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Limiting Instructions In Joint Criminal Trials

not to protect the insured while driving his spouse's automobile as a temporary substitute.[46]

It is difficult to make the temporary substitute provision entirely clear and definite. It is submitted that the provision is desirable and necessary as it enables the insured or his permittee to continue to drive while the described automobile is temporarily disabled. Certain restrictions in the provision are also desirable and necessary, however, as they enable the insurer to establish a premium appropriate for coverage and prevent the insured from misusing the provision to obtain free coverage on additional automobiles he owns.

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LIMITING INSTRUCTIONS IN JOINT CRIMINAL TRIALS

In a criminal trial involving several defendants, it is said that "one of the most recurring of the difficulties pertains to incriminating declarations by one or more of the defendants that are not admissible against others. The dilemma is usually resolved by admitting such evidence against the declarant but cautioning the jury against its use in determining the guilt of the others."[1] Although the theory that this limiting instruction will negate the prejudice created by the admission of the confession has been called a "naive assumption . . . [which] all practicing lawyers know to be unmitigated fiction,"[2] this practice is sanctioned.[3] Its justification has been said to be that it "furthers, rather than impedes, the search for truth."[4] The problem is essentially to protect the nonconfessing defendant by insulating him from prejudicial implication; and, at the same time, to protect the public interest by continuing the use of joint trials without excluding competent evidence against the confessor.[5]

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[46]The modified temporary substitute provision has been construed as not extending coverage when the insured uses a temporary substitute owned by a spouse. Samples v. Georgia Mut. Ins. Co., 110 Ga. App. 297, 138 S.E.2d 463 (1964).

[1]Delli Paoli v. United States, 352 U.S. 232, 247 (1957) (dissenting opinion).

[2]Krulewitch v. United States, 336 U.S. 440, 453 (1949).

[3]Delli Paoli v. United States, 352 U.S. 232 (1957); 4 Wigmore, Evidence § 1079(d) (3d ed. 1940).

[4]"In effect, however, the rule probably furthers, rather than impedes, the search for truth, and this perhaps excuses the device which satisfies form while it violates substance; that is, the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but also anybody's else." Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).

[5]People v. Skelly, 409 Ill. 613, 100 N.E.2d 915, 920 (1951).

The effect of a limiting instruction against the misuse of a confession implicating nonconfessing co-defendants was questioned in *Oliver v. United States.*[6] Defendants Crump, Oliver, Mason and Williams were indicted and jointly tried for the rape of a fourteen year old girl. There was no motion for severance. The victim testified as to the incident and identified the defendants as her assailants. Her testimony was corroborated by that of (1) her father, mother, and a neighbor who described her disheveled condition when found near the scene of the crime; (2) a doctor who examined the victim; and (3) a witness from the Federal Bureau of Investigation who examined the victim's clothes.

Crump made a written confession of the rape. The other three defendants made oral admissions to police officers of their participation in the crime. Later, all four men denied making any admissions. Over the objection of the defense, the trial judge admitted Crump's written confession, which implicated the others, and gave a limiting instruction to the jury to disregard the references to the other defendants.[7] Crump's entire confession was then read to the jury. Crump, Oliver, and Williams were found guilty as charged; and Mason was convicted of assault with intent to commit rape.

On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed Crump's conviction, but reversed the convictions of Oliver, Mason and Williams. Relying on *Kramer v. United States,*[8] the court reasoned that when it is possible to delete the names of the nonconfessing co-defendants without weakening the confession as to the declarant, it is prejudical error[9] to admit the entire confession without deleting the hearsay references to the co-defendant, and that a limiting instruction cannot repair the damaging impact of such references.[10]

One judge dissented,[11] contending that all four convictions should be affirmed because the limiting instruction was sufficient to protect the non-confessors from prejudice, especially when the other evidence

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[6]335 F.2d 724 (D.C. Cir. 1964).

[7]Counsel for the defense made a general objection, but did not specifically request deletion. The trial judge gave a limiting instruction, and as the confession was read, defense counsel again objected. The judge repeated that the entire confession should be read to the jury, but it could only be used against the declarant. Oliver v. United States, supra note 6, at 727.

