as a final matter before the evidence is actually offered, and (3) was ruled on definitively by the trial judge.[97] Still others distinguished between objections to evidence, which must be renewed when evidence is offered, and offers of proof, which need not be renewed after a definitive determination is made that the evidence is inadmissible.[98] Finally, the Seventh Circuit had already accepted the approach of

[92] *Id.*

[93] FED. R. EVID. 103 (emphasis added).

[94] Tampa Bay Water v. HDR Eng'g, Inc., 731 F.3d 1171, 1178 (11th Cir. 2013).

[95] FED. R. EVID. 103 advisory committee's notes.

[96] *See, e.g.*, Collins v. Wayne Corp., 621 F.2d 777, 784 (5th Cir. 1980) ("[O]nly a proper objection at trial can preserve error for appellate review." (internal citation omitted)).

[97] *See, e.g.*, Rosenfeld v. Basquiat, 78 F.3d 84, 90–91 (2d Cir. 1996) (holding that renewal is not required regarding the admissibility of former testimony under the Dead Man's Statute).

[98] *See, e.g.*, Fusco v. Gen. Motors Corp., 11 F.3d 259, 262–63 (1st Cir. 1993) (distinguishing between objections to evidence and offers of proof).

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the 2000 Amendment prior to its adoption.[99] The 2000 Amendment eliminated this division by providing that a claim of error with respect to a *definitive ruling* is preserved for review by a pre-trial motion *in limine* when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103.[100]

The advisory committee's notes accompanying the 2000 Amendment make clear that the purpose of the change was to eliminate excessively formalistic roadblocks. "When the ruling is definitive," the notes state, "a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity."[101] In fact, the Tenth Circuit explained in *United States v. Mejia-Alarcon* that, "[w]hen counsel diligently advances the contentions supporting a motion [*in limine*] and fully apprises the trial judge of the issue in an evidentiary hearing, application of the rule [requiring parties to reraise objections at trial] . . . make[s] little sense."[102] This same rationale seems to apply in the *Bruton* motion to sever context, where the merits of the *Bruton* issue raised by the defendant determine whether severance is proper.

Looking at the way courts have applied this type of "categorical denial" or "definitive ruling" standard in the motion *in limine* context reveals that this approach is generally effective at resolving cases in a clear manner, consistent with principles of fairness and due process. For example, consider the Tenth Circuit's *Mejia-Alarcon* case, which I briefly quoted from in the last paragraph.[103] Mejia-Alarcon ("Mejia") was arrested during an undercover operation conducted by the Drug Enforcement Administration and the Las Cruces-Dona Ana County Metro Narcotics Unit.[104] At a pre-trial hearing, Mejia made a motion *in limine* to exclude the admission of his prior conviction for the unauthorized acquisition and possession of food stamps.[105] The lower court denied the motion, ruling that the government could use the conviction

[99] Wilson v. Williams, 182 F.3d 562 (7th Cir. 1999) (en banc).

[100] FED. R. EVID. 103 advisory committee's notes.

[101] *Id.*

[102] United States v. Mejia-Alarcon, 995 F.2d 982, 986 (10th Cir.) (quotation marks omitted) (citation omitted), *cert. denied*, 114 S. Ct. 334 (1993).

[103] *Id.* at 982. It should be noted that, because this case pre-dates the 2000 Amendment to Rule 103, the Tenth Circuit was applying its own slightly different standard to resolve the case. *See id.* Nevertheless, the case still provides a good general example of the kind of "categorical denial" or "definitive ruling" standard which I am advocating for in the separate, *Bruton* context.

[104] *Id.* at 984.

[105] *Id.* at 985.

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to impeach Mejia if he testified, on the ground that the conviction was for a crime of dishonesty or false statement under Federal Rule of Evidence 609(a)(2) ("Rule 609(a)(2)").[106] At the time, the Tenth Circuit followed the rule, similar to the current standard set forth in Rule 103(b), that "a motion *in limine* may preserve an objection when the issue (1) is fairly presented to the district court, (2) is the type of issue that can be finally decided in a pre-trial hearing, and (3) is *ruled upon without equivocation by the trial judge*."[107] Holding that the issue had been adequately preserved for appeal, the court noted that, at a pre-trial hearing, Mejia's counsel had specifically argued the issue of whether Mejia's prior food-stamp conviction should be admissible at trial.[108] Furthermore, the court pointed out that the issue outlined by the motion *in limine* "presented an evidentiary issue akin to a question of law: whether Mejia's food-stamp conviction qualified as a crime of dishonesty under Rule 609(a)(2)."[109] Accordingly, the trial court's ruling did not depend on other evidence admitted at trial.[110] Having found that the issue was not waived, the court went on to consider Mejia's argument on the merits and concluded that his conviction had been admitted improperly.[111]

This outcome is desirable for several reasons. Most importantly, this standard most accurately reflects defense counsel's intentions and expectations: Mejia's counsel clearly believed he had argued against the admissibility of Mejia's conviction.[112] Extensive pre-trial litigation took place, the government had an opportunity to fully respond to the objection, and the trial court considered, and denied, the motion on its merits.[113] Only an awkwardly formalistic procedural regime would require Mejia to re-raise the same legal argument before the same judge at trial. Such a requirement is nothing more than an arbitrary "trap for the unwary."[114]

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[106] *Id.*

[107] *Id.* at 986.

