



alleging that Ted used Ronnie Kimble to kill Patricia Kimble. Discovery materials furnished to the defendant allege that Ted Kimble when asked by a witness if he killed his wife, said that his brother Ronnie had killed her. The witness alleges that Ted told him or her that his Brother Ronnie shot Patricia in the head and then poured gas on her body.

4. The admission of such statements at a joint trial where the "confessing" defendant does not take the stand violates *Bruton v. U.S.*, 391 U.S. 123 (1968); *State v. Fox*, 274 N.C. 277 (1968) (adopting *Bruton*) and 15A-927 as to the "non-confessing defendant." Should the prosecution attempt to introduce Ted Kimble's alleged statement implicating Ronnie Kimble as his wife's killer through the testimony of Poe, Pardee and others, such statements would clearly violate Ronnie Kimble's Sixth Amendment right to confrontation under *Bruton* where Ted did not testify.

5. Although *Bruton* applied to an in-custody confession, "the rule as stated in *Bruton* and *Fox* applies with equal force to admissions... ." *State v. Spaulding*, 288 N.C. 397, 403 (1975) (citing *Bruton* and *State v. Jones*, 280 N.C. 322, 185 S.E.2d 858).

6. *Spaulding*, in addition, parallels our case from a *Bruton* standpoint. In *Spaulding* the witness testified that Defendant Walters told him that Defendant Spaulding had been involved in the murder. *Spaulding*, 288 N.C. at 404-05. Our Supreme Court ruled that failure to exclude the statement was a Sixth Amendment Confrontation Clause violation under *Bruton*,

"Since the evidence was not admissible as to Spaulding, its admission clearly violated his right of confrontation and cross-examination guaranteed by the Sixth and Fourteenth Amendments." *Id.* at 406. [The court went on to hold that the error was harmless because the evidence against Spaulding was overwhelming. That evidence included an eyewitness who placed Spaulding in the library (the scene of the crime) with blood all over him.] This is a far cry from the factual situation in our case.

7. Nor are the alleged statements made by Ted Kimble subject to redaction. The real danger in our case is that the jury will conclude that simply because the defendants are brothers that if one is guilty so must be the other: that blood is indeed thicker than water and "bad blood" the thickest of all. If the state convinces the jury of Ted Kimble's guilt, then the jury may well find Ronnie Kimble guilty based, not on the evidence against him, but the evidence against Ted and the knowledge that they are brothers.

8. For the reasons set forth in *Bruton* and its North Carolina progeny, including 15A-927 (North Carolina's codification of *Bruton*), the defendant prays the Court sever his trial from that of his brother and codefendant Ted Kimble.

**SEVERANCE BASED ON GROUNDS OTHER THAN BRUTON**

9. The test for statutory severance "is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial." *State v.*

*Boykin*, 307 N.C. 87, 90 (1982), quoting *State v. Nelson*, 298 N.C. 573, 587 (1979), *cert. denied*, 446 U.S. 929 (1980).

"[T]he trial court must deny a joinder for trial or grant a severance of defendants whenever it is necessary to promote a fair determination of the guilt or innocence of one or more defendants." *State v. Pickens*, 335 N.C. 717, 724 (1994).

What could be more unfair than to promote a jury determination of guilt against Ronnie Kimble, based not on evidence of his guilt, but based upon some evidence of his brother's guilt.

