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# THE RISK OF GUILT BY ASSOCIATION: JOINDER OF DEFENDANTS AND CONSOLIDATION OF INDICTMENTS AGAINST DIFFERENT DEFENDANTS

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August 1st, 2022

## INTRODUCTION

It has been said that misery loves company (Dominick de Gravina, Chronicon de Rebus in Apulia gestis), but when it comes joint trials of multiple defendants, company can cause misery in the form of undue prejudice arising from other charges or irreconcilable conflicts in defense strategies that can create an inference of guilt by association.

## CHESTNUT ROASTED BY CO-DEFENDANT'S UNRELATED CHARGES

For example, in *People v Chestnut* (19 NY3d 606 [2012]), the Court of Appeals held that the defendant in this armed-robbery case was unfairly prejudiced by the trial court's denial of his motion to sever unrelated drug possession and resisting arrest charges levelled against his codefendant (proof of which took up nearly half the trial) because they created the impermissible inference that the defendant was also involved in drug activity which must have had something to do with the robbery.

The defendants were charged as accomplices with Robbery 1st and 2nd degree, stemming from the gunpoint theft of jewelry, cash, a cell phone, and other personal property from the victim who was loading packages into a vehicle. The codefendant was also charged with four drug offenses and resisting arrest based on a confrontation with the police at his home two months later.

Defense counsel moved to sever those charges, alleging substantial prejudice from the risk of a "spillover" effect upon his client. The trial court denied the defendant's motion, he was convicted as charged (the codefendant was also convicted of the robbery and the other charges) and the Appellate Division held that the trial court committed error which was harmless in view of the overwhelming proof of guilt.

The Court of Appeals agreed that the trial court erred in denying severance but found that the error was not harmless because the proof in this one-witness identification case was underwhelming.

The Court held that the drug charges were improperly joined in the first place because they pertained to the co-defendant only and were not based on either a common scheme or criminal transaction (CPL 200.40 [1] [a-c]).

In the Court's view, there was a substantial risk that the jury's deliberation was infected by the voluminous evidence presented on charges that had nothing to do with this defendant. (Police found

the co-defendant in a bedroom of his mother's house with a large amount of crack cocaine and marijuana). This served to distract the jury from the principal issue of IDENTICATION in the robbery case which the Court found was less than conclusively established.

The victim's description of the perpetrators did not really match the defendant ("5'8" versus his actual height of 5'11'') and there was no mention of any tattoo (which the defendant had on his hand) even though the victim claimed to have observed him for a minute from a half-a-foot away. Also, the victim's initial photo identification was tentative ("he looks like the robber"), and he only became more confident about the ID several weeks later.

On these facts, the Court could not conclude that the nature and amount of evidence of guilt was enough to excise the error (in admitting evidence of unrelated drug charges not brought against the defendant) and eliminate the risk of coloring the jury's deliberations (citing *People v Crimmins*, 56 NY2d 230 [1975]).

The Court also found that the trial court's instruction, that the drug charges only pertained to the co-defendant, was inadequate because the jury was never directed to disregard that evidence in its determination of the defendant's guilt or innocence on the robbery counts.

The dissenting judge (Hon. Susan P. Read) deemed the defendant's argument that the drug charges were improperly joined in the same indictment to be UNPRESERVED because it was not advanced to the trial court. Rather, the defendant argued that the court should exercise its discretion and sever the counts due to unfair prejudice (which presumes that the charges were properly joined in the first instance under CPL 200.40[1]).

When the conditions of the statute are not satisfied, joinder is NOT allowed (*People v Spencer*, 67 AD2d 867 [1st Dept 1979]). On the other hand, if the charges are properly joined, the defendant may then seek DISCRETIONARY SEVERANCE upon a showing of GOOD CAUSE that UNDUE PREJUDICE will result from a joint trial (*People v Mahboubian*, 74 NY2d 174 [1989]).

Consequently, since the defendant made only the latter argument at the trial court level, in the dissenter's view, he should not have been allowed to raise the former one for the first time on appeal.

The majority noted that regardless of the legal rationale, defense counsel repeatedly sought the same relief (i.e., excision of the drug charges) and gave the trial court every opportunity to avoid the prejudice that ultimately resulted from the inclusion of charges that had no place in the defendant's trial.

SOME CASES INTERPRETING CPL 200.40

CPL 200.40 reflects a PREFERENCE for joint trials where defendants are charged with ACTING IN CONCERT as ACCOMPLICES (Penal Law § 20.00) and the SAME EVIDENCE is presented to establish their guilt of the crimes charged (see *People v Thompson*, 57 AD3d 1114 [4th Dept 2009]). When that is the case, only the most COGENT REASONS will permit a severance (*People v Fassino*, 169 AD3d 921 [2nd Dept 2009]).

