

April 2013

Criminal Law—Use of Incriminating Confession of Codefendant in Joint Trial Held Ground for Reversal as an Abuse of Trial Court's Discretion for Reversal as an Abuse of Trial Court's Discretion and Violation of Non-Confessor's Confrontation Right (United States v. Bozza, 365 F.2d 206 (2d Cir. 1966))

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

phylactic as well as the curative measures of the judicial process are needed.

There is good reason for the constitutional requirement of "probable cause" for search and seizure by law enforcement officials. "Requiring more would unduly hamper law enforcement. *To allow less would be to leave law-abiding citizens at the mercy of the officer's whim or caprice.*"⁴⁴ This thought must be kept in mind in any attempt to balance our society's interest in law enforcement against its constitutional guaranty of privacy. It is submitted that the reasonableness of the frisk on "reasonable suspicion," when seen in the light of the constitutional policy espoused in *Mapp*, depends on its being distinguishable from a search based on "probable cause." The decision of the majority in the instant case has made that distinction more apparent than real. Initially, as Judge Van Voorhis pointed out, the frisk rests on uncertain ground. If we accept it at all, we accept it as an exception to traditional "probable cause" requirements in order that the police may protect their own lives. But as an exception it must be strictly circumscribed. The confiscation provision of the "stop and frisk" statute, as interpreted by the Court in *Peters* and *Sibron*, authorizes conduct clearly beyond that which was approved in *People v. Rivera*. It is suggested that this interpretation is not likely to withstand the test of constitutional reasonableness.⁴⁵ In fact, to allow such confiscation, and to admit such evidence is to circumvent the *Mapp* exclusionary rule, thereby undermining the constitutional guarantees of the fourth amendment.



CRIMINAL LAW — USE OF INCRIMINATING CONFESSION OF CODEFENDANT IN JOINT TRIAL HELD GROUND FOR REVERSAL AS AN ABUSE OF TRIAL COURT'S DISCRETION AND VIOLATION OF NON-CONFESSOR'S CONFRONTATION RIGHT. — At a joint trial, a signed, post-arraignment confession of one defendant was admitted as corroborative evidence of a codefendant's testimony, despite non-confessing defendants' objections and motions for severance. The names of the non-confessing defendants had been deleted from the confession, and the jury was emphatically instructed, before and after its admission, that the confession was admissible only against the confessor. In reversing the convictions of the non-confessing defendants, the Court of Appeals for the Second Circuit

⁴⁴ *Brinegar v. United States*, 338 U.S. 160, 176 (1949). (Emphasis added.)

⁴⁵ See 50 CORNELL L.Q. 529 (1964), for a discussion which also suggests that the limitations on "stop and frisk" must be drawn at the *Rivera* holding.

held, that because of the complexity of the case, the importance of the confession to the government's case, and the "real doubt" that at least some jurors failed to follow the trial court's instructions regarding the limited applicability of the confession, its admission was prejudicial error requiring reversal and a new trial. *United States v. Bozza*, 365 F.2d 206 (2d Cir. 1966).

When two or more defendants are jointly indicted and tried, the paramount problem facing the trial court is that of weighing the desire to effectively punish the antisocial behavior of the alleged partners in crime against the individual defendant's right to every procedural safeguard.¹ Since joint trials are peculiar to our jurisprudential tradition, they demand every legal protection "to individualize each defendant in his relation to the mass."² In order to effectively provide such protection to joint defendants in federal trials, Rule 14 of the Federal Rules of Criminal Procedure allows separate trials, severance, or any other just relief when it is shown that a codefendant is prejudiced.³ However, this rule is not applicable if the defect comes within the purview of the harmless error rule, which disregards "any error, defect, irregularity or variance which does not affect substantial rights. . . ."⁴

The purpose of the harmless error rule has been stated to be the prevention of reversals for technical errors which do not seriously jeopardize the rights of the defendant.⁵ In *Kotteakos v. United States*,⁶ the United States Supreme Court set forth the test to be utilized by the lower courts when considering the possible applicability of the harmless error rule.