[8]317 F.2d 114, 117 (D.C. Cir. 1963).

[9]Supra. note 6, at 728, citing Fed. R. Crim. P. 52 (a). This rule does not require reversal for "harmless error."

[10]Supra note 6, at 728.

[11]Ibid.

overwhelmingly established their guilt. Another judge would have reversed all four convictions on the ground that the defendants were arrested without probable cause, and that confessions obtained during a period of illegal detention are inadmissible in evidence.[12]

In a joint trial, when there is a confession by one defendant which implicates nonconfessing co-defendants, the court may employ one of several methods regarding that confession: (1) admit the entire confession into evidence with a limiting instruction to the jury that it is to be considered only in determining the guilt of the declarant;[13] (2) either admit the confession but delete the name or reference to the nonconfessor,[14] or substitute an "X" for his name[15] (3) limit the prosecution to evidence which is admissible against all defendants or, failing to agree to do so, requiring prosecution of each defendant separately;[16] or (4) order a severance.[17]

(1) Admission of the entire confession with a limiting instruction is the general rule. It has a dual purpose. It promotes efficient and effective administration of criminal justice through elimination of expensive individual litigation. It is also thought sufficient to protect the nonconfessors from the prejudicial effect of being implicated by the confession.[18] While proponents of the general rule are aware that its application may involve prejudice to the nonconfessor's cause, they contend that the prejudicial effect is eliminated or diminished by a limiting instruction to the jury.[19]

The opponents of the general rule contend that a limiting instruction does not sufficiently protect the right of the defendant to have his guilt determined solely on the basis of the evidence against him. This is because it exacts of the jury a task which it cannot possibly perform—that of disregarding a reference in the confession to a co-de-

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[12]Supra note 6, at 729.

[13]E.g., United States v. Klein, 306 F.2d 13 (2d Cir. 1962); State v. Sanchez, 59 Ariz. 426, 129 P.2d 932 (1942).

[14]Kramer v. United States, supra note 8, at 117; People v. Buckminster, 274 Ill. 435, 113 N.E. 713, 715-16 (1916).

[15]Malinski v. New York, 324 U.S. 401, 411-12 (1945).

[16]Delli Paoli v. United States, supra note 1.

[17]Delli Paoli v. United States, supra note 1. See also State v. Francis, 152 S.C. 17, 149 S.E. 348 (1929); Annot., 70 A.L.R. 1171 (1931).

[18]United States v. Cafaro, 26 F.R.D. 170, 172 (S.D.N.Y. 1960).

[19]Delli Paoli v. United States, 352 U.S. 232, 238 (1957); Blumenthal v. United States, 332 U.S. 539, 559-60 (1947); United States v. Leviton, 193 F.2d 848, 855-56 (2d Cir. 1951); People v. Rhinehart, 196 Cal. App. 2d 240, 16 Cal. Rptr. 391, 393 (Dist. Ct. App. 1961); People v. Skelly, supra note 5, at 920; State v. Smith, 201 Wis. 8, 229 N.W. 51, 52 (1930); accord, United States v. Sansone, 206 F.2d 86, 88 715-16 (1916).

fendant on trial for the same crime.[20] Furthermore, once the confession is introduced, the limiting instruction may be even more damaging than if not given, because it further emphasizes the co-defendant's alleged connection with the crime.[21]

Although recognizing the dangerous possibility that a jury may establish the nonconfessor's guilt by inference or transference,[22] courts adhering to the general rule contend that a basic premise of the Anglo-American jury trial system is that the jury takes the law from the judge, and that unless we can assume that the jury follows the proper instructions of the court, the jury trial system has a fatal defect.[23]

(2) Deletion or substitution[24] may be available when the result will be an effective confession against the declarant without rendering the confession unintelligible.[25] This solution is available only when the reference to the nonconfessor is not organically interwoven with the declarant's admission of guilt.[26]

One objection to this procedure is that the confessing defendant has the right to have the confession read into evidence exactly as he

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[20]"The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such an inadmissible declaration cannot be wiped from the brains of the jurors." Delli Paoli v. United States, 352 U.S. 232, 247 (1957) (Frankfurter, J. dissenting).

