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Article 10

Joint Criminal Trials

JOINT CRIMINAL TRIALS

. . . the right to a fair trial is the most fundamental of all rights, for without it all other rights are mere words, empty and meaningless.[1]

During the last decade, various television programs have utilized the now colloquial "isolation booth." Contestants entered the soundproof booth, and the built-in speaker system was turned off, leaving the individual "isolated" from others in the studio. Whenever two or more criminal defendants are jointly tried, the jurors are required to place each in a separate "isolation booth." They are instructed that, in determining the guilt or innocence of defendant *A*, they must weigh only that evidence which was admissible against defendant *A*, and then isolate and ignore that portion of the evidence admissible only against him during their consideration of the guilt or innocence of defendant *B*.

The efficacy of this instruction as affording protection to a defendant in a joint criminal trial is largely dependent upon the jury's ability to "isolate" and distinguish the evidence educed. An examination both of the jury's capacity to perform its assigned function adequately and of the resultant impact upon the rights of defendants constitutes the subject matter of this note.

History of the Joint Trial

At common law, a separate trial was not numbered among the rights of an individual who was one of several codefendants jointly indicted for the same crime.[2] However, a court could, in its discretion, grant a separate trial upon the application of a defendant who feared that a joint trial would prejudice his defense.[3] This situation prevailed in New York until 1829 when the common-law rule was abrogated. The statute then enacted provided that when "two or more defendants shall be jointly indicted for any felony, any one defendant requiring it, shall be tried separately."[4] This standard existed for almost a century until, in 1926, alleged abuses of the right to separate trial, as well as popular demand for more drastic treatment of persons charged with crime, prompted the New York legislature to withdraw the absolute right to severance from a joint criminal defendant.[5] Thus, discretion was once again vested in the trial judge. The sole criterion by which the exercise of discretion could be regulated was found in the nebulous caveat that if facts or circumstances existed which made it unfair to try the defendants jointly there would be a reversible abuse.[6]

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[1] Vanderbilt, *The Essentials of a Sound Judicial System*, 48 NW. U.L. REV. 1 (1953).

[2] People v. Vermilyea, 7 Cow. 108, 138 (N.Y. 1827). There is likewise no common-law right on a defendant's part to be tried jointly, and severance could be had at the instance of the prosecution. Hoffman v. Commonwealth, 134 Ky. 726, 121 S.W. 690 (1909).

[3] 5 ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 1944 (1957). It should also be noted that the "discretion with which the court is clothed is of course a judicial discretion, which means that it may not be arbitrarily exercised and that where the circumstances are such that a defendant will be deprived of a fair trial if jointly tried, a severance must be ordered." 5 ANDERSON, *op. cit. supra* (Supp. 1964, at 21); see also People v. Clark, 17 Ill. 2d 486, 162 N.E.2d 413 (1959).

[4] N.Y. REV. STAT. (1829), pt. IV, ch. 2.

[5] People v. Wargo, 149 Misc. 461, 462, 268 N.Y. Supp. 400, 402 (Sup. Ct. 1933).

[6] People v. Doran, 246 N.Y. 409, 424, 159 N.E. 379, 384 (1927).

Grounds For Severance

Where the defenses or interests of co-defendants are antagonistic, severance is likely to be granted.[7] However, it is necessary that the "antagonism" actually and presently exist, since the prejudicial effect must be probable and not merely possible.[8] Moreover, it must be emphasized that the existence of a present and probable prejudicial effect does not require severance as a matter of right. The discretion of the court still remains the paramount factor.[9]

Separate trials may also properly be granted, where it appears that a defendant will be substantially prejudiced by the introduction of evidence which is not admissible against *him*, although it is admissible against the other defendant(s).[10] However, severance is not, by any means, the inevitable result, *e.g.*, were the prosecution to manifest an intent not to utilize the evidence, or were the court to decide that, despite its employment, a jury could be effectively cautioned concerning its place in their considerations, then severance would be denied.[11]

