JOINT CRIMINAL TRIALS WITH MULTIPLE JURIES: WHY THEY ARE USED AND SUGGESTED WAYS TO IMPLEMENT THEM

Vol. 73, No. 4 April 1999 Pg 72 Adam Hersh

Criminal Law

In multidefendant criminal cases, one jury is often insufficient to resolve all defendants' cases. The most common scenario is when the majority of evidence is admissible against each defendant, but one defendant has made a confession that also implicates the other defendants. While the out-of-court statement may be admissible against the confessing defendant, it is inadmissible against codefendants having the same jury as the declarant.[1]

Traditionally, a prosecutor in this type of multidefendant case may elect 1) a joint trial at which evidence of the statement is not admitted; 2) a joint trial at which evidence of the statement will be admitted after all references to the non-declarant defendant have been deleted, provided the court determines that admission of the evidence with deletions will not prejudice the nondeclarant defendant; or 3) severance of the nondeclarant's case from the confessing defendant's case.[2]

While the first two options preserve a single trial with one jury, the loss or redaction of a defendant's statement can prevent full presentation of all relevant evidence against that defendant. The third option, severance, preserves a defendant's statement but can result in massive duplication of effort because the substantially same case is presented repeatedly before different juries. This option becomes especially problematic in cases with recalcitrant, hard-to-locate or petrified witnesses, as well as in sexual battery and child abuse cases where the trauma of successive testimony about painful events can result in the victim's inability to testify.[3]

To counter these concerns, a trend has emerged for multiple juries in a joint trial. That is, multiple defendants are tried simultaneously at one trial by separate juries, with each jury hearing evidence admissible as to that jury's defendant or defendants. The procedure essentially is a grant of severance, but within a framework permitting single presentation of overlapping evidence.[4] This article discusses the background, Florida experience, and application of multiple jury trials, and concludes that, with cooperation from all participants, multiple jury trials are an effective use of judicial resources that safeguard the rights of the accused.

Background

Federal appellate courts took the lead in considering the use of multiple jury trials. In *United States v. Sidman,* 470 F.2d 1158 (9th Cir. 1972), *cert.*

denied, 409 U.S. 1127 (1973),[5] a decision affirming a bank robbery conviction, the Ninth Circuit Court of Appeals concluded the multiple jury trial system did not violate a defendant's rights under the Sixth Amendment, Due Process Clause of the 14th Amendment, or Federal Rules of Criminal Procedure. Similarly, federal courts, when reviewing habeas corpus petitions of state court defendants, have refused to vacate convictions because multiple jury trials were used. [6]

In addition to federal courts, every state appellate court has upheld the multiple jury procedure against constitutional challenges.[7] In the process, however, some courts have cautioned against the widespread use of multiple jury trials and only reluctantly approved them.[8] Reversal of a multiple jury trial conviction has not occurred based on generalized grievances against the procedure, but rather when error in its application is identified.[9]

Although there is no specific statutory provision for multiple jury trials, courts have identified several sources for the power. The first is a trial court's broad discretion to execute rules of severance. In *United States v. Rowan,* 518 F.2d 685 (6th Cir.), *cert. denied,* 423 U.S. 949 (1975), for example, a defendant in a multiparty bank robbery case had one jury render his verdict while two codefendants were tried at the same time by a second jury. On appeal, the defendant argued that permitting his jury to consider evidence relating solely to the guilt of the codefendants denied his right to a fair trial. This position was rejected in part on the trial court's wide

authority to implement Rule 14 of the Federal Rules of Criminal Procedure regarding severance.[10] Other courts have indicated that Rule 57 of the Federal Rules of Criminal Procedure grants federal courts broad power to implement a multiple jury trial.[11] Further, state courts may institute the procedure based on their common law authority.[12] In Florida, a state court's "very broad discretion in the procedural conduct of trials" has been used as a basis for approving multiple jury trials.[13]

Florida's Experience with Multiple Jury Trials

In *Feeney v. State,* 359 So. 2d 569 (Fla. 1st DCA 1978), Florida became one of the first states to endorse multiple juries after the Ninth Circuit's *Sidman* decision.[14] Feeney was convicted of two counts of robbery with a firearm after his codefendant, tried simultaneously before a separate jury, was acquitted. Noting that the overwhelming majority of evidence was admissible against both defendants, the First District Court of Appeal stated:

