DUAL JURIES

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MULTIPLE DEFENDANTS--ENFORCING THE DECLARED LEGISLATIVE PREFERENCE FOR JOINT TRIALS: P.C. 1098: ARANDA: SEVERANCE AND DUAL JURIES

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"A man takes some risks in choosing his associates and if hailed into court with them, must ordinarily rely on the fairness and ability of the jury to separate the sheep from the goats" (United States v. Fadkin (2nd Cir.) 81 F2d 56,59.

"The court should separate the trial of co-defendant in the face of an incriminating confession, prejudicial association with co-defendant, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that in a separate trial a codefendant would give exonerating testimony. (People v.Massie (1967) 66 C2d 899 at 917)" People v. Turner (1984) 37 C3d 302 at 312).

I. THE PREFERENCE FOR JOINT TRIALS P.C. SECTION 1098: "Under the statute, the Legislature declared joint trials to be the rule and separate trials the exception." People v. Gatlin (1989) 209 CA3d 31 at 42.

A. "Joint trials play a vital role in the criminal justice system, accounting for almost one-third of federal criminal trials in the past five years. [Citation] Many joint trials-for example, those involving large conspiracies to import and distribute illegal drugs-involve a dozen or more co-defendants. Confessions by one or more of the defendants are commonplace and indeed the probability of confession increases with the number of participants, since each has reduced assurance that he will be protected by his own silence. It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability-advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of

inconsistent verdicts."
The preference for joint trials encompasses varied and significant interests. So significant, in fact, that they may serve as counterweights to a defendant's right to confront witnesses, his privilege against self-incrimination, his right to exclude prejudicial character evidence, and others. (Cites omitted)" Greenberger v. Superior Court (1990) 219 CA3d 487 at 498-499.

B. IT IS INCUMBENT UPON THE DEFENDANT TO DEMONSTRATE SUBSTANTIAL PREJUDICE TO HIM/HER AS A RESULT OF A JOINT TRIAL BEFORE A COURT NEED SEVER THE CASE. In upholding a trial court's refusal to grant severance despite a co-defendant's prejudicial association with the Aryan Brotherhood and his trial tactic of shifting blame for the killing to defendant, the Supreme Court noted: "Separate trials would have consumed a great amount of scarce judicial resources, and defendant did not demonstrate the kind of substantial prejudice which would justify such an expenditure." (People v. Pinholster (92) 1C4th 865 at 933)

C. RATIONALE FOR JOINT TRIALS: People v. Aranda (1965) 53C2d 518 at 530Fn9:

1. Conserve state funds.

2. Diminish inconvenience to witnesses and public authorities and,

3. Avoid delays in punishing the guilty.

II. PREJUDICIAL ASSOCIATION; CONFUSION OF EVIDENCE CONFLICTING DEFENSES; EXONERATING TESTIMONY

A. PREJUDICIAL ASSOCIATION/CONFUSION OF EVIDENCE: People v. Massie (1967) 66C2d899

1. Legal Basis In Massie. People v. Chambers (1964) 231 CA2d23:

In Chambers, defendant and co-defendant were charged with assaulting Hugh Lawrence, a 75 year old resident of a nursing home purchased by defendant from co-defendant who remained as a nurse. Co-defendant was also charged with three additional counts of assault on the victim. Only one witness, Delgado, testified against defendant, stating defendant punched the victim on several occasions (only one assault was charged). Defendant claimed alibi. Whereas Delgado's testimony amounted to three pages of transcript, three additional days of testimony elicited "Voluminous evidence of unrelated acts of brutality" by the co-defendant, establishing against her acts described as "disgusting and inflammatory" against a number of elderly patients at the nursing home. The prosecution also suggested that the defendants "shared a single bed."

