

Murder Down by the River:  
A Case Study on Conspiracy, Co-  
Defendants, Severance, and *Bruton*

IPAC Winter Conference 2013

DJ Mote  
Chief Deputy Prosecutor  
Jefferson County

---

---

---

---

---

---

---

---

Topics

- Charging co-defendants
- *Bruton*
- Co-conspirator Statements
- Immunity

---

---

---

---

---

---

---

---

The Beginning

- February 12, 2007 Sonia Kent contacts police
- Ashley Robinson missing since January 2007
- On March 14, 2007, ISP conduct interviews

---

---

---

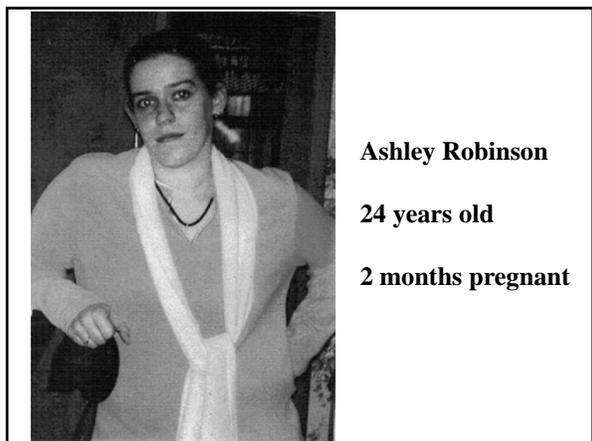
---

---

---

---

---



---

---

---

---

---

---

---

---



---

---

---

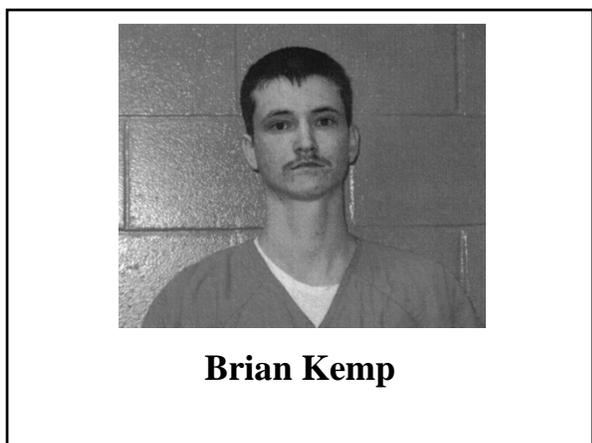
---

---

---

---

---



---

---

---

---

---

---

---

---

### Kemp Interview

- Non-custodial statement to police
- Was not read *Miranda*
- Police began questioning about weapons
- Kemp tells police “She’s dead”

---

---

---

---

---

---

---

---

### IC 35-34-1-9(b) Joinder of defendants HJI




---

---

---

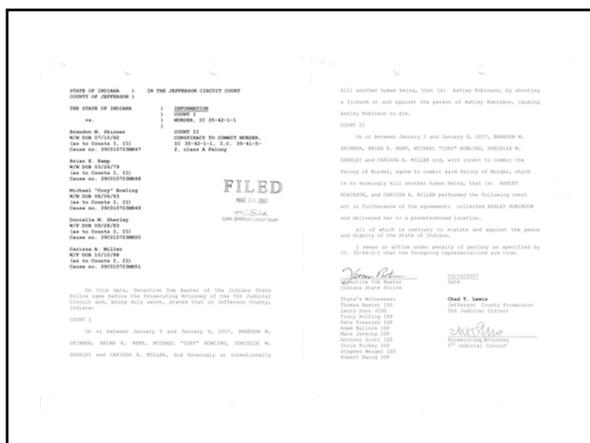
---

---

---

---

---




---

---

---

---

---

---

---

---

**Slide 8**

---

**HJ1**     Haley, Jennifer, 11/6/2013

On or between January 5 and January 9, 2007, BRANDON M. SKINNER, BRIAN E. KEMP, MICHAEL "CORY" BOWLING, DONIELLE M. SHERLEY, and CARISSA A. MILLER, did knowingly or intentionally kill another human being, that is: ASHLEY ROBINSON, by shooting a firearm at and against the person of ASHLEY ROBINSON, causing ASHLEY ROBINSON to die.

---

---

---

---

---

---

---

---

Is a Defendant Entitled to a Separate Trial?