> The law is, and must be, dynamic and not static. Procedural law is no exception. Experience comes about as a result of experiment. A trial judge has very broad discretion in the procedural conduct of trials. In the absence of demonstrated prejudice we are loathe to disapprove the novel procedure employed sub justice.[15]

Similar to federal and other state court decisions, *Feeney* made clear that to warrant reversal, specific error in the application of multiple jury trials must be shown.[16] Indeed, even if specific error is identified on appeal, absent fundamental error testimony that was not objected to at trial will not overturn a multiple jury trial conviction.[17]

Another endorsement of the multiple jury system was *Velez v. State,* 596 So. 2d 1197 (Fla. 3d DCA 1992), in which the defendant was convicted of manslaughter of a law enforcement officer, attempted manslaughter of a law enforcement officer, grand theft, and armed burglary of an occupied dwelling. The trial court granted Velez's motion to sever from his codefendant but, instead of conducting two entirely separate trials, impaneled two juries to hear the defendants' cases at the same time.[18] When the state introduced the codefendant's out-of-court statement, Velez's jury was removed from the courtroom so that only the codefendant's jury heard the statement. Velez's jury also was excused when a third defendant, who had entered a plea agreement before trial, testified during the state's case against Velez's codefendant. The third defendant, who apparently provided testimony helpful to Velez, was called during Velez's case for consideration by his jury. [19]

On appeal, Velez did not argue that the multiple jury system was inherently prejudicial.[20] Rather, Velez claimed that, because his jury was excused when the third defendant testified against his codefendant, he was forced to call the third

defendant during his own case and lose final closing argument.[21] The *Velez* court rejected this position, noting that the defendant did not request final closing argument and called another witness to testify in addition to the third defendant.[22] On the propriety of multiple jury trials, *Velez* was cautious yet favorable:

Although the use of dual juries is innovative and requires great diligence by the trial court, it is a useful exercise in judicial economy. . . . Although the use of dual juries is rife with the *potential* for error or prejudice, none occurred in the conduct of this trial. The trial court took great pains to ensure that each defendant's jury only heard evidence that was admissible against that defendant. The State, the defense, and the trial court engaged in extensive discussions regarding the implementation of safeguards surrounding the use of the dual jury system.[23]

Feeney and *Velez* help establish that multiple jury trials can be an efficient use of judicial resources while protecting the rights of accuseds. In Florida, however, there has been little guidance regarding the specific implementation of multiple jury trials. Below is a list and discussion of practical considerations that should be taken into account as a starting point to effectively safeguard defendant rights in the multiple jury context.

Practical Considerations

Jury selection. Each defendant should be able to conduct separate voir dire from different jury panels.[24] During jury selection, the selecting defendant and counsel would be at the defense table without the other defendant(s) or defense attorney(s). Only the information or indictment of the selecting defendant should be read to the venire.[25] The nonselecting defendant(s) and defense attorney(s) may be acknowledged during the selecting defendant's voir dire to determine if any prospective jurors know them. Further, the court would explain which defendant's case the venire members will decide if chosen for jury service, and that each jury will be admonished to remain separate and not discuss the cases with each other.[26]

Opening statements. Although some decisions approving multiple jury trials involve simultaneous opening statements, it is best to give separate opening statements to each jury.[27] This procedure ensures that each lawyer's opening will not reference evidence, such as an out-of-court statement by a defendant, that would be inadmissible in a codefendant's case in the presence of the codefendant's jury.

Prosecution's case. Absent conflict, all overlapping testimony can be presented in the presence of each jury. For example, the crime scene investigator in a multidefendant murder case can testify to each jury simultaneously about the location of the body, crime scene photographs, physical evidence found at the scene, and other items. Eyewitnesses and

forensic experts such as the medical examiner, weapons analyst, fiber analyst, and serologist may present their findings and testimony in similar fashion. Rebuttal testimony applicable to all defendants likewise can be presented in the presence of each jury.

For cross-examination of prosecution witnesses, some cases note each jury is present during the other defendant's cross-examination. The better practice, especially when a defense attorney seeks to emphasize greater culpability of a codefendant, would be for only the cross-examining defendant's jury to be present.[28] Redirect examination similarly would take place in front of only the cross-examining defendant's jury.

When a defendant's out-of-court statement is presented, the other jury or juries would be excused.[29] If the defendant's statement and cross-examination on it are brief, this evidence may be elicited while the excused jurors are on an extended lunch recess. If the statement or cross-examination on it is lengthy, the other jurors may be excused early for the day while evidence of the defendant's statement is presented to his or her jury.