The judicial discretion to sever has been exercised when a motion for severance was based upon the contention that another defendant had made a confession implicating the movant in the commission of the crime.[12] The majority of jurisdictions have held that the rights and interests of the non-confessing defendant are adequately protected by an instruction to the jury that the confession is only referable to the defendant who made it.[13] This attitude has been expressed in *People v. Isby*,[14] where it was asserted that the exercise of discretion is not abused where severance is denied in the face of proof that "damaging testimony, admissible against one defendant and not against the other, may be received in the case. . . ."[15] Rather, "it is then incumbent upon the court to limit such evidence in its application to the defendant to whom it is referable."[16]

It is evident, then, that a great burden is placed upon the defendant; he must show that the evidence to be adduced is prejudicial; that it is substantially so; and that it cannot be outweighed by proper instructions to the jury. Having surmounted this burden, a defendant still must await the exercise of the court's discretion, mindful that:

> an appellate court will neither lightly overrule the trial court in its exercise of

[7] State v. Progue, 243 La. 337, 144 So. 2d 352 (1962).

[8] See *ibid.*; State v. McCarthy, 130 Conn. 96, 31 A.2d 921 (1943).

[9] People v. Erno, 195 Cal. 272, 232 Pac. 710 (1925); *cf.* People v. Aranda, —— Cal. 2d——, 47 Cal. Rptr. 353, 407 P.2d 265 (1965).

[10] People v. Rossi, 270 App. Div. 624, 63 N.Y.S.2d 4 (3d Dep't 1946).

[11] People v. Santo, 43 Cal. 2d 319, 273 P.2d 249 (1954); State v. Castelli, 92 Conn. 58, 101 Atl. 476 (1917); State v. Rios, 17 N.J. 572, 112 A.2d 247 (1955). *But see* People v. Aranda, *supra* note 9, at ——, 47 Cal. Rptr. at 360-61, 407 P.2d at 272-73.

[12] People v. Feolo, 282 N.Y. 276, 26 N.E.2d 256 (1940); People v. Doran, 246 N.Y. 409, 159 N.E. 379 (1927); People v. Wargo, 149 Misc. 461, 268 N.Y. Supp. 400 (Sup. Ct. 1933); People v. Wood, 306 Ill. 224, 137 N.E. 799 (1922).

[13] Delli Paoli v. United States, 352 U.S. 232 (1957); Hall v. United States, 168 F.2d 161 (D.C. Cir.), *cert. denied*, 334 U.S. 853 (1948); People v. Campbell, 301 Mich. 670, 4 N.W.2d 51 (1942).

[14] 30 Cal. 2d 879, 186 P.2d 405 (1947).

[15] People v. Isby, 30 Cal. 2d 879, 897, 186 P.2d 405, 416 (1947).

[16] *Ibid.*

> judicial discretion nor substitute its own judgment, unless it appears that there has been a clear abuse of the discretion vested in the court of original jurisdiction.[17]

The decisional law would seem to assert that a great deal of faith can reasonably be placed in the ability of the jury to render a decision in accordance with the court's instructions. But, *will* the jury so limit the evidence and "isolate" it from its consideration of the non-confessing defendant? Although it can be argued that a jury will not, in fact, compartmentalize the evidence, nevertheless, there exists a presumption that the jury acts as it is instructed. In *Lindsey v. State,*[18] it was argued

> that the jury could not consider the confessions for any purpose without considering them against appellant [the non-confessing defendant]. But this does not necessarily follow. The jury was told to do so, and we perceive no reason why they may not have done it.[19]

In a minority of jurisdictions, codefendants are offered severance where the prosecution does not agree to withhold the confession or to delete therefrom any reference to the movant.[20]

In all the aforementioned situations, the propriety of granting severance is necessarily influenced by both the prevalent public attitude, and the constitutional requirement of due process imposed on state criminal procedure.

