IN THE CIRCUIT COURT IN THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

CASE NUMBER: 05-2012-CF-035337-AXXX-XX

STATE OF FLORIDA,

Plaintiff,

-vs-

BRANDON BRADLEY,

Defendant.

_____/

ORIGINAL



TRANSCRIPT OF DIGITAL

STATUS CONFERENCE RECORDING

The transcript of the hearing taken in the above-styled cause at Moore Justice Center, 2825 Judge Fran Jamieson Way, Viera, Florida, 32940, on the 20th of August, 2013, before the Honorable Morgan Laur Reinman, commencing at 3:20 p.m.



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P R O C E E D I N G S

THE BAILIFF: All rise, come to order. Circuit Court for the Eighteenth Judicial Circuit in and for Brevard County, Florida is now in session. Judge Morgan Reinman presiding.

THE COURT: Please be seated. Okay, good afternoon. We're here this afternoon in the State of Florida versus Bradley and also in the State of Florida versus Kirchner, Case Nos. 12-35337A and Case No. 12-35337B. Let the record reflect that Ms. Kirchner is present on behalf of Mr. Bradley.

Are we waiving Mr. Bradley's appearance for purposes of these proceedings?

MR. PIROLO: Yes, Your Honor.

THE COURT: Okay. We're set for a motion to -- the defendant's motion to sever defendants. And that's on Mr. -- on behalf of Mr. Bradley, the defense has filed a motion. And on behalf of Ms. Kirchner, the defense has also filed a motion. I'm going to allow the -- Mr. Bradley to go first, and then I'll allow Mr. Bross to supplement the arguments. I think the issues are relatively similar.

Then I'll give the State the opportunity to

respond. But I do want the State, pursuant to Rule 3.152B, Subsection 1A and Subsection B2, I do want the State to tell the Court and the defense attorneys if they intend to introduce evidence of statements that makes reference to another defendant that may not be admissible against the moving defendant.

What's the State's intentions?

MR. MCMASTER: Judge, the State does intend to introduce statements of each of the defendants. We stipulate that there are statements in Mr. Bradley's post-Miranda admissions that do implicate Ms. Kirchner. We also agree that there are statements in Ms. Kirchner's post-Miranda statements that implicate Mr. Bradley. It would be the State's intent to redact any of those references from one defendant to the other such that any statements that would be admitted would be related solely to that individual defendant. So we would be selecting option number B under two, Subsection two of the rule.

THE COURT: So it's the State's intention in exercising that option that there would be redactions done. And then at that time, the Court would have to consider whether those statements

were appropriate based -- based on the criteria under the rule?

MR. MCMASTER: Yes, ma'am.

THE COURT: Okay. I asked for that clarification so the defense can narrow their arguments. That they're not -- they're not electing A, they're electing B. I don't know if they have -- might be difficult to argue without hearing some of those statements and what the redactions would be. I mean, that may be difficult, but I'll allow the defense to proceed.

So I believe Mr. Pirolo is going to be arguing on behalf of Mr. Bradley?

MR. PIROLO: Yes, Your Honor.

THE COURT: I did receive case law from you. I am familiar with that case law, just so you know. I have reviewed those cases previously.

So, Mr. Pirolo, you may proceed.

MR. PIROLO: Thank you, Your Honor. Our motion has been filed. We have a ground the motion to sever, Judge, under the Florida and United States Constitution, Florida Constitution, Section -- Article 1, Sections 2, 9, 16, 17, and 22, and under the 5th, 6th, 8th, and 14th Amendments of the United States Constitution. And,

also, as the Court has previously stated, this is under Florida Rule of Criminal Procedures 3.152B.

As the Court already knows, there are two statements were given on March 6; one by Ms. Kirchner, the other one by Mr. Bradley. We understand today the State's wanting to go forward with introducing both statements and redacting portions of the names. Judge, that does not cure the problem. In fact, the cases that are cited in our motion and the cases that are provided to the Court illustrate that reason.

Specifically, the cases are on point as to why they don't cure the problem. Just generally speaking, Your Honor, under the -- Ms. Kirchner's statement and Mr. Bradley's statements, and the Court would need to review the statements, but there are no -- for the majority of the statements, there's no interlocking facts, for the most part. There may be some facts that interlock with each other, but primarily it's our opinion there are no interlocking facts especially the more critical facts in the case.