[108] *Id.* at 987.

[109] *Id.*

[110] *Id.* at 987–88.

[111] *Id.* at 988 (finding that Mejia's conviction was admitted improperly, ultimately holding that this error was harmless).

[112] *Id.* at 987.

[113] *Id.* at 985–88.

[114] *Id.* at 986.

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The less formalistic "categorical denial" standard ensures that issues that are litigated on the merits pre-trial are not waived by a "gotcha" procedural rule.

Imagine if, instead, the Court in *Mejia-Alarcon* had adopted a more formalistic approach, holding that the issue had been waived when counsel failed to re-litigate the same issue again at trial. Such a ruling would have severely hampered Mejia's ability to raise an issue that the court ultimately found to have merit.[115] In the *Bruton* context, the waived issue would implicate the defendant's fundamental rights under the Confrontation Clause.

Given the movement away from formalistic procedural barriers to issue preservation heralded by Rule 103(b), treating *Bruton* motions to sever in the same fashion as other pre-trial motions would provide consistency and certainty for practitioners and courts. There is no substantive reason to distinguish between the rationale for applying a "categorical denial" standard in the motion *in limine* context and the rationale for applying it in the *Bruton* context. Indeed, the rationales are the same. If the parties have, for all practical purposes, already litigated an issue on the merits, courts should be careful to avoid concocting unnecessary procedural "traps for the unwary" which prevent review of that issue on appeal.

The second major reason why courts should adopt a "categorical denial" standard in the *Bruton* context is that this standard sufficiently addresses the legitimate concerns underlying the general requirement for contemporaneous objections. The two main objectives behind this general requirement, articulated by the Eleventh Circuit in *Turner*, are (1) ensuring that trial courts have an opportunity to avoid errors that might otherwise necessitate time-consuming re-trial, and (2) preventing counsel from "sandbagging" the courts by withholding a valid objection in order to obtain a new trial when the error is raised on appeal.[116] These concerns are vitally important and should not be lightly dismissed. But the beauty of the "categorical denial" standard is that it takes these concerns into account by ensuring that the trial court has been asked to explicitly consider the *Bruton* issue at trial. If the trial court has not been asked to consider a motion to sever, or if it has not definitively rejected the motion to sever on the merits of the *Bruton* claim, then this standard would not preserve the issue for appeal unless counsel renews his or her objection at trial.

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[115] *Id.* at 988.

[116] United States v. Turner, 474 F.3d 1265, 1276 (11th Cir. 2007) (citing United States v. David, 83 F.3d 638, 644–45 (4th Cir. 1996)), *rehearing en banc denied*, 253 F. App'x 923 (11th Cir.), *and cert. denied*, 552 U.S. 1103 (2008).

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A good example of this type of standard effectively guarding against these two concerns can be found in a recent Ninth Circuit case, *United States v. Whittemore*.[117] The defendant in *Whittemore* agreed to raise $150,000 for Senator Harry Reid's reelection campaign by a particular deadline.[118] Just prior to the deadline, *Whittemore* distributed $145,000, in increments of $5,000 per person, to relatives and to employees of a company of which he was chairman, requesting that the recipients contribute to Senator Reid's campaign.[119] Each recipient made a contribution of $4,600—the maximum allowed under federal law.[120] At trial, Whittemore was convicted of making excessive campaign contributions in violation of 2 U.S.C. §§ 441a(a)(1) and 437g(d)(1)(A)(i), making contributions in the name of another in violation of 2 U.S.C. §§ 441f and 437g(d)(1)(A)(i), and making a false statement to a federal agency in violation of 18 U.S.C. § 1001(a)(2).[121] On appeal, Whittemore argued, among other things, that the district court improperly excluded proffered testimony from Valerie Fridland, a linguistics professor, who would have offered her opinion regarding potential interpretations of one of the statutes Whittemore was convicted of violating.[122] Whittemore had raised this issue in a pre-trial motion *in limine*, but the Ninth Circuit was faced with the question of whether he had waived it for appeal by failing to offer the testimony at trial.[123] Here, the court found that the issue *had* been waived by his failure to re-offer the testimony since the district court's ruling on his motion was explicitly tentative, and, therefore, not a "definitive ruling" on the issue.[124] Specifically, the court pointed out that the district court had denied the motion without prejudice and explicitly stated on the record that evidence introduced during the trial could warrant reconsideration.[125]

Under these circumstances, Whittemore and his counsel were clearly on notice that the trial court had not yet definitively rejected their motion and was open to

[117] United States v. Whittemore, 776 F.3d 1074, 1082 (9th Cir.), *cert. denied*, 136 S. Ct. 89 (2015).