Defense cases. If a defendant chooses to present evidence, the codefendant(s) should determine whether their jurors will be in the courtroom during the presenting defendant's case. If the defendants have a unified defense (*e.g.,* entrapment or alibi),

then having each defendant's jury in the courtroom during the other's case can be an effective method of emphasizing their mutual position.

A problem arises, however, if defendants' cases are antagonistic. Antagonistic defenses are when "the jury, in order to believe the core of testimony offered on behalf of that defendant, must necessarily disbelieve the testimony offered on behalf of his codefendants."[30] An example is when a defendant introduces testimony that the codefendant is solely responsible for a murder they are each charged with committing.[31] Antagonistic defenses effectively result in two prosecutors: the government and the other defendant.[32] In a multidefendant one-jury case, this situation constitutes improper joinder for which severance should be granted.[33] Similarly, in a multiple jury trial with antagonistic defenses, during the presenting defendant's case only that defendant's jury should be in the courtroom.[34]

Closing arguments. If the prosecution can reference only jointly admissible evidence, then simultaneous closing argument to each jury is appropriate. Where, however, reference to evidence against one defendant in the presence of the other defendant's jury would be impermissible (such as a defendant's statement incriminating the codefendant, or a defendant's witness incriminating the codefendant), the prosecution should give separate closing arguments to each jury. The same principles apply to defense attorneys.[35]

Jury instructions, deliberations, and verdicts. Each jury should be charged separately and must be provided separate rooms so that there is no interaction between members of each jury.[36]

Exhibits such as photographs should be duplicated so that each jury may have a copy during deliberations. Exhibits that cannot be duplicated, including physical evidence such as weapons or articles of clothing, may be shared between juries with bailiff assistance. One court allotted a jury an hour for initial review of shared exhibits before they were transmitted to another defendant's jury for initial review. The court further ordered that each jury subsequently may sign off for the exhibits as needed.[37]

The court should seal the first jury's verdict until the other jury deliberations are completed. To avoid reassembling the first jury to confirm its verdict hours or days after reaching it, the following procedure may be considered: When the first verdict is reached, it is read silently by the trial judge; the attorneys view the verdict at sidebar; each juror reviews the verdict form(s) and is asked whether that is the juror's verdict; if all jurors answer in the affirmative then the clerk records the verdict; the court admonishes the jury against discussing the case or verdict until contacted by telephone that the admonition no longer applies; and the jurors are discharged.[38]

Conclusion

Multiple juries in a joint trial are a powerful judicial resource. When used properly, they can save large amounts of time and money while protecting the rights of defendants. Each case presents a unique application of the multiple jury procedure, and requires the cooperation of judges, prosecutors, defense attorneys, and juries for it to be a success. q

[1] *Bruton v. United States*, 391 U.S. 123 (1968) (holding that a defendant's Sixth Amendment right to confrontation of witnesses is violated when a codefendant's confession is admitted at their joint trial, despite the jury being instructed that the confession is admissible only against the codefendant who made the confession).

[2] *See* Fla. R. Crim. P. 3.152(b)(2); *see also Bruton,* 391 U.S. at 133–34.

[3] While circumstances may permit the victim's hearsay statements rather than testimony subject to cross-examination, *see, e.g.,* Fla. Stat. §90.803(23) (1997), the victim's live testimony is a resource that can make the difference between conviction and acquittal.

[4] *Velez v. State,* 596 So. 2d 1197, 1199 (Fla. 3d D.C.A. 1992); *State v. Padilla*, 964 P.2d 829, 832 (N.M. App.), *cert. denied,* 961 P.2d 167 (N.M. 1988); *People v. Irizarry,* 634 N.E.2d 179, 182 (N.Y. 1994).

[5] *See also United States v. Rowan*, 518 F.2d 685 (6th Cir.), *cert. denied,* 423 U.S. 949 (1975).

[6] *Beam v. Paskett,* 3 F.3d 1301 (9th Cir. 1993) (use of dual juries during trial of habeas corpus petitioner whose murder conviction was affirmed but death sentence was reversed did not violate the

petitioner's rights under the Fifth, Sixth, and 14th amendments), *cert. denied,* 511 U.S. 1060 (1994); *Smith v. DeRobertis*, 758 F.2d 1151 (7th Cir.) (simultaneous trial of two defendants in same courtroom before two juries, one determining guilt of each defendant, did not violate the due process clause of the 14th Amendment), *cert. denied*, 474 U.S. 838 (1985).