It is worth noting that mere differences in trial strategy between/among co-defendants or inconsistencies in defenses are generally insufficient to compel severance. Rather, it must be shown that the CORE of each defense is in SUBTANTIAL CONFLICT with the other(s) and that risk of unfair prejudice

(i.e., inference of guilt) derives from the fact of the conflict itself (*People v McGuire*, 148 AD3d 1538 [4th Dept 2017).

The defendant in *McGuire* was charged along with two codefendants with Criminal Possession of a Weapon 2nd degree, stemming from the seizure of a loaded handgun from under a seat in a vehicle in which they were all riding.

The defendant's counsel argued that the defenses of each defendant were irreconcilable because the defendant denied possession and the co-defendants implicated him. In particular, the co-defendants stated that when the vehicle was pulled over, the defendant removed the gun from his waistband and tried to hand it off. When the co-defendant refused to take it, the defendant stashed it under a seat. The other co-defendant testified that the defendant offered him $10,000.00 to take the weight for the weapon.

The Fourth Department noted that the co-defendants took an aggressive adversarial position against the defendant, effectively placing them in the role of de facto prosecution witnesses against the defendant (citing *People v Cardwell*, 78 NY2d 998 [1991]). Moreover, the essence of their respective defenses was in conflict such that the jury, in order to credit the codefendants' defense, necessarily had to disbelieve the defendant's denial of possession. Consequently, there was a significant risk that the conflict alone would create an inference of the defendant's guilt (citing *People v Mahboubian*, supra).

In contrast, see *People v McDermott* (201 AD2d 913 [4th Dept 1994]), where the defendants' defenses were in harmony, arguing that sexual contact with the victim was consensual.

And in *People v Rideout* (177 AD3d 377 [4th Dept 2019]), the Fourth Department found no error in the trial court's refusal to sever the defendant's murder charge from her codefendants' charges, where the proof as to all of them was essentially the same and there was no indication that the cross examination of certain prosecution witnesses by counsel for the co-defendants elicited any new information not brought out on direct examination (citing *People v Murray*, 155 AD3d 1538 [3rd Dept 2017]).

The proof in this circumstantial case showed that the defendant who had an ongoing custody dispute with her husband was observed purchasing drain cleaner (later used to disfigure him) and disposing of the garrot that was used to strangle him. She was also seen cleaning his apartment after which his car keys were found at her place. The defendant had also rented a house out-of-state where she planned to move with her two children even though the defendant had primary custody.

The court noted that the case against the defendant was essentially based on the same evidence that was introduced against the co-defendants, and there was no basis for the jury to infer the defendant's guilt from the existence of any conflict between them (citing *People v McGuire*, supra).

THE STATUTE

CPL 200.40 (1) states that two or more defendants may be JOINTLY CHARGED in a single indictment provided that:

a. All such DEFENDANTS are JOINTLY CHARGED with EVERY OFFENSE ALLEGED THEREIN; or
b. All the OFFENSES CHARGED are BASED UPON a COMMON SCHEME or PLAN; or

c. All the OFFENSES CHARGED are BASED UPON THE SAME CRIMINAL TRANSACTION as defined in PL 40.10 (2); or
d. All the DEFENDANTS are JOINTLY CHARGED with ENTERPRISE CORRUPTION (see text of subdivisions i-iii for particulars.

CPL 40.10 (2) defines a CRIMINAL TRANSACTION as conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either (a) so CLOSELY RELATED and CONNECTED in point of TIME and CIRCUMSTANCE of COMMISSION as to constitute a SINGLE CRIMINAL INCIDENT, or (b) so CLOSELY RELATED in CRIMINAL PURPOSE or OBJECTIVE as to constitute ELEMENTS or INTEGRAL PARTS of a SINGLE CRIMINAL VENTURE.

CPL 200.40 (1) goes on to state that even though cases may be joined per subdivisions a-d, the court, upon timely MOTION of the DEFENDANT or the PEOPLE, and for GOOD CAUSE SHOWN, exercise its DISCRETION to order that ANY DEFENDANT BE TRIED SEPARATELY FROM THE OTHER(S).

GOOD CAUSE includes, inter alia, a finding that a joint trial will cause UNDUE PREJUDICE to the defendant or the People. Conclusory or speculative claims of prejudice will NOT suffice (see *People v Jason*, 158 AD2d 337 [1st Dept 1990], *People v Tolbert*, 202 AD2d 171 [1st Dept 1994]).

CPL 200.40(2) states that when two or more defendants are charged in SEPARATE INDICTMENTS with an offense(s) which could have been charged in a single indictment, the court may, upon application by the People, order that such indictments be CONSOLIDATED, and the charges be heard in a SINGLE TRIAL. (Any offenses not properly included in a single indictment shall NOT be consolidated but may be separately prosecuted in the other indictment or superior court information).

