

# Questioning Accomplices (*Aranda–Bruton*)

*Once partners in crime recognize that the “jig is up,” they tend to lose any identity of interest and immediately become antagonists.”*<sup>1</sup>

When officers have arrested two or more accomplices to a crime, the odds of eliciting an incriminating statement from at least one of them are pretty good. That’s mainly because a suspect who knows that his accomplice has been arrested will not know whether his associate is talking to investigators and, if so, what he is saying. Consequently, he will not know what the investigators know, which gives them a big advantage. As the United States Supreme Court pointed out in *Richardson v. Marsh*, “[T]he probability of confession increases with the number of participants, since each has a reduced assurance that he will be protected by his own silence.”<sup>2</sup>

While this is undoubtedly a good thing, it can result in a serious problem for prosecutors if they want to try the accomplices together. This problem is the result of two significant cases—*People v. Aranda* and *Bruton v. United States*—which essentially provide that if part of a defendant’s statement incriminates his codefendant, prosecutors will not be permitted to use that part against either of them unless one of the exceptions to *Aranda-Bruton* applies.<sup>3</sup>

There are three reasons for this rule. First, statements by one accomplice that incriminate another are inherently unreliable because accomplices almost always try to make themselves appear less culpable by shifting as much blame as possible to their associates.<sup>4</sup> Second, despite their questionable reliability, statements by accomplices tend to be “devastating” in the minds of the jurors.<sup>5</sup> Third, and maybe most important, the attorney for a defendant who is incriminated by a codefendant’s statement will be unable to cross-examine the codefendant—and thus test the trustworthiness of his statement—if, as is often the case, he does not testify.<sup>6</sup>

There is, of course, an easy solution to the problem: prosecutors can try the defendants separately. But while this solves one problem, it creates several others. Of particular importance, it will almost always make it more difficult to obtain convictions. In addition, it’s hard on victims and witnesses, it’s expensive, and it wastes valuable court resources. In the words of the United States Supreme Court, separate trials “impair both the efficiency and the fairness of the criminal justice system” by “requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of

<sup>1</sup> *Lee v. Illinois* (1986) 476 U.S. 530, 544-45. Edited.

<sup>2</sup> (1987) 481 U.S. 200, 209-10.

<sup>3</sup> **NOTE:** This rule was announced by the California Supreme Court in *People v. Aranda* (1965) 63 Cal.2d 518. Three years later, the U.S. Supreme Court essentially adopted the rule as a matter of constitutional law in *Bruton v. United States* (1968) 391 U.S. 128. Consequently, in California it is commonly known as the *Aranda-Bruton Rule*. ALSO SEE *People v. Boyd* (1990) 222 Cal.App.3d 541, 561 [“The premise of *Aranda* is essentially the same as that of *Bruton*”]. **NOTE:** *Aranda-Bruton* also applies when the declarant and the accomplice both make statements that, when considered together, incriminate the accomplice because they are inconsistent. See *People v. Fulks* (1980) 110 Cal.App.3d 609, 617 [inconsistent statements were highly incriminating because they “carried the unmistakable message that each was a hastily contrived fabrication”].

<sup>4</sup> See *Lee v. Illinois* (1986) 476 U.S. 530, 541 [such statements are “presumptively unreliable”].

<sup>5</sup> See *Bruton v. United States* (1968) 391 U.S. 123, 136.

<sup>6</sup> See *Bruton v. United States* (1968) 391 U.S. 123, 136 [“The unreliability of such evidence is intolerably compounded when the alleged accomplice does not testify and cannot be tested by cross-examination.”]; *Lee v. Illinois* (1986) 476 U.S. 530, 541 [the “truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice’s confession is sought to be introduced against a criminal defendant without benefit of cross-examination”]; *People v. Burney* (2009) 47 Cal.4th 204, 230 [“If the declarant codefendant invokes the Fifth Amendment right against self-incrimination and declines to testify, the implicated defendant is unable to cross-examine the declarant codefendant regarding the content of the confession.”].

knowing the prosecution's case beforehand."<sup>7</sup> On the other hand, said the Court, joint trials "generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability."<sup>8</sup>

So, what can officers do about this? In many cases, a lot. As noted, there are exceptions to the restrictions imposed by *Aranda-Bruton*—in fact, there are five. And, as we will discuss, in many cases the actions of the investigating officers will determine whether any of these exceptions are applicable. It will soon become apparent, however, that it is not easy for officers to navigate around *Aranda-Bruton*. On the contrary, it requires a good understanding of some complex legal rules, a lot of patience, and a little luck. But, given the alternatives, it is well worth the effort.