On page two and three of my motion, Judge, we sort of set out the reasons why we believe Ms. Kirchner's statement is -- does not interlock

with Mr. Bradley's statement. And, therefore, the motion should be granted among other reasons. But starting off on page two, we had indicated that during the beginning of Ms. Kirchner's statements to law enforcement, and for the most part of the beginning of it, she emphasizes some distaste towards law enforcement.

We believe that that would unfairly prejudice Mr. Bradley. The jury could just infer those statements also apply to Mr. Bradley's beliefs. But more specifically on page three, paragraph seven, we've outlined several portions of Ms. Kirchner's statement where it shows that it does not interlock. It also shows the unreliability of Ms. Kirchner's statement. And the Court has it, I won't hit every single one.

But it starts off with Ms. Kirchner not even knowing who the shooter was. Mr. Bradley (Sic) has given other names other than Mr. Bradley. Giving law enforcement, first, a nickname and then a full name of who -- of a third party in the car who the shooter, in fact, was. She, at some point, also does not identify Mr. Bradley towards the end of the interrogation. She was given a photographic lineup, does not select Mr. Bradley from it and

several other points is laid out on page three, paragraph seven, as the Court can see.

Judge, under the case law, we think it's very clear on what the Court has to do. The Bruton case has been cited in our motion, and I've provided a copy to the State and to the Court as well. That's at 88 S.Ct. 1620. It's a United States Supreme Court case. In that particular case, the Court held those prejudicial error.

In that case, actually, the Court gave an instruction which we think, at some point, the State would ask the Court do, and that didn't solve the problem. It was still prejudicial error. And one of the main factors be is that if we get the situation where the co-defendant's statements introduced but then the co-defendant does not testify in that case. In our particular case, Mr. Bradley's confrontational rights, his right to confront his accusers, would be violated.

He would not have a right to confront Ms. Kirchner under cross-examination. In the Bruton case it outlines, obviously, the history of confrontation and a co-defendant's statements. And it starts -- and I believe the Court also has my case, and I've highlighted at least the pertinent

portions that I want to get into. But on page five of that opinion, it talks about, towards the end of the right-hand column is: Where the powerfully incriminating extrajudicial statements of a co-defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.

Not only are the incriminations devastating to defendant, but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed.

We're not going to know ahead of time and nor do we -- are entitled to. And Ms. Kirchner is not going to be told ahead of time whether or not these defendants are going to be testifying at trial. And you cannot ensure a fair trial if you introduce their videotaped statements at trial and then they don't testify. Then they cannot cross-examine the

person making the declarations.

The Lee case, Judge, that I've provided also, it's another United States Supreme Court case. 106 Southern -- S.Ct. 2056, Lee versus Illinois. Again, that was a joint trial. It was a homicide case. Both defendants were tried together, neither of the defendants testified in the trial. And the Court, ultimately, reversed saying there was a clear confrontation violation.

And more specifically in the case, right on page one, on the right-hand column on Paragraph A, as you're citing from -- or on the Court's opinion: This truthfinding function of the Confrontation Clause is uniquely threatened when accomplice's confession is sought to be introduced against the defendant without the benefit of cross-examination. Moving on down that paragraph: Thus, accomplice's confessions that incriminate defendants are presumptively unreliable. And it's our position that Ms. Kirchner's statement is presumptively unreliable.

It is unreliable as we've referenced in our motion pointing out the statements that she gave to law enforcement and how that shows her unreliability. Moving on in the case, Judge, we've

point out that the Court goes on to, obviously, talk about why it's important for cross-examination. Then it lays out why the Confrontation Clause was even adopted. And it gets into what confrontation really is and what Mr. Bradley would not be getting at his trial, and how his confrontation rights and his Crawford rights under the Crawford case would be violated that he would not be able to have his accuser under oath and submit to cross-examination.

And, also, the jury would not be able to look at that witness as they're testifying under oath in the courtroom to observe his or her demeanor in court. On page six of the Lee case, Judge, left-hand column, the first full paragraph. Again, it should be highlighted for the Court. The Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced as a criminal defendant without the benefit of cross-examination.

The arrest statements of a co-defendant have traditionally been viewed with special suspicion. A co-defendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence. And they cite the

Bruton case as well. And more specifically, they cite Justice White's dissenting opinion in this case. But that's the problem, again, Judge, that we run into.

And part of our motion as well, Judge, lays out and it kind of gets me to the Cruz case, the next case that's applied to the Court. Supreme Court United States 107 S.Ct. 1714, Cruz versus New York. In that case, the Court ruled that where non-testifying co-defendants confession incriminating the defendant was not directly admissible against the defendant, the Confrontation Clause barred its admission in joint trial, even though the jury was instructed not to consider the confession against the defendant and even though the defendant's own confession was admitted against him.