Given these facts, the Chambers court concluded that " ... defendant was probably convicted by association, rather than by evidence of his personal guilt, that an unfairness so gross has occurred as to deprive him of due process of law." (Chambers ibid p. 28)

a. Chambers Distinguished:

i. People v. Wickliffe (1986) 182 CA3d 37 Mott and Wickliffe, who earlier were drinking, sought to repossess a truck. During the attempt, its owner sought to intervene and was kicked in the head by Wickliffe (passenger) and fell to the ground where he was run over by the truck's driver, Mott. Wickliffe was charged with P.C. 240; Mott with V.C. 23152. The court held that neither defendant was prejudiced at trial by the actions of the other at the crime scene and distinguished Chambers in as much as the instant matter was based on defendants' joint conduct; whereas in Chambers, there was no evidence of concerted or conspiratorial action.

ii. People v. Burns (1969) 270 CA2d 233. Defendants were charged with robbery. Identification was at issue. Evidence of a prior robbery by co-defendant was admitted on that issue. Burns claimed that despite a limiting instruction, he was unfairly prejudiced by his association with a co-defendant alleged to have committed an additional robbery. The court found no prejudice to the defendant and distinguished Chambers, noting that the Chambers trial court failed to instruct the jury regarding which evidence would be admitted against one defendant but not against the other; thereby, "failing to protect the defendant from the damaging effect of prejudice arousing evidence applicable only to his co-defendant." (Burns ibid p.252).

b. Prejudicial Association/Confusion of Evidence Alone Will Not Justify Severance Absent A Clear Showing Of Prejudice (People v. Kelly (1986) 183 CA3d 1235, pp. 1238-1241; People v. Pinholster (1992) 1C4th 865, 933)

i. People v. Santo (1954) 43C2d 319, Barbara Graham contended a separate trial should have been ordered because evidence was introduced at trial which would have been inadmissible if she had been tried separately and because it was to her disadvantage to be associated with sordid characters. The Supreme Court found no error as the trial court properly instructed the jury. (ibid pp. 331-332). Ms. Graham was subsequently executed.

ii. People v. Goodall (1982) 131 CA3d 129, defendant complained because in her trial for manufacturing PCP, two separate prior incidents of arrests of the two co-defendants for manufacturing PCP were admitted against them at trial. The court held that severance was not mandated as the trial court properly instructed the jury regarding against whom the evidence could be considered.

B. CONFLICTING DEFENSES: "Although several California decisions have stated that the existence of conflicting defenses may compel severance of co-defendants trials, none has found an abuse of discretion or reversed a conviction on this basis People v. Hardy (1992) 2 C4th 86, 168.

1. People v. Simms (1970) 10 CA3d 299. Scott, Simms and a third party robbed the victim and knocked him unconscious. At trial, the victim detailed the assault. Scott, testifying in his own behalf, corroborated the victim and stated the incident occurred as he described it; however, Scott said he did nothing and the attacker was only Simms. Scott's extrajudicial statements implicating Simms were also admitted into evidence. Simms testified and denied any involvement.

   The appellate court concluded that Simms' attorney deliberately chose to have his client tried with Scott and that this tactical decision did not reduce the proceedings to a farce or a sham. It further held the trial court was under no duty to sever a trial absent a motion to do so by a defendant. Consequently, the court affirmed the conviction.

2. People v. Turner (1984) 37 C3d 302. Turner and Souza were charged with murdering Merle and Freda Claxton. Identification belonging to Merle Claxton and Turner was found in an abandoned car (registered to the Claxtons) near the Claxton residence. Also in (and near) the car, several rifles and property belonging to the Claxtons were found. Footprints from the victims' home were followed 12 miles into the desert, where defendants were arrested as they hid behind a bush; Souza possessed some Claxton personal property. At trial, Turner did not testify; Souza testified he knew Turner and together they smoked PCP on the day of the murder. Together they burglarized the Claxton house; however, because the house was occupied he (Souza) did not at first enter it; instead, he fled and saw Turner enter the house through a window and heard three gunshots. Thereafter, he (Souza) was admitted into the house by Turner and saw the victims on the floor. Souza admitted taking property but said he did so on the orders of Turner who looked like he was "tripping" on PCP. Souza also testified Turner confessed the murders to him.