The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is, rather . . . whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.⁷

¹ In *United States v. Liss*, 137 F.2d 995 (2d Cir.), *cert. denied*, 320 U.S. 773 (1943), the dissent noted that "the potential danger of injustice involved in all conspiracy actions . . . [demands that] they be conducted with exceptional fairness. 'Expedition' and 'efficiency' . . . ought not be purchased at the expense of justice." *Id.* at 1004. For special trial procedures employed at joint trials see O'Dougherty, *Prosecution and Defense under Conspiracy Indictments*, 9 BROOKLYN L. REV. 263 (1940).

² *Kotteakos v. United States*, 328 U.S. 750, 773 (1946).

³ "If it appears that a defendant . . . is prejudiced by a joinder of offenses or defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." FED. R. CRIM. P. 14.

⁴ FED. R. CRIM. P. 52(a).

⁵ *Supra* note 2, at 759 n.11.

⁶ 328 U.S. 750 (1946).

⁷ *Id.* at 764-65.

Therefore, the question presented in a joint trial where there is an allegation of prejudice is whether the prejudice claimed had "substantial influence" so as to warrant the application of rule 14 allowing severance, or whether it is merely a technical error to be ignored pursuant to rule 52(a).

In the conspiracy area, courts have found prejudicial error present in instances where there is a discrepancy in the number of conspiracies charged;⁸ upon mention of a defendant's prior criminal record;⁹ when unsworn, out-of-court statements of a non-defendant are admitted;¹⁰ and where a tape recording of a conversation implicating all defendants was admitted without any warning to the jury that the tape was evidence of only the speaker's guilt.¹¹

A more frequently alleged form of prejudice is the harm to a defendant caused by the admission of a codefendant's confession or statement which incriminates the non-confessing defendants.¹² When a continuing conspiracy is in progress, any declaration made by a conspirator to a third party is deemed, because of the "partnership-agency" relationship of the conspirators, to have been spoken in furtherance of the conspiracy and, hence, admissible in evidence against all the defendants.¹³ However, when the conspiracy has realized its objective, or when the purpose of the conspiracy has been abandoned, this partnership-agency relationship ceases.¹⁴ At this time, therefore, any declaration or admission is a frustration of the conspiratorial plan and admissible only as evidence against the declarant.¹⁵

The United States Supreme Court, in *Blumenthal v. United States*,¹⁶ was confronted with the issue of whether, on a conspiracy indictment naming five defendants, admissions by two defendants to tax officials after the conspiracy ceased were properly admitted at the joint trial. The Court found that any doubt as to the jury's

⁸ *Fiswick v. United States*, 329 U.S. 211 (1946) (forty conspiracies were charged, but only one was proven). *But see* *United States v. Elgisser*, 334 F.2d 103 (2d Cir.), *cert. denied*, 379 U.S. 881 (1964).

⁹ *Sumrall v. United States*, 360 F.2d 311 (10th Cir. 1966); *United States v. Myers*, 311 F.2d 311 (3d Cir. 1962), *cert. denied sub nom. Rucker v. Myers, Warden*, 374 U.S. 844 (1963); *United States v. Rinaldi*, 301 F.2d 576 (2d Cir. 1962).

¹⁰ *Krulewicz v. United States*, 336 U.S. 440 (1949).

¹¹ *United States v. Cianchetti*, 315 F.2d 584 (2d Cir. 1963).

¹² See *Blumenthal v. United States*, 332 U.S. 539, 555 (1947).

¹³ *United States v. Gooding*, 25 U.S. (12 Wheat.) 460 (1827) (indictment for fitting out ship for use in Negro slave trade). For elaboration on the agency relationship aspect, see 3 WIGMORE, EVIDENCE § 1079 (3d ed. 1940).