So here we kind of have an encompassing fact pattern that instruction, a special instruction, is given to the jury. The defendant's own statement to law enforcement was introduced to the trial, and even that did not cure any problems. And in this particular case, Judge, what happened was that the co-defendants didn't testify. Obviously, the statement, the one co-defendant which was actually

Mr. Cruz's brother, was introduced, his taped statement.

And then there were statements that Mr. Cruz had made to other people that came out in trial. And with the special instruction, it still did not cure any problems. But more importantly in this case, so that the Court understands, page four of the opinion, the right-hand column, it's the middle portion of that last paragraph, they indicate that but in the real world of criminal litigation, defendant is seeking to avoid his confession on the ground that it was not accurately reported or that it was not really true when it was made.

Moving on to page five of the opinion, first full paragraph: It seems illogical, and therefore contrary to common sense and good judgment, to believe that co-defendant confessions are less likely to be taken into account by the jury the more they are corroborated by the defendant's own admissions; or that they are less likely to be harmful when they confirm the validity of the defendant's alleged confession.

Moving further down: We hold that, where a non-testifying defendant's confession incriminating the defendant is not directly admissible against

the defendant. And, Judge, in our case Ms. Kirchner's statement is not directly admissible against Mr. Bradley at trial. The Confrontation Clause bars its admission at their joint trial even if the jury is instructed not to consider it against the defendant and even if the defendant's own confession is admitted against him.

There are two Florida Supreme Court cases that I've provided to the Court. The first one is Roundtree that is at 546 So.2d 1042. That's from the 1989. This was a first-degree murder case, death penalty. It was sought by the State and it was the -- the Court found that both the penalty and guilt phase of the defendant's trial should have been severed from those of his co-defendant.

Basically, what happened in this case, both Roundtree and his co-defendant made incriminating statements. There was some parts of the statement were consistent with one another, other parts were inconsistent with each other. They were, obviously, tried together. And what the Court then tried to do in the case was -- or at least the State argued that Roundtree could have been convicted under the felony murder theory of the case. But, yet, the Florida Supreme Court said

that even though that being true, again, it was prejudicial error to try the defendants together.

Page three of the opinion states: While this is true, could have been found guilty of felony murder, a defendant, nonetheless, has the right to rely upon nonstatutory mitigating evidence during the penalty phase that he did not murder the victim and that he did not plan or participate in the murders. Since there were no eye witnesses to the murder, the only evidence that Roundtree was the triggerman comes from co-defendant Brown's confession.

They go on and cite the Cruz case, U.S. Supreme Court case as well. And moving on to page four of the opinion, he also cites the Lee case. And on the left-hand column on that last paragraph on that side right around midway: When intent is a crucial element of the charge offense, co-defendants' statements that implicate each other as the sole murder cannot be deemed interlocking. When the discrepancies involve material issues such as the roles played by the defendants and whether the crime was premeditated, a co-defendant's confession is not rendered reliable because it appears to contain facts that interlock with the

facts of the defendant's statement.

Absent the opportunity for cross-examination, the admission of Brown's confession denied Roundtree his right to confront the witness against him in violation of the Confrontation Clause of the Sixth Amendment. Allowing both to be tried together forced Roundtree to defend against the accusations made by Brown in both the guilt and penalty phase. By denying his motion, the Court, essentially, forced Roundtree to confront two accusers: The State and the co-defendant in the case.

And it further goes on to stay: We cannot say that Roundtree's confession cured the prejudicial effect of the co-defendant's accusatory statements during the penalty phase of the trial. Obviously, as the case goes on, Judge, there will be two phases: The guilt phase and the penalty phase. And this case, essentially, lays out notion that Mr. Roundtree's rights were violated, obviously, in the guilt phase, but even in his penalty phase because any mitigation he could have brought up in penalty phase, he was unfairly prejudiced because of the statement given by his co-defendant.

Premeditation was an issue in the Roundtree case and will be an issue in our case. And the jury needs to look at everything as a whole and individually and see the actions of Mr. Bradley, what actions lay out potentially, what elements of what crimes the State is charging him with. Ms. Kirchner's statement can only prejudice Mr. Bradley because it will take away the jury's focus from what Mr. Bradley is specifically charged with and what evidence the State can prove of Mr. Bradley's conduct, actions. And it also takes away -- it also just confuses the jury. What are they hearing, who are they hearing it from, who's saying it, and who does it apply to, and how should the jury apply it in their deliberations?