[7] *See Velez v. State,* 596 So. 2d at 1199; *People v. Harris*, 767 P.2d 619, 635 (Cal. 1989); *see generally* Annotation, Propriety of Use of Multiple Juries at Joint Trial of Multiple Defendants in State Criminal Prosecution, 41 A.L.R. 4th 1189, 1191 (1985 and Supp. 1997); Annotation, Propriety of Use of Multiple Juries at Joint Trial of Multiple Defendants in Federal Criminal Case, 72 A.L.R. Fed. 875 (1985 and Supp. 1997). The American Bar Association's Standards for Criminal Justice note that joint trials with multiple juries "may provide solutions not only to the specific problem of codefendant statements but also to some of the general problems of prejudice that occur in joint trials." ABA Standards for Crim. Just. §13-3.2 commentary (Supp. 1986).

[8] *See*, *e.g.*, *Ewish v. State,* 871 P.2d 306, 316 (Nev. 1994) (affirming multiple jury trial convictions for arson and murder in light of "overwhelming" evidence of guilt, but noting that, "[T]his opinion is not an endorsement of the multiple jury device. If not implemented carefully or in the proper circumstances, using multiple juries to administer criminal trials becomes a breeding ground for curious results, tainted justice, and issues for appeal."); *United States v. Lewis*, 716 F.2d 16, 19 (D.C.

Cir.) ("We accept the dual jury procedure so long as it comports with the ethos of due process commanded by our stringent rules of criminal justice. In evaluating the application of the dual jury procedure in particular cases our focus too is upon whether there exists evidence indicating that the dual jury caused specific prejudice to someone's defense at trial."), *cert. denied,* 464 U.S. 996 (1983); *State v. Corsi,* 430 A.2d 210, 213 (N.J. 1981) (affirming dual jury trial convictions where neither defendant could identify any prejudice or error, but concluding that "the multiple jury procedure utilized in the instant case can involve substantial risks of prejudice to a defendant's right to a fair trial. . . . We do not recommend it.").

[9] *See People v. Brown,* 624 N.E.2d 1378, 1389 (Ill. App.) (defendant found guilty at multiple jury trial of two counts of first degree murder and one count of arson; reversing conviction, appellate court noted that the defendant's rights under *Bruton v. United States,* 391 U.S. 123 (1968), were violated when a state witness on direct examination and the prosecutor at closing argument confused portions of the defendant's confession with the codefendant's confession, and the prosecution confused testimony a witness gave for defendant's jury with different testimony the same witness gave for the codefendant's jury), *appeal denied,* 624 N.E.2d 810 (Ill. 1993); *see also DeRobertis*, 758 F.2d at 1152 ("[T]he criminal defendant must show some specific (and we add, undue) prejudice to him" from the multiple jury procedure), *cert. denied,* 474 U.S. 838 (1985); *Padilla,* 964 P.2d at 832 ("Even when courts have

refused to endorse the procedure, they have refused to reverse a conviction without evidence of prejudice."), *cert. denied*, 961 P.2d 167 (N.M. 1988).

[10] *Rowan,* 518 F.2d at 689. *See also* Fed. R. Crim. P. 14 ("If it appears that a defendant or the government is prejudiced by a joinder of offenses or of 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*.") (emphasis added).

[11] *See Hedlund v. Shelton,* 840 P.2d 1008, 1010 (Ariz. 1992), quoting *State v. Lambright,* 673 P.2d 1, 7 (Ariz. 1983). Fed. R. Crim. P. 57(b) states that, "A judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district."

[12] *DeRobertis,* 758 F.2d at 1152; s*ee also United States v. Sidman*, 470 F.2d 1158, 1170 (9th Cir. 1972), *cert. denied,* 409 U.S. 1127 (1973); *Padilla*, 964 P.2d at 832; *People v. Ricardo B.*, 535 N.E.2d 1336, 1338 (N.Y. 1989).

[13] *Feeney v. State,* 359 So. 2d 569, 570 (Fla. 1st D.C.A. 1978).

[14] *See supra* note 5 and accompanying text.

[15] *Feeney,* 359 So. 2d at 570.

[16] *See supra* notes 7–9 and accompanying text.

[17] *Watson v. State,* 633 So. 2d 525 (Fla. 2d D.C.A.), *rev. denied,* 641 So. 2d 1347 (Fla. 1994).