One other thing before we begin: to simplify our discussion, we will refer to the suspect who made the statement as the "declarant," and the suspect who was incriminated by the declarant's statement as the "accomplice."

## Aranda Statements

A declarant's statement that incriminates an accomplice will be admissible under *Aranda-Bruton* in a joint trial if it constitutes an "Aranda statement." Simply put, an *Aranda* statement is one in which the declarant (1) explained only *his* role in planning and carrying out the crime, and (2) said nothing to suggest that he had an accomplice. For example, if Curley was giving a statement, and if he said "Moe and I went into Larry's Liquor Store and robbed it," the statement would not constitute an *Aranda* statement—and therefore could not be used by prosecutors if Curley and Moe were tried together—because Curley's statement also incriminated Moe. On the other hand, if Curley had said "I went into Larry's Liquor Store and robbed it," the statement would be admissible because Moe was not prejudiced by it.

To obtain an *Aranda* statement, it is usually best if investigators begin by trying to elicit complete statements from every arrestee who was involved in the planning or commission of the crime. Such a statement is necessary to help ensure that the investigators and prosecutors will have a complete picture of the incident, and also to provide prosecutors with the material they will need for an *Arandized* statement (discussed next) if the declarant does not give a usable *Aranda* statement. Then, after obtaining a complete statement, investigators will ask the declarant to give a second statement (the *Aranda* statement) in which he explains his role—and only his role.<sup>9</sup>

It must be acknowledged, however, that *Aranda* statements are notoriously difficult to obtain because it is unnatural for a suspect to describe a joint venture as if he were acting alone. It is especially hard to get them to avoid using the words "we," "he," "they" or some other reference to an accessory. To complicate matters, suspects who are asked to give such a statement will ordinarily be confused as to the objective of the officers' peculiar request, and the officers will seldom want to divulge their tactical reasons for seeking it. But even if the attempt fizzles, as we will discuss next, prosecutors may be able to convert an unsuccessful *Aranda* statement into a usable *Arandized* statement.

## Arandized Statements

A so-called "*Arandized* statement"—also known as a "redacted" or "sanitized" statement—is a statement that originally contained information that incriminated the declarant's accomplice, but which was edited (usually by prosecutors or at the direction of the trial judge) so as to eliminate all direct and indirect references to the accomplice; i.e., there is nothing in the statement to indicate that an accomplice even existed. As the Supreme Court explained:

<sup>7</sup> *Richardson v. Marsh* (1987) 481 U.S. 200, 210.

<sup>8</sup> *Richardson v. Marsh* (1987) 481 U.S. 200, 210. **NOTE:** Before *Aranda-Bruton*, the courts often permitted the declarant's statement to be used at a joint trial if the court instructed the jurors that they must not consider anything in the statement as evidence against the accomplice. In *Bruton v. United States*, however, the Supreme Court ruled that this procedure was inadequate because of "the risk that the jury will not, or cannot, follow instructions," especially where "the powerfully incriminating extrajudicial statement of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial." (1968) 391 U.S. 123, 136.

<sup>9</sup> See *People v. Mitcham* (1992) 1 Cal.4<sup>th</sup> 1027, 1047 ["[The officer] requested that [the declarant] provide another statement referring solely to his own involvement in the crimes and omitting any reference to [Mitcham]."].