And, lastly, Judge, the last case I've provided the Court is the Bryant case, Florida Supreme Court 565 So.2d 1298. It's a 1990 decision. This is another -- this is a double homicide, first-degree murder where the death penalty was sought. The Court reversed the convictions and the death sentence. It was inappropriate to try the defendants together.

In this case, again, Judge, there were two defendants that made self-implicating statements.

One limited his or her involvement about placing blame on the other. And here we get to what the State had offered the Court prior to me getting up here, is that they did redact the statements in this particular case. They redacted -- and this is on page two of the decision. They redacted the statements of each of the defendants was introduced. The statements contained explanations of the participation of the others, and they used pronouns and the word "someone" in place of the co-defendant's name.

So the Court in Bryant went the extra step and tried to do the redactions and placed different pronouns where the names were, and that still did not cure the prejudicial effect. The Court, obviously, cites the cases we've got to before you, the Florida Supreme Court cases. But then on page four, it kind of goes a step further and it really breaks down Rule 3.152. It talks about that the rule is designed to assure a fair determination of each defendant's guilt or innocence.

That may be achieved when all the relevant evidence regarding the criminal offense is presented in such a manner that the jury can distinguish the evidence relating to each

defendant's act, conduct, and statements, and then can then apply the law intelligently and without confusion to determine the individual defendant's guilt or innocence. The rule allows the trial Court, in its discretion, to grant severance when the jury could be confused or improperly influenced, and a type of evidence that can cause confusion is the confession of the defendant which, by implication, affects a co-defendant, but which the jury is supposed to consider only as to the confessing defendant and not as to the others. A severance is always required in this circumstance. And, again, they cite Bruton.

And, finally, move on to page five of that opinion. They conclude by saying: We find that the trial should have been severed since -- and they listed the defendants by name -- the co-defendants were unable to cross-examine the other co-defendant. A Bruton violation occurred because the redacted statement, when considered with the other statements, effectively inculpated the other co-defendants and could have confused the jury about the extent of each one's participation. I know we have it under the rule as an option. And I don't mean to criticize the State's choice or

consideration of wanting to go forward and redacting the statements, but I think it just -- it makes it a lot muddier for the jury.

And that's what the Bryant case went on to say. It just confused the jurors even more when they went ahead and redacted the statements and put in pronouns where the names would be. And, Judge, just to put it in a way of simpler terms, I think it's just even cleaner for the State. They're the ones that have to put on the evidence. It's just cleaner and less chance of any error happening when you have two trials in this case.

You have two completely different statements. And I know the Court has not seen the statements or heard them, you only have some notations in our motion. But when the Court sits down and views both statements, you will see that they are not interlocking. And even if at some point they interlock, it's not to the extent that the U.S.

Supreme Court or the Florida Supreme Court, for that matter, has dictated that we're going to allow the defendants to be tried together. Cannot guarantee that each defendant will be cross-examined, and there's a strong likelihood that the defendants may not testify. And they're

constable -- Mr. Bradley's constitutional rights would be violated if he cannot confront his accuser which then the State would include his co-defendant as another accuser.

And, Judge, we're asking the Court to grant our motion to sever. And that under 3.152(b), 2(c), that that is the only remedy that the Court has, that is the severance of the moving defendant. So we ask that the Court sever this case, sever Mr. Bradley's case from Ms. Kirchner's case. And when we proceed to trial in January, that it would just be Mr. Bradley on trial.

Judge, can I just have one moment?

THE COURT: Yes, you may.

MR. PIROLO: A good point has been averred to me. And, again, the Court has to watch the statements. But once you do, you'll realize that there's no way the State can redact the statements as they talked about doing earlier and without one -- with the co-defendants still not incriminating the other co-defendant. You're going to have to watch the statements to get an idea of it, but there's just simply no way around it in this case with these two statements.

So, again, we're asking the Court grant the

motion to sever. And under the third paragraph under C, that it's just a strict severance of both parties. And that redacting, or a jury instruction, or any other curative measures are not going to cure it, it's still going to be prejudicial error. Thank you, Your Honor.

THE COURT: Mr. Pirolo, I have a question as to clarification, and perhaps the State needs to assist. It's my understanding -- and some of this hasn't been brought before the Court by way of the statements. But it's my understanding, with regard to Ms. Kirchner, there was apparently a statement made on, I believe, March the 6th, 2012, is the date. And then there may have been some statements made to her, I think, with regard to press. I don't know what the State's intentions are to those other statements. Because I may have to review the statements in order to properly rule on the motion.