On appeal, Turner urged that his case should not have been consolidated with Souza's, as Souza's testimony conflicted with Turner's defense; thereby, prejudicing him, i.e., without Souza's testimony, the case against Turner was "merely" circumstantial. The Supreme Court noted that the Claxton murder was "... the classic situation for joint trial-defendants charged with common crimes against common victims." (Turner supra p. 312)

Addressing the issue of conflicting defenses, the court rejected defendant's contention that "the prosecution would simply put on its case, then sit back and watch as defense counsel became the real adversaries", The court noted, that if Turner's contention had merit "separate trials would appear to be mandatory in almost every case." Finding no denial of due process, the court cited Simms (see above) for the proposition that "... no denial of fair trial results from the mere fact that two defendants who are jointly tried have antagonistic defenses and one gives testimony that is damaging to the other and thus helpful to the prosecution. (cites)." Turner supra at pp. 312-313.

3. People v. Almarez (1988) 173 CA3d 304.

Tokumato, Walker, and Collier entered an apartment occupied by five individuals including Almarez (defendant) and Amaro (co-defendant). At some point, Tokumato fought with Almarez who subsequently called for help. Almarez was aided by his brother Robert (also a co-defendant) who struck Tokumato on the head disabling him. Robert then shot and killed Tokumato. Almarez, Amaro, and Robert bound and kidnapped Walker and Collier and drove them to "the cemetery" (a construction site in Manhattan beach). Robert ordered them from the car. Walker fled and heard a gunshot. Collier was murdered.

At trial, Amaro testified that Tokumato was shot accidently when he was struck with a gun butt by Robert. Amaro also testified he feared Almarez because he had seen Almarez "beat one persons head against a pool table, beat another person with a pool stick, and throw a girl through a glass window." Amaro added that Almarez had said he had been to prison for murder. Amaro's defense was he followed Almarez's orders lest Almarez kill him. According to Amaro, Almarez was the ringleader.

Before trial Almarez sought severance, contending that Amaro would testify (1) Almarez killed Collier, (2) he feared Almarez who coerced him; (3) Almarez was a violent man who had been imprisoned for manslaughter. The motion was denied. In rejecting Almarez's claim that the trial court's denial of the severance motion was an abuse of discretion, the Court of

Appeals noted that the defenses of Almarez and Amaro were "... not completely conflicting, because there [was] little disagreement about most of the events" despite the fact Amaro testified Almarez instigated and perpetrated the Collier murder, and was a frightening and violent man (People v. Almarez supra at p. 315). Additionally, the court found the trial court's limiting instruction decreased the prejudice which may have resulted.

4. In People v. Boyde (1988) 46C3d 212.

Boyde and his nephew Ellison robbed then killed a Seven-Eleven clerk. After his arrest, Boyde implicated Ellison causing him to be arrested. After his arrest, Ellison at first claimed he killed the victim; however after taking a polygraph, Ellison contended Boyde shot the victim, saying he (Ellison) initially accepted the blame because he expected Boyde would be imprisoned longer than he. Each defendant moved to sever their trial; however, Ellison waived jury. The trial court denied the severance motion, excluded the jury from hearing Ellison's extrajudicial admissions, and ruled Boydes jury could hear Ellison's testimony in his own defense. In that testimony, Ellison placed the entire blame for the killing on Boyde, adding Boyde robbed the store as he (Ellison) waited in the car, Boyde kidnapped the victim from the store, Boyde ordered him (Ellison) to drive the victim to a remote locale, and Boyde executed the victim because Boyde said he would not return to prison. Given Ellison's testimony, his extrajudicial statements exculpating Boyde were played for the Boyde jury at his request. Boyde testified and blamed Ellison. Ellison produced several witnesses who implicated Boyde as the shooter (on appeal Boyde claimed prejudice as he was surprised by the additional testimony against him. Ellison, unlike the prosecution, had no discovery duty vis-a-vis Boyde. The Supreme Court found no prejudice.)