---

---

---

---

---

---

---

---

Court's Discretion



---

---

---

---

---

---

---

---

The *Bruton* Rule  
and  
Severance of Defendants

---

---

---

---

---

---

---

---

The *Bruton* Rule

Accomplice's confessions that incriminate defendants are presumptively unreliable. *Lee v. Illinois*, 476 U.S. 530 (1986)

Therefore, a defendant's 6<sup>th</sup> Amendment right to confrontation is violated when a non-testifying codefendant's extrajudicial statement implicating the defendant is admitted into evidence. *Bruton v. United States*, 391 U.S. 123 (1968).

---

---

---

---

---

---

---

---

IC 35-34-1-11  
Separate Trial of Defendants Joined

The court shall require the prosecutor to elect:

(1) a joint trial without the statement;

(2) a joint trial with redacted statement; or

(3) a separate trial for the moving defendant.

---

---

---

---

---

---

---

---

IC 35-34-1-11

In all other cases, the court shall order a separate trial if necessary to protect a defendant's right to a speedy trial or to promote a fair determination of the guilt or innocence of a defendant.

---

---

---

---

---

---

---

---

IC 35-34-1-11

(c) The court may order the prosecutor to disclose *in camera* the statements

---

---

---

---

---

---

---

---

*Bruton*

- *Bruton* problem only if they “facially incriminate” another defendant.
- *Bruton* applies if the statement incriminates the defendant, whether or not specific reference is made.

---

---

---

---

---

---

---

---

Bruton



- Statement containing the co-defendant's silence or refusal to answer questions which are incriminating of the defendant can create a *Bruton* violation.

---

---

---

---

---

---

---

---

Bruton

- It is the **defendant's** right to invoke or not invoke the protection of *Bruton*.
- It is not properly invoked by the State or the trial court.

---

---

---

---

---

---

---

---

IC 35-34-1-12  
Motion for Separate Trial

- Must be made before start of trial
- Waived if untimely.
- If overruled, the motion may be renewed
- Waived if not renewed.
- If granted, subsequent trial of that defendant on the offenses charged is not barred.

---

---

---

---

---

---

---

---

Defendant is NOT Entitled to a Separate Trial When:

1. Evidence against co-defendant is stronger than that against the defendant.
2. Co-defendant implicates another.
3. Co-defendant plans to testify and make statements damaging to the movant.
4. Joint trial requires defendants to share peremptory challenges.

---

---

---

---

---

---

---

---

Defendant IS Entitled to Separate Trial if:



Mutually antagonistic defenses

---

---

---

---

---

---

---

---

Strategy Options

1. Don't offer the statement
2. Redact any co-defendant statements to eliminate any references to the defendant
3. Try the co-defendants separately

---

---

---

---

---

---

---

---

Brian Kemp's Statement

- Me, Skinner, Bowling, Miller and Sherley
- Skinner asked if I had a gun (yes)
- Miller and Sherley picked up Robinson
- Skinner would then shoot Robinson and throw her in the river
- We decided this before we all left

---

---

---

---

---

---

---

Brian Kemp's Statement

- Skinner, Bowling and I got in my Blazer
- Skinner took my shotgun, we loaded it
- I drove us down to the river
- Sherley, Miller and Robinson arrive
- Bowling handed Skinner the shotgun

---

---

---

---

---

---

---

Brandon Skinner Statement

- We were at Kemp's house
- Kemp and Bowling said, "We can handle this"
- I asked Sherley and Miller to find Robinson
- We planned to meet down by the river
- Kemp drove Bowling and I to the river

---

---

---

---

---

---

---

### Brandon Skinner Statement

- The girls dropped Ashley off
- Brian was talking to Ashley by the river
- Bowling handed me the shotgun
- I pointed it at Ashley and it “went off”
- Brian handed me another shell
- Told me to “make sure”
- Ashley was shot a second time

---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

---

### Co-Defendant's Statements

- Each defendant implicated all others
- Defendant's are all charged together
- *Bruton* controls the admissibility of these pre-arrest statements



---

---

---

---

---

---

---

---

Decisions...

- Prove the case without any of the statements?



---

---

---

---

---

---

---

---

What Other Evidence Do We Have?

- Gun recovered at Kemp's grandmother's house
- Shot shells recovered from scene
- No one puts them with victim before shooting
- No body (at the time)
- No uncharged eye-witnesses to shooting

---

---

---

---

---

---

---

---

Decisions...

- Prove the case without any of the statements?



---

---

---

---

---

---

---

---

Decisions...

- Prove the case without any of the statements?  
(No)
- Redact each statement of co-defendant references?




