

3.1 Statements by Defendant or Codefendant

You have heard testimony that the defendant made a statement. It is for you to decide (1) whether the defendant made the statement, and (2) if so, how much weight to give to it. In making those decisions, you should consider all the evidence about the statement, including the circumstances under which the defendant may have made it.

Comment

This instruction uses the word “statement” in preference to the more pejorative term, “confession.” The word “confession” implies an ultimate conclusion about the significance of a defendant’s statement, which should be left for the jury to determine. The language of this instruction was expressly approved in *United States v. Hoac*, 990 F.2d 1099, 1108 n.4 (9th Cir. 1993).

When voluntariness of a confession is an issue, the instruction is required by 18 U.S.C. § 3501(a), providing that after a trial judge has determined a confession to be admissible, the judge “shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.” *See also United States v. Dickerson*, 530 U.S. 428, 432 (2000) (holding that *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny govern admissibility of accused person’s statement during custodial interrogation and could not be in effect overruled by § 3501). Section 3501(e) defines “confession” as “any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.” *See Hoac*, 990 F.2d at 1107 (where defendant raises genuine issue at trial concerning voluntariness of statement, trial court is obligated by statute to instruct jury concerning weight to be accorded that statement). Failure to give the required instruction may constitute plain error. *Id.* at 1109.

In a joint trial, when a nontestifying defendant’s statement directly inculpatates a nonconfessing codefendant, the Confrontation Clause may bar the admission of the defendant’s statement. *Bruton v. United States*, 391 U.S. 123, 137 (1968) (holding admission of nontestifying defendant’s statement inculpatating nonconfessing codefendant by name violated the Confrontation Clause, despite limiting instruction). In these circumstances, modification of the statement may be necessary to avoid directly identifying the nonconfessing codefendant and the court may be required to offer a limiting instruction that jurors may consider the statement only with respect to the confessing codefendant. *See Samia v. United States*, 599 U.S. 635 (2023) (holding that nontestifying codefendant’s confession that substituted a codefendant’s name with “other person,” coupled with limiting instruction, did not violate the Confrontation Clause because it did not directly inculcate defendant); *Gray v. Maryland*, 523 U.S. 185, 194 (1998) (holding that obviously redacted statement substituting nonconfessing codefendant’s name with “deleted” or “deletion” was “directly accusatory” and violated the Confrontation Clause, notwithstanding limiting instruction); *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (holding the Confrontation Clause did not bar admission of a

redacted statement by the nontestifying codefendant because the statement did not implicate anyone else and the jury was instructed not to use the confession in any way against the defendant). See Model Instruction 2.12 Evidence for Limited Purpose for limiting instructions.

The trial court must make a preliminary finding by a preponderance of the evidence that the co-conspirator's statements fall within the scope of the hearsay exception for statement of co-conspirators. In *United States v. Ehmer*, 87 F.4th 1073, 1127-28 (9th Cir. 2023), one of the defendants contended that another co-conspirator's statements, which were made after the defendant had withdrawn from the conspiracy, were hearsay and erroneously admitted. The Ninth Circuit agreed and held that the trial court erred in not making a preliminary finding on the "threshold question" whether the co-conspirator's statements were made when the defendant was part of the conspiracy. *Id.* at 1127 (rejecting the government's argument that "the hearsay exception continues to apply, even as to persons who have withdrawn from the conspiracy, so long as the **declarant** remains in the conspiracy.>").

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