COMMENTS

POST-CONSPIRACY ADMISSIONS IN JOINT PROSECUTIONS—EFFECTIVENESS OF INSTRUCTIONS LIMITING THE USE OF EVIDENCE TO ONE CO-DEFENDANT

The recurrent problem of jury capacity to follow instructions limiting the use of evidence appears acutely in joint conspiracy prosecutions, where post-conspiracy admissions are competent against the declarant but remain inadmissible hearsay with respect to his co-defendants.[1] These admissions tend inevitably to implicate co-defendants in the conspiracy charge, since conspiracy requires the existence of several conspirators.[2] The prevailing practice has been to admit the evidence, subject to an instruction—the "placebo"—limiting its application to the declarant.[3]

In the recent case of *Delli Paoli v. United States*,[4] the United States Supreme Court re-examined and re-affirmed the general propriety of this practice. It is proposed to examine the advisability of this decision in view of the risk of jury irregularity and the availability of alternative procedures for avoiding this risk.

In *Delli Paoli*, appellant and others were jointly indicted and tried for conspiring to deal unlawfully in alcohol. No motion for severance was made. A confession by one of the co-defendants, implicating the appellant, was admitted against the declarant, the court instructing, both at the time of introduction and in the charge, that the confession be considered against the declarant alone. The Court of Appeals for the Second Circuit, per L. Hand, J., sustained this procedure over the dissent of Judge Frank;[5] the Supreme Court affirmed with four justices dissenting. The Court reasoned that jury capacity to follow limiting instructions is to be assumed until such factors as the complexity of the trial and the order of proof render it untenable to assume that the jury could consider the admission separately from the other evidence.[6] The dis-

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

[2] An exception to this statement should be made where the admission inculpates only unindicted co-conspirators.

[3] Cases collected in Right to Severence Where Two or More Persons Are Jointly Accused, 70 A.L.R. 1171, 1185 (1928).

[4] 352 U.S. 232 (1957).

[5] United States v. Delli Paoli, 229 F.2d 319 (C.A.2d, 1956). Medina, J., concurred in a separate opinion.

[6] The Court mentioned five factors as supporting its assumption of jury regularity in this case: the simple character of the proof, enabling the jury to consider separately the role of

senters, approving the reasoning of Judge Frank, suggested that the placebo rarely gives adequate protection to co-defendants.

In assuming jury regularity, the majority relied in part on opinions of Judge Learned Hand, among them *Nash v. United States.*[7] However, in *Nash,* one of the numerous cases in which Judge Hand encountered the problem, he plainly stated his belief that the placebo is a "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 anybody else's."[8] Judge Hand has approved the prevailing practice, in *Nash* and other cases, only because it "probably furthers rather than impedes the search for truth."[9]

Judge Hand's position is not entirely clear. He may mean that admissions further the search for truth as to the guilt of the declarant's co-defendants. This view would directly contradict the established rule, re-affirmed in *Krulewitch v. United States,*[10] that post-conspiracy admissions are receivable against the declarant only.[11] The only other justification for the distinction lies in the other possible meaning of Judge Hand's position: that the admissions further the search for truth as to the declarant's guilt, and so should be receivable at the declarant's trial despite their probable use against his co-defendants. This latter view of Hand's position overlooks, however, the possibility of procedures avoiding jury use against co-defendants of admissions received against the declarant.

If Judge Hand sees *Delli Paoli* as furthering the search for truth as to co-defendants' guilt, he would seem to contemplate the inclusion of post-conspiracy admissions within an exception to the hearsay rule.[12] The most apt exception is that covering declarations against interest. There are several obstacles, however, to use of this exception. First, the weight of authority holds

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each defendant; separate representation of each defendant, emphasizing to the jury the separateness of their interests; the introduction of the confession after the rest of the prosecution's case; the absence of affirmative indication in the record of jury irregularity; and the corroborative character of the confession. But compare Judge Frank's discussion of the role of the confession in the case against Delli Paoli, United States v. Delli Paoli, 229 F.2d 319, 322–23 (C.A.2d, 1956).

[7] 54 F.2d 1006 (C.A.2d, 1932), cited in Delli Paoli v. United States, 352 U.S. 232, 239 n.5 (1957).

[8] Id., at 1007. Judge Hand took the same view in two other cases cited by the Court in Delli Paoli: United States v. Gottfried, 165 F.2d 360, 367 (C.A.2d, 1948); United States v. Pugliese, 153 F.2d 497, 500–501 (C.A.2d, 1945).

[9] Ibid.