[21]Kramer v. United States, 317 F.2d 114, 117 (D.C. Cir. 1963); United States v. Gordon, 253 F.2d 177, 183 (7th Cir. 1958); Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932); Krulewitch v. United States, 336 U.S. 440 (1949) (concurring opinion).

A study at the University of Chicago law school revealed the following: "A moot case was played on tape to thirty moot juries. In ten of the cases defendant reveals he has no liability insurance, but no objection taken to this disclosure; the mean award of all verdicts was $33,000. In another ten the defendant reveals he has liability insurance, and again no objection is taken and no further attention is paid; the mean award was $37,000. In the remaining ten the defendant reveals his liability insurance, objection is taken, and the jury is instructed to disregard insurance; the mean award was $46,000. A conscious attempt to follow the limiting instruction apparently was made: In the ten cases where insurance was disclosed but no instruction given there were 61 references to insurance in the jury deliberations, 46% carrying an implication for raising damages; where the limiting instruction was given, there were only 36 references to insurance, 19% of which carried an implication for raising damages." Comment, 24 U. Chi. L. Rev. 710, 713 n.21 (1957).

[22]Blumenthal v. United States, 332 U.S. 539, 559-60 (1947); People v. Skelly, supra note 5, at 920.

[23]Delli Paoli v. United States, 352 U.S. 232, 242 (1957).

[24]Stein v. New York, 346 U.S. 156, 194 (1953); Malinski v. New York, 324 U.S. 401, 410-411 (1945).

[25]Malinski v. New York, 324 U.S. 401, 412 (1945); Kramer v. United States, 317 F.2d 114, 117 (D.C. Cir. 1963); People v. Buckminster, 274 Ill. 435, 113 N.E. 713, 715-6 (1916).

[26]People v. Buckminster, 274 Ill. 435, 113 N.E. 713, 715-16 (1916); Kramer v. United States, 317 F.2d 114, 117 (D.C. Cir. 1963).

made it; otherwise it is not his confession.[27] A more realistic objection is that deletion may arouse speculation in the minds of the jurors who may infer that the deleted segment implicates a co-defendant. As stated in the *Oliver* case, excision of any reference to the nonconfessor may arouse speculation in the minds of the jurors, but "the objective is to do the best that can be done to avoid risk of prejudice even though no steps can perfectly eliminate it."[28] If the reference to the nonconfessor is deleted, the risk of prejudice to him is substantially reduced without impeding the prosecution of the confessor.

(3) A third possible alternative is to present the prosecution with the choice of either limiting its case to evidence admissible against all defendants or, failing to do so, prosecuting each defendant separately.[29] This solution is not often used. The effect of such a choice would be to force the prosecution to try the confessor separately or be deprived of the use of his confession against him. This alternative seems to be unduly harsh for the prosecution, and it is basically subject to the same criticism as severance since the two are closely related.

(4) The fourth alternative is severance, which is directed solely at the protection of nonconfessing defendants.[30] Severance, which provides separate trials for nonconfessing defendants, appears to be the ideal solution, but in conspiracy trials[31] where there are numerous defendants, it is costly and time consuming. In addition, separate trials are often impractical when the acts and subject matter on trial are closely related. With the impracticalities of separate trials, courts

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[27]4 Wigmore, Evidence § 1079(1)(d) (3d ed. 1940); "The rule is very clear that the confession must be given as made. If we strike out any part, then the confession ceases to be the confession as made. The rule in such cases is clearly to let all the defendant said be given, and the jury cautioned not to consider it against any one, except the man who makes it." State v. Jeffards, 121 S.C. 443, 114 S.E. 415 (1922).

[28]Oliver v. United States, 335 F.2d 724, 728 (D.C. Cir. 1964). It has also been held that refusal to grant deletion of the nonconfessor's name is not error. People v. Roxborough, 307 Mich. 575, 12 N.W.2d 466, 470 (1943).

