7.11. Accused's Statement — Multiple Accuseds

An accused's statement concerning the crime charged may not be considered by you against any accused other than the one who made it.

Authority: IN Pattern Instruction No. 12.0900

Comments from Pattern Committee

This instruction is for trials with two or more defendants.

The instruction may become an issue in three situations:

(1) The instruction must be given on request when:

a. A statement from one defendant who does not testify is offered as evidence;
b. The statement is admissible because it does "not refer directly to the [co]defendant himself, but [becomes] incriminating [with respect to the codefendant] 'only when linked with evidence introduced later at trial,' " *Gray v. Maryland*, 523 U.S. 185, 196, 118 S.Ct. 1151, 1157, 140 L.Ed.2d 294 (1998); and
c. The codefendant requests the instruction.

Under these circumstances, admitting the statement with the instruction does not violate the codefendant's confrontation rights. *Gray v. Maryland, supra* ; *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987) .

(2) The instruction will not avoid reversible error if:

a. A statement from a defendant who does not testify is offered as evidence;
b. The statement is **inadmissible** because, considered by itself, it incriminates the codefendant, so that admitting it unchanged will violate the codefendant's confrontation rights, *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) ; and
c. The codefendant objects.

In this situation, the statement may perhaps be made admissible by "redaction" to remove all inferences which might incriminate the objecting codefendant. If it cannot be redacted sufficiently, it must be excluded, and admitting it with the instruction is a constitutional error.

The Committee notes for the judge that extensive "redaction" is often needed and even then may be inadequate. A redaction which simply "replace[s] a proper name with an obvious blank, the word 'delet[ed],' a symbol, or similarly notif[ies] the jury that a name has been deleted" violates *Bruton*, when the statement "obviously refer[s] directly to someone, often obviously to [codefendant], and involve[s] inferences [incriminating codefendant] that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." *Gray v. Maryland, supra*, 523 U.S. at 195 and 196, 118 S. Ct. at 1156 and 1157.

(3) The instruction is properly used when:

A defendant testifies:

a. That defendant's statement is offered as evidence against him;
b. The statement may incriminate the codefendant;

The testifying defendant is subject to full and effective cross-examination about the statement, so that codefendant has no *Bruton* confrontation objection to the statement. *See Nelson v. O'Neil*, 402 U.S. 622, 627, 91 S.Ct. 1723, 1726, 29 L.Ed.2d 222 (1971) ("[t]he Constitution as construed in *Bruton*, in other words, is violated only where the out-of-court hearsay statement is that of a declarant who is unavailable at the trial for 'full and effective' cross-examination");

a. The statement is hearsay as to the codefendant under Evidence Rule 801 (e.g., the statement was not sworn and is inconsistent with the testifying Defendant's testimony); and
b. The codefendant requests, pursuant to Indiana Evidence Rule 105, a limiting instruction that the statement may not be considered against him.