The Supreme Court found neither abuse of discretion by the trial court nor a denial of Boyde's right to a fair trial by the denial of his severance motion. The court noted, "Although the defense positions might be characterized as antagonistic on the identity of the actual killer, it was undisputed each defendant participated...[E]llison did not present the kind of extensive evidence...which would have turned the trial into more of a contest between the defendants than between the prosecution and either of them..." (People v. Boyde supra at pp. 233-234.) At p. 233, the court referred to United States v. Brady (9th Cir. 1978) 579 F2d 1121): "The two defendants facing manslaughter charges defended by claiming that the other inflicted the fatal blows to the victim of their joint assault. Acknowledging the obvious hostility and conflict in the positions taken by defendants, the court found that "prejudice

which either appellant may have suffered from the testimony of the other is relatively slight. It is undisputed that each appellant participated in the incident. Consequently, it would only be natural for one to try to place the blame on the other. The jury had the responsibility of assessing each of the appellants' credibility. Moreover, the testimony of each appellant was merely cumulative of the government's case against the other and considering the simplicity of the case, there is no sound reason to suggest that members of the jury, being properly instructed as they were, could not realistically appraise the evidence against each appellant." (Id. at p. 1128.)

5. People v. Keenan (1988) 46 C3d 478.

Keenan and Kelly robbed an art gallery and shot its owner. The identity of the shooter was disputed, the identity of the perpetrators was not. Kelly claimed he participated because he feared Keenan and that Keenan shot the owner. Kelly said his fears were based on another shooting committed by Keenan. Kelly's testimony to this end was corroborated by the admission of his audio-taped extrajudicial confession in which he claimed coercion, and the testimony of the victim of the earlier shooting who said Keenan shot him and left him for dead.

Twice before trial Keenan sought and was denied severance. In finding no abuse of the trial courts discretion to deny the severance motion, the Supreme Court rejected Keenan's argument that prejudice resulted because not only did Kelly seek to blame defendant for the incident, but Kelly also sought to bolster his defense by introducing evidence of an uncharged shooting by Keenan which would have been inadmissible against him in a separate trial. The court then announced a test for determining whether or not a defendant is entitled to severance.

> "...[T]he court must decide whether the realistic benefits from a consolidated trial are outweighed by the likelihood of substantial prejudice to the defendant. In determining the degree of prejudice, the court should evaluate whether (1) consolidation may cause introduction of damaging evidence not admissible in a separate trial, (2) any such otherwise inadmissible evidence is unduly inflammatory, and (3) the otherwise-inadmissible evidence would have the effect of bolstering an otherwise weak case or cases. Severance motions in capital cases should receive heightened scrutiny for potential prejudice. (cites). Keenan supra at pp. 500-501.

The court noted further that the admission of "other crimes" evidence in an otherwise proper joint trial does not alone justify severance, that judicial economy may be "obviously paramount" (ibid p. 501), and the damaging testimony of a co-defendant which would not be introduced at a separate trial is not a justification for severance (ibid p. 502 Fn 8).

6. People v. Hardy (1992) 2 C4th 86.

Reilly and Hardy were promised insurance proceeds by Cliff Morgan in exchange for the murder of his wife and eight year old son, Nancy and Mitchell. Reilly explained, in detail, the scheme to his girlfriend Debbie. On the night of the murder, Hardy and Reilly were at Debbie's where Reilly phoned Cliff and received the go ahead for the "hit". The following day, Debbie confronted Reilly who described in detail the murder, and said his unnamed crime partner actually stabbed the victims. The police contacted Debbie the next day. She told the investigators nothing except "Morgan" wanted his wife killed. Later that same day, Debbie revealed to Reilly her interview with the police. Enraged, he stated he would need to speak with Hardy about coordinating an alibi. Reilly again confessed to Debbie who eventually went to the police, and told them everything. At trial, several witnesses implicated Reilly, Hardy, and Cliff Morgan in the murder plot.