[T]he Confrontation Clause is not violated by the admission of a nontestifying accomplice's confession with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.<sup>10</sup>

Or, in the words of the Court of Appeal, "[I]f references to the participation of anyone else, whether directly or indirectly identified or not, are nonexistent, or are deleted, the trial may be joint, and the extrajudicial statement may be received against the declarant."<sup>11</sup>

At the outset it should be noted that written *Arandized* statements were admitted in the past if all references to the accomplice were replaced with a blank space or a neutral term such as "deleted," "the other guy" or a pronoun.<sup>12</sup> But this proved to be unsatisfactory because, as the Supreme Court observed in *Gray v. Maryland*,<sup>13</sup> jurors would quickly figure out that the purpose of these devices was to hide the identity of another person, and the most likely candidate was the declarant's codefendant. The Court offered this example: Assume that officers obtained the following confession from Bob Smith: "I, along with Sam Jones, robbed the bank." If prosecutors redacted the confession to read "I and blank robbed the bank," a juror who heard the confession and wondered to whom "blank" referred, "need only lift his eyes to Jones, sitting at counsel table, to find what will seem the obvious answer."

To avoid problems such as these, prosecutors would simply delete every word that could possibly be interpreted to mean that the declarant had an accomplice. But this didn't work either because it resulted in strange and awkward sentences that would just

befuddle the jurors; e.g., "Well, first broke open, opened up the lock with bolt cutters . . . and then opened the back of the car and got the body out and left the body near some rocks."<sup>14</sup>

Because of these problems, the Supreme Court ruled that edited or redacted statements will be admissible only if there was no "obvious indication of deletion."<sup>15</sup> As the Ninth Circuit explained in *U.S. v. Parks*, "The combination of an obviously redacted statement with the language implying the existence of a third party reasonably could lead the jury to conclude that the unnamed third party must be the codefendant before them."<sup>16</sup>

It should be noted that an *Aranda-Bruton* violation will not result if the *Arandized* statement contained information that only became incriminating to the accomplice as the result of circumstantial evidence that was presented to the jury *after* the statement was admitted. This was the ruling of the United States Supreme Court in the case of *Richardson v. Marsh*.<sup>17</sup> In that case, three people—Martin, Williams, and Marsh—robbed the occupants of a residence and killed two of them. Williams was arrested and gave a statement in which he identified Martin and Marsh as his accomplices. Among other things, Williams said they all drove to the house together, and that Martin had stated during the ride that he planned to kill all the occupants.

At the joint trial of Williams and Marsh (Martin was a fugitive), Williams' statement was read to the jury, except that all references to Marsh and Martin were deleted. Although the statement did not incriminate Marsh on its face, she later testified in her defense and acknowledged that she had accompanied Martin and Williams when they drove to the

<sup>10</sup> *Richardson v. Marsh* (1987) 481 U.S. 200, 211.

<sup>11</sup> *People v. Manson* (1976) 61 Cal.App.3d 102, 151.

<sup>12</sup> See, for example, *Gray v. Maryland* (1998) 523 U.S. 185, 197 ["Question: Who was in the group that beat Stacey? Answer: Me, deleted, deleted, and a few other guys."]; *People v. Burney* (2009) 47 Cal.4th 203, 231 ["the other"]; *People v. Schmaus* (2003) 109 Cal.App.4th 846, 855 ["another guy"]; *People v. Fletcher* (1996) 13 Cal.4th 451, 457 ["a friend"].

<sup>13</sup> (1998) 523 U.S. 185, 193. ALSO SEE *People v. Schmaus* (2003) 109 Cal.App.4th 846, 855 [Sixth Amendment violation occurs "if references to defendant's name are merely replaced by a symbol or by a blank space in place of defendant's name."]; *People v. Burney* (2009) 47 Cal.4th 203, 231 ["[W]hen, despite redaction, a codefendant's statement obviously refers directly to the defendant and implicates him or her in the charged crimes, the *Bruton* rule applies and introduction of the statement at a joint trial violates the defendant's rights under the confrontation clause."].

<sup>14</sup> *People v. Archer* (2000) 82 Cal.App.4th 1380, 1390 ["While appellant's name is not mentioned in the statement, the existence of another participant is obvious from the statement itself."].

<sup>15</sup> *Gray v. Maryland* (1998) 523 U.S. 185, 189, 197.

<sup>16</sup> (9th Cir. 2002) 285 F.3d 1133, 1139.