¹⁴ *Fiswick v. United States*, 329 U.S. 211, 217 (1946); *Brown v. United States*, 150 U.S. 93, 98 (1893); *Logan v. United States*, 144 U.S. 263, 308-09 (1892). See also 2 WHARTON, CRIMINAL EVIDENCE § 722 (11th ed. 1935).

¹⁵ *Blumenthal v. United States*, 332 U.S. 539 (1947). See also *Baker v. United States*, 329 F.2d 786 (10th Cir. 1964).

¹⁶ 332 U.S. 539 (1947).

use of the confessions against non-confessing defendants would be ground for reversal under rule 14. Nevertheless, it was held that the trial court's instruction that the confessions were to be used solely against the declarants left "no room for doubt that the admissions were adequately excluded. . . ."¹⁷

The *Blumenthal* rule, that harm to a defendant in admitting a codefendant's confession cannot be the basis for reversal if there are limiting instructions to the jury, seems to have been modified in *Delli Paoli v. United States*.¹⁸ There, in a trial of five defendants for conspiring to deal unlawfully in alcohol, no motion for severance was made, and the jury was instructed that the confession, while naming all defendants, was evidence of guilt only against the confessor. In the circuit court,¹⁹ Judge Learned Hand found that any attempt to delete names would have been a futile gesture because of other substantial evidence of guilt, and the admission was, thus, harmless error. He noted, additionally, that the dilemma of admitting a confession against the declarant, while protecting the rights of his codefendants, was to be solved by an exercise of discretion by the trial court.²⁰ Judge Frank, dissenting, viewed the confession as vital supportive evidence against the non-confessors, and noted that the posed dilemma could be solved in three ways: the court could either delete all references to the other defendants; refuse the admission of the confession at the joint trial; or sever the trial of the non-confessing defendants sua sponte.²¹

On review, the Supreme Court rejected the dissent's three-part rule regarding admissibility, and agreed with the majority that a severance because of the admission of a codefendant's confession was within the discretion of the trial court. The Court followed the *Blumenthal* rule in the main, but substituted a dual test in place of the single criterion of *Blumenthal*. A clear instruction to the jury that the confession was to be applied only against the confessor was held vital in *Delli Paoli* as it was in *Blumenthal*. Additionally, however, it was held that clear instructions to the jury must be made under circumstances where it is reasonably possible for the jury to follow them.²² In the circumstances of the case, the Court found a presumption that the jury complied with the instructions for five reasons: (1) the conspiracy was simple, *i.e.*, each defendant's role was easily understood; (2) the confession merely corroborated what the government had already established; (3) the rights of each defendant were protected by counsel at the trial and

¹⁷ *Id.* at 551-52.

¹⁸ 352 U.S. 232 (1957).

¹⁹ *United States v. Delli Paoli*, 229 F.2d 319 (2d Cir. 1956).

²⁰ *Id.* at 321.

²¹ *Id.* at 324.

²² *Delli Paoli v. United States*, 352 U.S. 232, 239 (1957).

no motion for severance was made; (4) the rights of each defendant were emphasized at trial; and, (5) there was no evidence of jury confusion.²³ Mr. Justice Frankfurter, dissenting, reasoned that the intrinsically ineffective admonition prohibiting use of the confession against a non-confessing but joint defendant was empty verbiage and that the knowledge of the confession could not be wiped from the minds of the jurors.²⁴ The government's "windfall" of influencing the jury definitely, although indirectly, was prejudicial error and, in the dissent's opinion, reparable only by separate trials.²⁵

Subsequently, in *Schaffer v. United States*,²⁶ the Supreme Court, in dictum, reasoned that the trial court is under a continuing duty to grant severance where prejudice is shown. Since the Court found no error in the case before it, it did not discuss the nature of the harmless error rule.