---

---

---

---

---

---

---

---

Redaction under *Bruton*

- Insertion of the work “blank” or “x” for the defendant’s name is not an adequate redaction
- Probably very few statements that are susceptible to effective deletion

---

---

---

---

---

---

---

---

Decisions...

1. Prove the case without any of the statements?  
(No)
2. Redact each statement of co-defendant references?  
(No)
3. Sever and try separately?  
(Yes)




---

---

---

---

---

---

---

---

### Who Wants to Do 5 Murder Trials?



---

---

---

---

---

---

---

---



### Pick Your Winner

---

---

---

---

---

---

---

---

### Pick Your Winner

- Who is most culpable? Least?
- Who has the worst criminal history? None?
- Who cooperated? Who didn't?
- What is the strength of each case?

---

---

---

---

---

---

---

---

Skinner

- Shooter
- Worst history of the bunch
- Powerful admissions

---

---

---

---

---

---

---

---

Kemp

- 2<sup>nd</sup> most culpable
- His house, his gun, his truck, his shells
- He disposed of the gun, clothing

---

---

---

---

---

---

---

---

One of the attorneys  
picked the winner for us

---

---

---

---

---

---

---

---

### Brian Kemp's Lawyer Wanted a Speedy Trial



---

---

---

---

---

---

---

---

### Brian Kemp Wants a Trial

- Skinner can wait...
- Offers to Miller, Sherely, Bowling
- Conspiracy for testimony against "All Co-Defendants" (Kemp)

---

---

---

---

---

---

---

---

### Dominoes Begin to Fall



- Bowling pleads to Conspiracy (open)
- Miller pleads to Conspiracy (open)
- Sherley pleads to Conspiracy (open)

---

---

---

---

---

---

---

---

## Immunity



---

---

---

---

---

---

---

---

### IC 35-37-3-3 Granting of Use Immunity

- The court shall instruct the witness, that any evidence the witness gives, or evidence derived from that evidence, may not be used in any criminal proceeding against that witness.
- Unless that evidence is volunteered or is not responsive.

---

---

---

---

---

---

---

---

### IC 35-37-3-3 Granting of Use Immunity

- Court required to grant immunity upon request
- Court must instruct orally or in writing
- Any evidence provided cannot later be used
- Evidence of perjury is excepted
- Refusal subjects witness to contempt

---

---

---

---

---

---

---

---

### Considerations

- Do I have to call this co-defendant?
- What's the worst outcome?
- Can I effectively control the co-defendant at trial?




---

---

---

---

---

---

---

---

### The Immunized Witness

- Voir Dire?
- Tell the jury about it in opening
- Cover immunity grant on the stand
- Have them appear in orange and cuffed
- In closing, *stress independent corroboration*

---

---

---

---

---

---

---

---

INSTRUCTION NUMBER \_\_\_\_\_

You are the exclusive judges of what may be either witness testimony or other evidence, if it goes to the substance of the case, is relevant to the exhibits, and is material to the issues in the case.

Testimony is more likely to be true if you consider the following factors:

- the witness's ability and opportunity to observe
- the behavior of the witness at the time of the observation
- any interests, bias, or prejudice the witness may have
- any relationship with people involved in the case
- the reasonableness of the testimony considering the other evidence
- your knowledge, common sense, and life experiences.

You should not disregard the testimony of a witness without a reason and without careful thought. If you find conflicting testimony, you must determine which witness you will believe and which of the testimony is more convincing.

The quantity of evidence or the number of witnesses should give the greatest value to the most convincing.

**In determining the significance of a witness's testimony, some factors you may consider are:**

**The reasonableness of the testimony considering other evidence**

---

---

---

---

---

---

---

---

INSTRUCTION NUMBER \_\_\_\_\_

You are the exclusive judges of the weight to be given to the evidence, it is in your duty to the defendant to determine its significance.

In determining the significance of a witness's testimony, some factors you may consider are:

- the witness's ability and opportunity to observe
- the behavior of the witness at the time of the event
- any interest, bias, or prejudice the witness may have
- any relationship with people involved in the case
- the reasonableness of the testimony considering the other evidence
- your knowledge, common sense, and life experiences.

You should not disregard the testimony of a witness without a reason and without careful consideration. If you find conflicting testimony, you must determine which witness you will believe and which of the testimony is most convincing.