[10] 336 U.S. 440 (1949).

[11] In Delli Paoli, Judge Hand distinguished Krulewitch on the ground that there, unlike Delli Paoli, the declarant was not a defendant. United States v. Delli Paoli, 229 F.2d 319, 321 (C.A.2d, 1956). This distinction would persuade if it were assumed that the admission can be limited by the placebo, but Judge Hand has rejected this assumption.

[12] See United States v. Gottfried, 165 F.2d 360, 367 (C.A.2d, 1948).

the exception applicable only to declarations against pecuniary interest,[13] although Federal Rule 26[14] might seem to authorize federal courts to follow the commentators' view that declarations against penal interest merit inclusion in the exception.[15] Also, it has been held that the unavailability requirement of the against-interest exception is met only by the declarant's death or insanity,[16] although the requirement ought as a matter of principle to be met in criminal cases by the declarant's refusal to testify.[17] Finally, admissions in the form of confessions to the police might be prompted by a special motive to misstate arising from a deal with the prosecution, especially likely where the confession implicates accomplices. While independent evidence of motive to misstate might be required to justify exclusion of a confession, such evidence would be so difficult to obtain that co-defendants would get little protection against confessions arising from a deal. However, since evidence of a deal will render a confession inadmissible even as against the confessor,[18] a court is unlikely to find that a confession admitted against the confessor does not come within the against-interest exception on the ground that it may have been prompted by a deal.

If post-conspiracy admissions cannot be brought within a hearsay exception, *Delli Paoli* might still be justified on the basis of the second possible meaning of Judge Hand's position: that these admissions further the search for truth as to the declarant's guilt, and so should be receivable at the declarant's trial despite their probable use against his co-defendants. The validity of such a position turns on the extent of the risk that juries will not follow limiting instructions, and on the availability of procedures avoiding such risk.

[13] Cases collected in Wigmore, Evidence §1476 n.9 (3d ed., 1940). Courts have often relaxed this rule by admitting declarations against penal interest where pecuniary interest is also prejudiced, and such prejudice may be found where the declaration admits a tort. Consult Jefferson, Declarations against Interest: An Exception to the Hearsay Rule, 58 Harv. L. Rev. 1, 31–32, 39–40 (1944). The non-tortious quality of the conspiracy offense presents obstacles to this approach. It has been asserted that the agreement represents the "gravamen" of the offense in conspiracy; but mere agreements without more invade no private rights and consequently generate no tort liability. See James v. Evans, 149 Fed. 136, 140 (C.A.3d, 1906); Burdick, Conspiracy as a Crime, and as a Tort, 7 Col. L. Rev. 229, 234 (1907). But consult Charlesworth, Conspiracy as a Ground of Liability in Tort, 36 L. Q. Rev. 38, 49 (1920). However, conspirators' admissions will often relate to commission of substantive crimes involving tort liability.

[14] Fed. Rules Crim. Proc. 26.

[15] Consult The Search for "Reason and Experience" under the *Funk* Doctrine, 17 U. of Chi. L. Rev. 525 (1950). Commentators see no merit in the distinction between declarations against penal and pecuniary interest. Consult Wigmore, Evidence §§1476–77 (3d ed., 1940); Model Code of Evidence, Rule 509 (1942); Uniform Rules of Evidence, Rule 63 (10) (1953).

[16] Cases cited in Wigmore, Evidence §1456 (3d ed., 1940).

[17] Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945).

[18] Wigmore, Evidence §§835–36 (3d ed., 1940).

Two procedures have been employed in a largely ineffective attempt to remove risk of jury irregularity in joint conspiracy trials. First, deletion of portions of admissions implicating co-defendants has been used. This remedy was concededly impractical in *Delli Paoli,* and will be so in any case where the ultimate fact in issue is criminal concert; implication of the declarant in a conspiracy demands reference to the existence of other conspirators, and such reference risks directing jury suspicion at co-defendants. The other device substitutes "X" or "Mr. Blank" wherever reference to co-defendants occurs.[19] Here, as well, there is the risk of jury suspicion that the fictitious names represent co-defendants, and to substitute false names not sounding fictitious would give co-defendants the benefit of a wholly erroneous favorable inference.