Hardy's girlfriend, Colette, testified Hardy and Reilly admitted the murders and asked her to provide an alibi. After Hardy's arrest, Colette destroyed several items of evidence at his request. Hardy also told Colette that "Reilly was in control" of the crime, and that he (Reilly) was the killer. Reilly and Hardy were sentenced to death. Cliff Morgan died of cancer before his penalty phase.

Before trial, at the motion to sever, counsel for Reilly stated he would claim Reilly withdrew from the conspiracy; Hardy's attorney claimed he would argue Hardy was entirely uninvolved in the insurance fraud and the murder; and Morgan's attorney said his client was entirely innocent, a victim of Reilly's blackmail plan. The Supreme Court, calling this crime a "classic case for joint trial" upheld the trial courts denial of the severance motion, adding:

> "Although it appears no California case has discussed at length what constitutes an "antagonistic defense," the federal courts have almost uniformly construed that doctrine very narrowly. Thus," [a]ntagonistic defenses do not per se require severance, even if the defendants are hostile or attempt to cast the blame on each other. (United States v. Becker (4TH CIR. 1978) 585 F.2d 703. 707). "Rather, to obtain severance on the ground of

conflicting defenses, it must be demonstrated that the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." (United States v. Davis (1st Cir. 1980) 623 F.2d 188, 194-195; see also, United States v. Ehrlichman (D.C.Cir. 1976) 546 F.2D 910, 929.) stated another way, "MUTUAL ANTAGONISM" ONLY EXISTS WHERE THE ACCEPTANCE OF THE PARTY'S DEFENSE WILL PRECLUDE THE ACQUITTAL OF THE OTHER." (United States v. Ziperstein (7th Cir. 1979) 601 F.2d 281, 285, see generally, 1 Wright, Federal Practice and Procedure: Criminal (2d ed. 1982) Section 223, pp. 799-802 & fn. 15, and cases cited.)" People v. Hardy, supra at p. 168. (emphasis added).

The court labled the defenses as "technically conflicting" but stated they were not "particularly antagonistic, as the term is used in the Federal Courts" (ibid. p. 168). Thus, although there was the specter of conflicting defenses, the realistic benefits of a consolidated trial; specifically, avoiding redundant presentation of evidence, justified a joint trial.

C. EXONERATING EVIDENCE GIVEN BY CO-DEFENDANT: "It is not error to deny a motion to sever based solely on defendant's bald assertion that someone has made an exonerating statement in his behalf" (People v. Isenor (1971 17CA3d at 333).

1. People v. Isenor (1971) 17CA3d 324: Establishes procedure for determining what circumstances justify severance based upon the possibility of exonerating testimony.

a. Isenor Facts: Robert Isenor, Melody Isenor, and Pepi Rogers were jointly charged with burglary and other crimes. Robert moved to sever, averring in an affidavit that at a separate trial, Pepi would testify that neither Isenor was involved in the alleged crimes. At the hearing on the motion, Pepi's attorney said he had no knowledge of Roberts averment vis-a-vis Pepi, Pepi was the brother of Melody, and unless the Isenor trial proceeded after Pepi's, he would advise Pepi to invoke his right against self-incrimination.

b. Isenor Test: Adopting the reasoning of Byrd v. Wainwright (5th Cir.1970) 428 F2d 1017, the Isenor court proposed inquiry into six areas:

i. Does a party seek the co-defendants testimony?

ii. Is the testimony exculpatory?

iii. Is the testimony significant?

iv. Is the court satisfied that the testimony itself is bonafide?

v. On the basis of the evidence shown at the time of the motion, how strong is the likelihood the co-defendant would testify at a separate trial?

vi. How do separate trials affect judicial economy?