So, Mr. McMaster?

MR. MCMASTER: Judge, I believe the statements you're referring to are the ones that Ms. Kirchner and Mr. Bradley made as they were being escorted from the CID office to the patrol car to be taken to the jail.

THE COURT: Yes.

MR. MCMASTER: Those were done on the evening of March 6th, 2012.

THE COURT: Okay. So are we talking about those statements as well as statements made to law enforcement and by way of questioning?

MR. MCMASTER: Yes.

THE COURT: Or is it only -- I know I heard some of this with regard to -- in the bond motions, but if you could clarify that for me.

MR. MCMASTER: Well, Judge, it's actually kind of interesting. Ms. Kirchner gave a total of about eight and a half hours worth of statements, you'll be seeing those on Friday at the motion for severance. During the eight and a half hours --

THE COURT: I think you mean the motion to suppress.

MR. MCMASTER: Motion to suppress, I'm sorry. In the first eight hours or so of the recorded statements, which start at the scene when she was removed from the vehicle and continue all the way on up until the end of the questioning and she was taken from the CID building and into the patrol car. The first eight hours are basically total lies by Ms. Kirchner. She does not implicate Mr. Bradley in any way. She tries to place the

blame on a former boyfriend.

She makes a number of statements that just are flat out untrue. The State has absolutely no intentions of introducing any of those statements. In the last half hour or so of her statement to the police before being taken to the jail, she did, ultimately, admit that Brandon Bradley was the shooter. That he was, in fact, the person who shot Deputy Pill. And she also admits that she was, in part, responsible for taking some of the items from the hotel.

I understand that the statements that she made about Mr. Bradley being the shooter cannot be admitted in a joint trial, and those the State intends to redact. Essentially, as far as Ms. Kirchner goes, we would probably only use about five minutes worth of the conversation that she had with the police dealing specifically with her own actions at the hotel. With respect to Mr. Bradley, Mr. Bradley's statement is much shorter. He primarily talks about his own actions. Most of the questions and answers from Mr. Bradley have to do with what he did.

He admitted to the shooting, explained to the officers his reasons why he did it. When asked

about Ms. Kirchner's participation, he makes, essentially, two incriminating statements. He alleges that Ms. Kirchner was or had handed him the gun that he used to shoot Deputy Pill when Deputy Pill was first approaching the vehicle. And he makes a second statement later in the recorded statement that Ms. Kirchner was the one primarily responsible for taking the items from the hotel.

The State understands that neither one of those statements can come in in a joint trial and would intend to redact them. In this case, it's going to be relatively easy to follow the procedures set forth in the rule that we've been looking at because both of the statements have been transcribed. The defense had Ms. Kirchner's statements transcribed. I think there's some problems with the accuracy and completeness of that.

There's some parts that were left out and some parts that -- I'm not quite sure how the reporter did it, but doubled up in the transcript. But I think those can be resolved. The State has acquired a transcript of Mr. Bradley' statement. We intend to produce the redacted statements and can submit the transcript along with the redacted

statements to the Court for -- and advance the trial for the Court's review to make sure that anything that the State has left in there does not make reference to the other co-defendant in each of their respective statements.

So I think that that's exactly the procedure that's outlined by the rule. It's the procedure the State intends to follow, and I don't see that there's going to be a problem with it. I don't disagree with the case law Mr. Pirolo cites, that is the case law. But in those cases, the statements were admitted with references to the other co-defendant in it.

And I'm submitting to the Court that this Court can clearly make a determination pretrial that these statements that the State seeks to introduce do not implicate the other co-defendant. This is going to be a long expensive trial, and trying it twice for no reason makes no sense. The State wishes to go forward with the joint trial, and that's going to be what we're requesting.

THE COURT: Mr. McMaster, it's my understanding, based on representations made by Mr. Pirolo, that there's some derogatory statements made by Ms. Kirchner with regard to

law enforcement. What's the State's intention with regard to those?

MR. MCMASTER: I do not believe that we intend to introduce those in my case-in-chief.

THE COURT: I heard, "I do not believe."

MR. MCMASTER: Well, Judge, trials are always a fluid sort of thing depending on what evidence we ultimately end up presenting. It's possible that we would seek to do that, but we would give advanced notice to the Court and counsel so that the Court can make an advanced ruling on that.

THE COURT: And I also heard in the -- I mean, I'm assuming that you may intend to introduce that with regard to the penalty phase based on your statement?

MR. MCMASTER: Depends on what our ultimate decision is as to Ms. Kirchner's status with the death penalty.