Refusal to presume jury regularity in the placebo situation seems entirely consistent with the Court's statement in *Delli Paoli* that "the jury system makes little sense" unless jury regularity is presumed where "circumstances are such that the jury can reasonably be expected to follow" instructions.[20] It seems reasonable that a jury will follow many instructions, but it does not follow that it is reasonable to expect a jury to obey instructions to disregard relevant evidence. Research by the Jury Project at the University of Chicago Law School tends to support a widely held suspicion of trial lawyers that such an instruction only serves to make the forbidden evidence weigh more heavily in jurors' minds, even though they may consciously attempt to follow the instruction.[21]

Avoidance of reliance on limiting instructions seems possible only by separate trials for each defendant whenever the prosecution uses post-conspiracy

[19] Malinski v. New York, 324 U.S. 401, 410–12 (1945), held that the substitution device, together with a limiting instruction, adequately protected a non-confessing co-defendant. However, in Stein v. New York, 346 U.S. 156, 194–96 (1953), which sustained the propriety of admitting a co-defendant's confession with a limiting instruction but with no substitution, the Court relied on Malinski, reasoning that the substitution devices used there did not control the decision, and quoting with approval from Justice Rutledge's Malinski dissent: "The devices were so obvious as perhaps to emphasize the identity of those they purported to conceal." See People v. Kelly, 409 Ill. 613, 100 N.E.2d 915 (1951).

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

[21] 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 is 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 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. This experiment is reported in Kalven, Report on the Jury Project of the University of Chicago Law School (speech given on Nov. 5, 1955, to a Conference on Legal Research at the University of Michigan Law School, on file at the University of Chicago Law School Library).

admissions. It should be noted that the defendants did not request severance in *Delli Paoli*. One may thus argue that the Court has not yet approved the prevailing view that denial of motions for severance lies within the trial court's discretion unless it clearly appears that the jury relied on an admission in convicting co-defendants.[22] Thus it may still be possible, where a defendant moves for severance, for a federal court to adopt Judge Frank's suggestion that severance be the price for reception of post-conspiracy admissions.[23] Such a rule would result in separate trials only where the prosecution feels the admissions sufficiently important to justify the expense and inconvenience of separate prosecution.[24] In any event, where post-conspiracy admissions are put in evidence at joint trial, administrative expense should not deter severance; risk of injustice would seem a heavy price for economy of administration.

[22] Consult note 3 supra. Prejudicial reliance may be shown in several ways. A court may look to the extent to which the admission itself implicates co-defendants. Hale v. United States, 25 F.2d 430 (C.A.8th, 1928). Or the issue may turn on the ease with which the admission could be considered separately from the other evidence. Consult note 6 supra. For courts presuming jury reliance despite the placebo, lack of prejudice may be shown by the existence of overwhelming independent evidence of guilt. People v. Skelly, 409 Ill. 613, 100 N.E.2d 915 (1951); People v. Fisher, 249 N.Y. 419, 164 N.E. 336 (1928).

[23] United States v. Delli Paoli, 229 F.2d 319, 324 (1956).

[24] Several state statutes have made severance mandatory in felony cases. Statutes collected in A.L.I. Code of Criminal Procedure 239-41 (proposed final draft, 1930). Under such a statute, Colorado courts have required the defendant on his severance motion to show by affidavit the existence of evidence admissible as to a co-defendant and inadmissible as to the movant. Garcia v. People, 88 Colo. 267, 295 Pac. 491 (1931). Inasmuch as the prosecution's case may not be fully available to the defendant on pre-trial discovery, such an interpretation imposes an unfair burden. Consult Pre-Trial Disclosure in Criminal Cases, 60 Yale L.J. 626 (1951). The most compelling argument against discovery, i.e., that it encourages fabricated defenses, seems inappropriate with regard to the placebo situation, since the evidence concerned is not properly part of the prosecution's case against the movant. Further, content disclosure need not be mandatory, the primary concern of the movant being the existence and possible use at joint trial of this *species* of evidence. Perhaps simple allegation of the existence of implicating admissions should suffice to force the prosecution to declare its intentions with regard to introducing such evidence on joint trial. Also, it should be noted that these declarations are often introduced as testimony, usually beyond the purview of discovery procedure.

COMPETITORS' RIGHT TO ENJOIN UNLICENSED PROFESSIONAL PRACTICE

Professional men,[1] facing invasion of their fields by unlicensed competitors, have sought injunctive relief frequently in recent years.[2] While the trend is

[1] Profession, as used in this comment, refers to a wide range of occupations. The common factor is the requirement of governmental licensing based on personal qualifications.

[2] In Illegal Practice of Professions—Licensed Practitioner's Right to Enjoin, 11 So. Calif. L. Rev. 476 (1938), it is stated that the first injunction granted against unlicensed professional practice was in Dworken v. Apt. House Owners Ass'n, 38 Ohio App. 365, 176 N.E. 577 (1931).