<sup>17</sup> (1987) 481 U.S. 200.

residence. In light of this testimony, Williams' *Arandized* statement was incriminating to Marsh for the following reason: Williams said in his statement that Martin had announced in the car that he was going to kill the occupants. Marsh testified that she was inside the car. Therefore, Marsh must have known that Martin planned to murder the occupants, and yet she did not withdraw from the conspiracy. Consequently, Marsh argued that the admission of Williams' statement constituted a violation of *Bruton*. But the United States Supreme Court disagreed, ruling that a violation does not result when, as here, the declarant's statement "was not incriminating on its face, and became so only when linked with evidence introduced later at trial."<sup>18</sup>

A similar issue arose during the 1970-71 murder trial of Charles Manson and three women who were members of the Manson Family. Specifically, the statements of the women were edited so that each woman explained only her role in carrying out the grisly Tate-LaBianca murders in Los Angeles. Nevertheless, the women contended on appeal that the statements of the others incriminated them—and thus violated the *Aranda* rule—because prosecutors had presented evidence to the jury that members of the Manson Family "ate together, slept together, had sex together, and functioned as a unit." In light of this testimony, they argued that the murderous actions of one member of the "unit" would naturally be viewed by the jurors as actions that were committed, encouraged, or at least approved by the others. Employing reasoning that the United States Supreme Court would adopt 11 years later in *Richardson v. Marsh*, the Court of Appeal ruled that an *Aranda* violation

does not result when, as occurred here, "each admission was edited to delete any explicit reference to anyone other than the declarant," and that the admissions only became incriminating to the others "by reason of circumstantial implications that might be drawn by the jury."<sup>19</sup>

Finally, it should be noted that, even if prosecutors were able to produce an *Arandized* statement, it will not be admissible at a joint trial if it was *more* incriminating to the declarant than the unedited version.<sup>20</sup> Still, in *People v. Lewis* the California Supreme Court ruled that the editing of one codefendant's statement from "We went to the mall" [where the codefendants kidnapped and later murdered a woman] to "I went to the mall" did not violate this rule because, although it "impliedly overstated" the declarant's role when considered in the abstract, there was substantial independent evidence that he did not act alone.<sup>21</sup>

## Adoptive Admissions

A declarant's statement will be admissible under *Aranda-Bruton* if, before it was admitted into evidence, the accomplice acknowledged it was true. Such an acknowledgment renders the statement an "adoptive admission" which prosecutors may use in court because, as the California Supreme Court explained, "once the defendant has expressly or impliedly adopted the statements of another, the statements become *his own admissions*."<sup>22</sup>

There are two ways in which a declarant's statement may be adopted by an accomplice. The most common is an express adoption, which occurs when officers tell the accomplice what the declarant claimed

<sup>18</sup> ALSO SEE *People v. Hampton* (1999) 73 Cal.App.4th 710, 720 [no *Aranda-Bruton* violation because any incrimination resulting from the redacted statement "requires inference from the statement itself and linkage with other evidence"]; *People v. Bolden* (1996) 44 Cal.App.4th 707, 713-14 [declarant's statement that he "left the house with some friends" before committing an arson did not sufficiently identify the accomplice: "That [Bolden] was a friend of [the declarant]—along with countless others—was not a distinctive fact; the linkage was insignificant"]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1047. ALSO SEE *People v. Orozco* (1993) 20 Cal.App.4th 1554, 1566 [the "incriminating link in this case was provided by the eyewitness identification"].

<sup>19</sup> (1976) 61 Cal.App.3d 102, 151.

<sup>20</sup> See *People v. Lewis* (2008) 43 Cal.4th 415, 457 ["A defendant is prejudiced in [the context of *Aranda-Bruton*] when the editing of his statement distorts his role or makes an exculpatory statement inculpatory."].

<sup>21</sup> (2008) 43 Cal.4th 415, 457.