The Court of Appeals for the Second Circuit applied the approach used in *Delli Paoli* and *Schaffer* when a codefendant's confession was used at a trial.²⁷ In *United States v. Caron*,²⁸ the defendants made a timely motion for severance whereas Delli Paoli had not. The circuit court of appeals held, nevertheless, that since the trial judge had admonished the jury fifteen times as to the limited use of the confession, and since there was extensive support of the government's case by witnesses not party to the conspiracy, the trial judge had not abused his discretion in denying the severance motion. Similarly, any error in allowing a codefendant's statement made in a prior civil court action was considered non-prejudicial to the non-confessing defendant in *United States v. Castellana*,²⁹ since the evidence of guilt therein was overwhelming. The court emphasized that there was not even a reasonable possibility that the confession added to the conviction.³⁰ Again, in *United States v. Casalnuovo*,³¹ the second circuit held that where a post-arraignment confession was not objected to by the named, non-confessing defendant, and no motion for mistrial was made, the conviction must be affirmed. The court held, additionally, that the issue was not whether the trial court should have deleted the names

²³ *Id.* at 241.

²⁴ *Id.* at 247 (dissenting opinion).

²⁵ *Id.* at 248 (dissenting opinion).

²⁶ 362 U.S. 511 (1960).

²⁷ See, e.g., *United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965); *United States v. Brown*, 335 F.2d 170 (2d Cir. 1964); *United States v. Houlihan*, 332 F.2d 8 (2d Cir.), cert. denied, 379 U.S. 828 (1964); *United States v. Manfredi*, 275 F.2d 588 (2d Cir.), cert. denied, 363 U.S. 828 (1960).

²⁸ 266 F.2d 49 (2d Cir. 1959).

²⁹ 349 F.2d 264 (2d Cir. 1965), cert. denied, 383 U.S. 928 (1966).

³⁰ *Id.* at 276.

³¹ 350 F.2d 207 (2d Cir. 1965).

of the codefendants, but whether there was sufficient additional evidence to sustain the convictions if the confession were disregarded.³²

In other circuits, however, neither the sufficiency of the other evidence against the non-confessing defendant, nor the presumption that the jury will follow the trial court's instructions to compartmentalize the evidence against each defendant, have been considered an effective means of safeguarding an incriminated defendant's right to a fair trial. In *Oliver v. United States*,³³ the District of Columbia Court of Appeals stated that the court could not be sure that the prejudice caused by reference to non-confessing defendants in a codefendant's confession was remedied by instructions to the jury. The court looked instead to the form of the confession, and noted that deletion of the non-confessing defendants' names would leave the confession just as effective against the confessor, and simultaneously respect the codefendant's constitutional rights.

Courts find themselves in a more difficult situation, however, when references in a confession to non-confessing codefendants are so grammatically intertwined with the declarant's own admission of guilt as to destroy its effectiveness in the declarant's own case. In such a situation, it has been held that a substitution of blank spaces for the other defendant's names will not afford protection. In *Jones v. United States*,³⁴ a confession made without aid of counsel and during an unreasonable delay in arraignment was held inadmissible against the confessor as well as the codefendants. The prosecution had substituted blanks for non-confessing defendants' names, and the jury was instructed as to the limited applicability of such evidence. However, other evidence made it obvious that the omitted names were those of the codefendants. The District of Columbia Court of Appeals did not apply the *Delli Paoli* presumption that the jury can dismiss an incriminating confession from their minds when considering the guilt of a codefendant. The court limited the *Delli Paoli* decision to its facts, finding it applicable only in those cases where the record contained a confession admissible against its maker, where deletion of the codefendants' names was impractical, where other evidence against a codefendant was sufficient to sustain a conviction, and where admonitions to the jury as to its limited applicability were clearly and consistently given.³⁵

In *Barton v. United States*,³⁶ a confession legally admitted against its maker incriminated a codefendant in the conspiracy. The fifth circuit was loathe to review the evidence against the

³² *Id.* at 212.

³³ 335 F.2d 724 (D.C. Cir. 1964).