THE COURT: Okay. And I think -- and that's still outstanding as of this time?

MR. MCMASTER: That's correct.

THE COURT: Okay. Anything else, Mr. Pirolo, in followup based on what Mr. McMaster provided?

MR. PIROLO: Judge, I don't want to repeat myself, but, again, you cannot redact these videos

without eliminating one co-defendant pointing a finger at the other co-defendant. It's just not going to happen. It doesn't matter how you redact it, what words you put in, what pronoun you put in. At the end of the day, you know that Ms. Kirchner would be implicating Mr. Bradley. And if she doesn't testify, we cannot cross-examine Ms. Kirchner.

Mr. Bradley will have -- he will not be able to confront his accuser, which she then becomes an accuser. He will not have a fair trial as is mandated under the Sixth Amendment of the United States Constitution. And, Judge, as Mr. McMaster said, the trial is fluid by its nature. And because of those reasons, I think it's even another reason, because the trial is so fluid, that the Court should sever the defendants in this case.

Because it just -- getting back to what I indicated earlier, it's just cleaner and it ensures. Our objective, as we understand, the cost. But the Court's primary objective is to make sure that Mr. Bradley gets a fair trial. And the only way this Court can guarantee Mr. Bradley a fair trial is if you grant this motion to sever.

THE COURT: Okay. I'm going to hear from

Mr. Bross.

MR. PIROLO: Thank you, Your Honor.

THE COURT: Thank you, sir.

MR. BROSS: May I approach?

THE COURT: Yes, you may.

MR. BROSS: Judge, Mr. McMaster has made some statements that although may be accurate, I find them very alarming and very disconcerting, for the Court as well, is that: What we believe, or what we may do, or what could be done, or what we should do, and maybe what they're going to do. Those are all very fluid words that are not exact.

And one of the things that was talked about in the Matthews versus State case that I gave this Court dealing with the Bruton issues is that if a motion to sever is filed pursuant to section of rule concerning severance and its alternatives in Bruton's situation, all statements of defendant and co-defendants should be considered, and if necessary, edited at the hearing on the motion to sever rather than after the trial has begun.

The State says this is a very expensive procedure, but yet, obviously, wants us to have some other hearing at a later time so then we can take all of the statements that they redact whether

they alter, amend, eradicate change by pronouns, or whatever they're going to do, and have another hearing on it instead of today. Today is the day they should have come before this honorable Court and said, Here's the statements that we're going to use against Mr. Brandon Bradley, Here's the statements we plan to use against Ms. Kirchner, or, in fact, even prior thereto.

They should have given defense attorneys and public defender all statements so that we could have compared and contrasted so we can walk in and say, This is what, you know, we believe is going to be the problem between those statements and how the interaction is going to leave a jury without knowledge, or mislead the jury, or make the jury infer that there was more there than what was in those statements. So it's not just a redaction of the statements, but it's misinformation, inference on that information, and failure to give all the information that may exculpate one defendant versus the other. And that's basically what this case dealt with.

This was the Matthews versus State case wherein there's a prosecution for an aggravated battery and battery brought against the defendant

and co-defendant as a result of kicking and beating of victims which occurred in a drunk tank. And what, basically, this came down to is whether or not one individual wore wooden shoes and the other one wore tennis shoes. And statements made about the one who wore the tennis shoes that he wore tennis shoes believing the jury to believe, therefore, ipso facto, it must have been the one who caused the more serious injury with the wooden shoes even though neither of the co-defendants testified during the course of the trial.

So you could not predict what a jury was going to look at, and this Court found it to be reversible error. They said that the Bruton violation occurred although direct reference to the defendants had been deleted from statements in that it was highly likely that a jury would infer from co-defendant's statements that he knew victim had been -- or a victim was seriously injured. State is not authorized to partially edit defendant's statements beforehand. And, again, we have the completeness doctrine.

So if the State cuts off part of it but it doesn't explain what they want to introduce beforehand, then we have the completeness doctrine.

And we're in the middle of a very litigious, very long jury trial which may take longer because you have two co-defendants. Should the State decide not to seek the death penalty against Ms. Kirchner, that trial is going to be much less or less litigious than the trial for the death penalty and then trying to set jurors for the penalty phase of a death penalty case.

Judge, so as we stand before this Court, this Matthews case strongly suggested that the State bring those statements even beforehand, before we even have this motion for severance so we don't have more hearings to determine what they plan to use and how they plan to use it. And then with the fact of the allegations of opening a door. Well, one defendant or co-defendant must have opened the door, therefore, they're going to use another statement that we didn't anticipate being used.