**In determining the significance of a witness's testimony, some factors you may consider are:**

**Your knowledge, common sense, and life experiences**

---

---

---

---

---

---

---

---

*State v. Brian Kemp*

---

---

---

---

---

---

---

---

Statements in Furtherance of a Conspiracy



---

---

---

---

---

---

---

---

Ind. Evidence Rule 801(d)

**Rule 801. Definitions**

**(d) Statements Which are Not Hearsay.** A statement is not hearsay if:

(2) *Statement by party-opponent.*

(E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

---

---

---

---

---

---

---

---

Ind. Evidence Rule 801(d)

Rule 801. Definitions The following definitions apply under this Article:

**(d) Statements That Are Not Hearsay.** Notwithstanding Rule 801(c), a statement is not hearsay if:

(2) *An Opposing Party's Statement.* The statement is offered against an opposing party and:

(E) was made by the party's coconspirator during and in furtherance of the conspiracy. The statement does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

2013 INDIANA COURT ORDER 0013 (C.O. 0013)

---

---

---

---

---

---

---

---

Conspiracy Need not be Charged

---

---

---

---

---

---

---

---

Requirements for Admissibility

- Existence of a conspiracy
- Members included the declarant and the party against whom the statement is offered
- Made during the course and in furtherance of the conspiracy

---

---

---

---

---

---

---

---

Proof of the Conspiracy

- Evidence of the conspiracy independent of the out-of-court declarations.
- Prima facie showing – proof need not be strong – direct or circumstantial evidence.
- Can use direct testimony of co-conspirator.
- Can use defendant’s own statements.

---

---

---

---

---

---

---

---

During and in Furtherance of

- Statements designed to promote or facilitate achievement of the goals of the conspiracy.
- Generally, statements made after the crime is done are not admissible
  - Some exceptions

---

---

---

---

---

---

---

---

State v. Brian Kemp

- Skinner wanted a deal to testify (!)
- Murder and Conspiracy Concurrent
- Police found the body
- All remaining co-defendants testified

---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

---



---

---

---

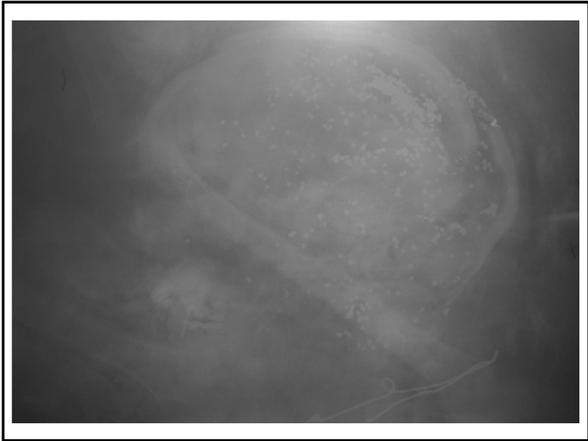
---

---

---

---

---



---

---

---

---

---

---

---

---



---

---

---

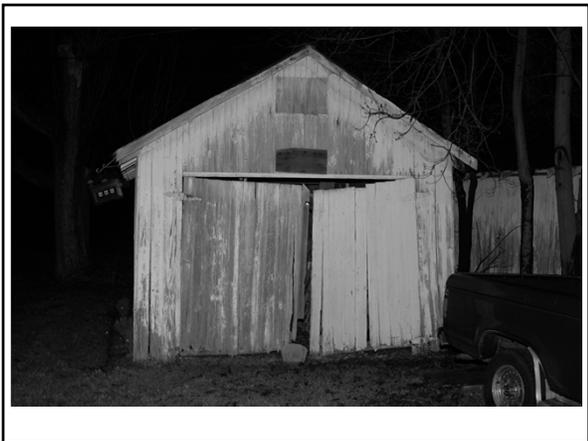
---

---

---

---

---



---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

---



### Brian Kemp's Statement

Q: And who was involved in the discussion?

A: Brandon, Donielle, myself, and Carissa, and Corey was in the room

Q: Can you recall what the discussion was about?

---

---

---

---

---

---

---

---

### Brian Kemp's Statement

...Brandon...said he wanted to kill her. He asked me if I had a gun.

That...I told him I did.

And they brought up that they could go get her...and bring her to the river...and drop her off down there

And he was gonna shoot her and throw her in the river.

---

---

---

---

---

---

---

---

“He said he wanted to kill her. He asked me if I had a gun.”

“...I told him I did.”

---

---

---

---

---

---

---

---

The Rest of the story...

- Michael Bowling
- Donielle Sherley
- Carissa Miller
- Brandon Skinner
- Brian Kemp

---

---

---

---

---

---

---

What We've Covered

- Charging co-defendants
- *Bruton*
- Co-conspirator Statements
- Immunity

---

---

---

---

---

---

---