[118] *Id.* at 1076.

[119] *Id.*

[120] *Id.* at 1077.

[121] *Id.*

[122] *Id.* at 1081.

[123] *Id.* at 1082.

[124] *Id.*

[125] *Id.*

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reconsidering it on the merits. As a result, counsel's failure to re-object at trial was inexcusable. Any reasonable attorney would be on notice that the issue was not yet settled, and holding that the issue was *not* waived under these circumstances would have squarely implicated the two concerns discussed in *Turner*. Yet, as we can see from the result here, the "categorical denial" approach effectively held trial counsel responsible for failing to acquire a definitive ruling on the issue at trial.[126] A more formalistic rule is simply not necessary to adequately safeguard the courts from being "sandbagged" by attorneys.[127]

I think it is fair to say that, in the *Bruton* context, if a defendant does not move to sever until *after* the objectionable testimony has been elicited, the *Bruton* issue should be considered waived.[128] Allowing a motion to sever to preserve the issue at this point would absolutely run the risk of allowing defense counsel to "sandbag" the trial court into committing reversible error.[129] However, this risk is simply not present when a defendant has made a timely *pre-trial* motion and the trial court has had an opportunity to consider it and deny it on the merits of the defendant's *Bruton* objection. In such circumstances, requiring defense counsel to re-object at trial would be "more a formalism than a necessity."[130] As *Whittemore* makes clear, applying a "categorical denial" standard will not diminish the incentive for defense counsel to be diligent in preserving appealable issues at trial.[131] Prudent counsel will ensure that the trial court makes clear on the record that it is denying the defendant's motion categorically, because of the "inherent risk that the appellate court might find that the objection was of the type that must be renewed."[132] In other words, trial counsel will still have an incentive to ensure that the record reflects that any pre-trial ruling on a *Bruton* issue is made definitively and categorically by the court. The only effect of widespread acceptance of a "categorical denial" standard would be greater

[126] *Id.* at 1081–82.

[127] United States v. Turner, 474 F.3d 1265, 1276 (11th Cir. 2007) (citing United States v. David, 83 F.3d 638, 644–45 (4th Cir. 1996)), *rehearing en banc denied*, 253 F. App'x 923 (11th Cir.), *and cert. denied*, 552 U.S. 1103 (2008).

[128] This is essentially what happened in *Turner*. *Id.* at 1275–81.

[129] *Id.* at 1276.

[130] FED. R. EVID. 103 advisory committee's notes.

[131] *Whittemore*, 776 F.3d at 1081–82.

[132] United States v. Mejia-Alarcon, 995 F.2d 982, 988 (10th Cir.), *cert. denied*, 114 S. Ct. 334 (1993).

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assurance that courts are not denying defendants the right to raise meritorious *Bruton* issues on appeal based on overly formalistic procedural rules.

Finally, allowing a pre-trial motion to preserve the *Bruton* issue is consistent with public policy goals of fairness and efficiency. It is important to keep in mind that the procedures in question here must be designed to adequately safeguard the important rights guaranteed by the Confrontation Clause. Given the modern movement against allowing excessive formalism to govern the rules of procedure, it "make[s] little sense" to continue following a rule which puts defendants at significant risk of inadvertently waiving substantive *Bruton* issues for appeal when those issues have already been litigated.[133] Following a more restrictive rule would create "a trap for the unwary, who sensibly rely on a definitive, well-thought-out pre[-]trial ruling on a subject that will not be affected by the evidence that comes in at trial."[134] This approach would maximize efficiency in the trial process by allowing courts to sort out any and all *Bruton* issues up front, thus saving time and resources while reducing the risk of objectionable testimony reaching the jury.

CONCLUSION

For these reasons, I believe it would be wise for the Supreme Court to resolve this circuit split by holding that a pre-trial motion to sever under *Bruton* is sufficient to preserve a *Bruton* objection for appeal where (1) a motion to sever under *Bruton* is filed with the district court, (2) the motion to sever is filed *prior* to trial or, at least, the elicitation of the potentially objectionable statement, and (3) the district court "categorically denies" the motion to sever on the grounds that the defendant's *Bruton* objection is meritless. Such a resolution would best balance concerns for protecting the rights guaranteed by the Confrontation Clause with the important requirement that defendants lodge contemporaneous objections in order to preserve them for appeal.

[133] *Id.* at 986 (quoting United States v. Sides, 944 F.2d 1554, 1560 (10th Cir.), *cert. denied*, 510 U.S. 927 (1991)).

[134] *Id.*

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