³⁴ 342 F.2d 863 (D.C. Cir. 1964).

³⁵ *Id.* at 867.

³⁶ 263 F.2d 894 (5th Cir. 1959).

codefendant apart from the confession and considered such scrutiny a substitution of the appellate court for the jury.³⁷ The court, noting that the trial court's instructions to the jury were the only attempt at protecting the codefendant, held that protection was lacking since the discipline required of the jurors in compartmentalizing the evidence was highly improbable. The court declared that if the limiting instructions were not actually effective, then the codefendant had been deprived of his constitutional right of confrontation under the sixth amendment.³⁸

Since the sixth amendment right to confrontation includes the right of a defendant to cross-examine his accuser,³⁹ constitutional problems are created by attempting to compartmentalize confessions. Thus, if the jury fails to comply with instructions compelling them to disregard the confession as it applies to a non-confessing codefendant, that codefendant will, in effect, be deprived of his right to cross-examine since he will not have had the opportunity to challenge the confession during the course of the trial.

The jury's role in evaluating confessions as evidence also gives rise to additional problems within the realm of compartmentalization. In *Jackson v. Denno*,⁴⁰ the Supreme Court reviewed the New York procedure which allowed submission of a confession to the jury with instructions to disregard such if it was later found to be involuntary and, thus, inadmissible. The Court found substantial error in this procedure, since the jury could not be expected to determine the voluntariness of the confession without simultaneously judging the truthfulness of the statement. It was found that the danger of the jury settling doubts regarding other evidence by using the "inadmissible" confession as support was error too great to be ignored.⁴¹ As support for this proposition, the *Jackson* Court relied on Mr. Justice Frankfurter's dissent in *Delli Paoli* which considered the admission of a codefendant's confession as a windfall to the government and considered any admonition to disregard such as intrinsically ineffective.⁴²

In the instant case, *United States v. Bozza*,⁴³ six defendants were convicted of charges, including conspiracy, relating to seven burglaries. Due to the fact that multiple conspiracies were alleged against multiple defendants, the jury was provided with a "short scorecard" to alleviate any confusion which might have ensued.

³⁷ *Id.* at 898.

³⁸ *Ibid.*

³⁹ *Pointer v. Texas*, 380 U.S. 400 (1965).

⁴⁰ 378 U.S. 368 (1964).

⁴¹ *Id.* at 388.

⁴² *Supra* note 22, at 247 (dissenting opinion).

⁴³ 365 F.2d 206 (2d Cir. 1966).

One of the defendants, arrested during the pendency of the alleged conspiracies, became a government informer and thereafter gathered information for use at trial. His testimony comprised the bulk of the government's case.

Subsequently, however, a post-arraignment confession of another conspirator was admitted. The names of the non-confessors had been left blank, and the trial court warned the jury fifteen times that the confession was admissible only against the confessor.

On appeal, the main issue considered by the Court was whether the presumption that a jury follows instructions was rebuttable. The majority found that *Delli Paoli* had impliedly recognized an exception to the presumption even where clear instructions to the jury were present. The majority emphasized the dual aspect of the *Delli Paoli* rule: not only must there be sufficiently clear instructions to the jury, as were certainly given by the trial court in the instant case, but there must be a reasonable possibility of the jury following the instructions. With respect to the latter requirement, the Court saw significant distinctions between the facts of *Delli Paoli* and those of the instant case.