ART FOR THEFT'S SAKE

In *Mahboubian*, supra, the Court of Appeals held that the defendant was substantially prejudiced by the trial court's refusal to sever his case (charging conspiracy to stage a theft of the defendant's Persian antiquities from a New York City storage vault for the purpose of committing insurance fraud) from his co-defendant whose defense was fundamentally at odds with the defendant's denial of involvement in any such scheme.

The defendant claimed that he was duped by the co-defendant into revealing critical information about the Christmas Day arrival from Switzerland of his objets d'art (many of which the People's experts claimed were phonies) at a New York City customs/storage facility. He also claimed that he had given the co-defendant a key to another storage vault to save himself a trip to the Unites States.

For his part, the codefendant alleged that he helped orchestrate the theft (committed by other accomplices, one of whom was a police informant who had taped their phone conversations) not to commit insurance fraud but to generate publicity that would enhance the property's value. (The defendant had insured the pieces for $18.5 million).

The Court of Appeals noted that a trial court, when faced with an application for severance, must make a case-specific inquiry that BALANCES public policy considerations favoring joint trials (i.e.., judicial economy) against a defendant's right to a fair trial uncompromised by a co-defendant's conflicting defense.

Blending two federal court approaches (*see United States v Romanello*, 726 F2d 173 [5th Cir 1984] and *Rhone v United States*, 365 F2d 980 [DC Cir 1966]), the Court concluded that severance is required where 1. the CORE of each defense is in IRRECONCILABLE CONFLICT with the other and 2. there is a SIGNIFICANT DANGER, as both defenses are presented that the CONFLICT ALONE would cause the jury to INFER the defendant's GUILT.

Here, the defendant's claim of non-involvement in any criminal scheme was in DIRECT CONFLICT with the codefendant's admission of staging a theft for publicity purposes. In the Court's estimation, to accept one defense, the jury would necessarily have to reject the other. There was also a substantial risk that the jury would reject both defendants' mutually exclusive versions by virtue of the conflict alone.

The Court also found that the defendant was prejudiced by the court's substantial redaction of his statement to prosecutors which largely inculpated the codefendant and exculpated himself. Accordingly, each defendant was denied a full opportunity to present a defense and thus denied a fair trial.

WHEN CO-DEFENDANTS POINT THE FINGER AT EACH OTHER

In *Bruton v United States*, (391 US 123 [1968]), the Supreme Court held that the defendant's Sixth Amendment right of CONFRONTATION was violated by the introduction into evidence of his non-testifying co-defendant's statement to a postal inspector that implicated both himself and the defendant in the robbery of a jewelry store/make-shift postal station.

The Court determined that the trial court's instruction for the jury to consider the confession only insofar as it implicated the codefendant was INSUFFICIENT to eliminate the substantial prejudice that introduction of the statement created. In the Court's view, there was just TOO GREAT A RISK that the jury would convict the defendant based on what amounted to inadmissible, prejudicial hearsay.

While redaction of any reference to a defendant in a co-defendant's statement can sometimes eliminate the risk of unfair prejudice (see *People v Smalls*, 55 NY2d 407 [1982]), courts must be sure to avoid situations where the defendant may be convicted by an implication of his her involvement in the other's admission.

In *People v Wheeler*, (62 NY2d 867 [1984]), the defendant and his brother were tried and convicted of murder stemming from a fatal shooting at a racetrack. The brother gave a statement to police implicating himself and his brother in the robbery which led to the victim's death. The trial court denied the defendant's severance motion but agreed to remove his name from the co-defendant's statement.

The Court of Appeals said that the redaction did not solve the problem of prejudice because the substituted references in the statement to "another participant" in a case involving two brothers on trial for robbery and murder could only be construed as inculpating the defendant.

The Court noted that when an extrajudicial statement by one defendant contains incriminating references to another defendant, admission of that statement upon a joint trial DEPRIVES the non-confessing defendant of the RIGHT OF CONFRONTATION unless the one who gave the statement testifies (citing *Bruton v United States*, supra). However, if the confession can be EFFECTIVELY REDACTED (to eliminate any direct or indirect implication of the defendant), it may be admitted. The burden to show a meaningful redaction resides with the People, and in this case, it was NOT met.

See also *People v Ruiz*, (207 AD2d 917 [2d Dept 1994]), where the refusal to grant severance constituted reversible error. The co-defendant's confession was NOT sufficiently redacted so that when considered along with eyewitness testimony, it implicated the defendant inferentially.