[18] *Velez,* 596 So. 2d 1197.

[19] *Id.* at 1199.

[20] *Id.*

[21] "[A] defendant offering no testimony in his or her own behalf, except the defendant's own, shall be

entitled to the concluding argument before the jury." Fla. R. Crim. P. 3.250. Consequently, a defendant who calls a witness to the stand other than himself or herself forfeits the right to concluding argument.

[22] *Velez*, 596 So. 2d at 1199.

[23] *Id.* at 1199–1200 (emphasis in original).

[24] *See Harris,* 767 P.2d at 630; *People v. Wardlow,* 173 Cal. Rptr. 500, 503 (Cal. App. 1981) ("The two juries were chosen from venires that were mutually exclusive."); *State v. Hernandez*, 394 A.2d 883, 885 (N.J. Super. 1978) ("Three juries of 14 were picked from separate panels and instructed not to discuss the cases with each other."), *cert. denied*, 407 A.2d 1216 (N.J. 1979).

[25] *See Harris,* 767 P.2d at 630.

[26] For a list of additional information one court instructed a venire, *see Hedlund*, 840 P.2d at 1011–12.

[27] *See Hedlund,* 840 P.2d at 1011–12; *Harris*, 767 P.2d at 630; *Hernandez*, 394 A.2d at 885.

[28] *See Harris,* 767 P.2d at 631; *People v. Brooks*, 285 N.W.2d 307 (Mich. App. 1979); *Hernandez*, 394 A.2d at 885; *see also DeRobertis*, 758 F.2d 1151.

[29] *See Bruton*, 391 U.S. 123; *Velez*, 596 So. 2d 1197.

[30] *United States v. Berkowitz*, 662 F.2d 1127, 1134 (5th Cir. 1981); *see also Zafiro v. United States*, 506 U.S. 534 (1993); *Herrera v. State*, 532 So. 2d 54, 57 (Fla. 3d D.C.A. 1988).

[31] *Crum v. State,* 398 So. 2d 810 (Fla. 1981); *Rowe v. State,* 404 So. 2d 1176 (Fla. 1st D.C.A. 1981); *see also Zafiro,* 506 U.S. at 543–44 (Stevens, J., concurring).

[32] *Crum,* 398 So. 2d at 811–12. *cf. Alfonso v. State,* 528 So. 2d 383, 385 (Fla. 3d D.C.A. 1987) ("[A] fair

determination of guilt is not foreclosed merely because codefendants blame one another for what has transpired."), *rev. denied,* 528 So. 2d 1183 (Fla. 1988); *United States v. Yefsky*, 994 F.2d 885, 896–97 (1st Cir. 1993) ("[M]ere antagonism of defenses does not require severance. . . the tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other."); *People v. Cummings,* 850 P.2d 1, 35 (Cal. 1993) ("The inconsistent defenses alone did not mandate complete severance.").

[33] *Crum,* 398 So. 2d 810; *Rowe,* 404 So. 2d 1176.

[34] *Watson v. State,* 633 So. 2d 525 (Fla. 2d D.C.A.) (error to permit codefendant to present, with defendant's jury in courtroom, the eyewitness testimony of an eight-year-old girl identifying defendant as triggerman who shot victim), *rev. denied,* 641 So. 2d 1347 (Fla. 1994).

[35] *Id.*; *Cummings,* 850 P.2d at 36; *People v. Ricardo B.*, 535 N.E.2d 1336, 1337 (N.Y. 1989).

[36] *Corsi,* 430 A.2d 210; *Wardlow,* 173 Cal. Rptr. 500; *Hernandez,* 394 A.2d 883.

[37] *Hedlund,* 840 P.2d at 1012; *see also Wardlow,* 173 Cal. Rptr. 500.

[38] *Hedlund*, 840 P.2d at 1012 (Ariz. 1992); *cf.* Fla. R. Crim. P. 3.470 and Fla. R. Crim. P. 3.570.

Adam Hersh *is an associate with Fonvielle Hinkle & Lewis in Tallahassee and was a felony division prosecutor for Florida's Second Judicial Circuit. He received a Bachelor of Arts degree from the University of Texas at Austin and a Juris Doctor degree from Florida State University College of Law.*

This column is submitted on behalf of the Criminal Law Section, Michael R. Band, chair, and Randy E. Merrill, editor.

Criminal Law

Newer Column **Older Column**