<sup>22</sup> *People v. Cruz* (2008) 44 Cal.4th 636, 672. ALSO SEE *People v. Castille* (2005) 129 Cal.App.4th 863, 876 ["The adoptive admission exception generally permits hearsay to be admitted against a party, when that party has adopted it or agreed that a statement, originally made by someone else, is true."]. NOTE: Because an adoptive admission is, as a matter of law, a statement by the accomplice (not the declarant), its admission into evidence does not violate *Crawford v. Washington* (2004) 541 U.S. 36. See *People v. Castille* (2005) 129 Cal.App.4th 863, 877-81; *People v. Combs* (2004) 34 Cal.4th 821, 842-43.

he had done, and the accomplice admits the statement is true; e.g., “Yeah, that’s what I did.”<sup>23</sup> The other is an implied adoption which may result if (1) the accomplice remained silent after hearing the part of the declarant’s statement that implicated him; and (2) the accomplice did not deny the allegation, even though he had an opportunity to do so.<sup>24</sup>

While most adoptive admissions are obtained when investigators read or summarize the declarant’s statement to the accomplice, or play a recording of it, there is another method that should be considered. It works like this: Investigators bring the suspects together in a room and, through questioning and an exchange of comments between the suspects and officers, determine which details pertaining to the planning and commission of their crime they agree upon. A good example is found in *People v. Castille*.<sup>25</sup>

In *Castille*, three men—Castille, Shields, and Brown—decided to rob Sharif’s Market in Oakland. While Brown waited outside in the getaway car, Castille and Shields entered wearing ski masks and armed with sawed-off shotguns. At first, everything went according to the plan: Shields stood guard at the door as Castille walked up to the clerk and brandished his shotgun. But then the clerk grabbed the gun and began to struggle with Castille. When Shields saw what was happening, he raised his shotgun and pointed it in the direction of the clerk. This caught the attention of Castille who ducked, thinking that Shields would hit him, too. As Castille ducked, Shields fired twice, killing the clerk. Castille and Shields then ran to the car and, as they sped off, the owner of the store, who had heard the commotion from his apartment upstairs, fired four or five shots at the vehicle.

For the next few weeks the investigation stalled. But then a man contacted officers and led them to the two shotguns, saying that Castille and Brown had given him the guns to sell. Shortly after that, officers located Brown’s car; it was parked on the street, the rear fender was peppered with bullet holes. About a

week later, officers arrested the three men for the murder and transported them to the Homicide Section for questioning.

Two homicide investigators were assigned to each suspect, and they interrogated them separately after obtaining *Miranda* waivers. All three essentially confessed. They were then put in a room together with the six investigators and the lead investigator, Lt. Ralph Lacer. Lacer testified that his objective was to try to obtain statements from everyone that would be admissible under *Aranda-Bruton*; and he figured that if all three suspects were interviewed together, the parts of the joint interview to which they agreed would constitute adoptive admissions.

The procedure that Lt. Lacer utilized, was described by the court as follows: “The officers frequently began their questions on a particular topic by addressing one defendant and then continuing the account with the other. As one defendant gave information, the officers asked the others to confirm certain statements.” Here’s an example:

CASTILLE: The clerk dude had the gun and everything. Remon [Shields] was like come on, so I let the gun go. I look at Remon and I see the gun pointing right at me so I’m like dang, if he pull the trigger it’s going to hit me in my head. So I ducked and ran out the store. As soon as I ducked, the shot went off.

SGT. BINGHAM: Okay Remon, you just heard what he said.

SHIELDS: Yes.

LT. LACER: Is what he said true? Remon, I know it’s hard but you need to answer me, son. Is what Clemeth just said true?

SHIELDS: If he say it’s true, it’s true.

LT. LACER: That’s your answer?

SHIELDS: You know, I don’t know for a fact though, I probably did, but I know when I went to turn and walk out of the store the gun went off. I know that. I know that. I can remember that. I, I won’t ever forget that.

<sup>23</sup> See *People v. Jennings* (2010) 50 Cal.4<sup>th</sup> 615, 663 [“defendant expressly admitted or accepted [the declarant’s statement] at the time the statement was made”]; *People v. Combs* (2004) 34 Cal.4<sup>th</sup> 821, 843. ALSO SEE *People v. Castille* (2005) 129 Cal.App.4<sup>th</sup> 863, 881 [a somewhat ambiguous adoption may suffice; “His response [‘If he says it’s true, it’s true’] is not free from ambiguity. However, permitting the jury to interpret his words, as juries are regularly called upon to do, presents no [constitutional] threat”].

<sup>24</sup> See CALCRIM 357; *People v. Jennings* (2010) 50 Cal.4<sup>th</sup> 615, 664 [“statements made by [the declarant] that were met by defendant’s silence, or by equivocal or evasive responses on his part, properly are viewed as adoptive admissions.”].