In *Delli Paoli*, the jury was presumed to have followed the instructions because the conspiracy was simple and the part each defendant played was clear. In *Bozza*, however, the Court noted that three conspiracies, not one, were alleged, and the role of each defendant was not easy to ascertain since ten different counts were sent to the jury. In *Delli Paoli*, a separate trial was never requested, while in the instant case the motion for severance was made many times. The confession in *Delli Paoli* was found to have merely corroborated what the government had already established, while in *Bozza* the confession provided "devastating corroboration" of the contested testimony of the former accomplice-informer.⁴⁴ Finally, in *Delli Paoli*, a presumption of obedience on the part of the jury was bolstered by the absence of any evidence of jury confusion or failure to follow the instructions. Here, notice was taken of the fact that the only evidence requested by the jury was the confession, a request that seemed unnecessary if they were merely deciding the guilt of the confessor. Thus, in the Court's opinion, there was a "real doubt . . . that at least some of [the jury] . . . failed to follow the court's instructions."⁴⁵

In holding that the introduction of the confession was prejudicial to the non-confessing defendants, the Court distinguished prior decisions rendered in the second circuit. It found that the peculiar circumstances of the instant case necessitated this determination.

⁴⁴ *Id.* at 216.

⁴⁵ *Ibid.*

The majority reasoned that:

it is not enough 'that the jury would have in all probability returned a verdict of guilty' against the other defendants without knowledge of [the confession] . . . which they were forbidden to possess The test is whether belief 'is sure that the error did not influence the jury, or had but very slight effect' . . . even if that be the standard in an area with 'grave constitutional overtones.'⁴⁶

The instant case, however, does not completely reject the concept that protection is afforded a codefendant by a trial court's instruction limiting the applicability of an incriminating confession. It is the Court's contention that there is a point at which the presumptive effectiveness of such instructions becomes overstrained and thus creates a basis for reversal.⁴⁷ Even if the informer's testimony were to be regarded as absolutely true, the question of error centers on a *certainty* that the jury would not have been influenced by the admission of the confession, and not on the weight of the other evidence.

The dissent viewed the majority opinion as endangering the effectiveness of all future joint trials since it would "change the law as to the trial court's discretion and cast more than serious doubt on the value of a judge's instructions."⁴⁸ In addition, it was felt that, as a result of the majority's decision, any confession in a multiple-defendant trial becomes inadmissible.⁴⁹

While the immediate effect of this decision will be felt in the second circuit, its ramifications apparently will be widespread since many constitutional questions appear to be raised. In superimposing the mandate of *Jackson v. Denno* on the rationale in *Bozza*, it seems clear that in addition to the procedures heretofore employed in protecting a non-confessing defendant from implied guilt, the trial court cannot rely solely on the jury's ability to compartmentalize the evidence. The mere possibility that the jury is unable to perform this function would apparently result in the non-confessing defendant being denied a fair trial. This line of reasoning may be evidenced in the state courts in view of the decisions of *People*

⁴⁶ *Id.* at 218. It should be noted that the court does not impose an affirmative duty on the trial court to move for severance sua sponte when an incriminating confession is introduced.

⁴⁷ *Id.* at 217.

⁴⁸ *Id.* at 231 (dissenting opinion).

⁴⁹ *Ibid.*

*v. LaBelle*⁵⁰ and *People v. Aranda*.⁵¹ In those cases both courts agreed that "unless 'all parts of the extrajudicial statements implicating any codefendants can be and are deleted *without prejudice to the declarant*' they are inadmissible in a joint trial."⁵² These cases manifest a strong inclination to protect a defendant at a joint trial from any possible adverse effect that a codefendant's confession might have.

In addition, it is also possible that if an incriminating confession were admitted, even though the name of the non-confessing defendant was deleted, and employed by a jury against such defendant, there might be an abridgement of the rights guaranteed by the sixth amendment. Since it is clear that a defendant has the right to confront his accuser and to cross-examine him, a question may arise if the jury subconsciously substitutes the name of the non-confessing defendant in the blank spaces of the confession. It is conceivable that this could occur despite clear instructions by the trial court, and thus, the defendant would be denied his right to cross-examine or confront the confessing defendant.⁵³

On the other hand, the dissent's view that the decision in the instant case will have an adverse effect on future multi-defendant trials presents a rational basis for argument. It was noted that the alternative to the admission of this type of confession at a joint trial would be a host of separate trials. In the instant case, for example, the dissent postulates that thirty-six separate trials would be required.⁵⁴ Undoubtedly, this would place a severe strain on the ability of the already overcrowded courts to grant a speedy trial.