[29]E.g., People v. Skelly, 409 Ill. 613, 100 N.E.2d 915 (1951); People v. Barbaro, 395 Ill. 246, 69 N.E.2d 692 (1946); see also Rex v. Martin, 9 Ont. L.R. 218 (1905); 4 Ann. Cas. 912, 918 (1907). Annot., 70 A.L.R. 1171, 1186 (1931). Cf. United States v. Leviton, 193 F.2d 848, 856 (2d Cir. 1951), where the general rule was upheld even when the prosecution stated that short of severance, nothing would insulate the co-defendant from implication spelled out in the confession of another defendant.

[30]Kramer v. United States, 317 F.2d 114, 117 (D.C. Cir. 1963); United States v. Gottfried, 165 F.2d 360 (2d Cir. 1948); People v. Buckminster, 274 Ill. 435, 113 N.E. 713, 715-16 (1916); Delli Paoli v. United States, 352 U.S. 232, 247 (1957) (dissenting opinion).

[31]Comment, 56 Colum. L. Rev. 1112 (1956).

must consider that in many such cases the possibility of prejudice is very limited and does not require severance.[32]

In advocating the severance alternative, Justice Frankfurter maintained that the prosecution should not have the "windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds."[33]

In a majority of states,[34] severance is within the discretion of the trial judge, and his decision will not be overturned absent a clear showing of abuse of discretion.[35]

In a number of states, a right of severance is given by statute.[36] Since either the nature of many crimes or other practical reasons often dictate joint trials, the usual procedure, where severance is discretionary, is to deny separate trials unless actual prejudice is shown.[37]

The question of which alternative presents the best solution to the problem of admitting implicating confessions is subject to conflicting opinion. It is submitted that severance is the ideal solution, but that it is sometimes impractical.[38] Deletion may arouse speculation; but it is not a radical departure from the general rule, and it may be satisfactory in most cases.

The general rule may present the only practical solution in an attempt to balance the interest of both state and defendant. This solu-

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[32]E.g., Maupin v. United States, 225 F.2d 680 (10th Cir. 1955); United States v. Hall, 126 F. Supp. 620 (D.D.C. 1955). But see Schaffer v. United States, 221 F.2d 17 (5th Cir. 1955); United States v. Haupt, 136 F.2d 661 (7th Cir. 1943).

[33]Delli Paoli v. United States, supra note 1, at 248.

[34]E.g., Alaska R. Crim. P. 14 (1963); Ark. Stat. Ann. § 43-1801, 1802 (1964); Cal. Pen. Code § 1908; Fla. Stat. Ann. § 918.02 (1944); Hawaii Rev. Laws § 258-18 (1955); Ill. Ann. Stat. ch. 38, § 114-8 (Smith-Hurd 1964); Ind. Ann. Stat. § 9-1804 (1956); Iowa Code Ann. § 780.1 (1946); Kan. Gen. Stat. Ann. § 62-1429 (1949); La. Rev. Stat. § 15:316 (1950); Mich. Comp. Laws § 768.5 (1948); Minn. Stat. Ann. § 631.03 (1945); Mo. Rev. Stat. § 545.880 (1959); N.Y. Code Crim. Proc. § 391; N.C. Gen. Stat. § 1-179 (1951); Ore. Rev. Stat. § 136.060 (1963); Pa. Stat. Ann. tit. 19, § 785 (1964).

[35]Opper v. United States, 348 U.S. 84, 95 (1954); 5 Wharton, Criminal Law and Procedure § 1944 (12th ed. 1957).

[36]E.g., Ala. Code tit. 15, § 319 (1958); Ga. Code Ann. § 27-2101 (1953); Miss. Code Ann. § 2514 (1956) (applicable only to felonies); Neb. Rev. Stat. § 29-2002 (1956) (applicable only to felonies); Tex. Code Crim. Proc. art. 650 (1948); Vt. Stat. Ann. tit. 13, § 6507 (1959) (discretionary unless the felony is punishable with death or more than five years imprisonment); Wyo. Stat. Ann. § 7-230 (1957) (applicable only to felonies).

[37]United States v. Cafaro, 26 F.R.D. 170, 172 (S.D.N.Y. 1960); 5 Wharton, Criminal Law and Procedure § 1944 (12th ed. 1957).

[38]United States v. Cafaro, 26 F.R.D. 170, 172 (S.D.N.Y. 1960).