And then we have to look at the inference effect of that statement without the totality of that statement. And in Matthews, again, which for purposes of the record is cited as 353 So.2d 1274. It is a Second DCA case, 1978. It went on to say that appellate claims on appeal that the trial Court's failure to grant this motion to sever made

on the morning of trial coupled with the admission of a prejudicial statement by its co-defendant and the excision of an exculpatory portion of appellant's own statement, neither defendant testified amounted to reversible error.

And, again, you know, they said -- they quoted that, again, the prosecutor should have brought these statements prior to the time and/or at the time of the motion to sever. Before the trial began, appellate filed a motion to sever on the ground that he would be prejudiced by the admission of his co-defendant's statement to the police. The prosecutor relied or replied that all references to the appellant and Baker statement had been excised. That's what we have here today.

The State is saying, We're going to excise it. We're only going to play two minutes of this and five minutes of that, but we believe or what might occur or -- and, you know, these statements are very nebulous, they're vague, they're overly broad, and they don't assure us what statements they plan to admit or not. And it goes on to say that on that basis, the trial Court denied appellant's motion. Although any direct reference to either defendant by the other was excised by the

prosecutor prior to the proffer their statements to the Court during trial, both defendants raised objections to portions of the proffered statements. And it goes on to say how each defendant had different reasons for why the proffered statement should have been given or should not have been given in order to exculpate and/or defend their client.

So at times when this is going to occur, it's going to be a circus-like atmosphere as to when that statement came out. You can't unring the bell when the statement comes out, and you can't then prevent the atmosphere of moving for a mistrial because it affects one co-defendant and not the other under the Bruton issues. And it will be a constant watch for under the Bruton issues to see if these statements are going to come out that's going to hurt one co-defendant versus the other.

In this case, unlike the case of Matthews, one defendant may testify because there is not a long lengthy criminal history. The other one may choose not to testify, and you can't stop a defendant who testifies from saying things that may not adversely affect the co-defendant to the extent the co-defendant could not cross-examine. Because

unless the co-defendant takes the stand to make statements contrary to, we're adverse to that. And then there's going to be wanting to use impeachment testimony or statements that were made at other various times to try to impeach the statements of the co-defendant who did testify. It's going to be a tremendous circus, and it cannot be controlled if the Court does not move for severance.

The State says it's the cost. Judge, it's the fairness that what the Court needs to look at. This Court is not obligated to look at cost, with all do respect. The Court is obligated to look at what is fair and just under Bruton. And as we put in our motion under number five, severance of the trial of the defendant Brandon Bradley is necessary this cause to promote a fair determination of the guilt or innocence of the defendant.

And that's what Bruton stands for, it's not as to cost. Because, again, as to cost, if there's reversible error, this case will be reheard a multitude of times back in either this courtroom or before another judge should this not be severed appropriately, which would help to avoid error because the error would be difficult, at best, to spot immediately when it comes out.

In the case of Mims versus State, cited as 367 So.2d 706. It is a First DCA case, 1979. Again in this case, introduction and evidence at joint trial of defendant, co-defendant on burglary charge of oral and written confessions given by co-defendant which implicated defendant was reversible error where through a passing attempt -- although a passing attempt had been made to disguise co-defendant's incriminating references to defendant by substituting pronouns and other words in place of defendant's name, the circumstances were such that the jury could not have supposed that the incriminating evidence referred to any other than defendant. And where the co-defendant did not testify, then the evidence of defendant's guilt was not so overwhelming as to render the error harmless.

Again in this case, there's only two people in the car, Judge. There's not three, or four, or a group of individuals who's alleged to have committed this crime. So when one co-defendant, through statements made either to the press or during the interview and/or the interrogation, makes a statement and it's introduced, it then infers that the other defendant must have done

something or adversely did something in regards to what is being said. And you don't always know how that jury is going to infer what is not being said or what is being hidden from them versus any change in the testimony or deletion of the testimony and parts and pieces are given in violation of the rule of completeness.

In this case, again, as in Mims versus State, it said that the motion for a separate trial was denied during the joint trial over objection by Mims. The State was permitted to adduce evidence of oral and written confessions given by Hutto which implicated Mims. A passing attempt to disguise Hutto's incriminating references to Mims was made by substituting pronouns and other words in place of Mim's name. And it goes on to indicating exactly what was said and how it was difficult for a jury to decipher. And it was unsatisfactorily done, Judge.