10. Based on materials furnished in discovery, fully three-quarters of that material is devoted to proving a circumstantial case of motive and guilty action by Ted Kimble. The discovery materials are replete with bad character evidence which the state will doubtless use to attempt to establish motive on the part of Ted Kimble, but which has no bearing whatsoever on Ronnie Kimble except insofar as it tends to establish his guilt in the eyes of the jury because his brother looks guilty. A few examples of this type of evidence that the state has indicated it intends to introduce include the following:

a. Less than one month after his wife's death, the state alleges that Ted Kimble asked a 17-year-old girl out on a date.

b. One week after his wife's death, the state alleges Ted Kimble attempted to buy a new, high performance sports car and said that he would pay cash for it while asking (presumably a salesman) if he had read about his wife's death in the paper.

c. Within two or three weeks of his wife's death, Ted Kimble bought a motorcycle, the state alleges,

in part with money earmarked for his wife's funeral expenses given him by his church.

d. Less than one month after his wife's death, the state alleges that Ted Kimble asked another woman to go out with him while telling her he had plans to build a new house.

e. The state will likely attempt to show that Ted Kimble stole large amounts of building materials and other items which he then resold through his building supply business under the theory that it establishes motive since Ted was forced to steal to boost profits in his business.

f. The state will likely attempt to introduce evidence that Ted Kimble was in possession of a great deal of "survival literature" which showed, among other things, how to make silencers, bombs and how to kill people.

11. Such evidence has no relevance to Ronnie Kimble except to imply guilt, not even by association, but guilt more by accident of birth. Such evidence is more subtle but no less damaging than direct bad character evidence and has to fail under a Rule 403 balancing test. If there ever was evidence where the "danger of unfair prejudice" substantially outweighs its probative value as to Ronnie Kimble, this must be it. Cautionary instructions are simply inadequate to cure this insidious and pernicious character assassination based on the implication of guilt by kinship. The Court has two options: either rule the evidence inadmissible in a joint trial or sever the trials of the two defendants.

12. While undersigned counsel are not in a position to predict the strength of the state's case against Ted Kimble, a not unlikely scenario would be that undersigned counsel might conclude at some point there would be little doubt in the jury's mind concerning the guilt of Ted Kimble. Undersigned

counsel would then be in a position where it would be very much in Ronnie Kimble's best interests to concede to the jury that Ted Kimble hired someone to kill his wife; but that individual was not Ronnie Kimble. When one defendant tries to put the blame for the murder on a codefendant, such is grounds for severance. *State v. Pickens*, 335 N.C. 717, 724 (1994).

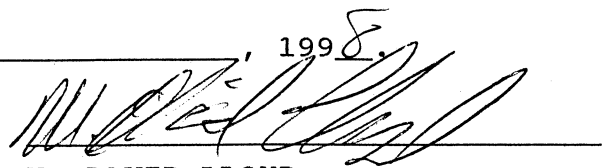
13. There are no North Carolina cases directly on point with our fact situation; however, there are strong parallels in the Supreme Court's decision in *State v. Hucks*, 323 N.C. 574 (1988). There the Court decided that a new trial was warranted where the trial court refused to grant severance when the codefendant changed his plea of not guilty to guilty after the jury was impaneled. In an effort to conserve judicial resources, the trial court declined to sever Hucks's trial. The Supreme Court held that the denial of severance "hopelessly tainted [the jury's determination] against Hucks." *Id.*, 323 N.C. at 584. We have an analogous situation here; if we reach the situation that a jury is convinced the state has proved its case against Ted Kimble and we are forced to concede that then we have sealed the guilt of Ted Kimble. This is analogous to the situation in *Hucks* where the mid-trial guilty plea tainted the jury's verdict against the remaining codefendant.

IN CONCLUSION such evidence is inadmissible against Ronnie Kimble because it is not relevant, fails a Rule 403 analysis and violates the strictures of *Boykin* and *Pickens* in that it precludes a fair determination of guilt. The only way

to cure such a problem is to rule the evidence inadmissible in a joint trial or grant severance.

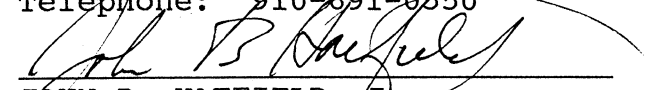
WHEREFORE, the defendant prays the court order the defendant be tried separately from Ted Kimble.

This the 22 day of Jan, 1998.



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