Public Attitudes Toward Joint Trials

In New York in 1926, the year in which the "right to severance" statute was repealed, it was felt that the demands of society for protection from, and immediate punishment of, the criminal were paramount to any in-depth evaluation of the criminal defendant's individual rights.[21] Judge Hiscock of the New York Court of Appeals stated that:

> there is a general recognition of the fact that the present prevalence of crime has outrun the capacity of ordinary institutions and procedural methods to control it and that we must have fundamental change and increase in the observance of the law. . . .[22]

As a result of this "present prevalence of crime," it was felt that remedial legislation was needed. One of the first changes proposed was a substitution of discretion in the court for a right in the defendant whenever severance was sought.[23] Indications of the rationale buttressing this suggested revision may be found in the statement of a public prosecutor:

> When a district attorney is compelled to give separate trials the witnesses become discouraged because of the loss of time involved and very often because their employment is in jeopardy. The cost to the county is great and it is necessary to obtain a new panel of jurors for each trial. The case becomes stale and influence is used to prevent witnesses who have appeared at the first trial from appearing at subsequent trials.[24]

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[17] People v. Diaz, 10 App. Div. 2d 80, 90, 198 N.Y.S.2d 27, 38 (1st Dep't), *aff'd,* 8 N.Y.2d 1061, 170 N.E.2d 411, 207 N.Y.S.2d 278 (1960).

[18] 201 Ark. 87, 183 S.W.2d 573, 577 (1942).

[19] *Ibid.*

[20] 11 N.Y.U. INTRA. L. REV. 251, 253 (1956); see People v. Aranda, *supra* note 9, at ——, 47 Cal. Rptr. at 361, 407 P.2d at 272. It is significant to note that even in jurisdictions where such severance is not granted, the court will demand, if possible, that all references to the codefendant be deleted. Malinski v. New York, 324 U.S. 401 (1945); People v. Vitagliano, 15 N.Y.2d 360, 206 N.E.2d 864, 258 N.Y.S.2d 839 (1965).

[21] Hiscock, *Criminal Law and Procedure in New York,* 26 COLUM. L. REV. 253 (1926).

[22] *Id.* at 255.

[23] *Id.* at 257.

[24] *Ibid.*

These arguments favoring substitution of discretion for a right appear to have been based solely upon considerations of expedience. It was recently stated that the *"sole reason which can be advanced for a joint trial is the economy and expedition of a single trial.* Nothing else!"[25] Even if it is conceded that other valid grounds may exist, it appears that vesting the court with discretion to grant or withhold severance does not guarantee the defendant a fair trial, *i.e.,* there is likely to be a substantial impairment of the rights of a defendant if severance is denied in a felony prosecution.[26] If such be the case, then "no considerations of expense to the State, inconvenience to witnesses and public authorities, or even of delay in punishment of the guilty can justify [such] a procedure. . . ."[27]

The Jury—Automatons or Men?

In a criminal trial, it is the responsibility of the court to ascertain the effect of antagonistic defenses, admissions and confessions upon the movant's right to a fair trial. If substantial prejudice is probable, severance should and will be granted. However, the determination of what constitutes substantial prejudice is dependent upon the abilities which a particular judge attributes to a jury. It does not seem unreasonable to assert that the primary determination—the ultimate factor underlying each decision to grant or deny the motion for severance—is the presence or absence on the jury's part of an ability to "isolate" the defendants in individual mental compartments.

Nevertheless, the proposition has been advanced that the question of ability to "isolate" bears no relevance to the discretionary power of the court since

> it is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense.[28]

In essence, what is claimed is that the jury, if properly instructed, will be able to "isolate" the individual defendants, and if proper instructions for this "mental" severance cannot be given, then actual severance will be granted. Thus, the reasonableness of the assumption that a jury can and will distinguish is put in issue.

In the majority of jurisdictions, wherein it is believed that the jury can distinguish, the juror's mind is seen as a *tabula rasa* at the inception of the trial. He has no prejudices, no knowledge of the case. He has the naked ability to make a reasonable decision on the facts as presented. When an improper remark is made, he, upon the court's admonition, immediately lifts it from his mind and casts it away. Evidence, admissions and confessions regarding defendant *A* are immediately placed in a perfectly sealed compartment from which nothing leaks into the compartment

[25] People v. Krugman, 44 Misc. 2d 49, 50, 252 N.Y.S.2d 846, 848 (Sup. Ct. 1964). This case also sets forth several standards which are suggested for a judge's consideration in determining whether to grant a motion for severance.