So as the Court looks at Bruton, as the Court looks at Mims versus State, and as the Court looks at Matthews versus State, without having all eight hours of the testimony of Ms. Kirchner, as well as the statements made to the press, as well as all statements made by Mr. Brandon Bradley,

there's going to be excised, deleted, amended, eradicated, or changed, this Court is without the ability at this point to say what the State can do, will do, and to keep the State in accordance with their guarantees of what they're going to present as opposed to what they may change, what they may not change, and the fluidity of the jury trial giving them the leeway to alter, eradicate, amend, and change.

It would not be so if the Court severed and allowed each defendant a fair and appropriate trial based upon the facts and evidence against each defendant. That is the better way to, eventually, save more money for the State and present a fair and neutral trial for all parties concerned, including the State, Judge. We ask that the Court sever these two co-defendants. Thank you.

THE COURT: Thank you, sir.

Response from the State?

MR. MCMASTER: Just briefly, Judge. As the Court knows, the motions to sever were just set for hearing a short time ago. The State just received the written motions a short time ago. In following the Matthews case law, all of the statements by both defendants have been provided to each of the

defendants in this case. They're fully aware of what the entire statements are that each defendant has given in this case.

I have not yet prepared and didn't have time to prepare the final version of what we intend to submit. But as I represented to the Court, I can do that. We can submit that to the Court along with the transcript and the complete copy of all of the statements. If the Court wants to listen to the, approximately, ten hours or so of the statements, you're certainly welcomed to do that.

THE COURT: I think you're representing that I'm going to hear a lot of one of the statements on Friday?

MR. MCMASTER: Well, Judge, in the motion to suppress, I think that the State's intent is to introduce copies of all of the statements that she made whether the Court listens to them in open court or not. I know that in previous hearings Mr. Bross has requested that that be done, I don't know if he's going to request that that be done again. If it is, it's going to last several days for the hearing, I believe. But the State will present the entire statements to the Court for its review whether at its convenience or in open court,

whichever way it goes.

And I can supply you with the final versions of what we would intend to seek to introduce in evidence so that the Court can compare that to the transcripts, see what references are made by one defendant to any co-defendant or any other person, and make a ruling in advance on what is and what is not admissible. I think it should be a fairly straightforward procedure, and I don't anticipate problems with it.

THE COURT: Okay. Anything else by the State?

MR. MCMASTER: No, Your Honor.

THE COURT: Okay. At this time, I do want to take this under advisement. I do expect to rule shortly though with regard to how the Court intends to proceed with regard to this motion. On Friday we have a motion to suppress on Kirchner that's set starting at 9:00 a.m., and it's scheduled for all day. Then there's a status conference set for September the 13th at 8:30 for 30 minutes. I do expect to get something out on this with regard to the motion to sever before September the 13th, okay? And then we can discuss it again on the 13th if we need to.

Mr. Moore?

MR. MOORE: We ask that when the State produces these redacted statements that we have a chance to review those and submit objections and, also, further argument based upon the redacted statements before the Court rules.

THE COURT: No. I would certainly give you that opportunity, certainly give you that opportunity. It may be that we'll have to have another hearing with regard to that if the Court intends to sever -- I mean, not rule on the severing of the defendant or not grant that motion.

MR. MOORE: And there's a question of recorded statements, jail statements as well. We've been provided the CDs and Ms. Kirchner's jail statements, and I don't know what the State's status is on them. I guess we'll know when we get the redacted.

THE COURT: I think you'll know -- you should know at that time. Okay, I'm going to -- I will take this under advisement. I expect to give you some directions with regard to that before September the 13th. And if we need to discuss it again on September the 13th, we will. Okay, that concludes the proceedings for this afternoon.

Thank you very much.

MR. BROSS: Your Honor, just to update on Friday, we are proceeding forward. Dr. Waldman will be here by phone, and I hope the Court got that document that we also sent to the State agreeing with the State for telephonic testimony.

THE COURT: I did receive that, and that's okay with the Court.

MR. BROSS: Thank you, Judge.

THE COURT: Okay, thank you.

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C E R T I F I C A T E

STATE OF FLORIDA )
)
COUNTY OF BREVARD )

I, JESSICA CRUZ-SEGARRA, Court Reporter and Notary Public, transcribed to the best of my ability the audio recording of the foregoing proceedings held.

Dated this 30th of September, 2014.

Jessica Cruz-Segarra

JESSICA CRUZ-SEGARRA, Notary Public
State of Florida, My Commission:
FF35359, Expires: July 11, 2017