⁵⁰ 18 N.Y.2d 405, — N.E.2d —, 276 N.Y.S.2d 105 (1966). Two defendants were jointly indicted and tried for murder. Subsequently, one of the defendants gave a confession which incriminated his codefendant and moved for severance. The trial court denied the motion and attempted to protect the non-confessing defendant by deleting all references to him in the confession. However, the Court of Appeals found that the trial court had also deleted statements which tended to inculpate the confessor. Thus, in view of the inculpatory nature of the confession the "defendant's right to a fair trial could only be protected by means of a separate trial. . . ." *Id.* at 411, — N.E.2d at —, 276 N.Y.S.2d at 110.

⁵¹ 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965). Defendants were convicted of first-degree robbery. The Supreme Court of California held that the admission of one defendant's illegally obtained confession was a miscarriage of justice against his codefendant, notwithstanding the instruction to the jury that the confession was admissible only against the confessor.

⁵² *People v. LaBelle*, 18 N.Y.2d 405, 411, — N.E.2d —, —, 276 N.Y.S.2d 105, 110, (1966).

⁵³ Another possibility whereby a defendant's right to cross-examine his accuser arises is where the confessing defendant refuses to take the witness stand.

⁵⁴ *United States v. Bozza*, 365 F.2d 206, 231 (2d Cir. 1966) (dissenting opinion).

Furthermore, the Court's broad acceptance of the "certainty of no influence" test regarding harmless error creates the probability that its rationale will be used outside the area of incriminating confessions, since the application of the harmless error statute is, thus, limited to *trivial* errors in the admission of evidence, without regard to the other evidence in the case.

Reversal in the instant case, of course, precludes review and there is no easy prognosis as to future Supreme Court declarations in this frequently appealed, factually distinguishable area. It would appear that the difficulty of proof of conspiracy counts puts a premium on the use of a legally obtained confession in a government case. This might influence the Court to retain the admissibility of codefendant's confessions in as many factual situations as possible, *e.g.*, where there is no prejudice to the non-confessing defendants because of the overwhelming substantial evidence against them and where the jury has shown no reliance on the confession. Because of the narrow majority margin in *Jackson*, wherein the *Delli Paoli* rationale was criticized, there is little concrete indicia as to the life expectancy of the *Delli Paoli* rule. It is suggested, nevertheless, that the instant decision shows a definite resolve on the part of the Second Circuit Court of Appeals to keep its own courts in order even without Supreme Court directive, and to use judicial initiative to give every defendant a completely fair trial.



CRIMINAL PROCEDURE — IMPRISONMENT RESULTING IN MORE THAN ONE YEAR'S CONFINEMENT FOR A MISDEMEANOR DUE TO INDIGENT DEFENDANT'S FAILURE TO PAY A FINE DEEMED UNCONSTITUTIONAL AND CONTRARY TO THE INTENT OF THE NEW YORK STATUTE. — Appellant, an indigent, pleaded guilty to a misdemeanor. The trial court, with full knowledge of appellant's financial condition, sentenced him to one year's imprisonment and fined him \$500 with a provision that the fine, if not paid, be served out at the rate of one day's imprisonment for each dollar unpaid. The New York Court of Appeals reversed and *held* that when the trial court is cognizant of an individual's inability to pay a fine, subsequent imprisonment in lieu of the fine resulting in imprisonment for more than the permissible maximum sentence, is contrary to the intent of the New York Code of Criminal Procedure. Such imprisonment violates the defendant's right to equal protection of the law, and is proscribed by the eighth amendment to the federal constitution as an excessive fine. *People v. Saffore*, 18 N.Y.2d 101, 218 N.E.2d 686, 271 N.Y.S.2d 972 (1966).