

**[CAPTION]**

**MOTION TO EXCLUDE CO-DEFENDANT'S HEARSAY STATEMENTS**

The Defendant, by counsel, respectfully requests this Court to enter an order requiring the State to (1) redact from the statement of [insert Co-defendant's name], a co-defendant in this cause, any references to the Defendant, prior to any use of the statement at trial; and (2) refrain from mentioning in the presence of the jury the references to the Defendant in the statement of the Co-defendant. In support of this Motion the Defendant states the following:

1. The Defendant is charged in this cause with the offense(s) of [insert offense(s)].

2. [Insert name of Co-defendant] is a Co-defendant in this cause.

3. The Co-defendant gave a statement to the police on [insert date] in which he also implicated the Defendant.

4. The Defendant and the Co-defendant are being tried jointly on [insert date].

5. The Defendant believes that, at trial of this cause, the prosecutor intends to introduce a statement given by the Co-defendant, as evidence against the Defendant.

6. The statement given by the Co-defendant makes the following references to Defendant as being implicated in the charged offense(s): [insert specific references]

7. It is Defendant's belief that the Co-defendant will not testify at trial, and that Defendant will have no opportunity to cross-examine the Co-defendant as to the statement.

8. Use of the statement by the prosecutor at trial where the Co-defendant does not testify and where the references to the Defendant are not redacted violates the Defendant's Sixth Amendment and Article I, Section 13 right to confront the witnesses against him. Bruton v. United States, 391 U.S. 123 (1968).

8. Even if the trials were to be severed, the statement would not fall within an exception to the hearsay rules. Indiana Rule of Evidence 804(b)(3) (excluding from the exception for statements against interest "a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both the declarant and the

accused”). See also State v. Chavez, 956 N.E.2d 709 (Ind.Ct.App. 2011).

WHEREFORE, the Defendant requests this Court to enter an Order requiring the State: (1) redact any references to the Defendant from the statement given by [insert name of Co-defendant] to the point where the statement is not incriminating against the Defendant; (2) refrain from mentioning in the presence of the jury any references to Defendant in the statement given by [inset name of Co-defendant]; and (3) instruct each witness to be called by the State to refrain from mentioning any references to the Defendant in the statement given by [insert name of Co-defendant], and for all other relief just and proper in the premises.

(Signature)

## CASE LAW

## CASEBANK O.1.b; J.9.b

Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (where Co-defendant's confession was admitted at joint trial and Co-defendant did not take the stand, Defendant was denied his constitutional right of confrontation).

Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987) (it was error to admit non-testifying Co-defendant's redacted confession made incriminatory through linkage by other evidence at trial in absence of limiting instruction advising jury that confession limited to confessor only).

Gray v. Maryland, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998) (use, at joint trial, of non-testifying Co-defendant's confession that has been redacted so as to replace Defendant's name with a space or the word "deleted," violates the 6th Amendment right to confrontation).

Garland v. State, 719 N.E.2d 1184 (Ind. 1999) (trial counsel's failure to object to admission of the Co-defendant's videotaped statement at joint trial constituted ineffective assistance and rendered result of proceeding unreliable and unfair). See also Latta v. State, 743 N.E.2d 1121 (Ind. 2001).

Taggart v. State, 595 N.E.2d 256, 258 (Ind. 1992) (it was reversible error to admit non-testifying Co-defendant's redacted confession where there was no limited instruction; rule in Richardson v. Marsh (1987), 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176, will be given retroactive application).

Norton v. State, 772 N.E.2d 1028 (Ind.Ct.App. 2002) (a defendant may voluntarily waive his Bruton protection and thereby cause an entire statement of co-defendant to be entered into evidence).

Ex Parte Sneed, 783 So.2d 863 (Ala. 2000) (editing of a statement of non-testifying co-defendant to render it admissible under Bruton altered it to such an extent as to render make it unduly prejudicial to declarant in capital murder trial).

## NOTE

Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987) and Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), discuss the admissibility of a Co-defendant's confession against a Defendant when the confession shows "indicia of reliability" regardless of whether the Defendant had an opportunity to cross examine the Co-defendant. These cases are implicitly overruled by Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (holding that out-of-court testimonial statements are inadmissible if there was no opportunity for the Defendant to cross during the out-of-court statement).