<sup>25</sup> (2005) 129 Cal.App.4<sup>th</sup> 863.

Before the officers concluded the joint interview, the court noted that “each defendant was asked directly whether he agreed with statements made by the others [they all did] and each had the further opportunity to clarify any statements to which he took exception.”

There were also certain things that the defendants did not agree on, such as when they first discussed robbing the store. Citing these conflicts, they contended their joint statement was inadmissible. But the court disagreed, ruling that an adoptive admission will not be suppressed merely because there were conflicts over matters that, in light of the entire statement, were immaterial. Accordingly, having determined that “[n]one of these differences in recollection are material in light of appellants’ admissions regarding the attempted robbery and murder,” the court ruled the recording was admissible as an adoptive admission.

One last thing: Officers should be very leery about putting the suspects together before they have each given fairly complete statements. That’s because a suspect who has not committed himself to a certain story may be able to concoct a plausible—but false—one by agreeing only to details that do not implicate him.

## Other Aranda-Bruton Exceptions

There are two other situations in which a declarant’s statement implicating an accomplice may be admissible at a joint trial.

**ACCOMPLICE MADE IDENTICAL STATEMENT:** A declarant’s statement that incriminates an accomplice will be admissible in a joint trial if the accomplice gave a statement in which he essentially said the same thing.<sup>26</sup> This exception does not, however, apply merely because the accomplice’s statement

“interlocked” to some degree with that of the declarant; i.e., there were certain similarities. What counts is whether the accomplice expressly or impliedly acknowledged the truth of that part of the declarant’s statement that incriminated the accomplice.<sup>27</sup>

For example, in *Lee v. Illinois*<sup>28</sup> police in East St. Louis arrested Lee and Thomas for committing a double murder. Both gave similar statements concerning many of the details surrounding the crime. There were, however, some discrepancies concerning the murders themselves. Specifically, their statements differed as to Lee’s awareness that Thomas had planned to kill the victims, and Lee’s role in carrying out the crimes. As the result of these discrepancies, the United States Supreme Court ruled that the admission of Thomas’s statement against Lee violated *Bruton*. Said the Court:

If those portions of the codefendant’s purportedly “interlocking” statement which bear to any significant degree on the defendant’s participation in the crime are not thoroughly substantiated by the defendant’s own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, when the discrepancies between the statements are not insignificant, the codefendant’s confession may not be admitted.

**STATEMENT BY CO-CONSPIRATOR:** Finally, under the co-conspirator exception to the hearsay rule, a declarant’s statement will be admissible in a joint trial if (1) the declarant and accomplice were co-conspirators in the crime, (2) the statement was made while the two were participating in the conspiracy, and (3) the statement was made in furtherance of the objective of the conspiracy.<sup>29</sup>

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<sup>26</sup> See *Lee v. Illinois* (1986) 476 U.S. 530, 545 [“Obviously, when accomplices’ confessions are identical in all material respects, the likelihood that they are accurate is significantly increased.”]

<sup>27</sup> See *Lee v. Illinois* (1986) 476 U.S. 530, 545.

<sup>28</sup> (1986) 476 U.S. 530.

<sup>29</sup> See CALCRIM 418; Evid. Code § 1223; *People v. Gann* (2011) \_\_ Cal.App.4th \_\_ [2011 WL 1049786]; *U.S. v. Delgado* (5th Cir. 2005) 401 F.3d 290, 299; *U.S. v. Rashid* (8th Cir. 2004) 383 F.3d 769, 777. ALSO SEE *U.S. v. Allen* (9th Cir. 2005) 425 F.3d 1231, 1235 [“[C]o-conspirator statements are not testimonial and therefore beyond the compass of *Crawford’s* [*Crawford v. Washington* (2004) 541 U.S. 36] holding.”]. **NOTE:** Admission of a declarant’s statement will not constitute error under *Aranda-Bruton* if the declarant testifies at the joint trial and he (1) denies or admits making the statement incriminating his accomplice and (2) is subject to “full and effective cross-examination” by the accomplice’s attorney. *Nelson v. O’Neill* (1971) 402 U.S. 622, 627.