[26] See People v. Aranda, *supra* note 9, at ——, 47 Cal. Rptr. at 357-61, 407 P.2d at 268-72.

[27] People v. Fisher, 249 N.Y. 419, 428, 164 N.E. 336, 339 (1928) (dissenting opinion).

[28] Delli Paoli v. United States, *supra* note 13, at 242.

reserved for defendant *B*. Naturally, the result is a fair and objective decision as to the guilt or innocence of each defendant.

However, it would seem that there is a more reasonable and valid approach. For example, Justice Frankfurter, writing for the four dissenters in *Delli Paoli v. United States*,[29] asserted that

> the fact of the matter is that too often such admonition [instruction to the jury] . . . is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell.[30]

This criticism does not stand alone. It has been enunciated that the maintenance of a belief that a jury can actually follow the nonadmissibility instructions is naive.[31] Elsewhere, the ability to assimilate and act upon such instructions has been referred to as a "mental gymnastic which is beyond, not only their [the jury's] powers," but beyond anyone's powers.[32] How can a joint trial, it is queried, fail to cause a diminution of the safeguards surrounding the defendant's right to a fair trial, when the jury is "ready to believe that birds of a feather are flocked together."[33] Can the defendant actually be said to have a fair opportunity to make his case stand on its own merits in the minds of these jurors?

The most severe blow dealt to the concept of a juror's ability to properly "isolate," was delivered in *Krulewitch v. United States*,[34] where it was stated without qualification that the "assumption that prejudicial effects can be overcome by instructions to the jury . . . all practising lawyers know to be unmitigated fiction."[35] The courts adhering to this theory seem to depict the "average juror" more realistically—a human being, quite capable of forming his judgment about the defendants by means of personal prejudice and association of guilt. Although it would be ideal to find a juror with a nature as described by the majority, nevertheless, such a man —like the "reasonable man"—does not exist. Thus, in the minority of jurisdictions, the juror's inability to completely compartmentalize the arguments and proof brought forth against one defendant is accepted as it exists in reality.

It is this realistic appraisal of the juror which, it is submitted, should be formally adopted. Accepting the fact that the limiting instructions of the court are generally ineffective, and admitting that, in reality, a juror does not distinguish, then can it not be reasonably concluded that a less fair trial is an inevitable result of a denial of severance. In this era of emphasis on the protection of individual rights, do the procedures prevailing in the majority of jurisdictions satisfy the federal due process

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[29] Delli Paoli v. United States, *supra* note 13.

[30] *Id.* at 247 (dissenting opinion).

[31] Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring). The entire text of the statement referred to is: "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." *Ibid.*

[32] Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).

[33] Krulewitch v. United States, *supra* note 31, at 454 (Jackson, J., concurring).

[34] 336 U.S. 440 (1949).

[35] Krulewitch v. United States, *supra* note 31.

requirements?

Since *Powell v. Alabama,*[36] wherein the Supreme Court found the denial of defendant's right to counsel a ground to reverse a state conviction, the Court has penetratingly construed state criminal procedure. The Court's primary justification has been found in the due process clause of the fourteenth amendment.

Due Process Requirements

With the exception of ex post facto laws and bills of attainder,[37] the federal constitution initially placed no limits on a state's freedom of action with respect to its criminal procedures. The fourteenth amendment, enacted in 1868, did not enumerate specific restrictions, but rather made use of general terms—terms "circumscribed by history and appropriate to the largeness of the problems of government with which they were concerned."[38] Until 1932, in *Powell,* this amendment resulted in little interference in state criminal proceedings. However, since that time, both the scope of the interference and the scope of the due process clause itself have been greatly enlarged. Until recently, the enlargement has consisted for the most part in balancing what has been characterized as the "interests of society pushing in opposite directions."[39] In discharging this balancing function, the Court will "give no ear to the loose talk about society being 'at war with the criminal' if by that it is implied that the decencies of procedure which have been enshrined in the Constitution must not be too fastidiously insisted upon in the case of wicked people."[40] Hence, it is not a mere balancing of wrath against right with which the Court is concerned, for this would be intolerable. Rather, it is a balancing of right against right—that of the state in furthering its criminal law and procedure, against that of the federal government in protecting the rights of its citizens.