JUDICIAL SLIP-OF-THE TONGUE CAN SINK THE DEFENDANT'S SHIP

In *People v Lopez*, (68 NY3d 683 [1986]), the Court of Appeals held that the defendant should be granted a new trial on armed robbery/murder charges where after redacting the codefendant's statement, the trial court nullified it by inadvertently mentioning the defendant's name when discussing the co-defendant's tape-recorded statement denying knowledge that anyone was going to use a sawed-off rifle. In the Court's view, the trial judge's direction to "strike that" (and replacing the defendant's name with "anyone") did not undo the damage.

The Court noted that the case turned on the issue of identification; the proof of which was not overwhelming. (Although the defendant was arrested three days later in a car full of people with the shotgun at his feet, only one witness identified him 16 months after the crime had been committed). Hence, the error in mentioning the defendant by name in conjunction with the codefendant's statement expressing surprise over another participant's use of a weapon, was NOT HARMLESS.

PEOPLE FAIL TO MEET BURDEN TO CONSOLIDATE CO-DEFENDANTS

In *People v Aleteb*, (63 Misc.3d 1222 [Sup Ct, Bronx County 219]) the court denied the People's motion to consolidate the defendant with three co-defendants, two of whom put him at the scene of a home invasion/robbery while denying any culpable participation in the crimes. (They said they were there to conduct an "innocent transaction.").

The court held that since four people were observed leaving the premises with stolen property and the evidence against the defendant was not strong (e.g., photo identification only, with no admissions, DNA, or physical evidence connecting him to the scene), the risk of unfair prejudice from a joint trial likely to involve antagonistic defenses that would implicate the defendant (even with redacted co-defendant statements) was too great (citing *People v Mahboubian*, supra).

The People's motion was premised primarily on a claim of judicial economy based on common victims and witnesses who, in their view, should not have to testify multiple times to the same event (citing *People v Bornholdt*, 33 NY2d 75 [1973]). They also argued that the defendant's claim that he was not there (i.e., misidentification) was not inconsistent with the co-defendants' claims of innocent presence at the scene.

The court concluded, however, that the People had conflated consolidation (for which they bear the burden) with severance, and even where joinder is permitted, the decision to grant it resides within the court's sound exercise of discretion (citing *People v Fisher*, 249 NY 419 [1928]). To meet their burden, the People must show not only that the cases are joinable (CPL 200.20[2]), but also that the public interest in avoiding multiple trials for the same crime outweighs the possibility of unfair prejudice to the accused. Citing *People v Lane*, (56 NY2d 8 [1982]), the court noted that the interest in expedited dispositions cannot come at the expense of the defendant's right to a fair trial.

The defendant persuaded the court that a joint trial would set the stage for a conviction by association with others whose statements (even if redacted to eliminate his name) would implicate him as the fourth person at the scene (one of whom wore a mask). As such, the risk was too great that he would suffer from a "spillover effect" rather than be judged by the evidence against him (citing *People v Cardwell*, 78 NY2d 996 [1993]).

The defendant also expressed concern that counsel for his finger-pointing codefendants would gang up against him, thus bolstering the People's case which was otherwise wanting for solid evidence against him.

MISDEMEANOR PROSECUTIONS

CPL 100.45 (1) states. In pertinent part, that the provisions of CPL 220.40 apply to INFORMATIONS, PROSECUTOR'S INFORMATIONS and to MISEMEANOR COMPLAINTS.

FINAL THOUGHT

Whenever a client is charged with crimes in an indictment along with one or more codefendants, it is well worth counsel's while to examine all the charges carefully to see whether they are properly joined in accordance with CPL 200.40. If every defendant is not charged with every offense or they don't arise out of a common scheme or the same criminal transaction, any oddball charges (or defendants) should be separated from those that are properly joined.

If the offenses are properly charged in the same indictment, counsel should examine the proof, consider the client's defense options, and determine whether any chosen theory of defense is in fundamental conflict with that of any co-defendant. The CPL 710.30 notice served on any/all codefendants should be reviewed for any statements that may implicate the client directly or by implication. In such case, redaction may not be enough to undo the risk of substantial prejudice if the tattling party does not testify.

Other considerations include any imbalance in the amount or quality of proof against one defendant compared to the other(s) and, if so, whether it would create an unfair risk of guilt by association. Also, if the proof does not lend itself to a clear assignment of criminal culpability between/among co-defendants in jurors' minds (see *People v Barnett*, 125 AD3d 878 [2d Dept 2015]), counsel should move to separate the defendant from the muck and mire of muddled proof.

It is worth remembering that severance is not available simply for the asking. Mere antagonism or inconsistency in defenses will not suffice. To overcome the strong public policy favoring joint trials, the defendant must make a strong factual showing that denial of severance will significantly impair his/her defense to the point of creating unfair prejudice that deprives him/her of a fair trial (see *People v Cruz*, 66 NY 2d 61 [1985]). If not, the defendant will be judged not only by the evidence against him/her but by the company he/she keeps.