It now appears that this balancing approach has succumbed to a view in which the state's interest in a certain procedure has been subordinated to the federal government's interest in the protection of the individual's rights, *provided* that there is an alternative procedure available.

In *Jackson v. Denno,*[41] the United States Supreme Court reversed a conviction of first degree murder when the trial judge, pursuant to the New York procedure, submitted to the same jury the questions of the guilt of the defendant and the voluntariness of his confession. The Court held this procedure violative of due process in that it denied the defendant the right to a fair and separate determination of the voluntariness of his confession. The conclusion was based on the "psychological impossibility, inherent in the New York procedure, for a jury to make a clearly separate judgment as to guilt or innocence when the question of coercion was simultaneously submitted to it."[42] The Court added that although this procedure might not have resulted in a violation each time employed, nevertheless, it was violative of due process in that it posed "substantial

[36] 287 U.S. 45 (1932).
[37] U.S. CONST. art. I, § 10.
[38] Malinski v. New York, *supra* note 20, at 413 (Frankfurter, J., concurring).
[39] Rochin v. California, 342 U.S. 165, 171 (1951).
[40] Malinski v. New York, *supra* note 20, at 418 (Frankfurter, J., concurring).
[41] 378 U.S. 368 (1964).
[42] 39 ST. JOHN'S L. REV. 138, 142 (1964).

threats to a defendant's constitutional rights to have an involuntary confession *entirely* disregarded. . . ."[43] The Court could not bring itself to ignore these hazards.[44]

The concern of the Court was not directed toward a balancing process, but was concentrated on the "unfairness of the New York practice, given the availability of better procedures."[45] Indeed, the Supreme Court has indicated that "a state criminal procedure may be held to violate due process not only when it is repugnant to the 'concept of ordered liberty' or 'shocks the conscience,' but also when it is simply less fair than alternative procedures."[46]

Conclusion

Since *Jackson* indicates that a realistic appraisal of the jury's ability to "isolate" and "compartmentalize" must result in a finding that such absolute ability does not exist,[47] it is apparent that, in a joint felony trial, with or without instructions, there exists a substantial threat to the individual defendant's rights. It is imperative to recall that not only will confessions, admissions or silent implications affect the codefendant's position, but, in like manner, his very presence as a codefendant may have an adverse effect upon his right to a fair trial. Therefore, the substantial threat, *i.e.*, the taint of a codefendant, inherent in a joint trial appears to preclude the rendition of a fair verdict.

Since there is a substantial danger, it can be logically urged that the mere availability of a better and fairer procedure compels its acceptance.[48] It is submitted, therefore, that the New York provision for severance in the discretion of the trial court should be amended with a resultant restoration of the pre-1926 *right* to severance in felony cases.[49] Naturally, total mental compartmentalization is not assured. The dangers from publicity would still exist. However, since this procedure more effectively shields a criminal defendant from substantial threats to his rights, it should be adopted.

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[43] Jackson v. Denno, 378 U.S. 368, 389 (1964). (Emphasis added.)

[44] Jackson v. Denno, 378 U.S. 368, 389 (1964).

[45] *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143, 212 (1964).

[46] *Ibid.*

[47] *Supra* note 42.

[48] Jackson v. Denno, *supra* note 44; *The Supreme Court, 1963 Term, supra* note 45.

[49] It may be argued that the special verdict provision in Section 438 of the New York Code of Criminal Procedure offers a more practical vehicle for assuring protection of the individual's rights. Under this provision, the jury is requested to decide only the facts, and present them to the court for judgment.

However, it is submitted that the same deficiencies which exist in the joint trial with a general verdict also exist when a special verdict is rendered, since, under this procedure, the arguments made regarding the nature of the jury's ability to compartmentalize would equally apply, thus negating any guarantee of absence of prejudice.