c. Application Of Isenor Test To Isenor Facts: The court opined that the trial court would be justified in concluding that either no statement was made by Pepi or it was untrue because of Pepi's relationship with the Isenors. Additionally, the Isenors failed to establish a likelihood or a "positive assurance" Pepi would testify in a separate trial ("the mere assertion that a co-defendant would be willing to exculpate a defendant is purely speculative. The absence of substantial proof that a co-defendant would be willing to testify...is in itself grounds for denying...severance" pp. 333-334).

d. Isenor - Severance and Judicial Adminstration: Isenor cautions courts to consider that a co-defendant's judgment must be final (i.e., self-incrimination privilege must terminate) before a co-defendant testifies.

e. Isenor - Deprivation Of Defendant's Constitutional Right To Compel The Attendance Of Witnesses (Co-Defendants).

The Isenor court dismissed this claim as meritless, stating the only impediment to the co-defendant's testifying was his own lack of willingness to do so. (The court distinguished Washington v. Texas (1966) 388 U.S. 14, 87 SCt 1920, indicating the unconstitutional Texas statute there at issue prevented the defense-but not the prosecution-from calling as witnesses co-participants in crimes.)

2. Federal Cases Inapposite But Distinguishable From Isenor: United States v. Echeles (7th Cir. 1965) 352 F2d 892; Byrd v. Washington (5th Cir. 1970) 428 F2d 1017.

a. Echeles mandated severance when a co-defendant offered to exonerate a defendant. However, in Echeles, the co-defendant made three "judicial" statements in a prior trial exonerating defendant.

b. Byrd found a deprivation of due process existed where, according to Byrd's counsel, six co-defendants of Byrd indicated that at a separate trial they would testify in support of Byrd's alibi that he was not present at the gang rape for which he and the others were on trial. The Byrd court accepted as trustworthy the proferred exculpatory testimony.

III INCRIMINATING CONFESSION: ARANDA/BRUTON

A. "In joint trials...when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any co-defendants of the declarant...[We reconsider] our present practice of permitting joint trials when the confession of one defendant implicates co-defendants...the practice is prejudicial and unfair to the non-declarant defendant and must be altered...

"When the prosecution proposes to introduce into evidence an extrajudicial statement of one defendant that implicates a co-defendant, the trial court must adopt one of the following procedures: (1) It can permit a joint trial if all parts of the extrajudicial statements implicating any co-defendants can be and are effectively deleted without prejudice to the declarant. By effective deletions, we mean not only direct and indirect identifications of co-defendants but any statements that could be employed against nondeclarant co-defendants once their identity is otherwise established. (2) It can grant a severance of trials if the prosecution insists that it must use the extrajudicial statements and it appears that effective deletions cannot be made. (3) If the prosecution has successfully resisted a motion for severance and thereafter offers an extrajudicial statement implicating a co-defendant, the trial court must exclude it if effective deletions are not possible." People v. Aranda (1965) 63C2d 518 at pp 529-531

B. BRUTON v. UNITED STATES (1968) 391 U.S. 340, 88Sct. 1620. Held that admission into evidence of a non-testifying defendant's confession which contained statements incriminating a jointly tried co-defendant violated the co-defendants "right of cross-examination secured by the Confrontation Clause of the Sixth Amendment."

IV RESOLVING THE ARANDA-BRUTON DILEMMA: REDACTION, CONFRONTATION, DUAL JURIES

A. REDACTION: RICHARDSON v. MARSH (1987) 481 U.S. 200; 107 SCt 1702 "We hold that the Confrontation Clause is not violated by the admission of a non-testifying co-defendants confession with a proper limiting instruction when...the confession is redacted to eliminate not only the defendants name but any reference to her existence. (We express no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun [Fn5])."

1. In Richardson, two defendants were charged with murder and other crimes. The co-defendants redacted confession described a conversation he had with a third party while driving to the victim's home. According to the redacted confession the third party stated he would kill the victims after robbing them. The non-confessing defendant testified she was in the car with the confessing defendant and the third party as they drove to the crime scene, but heard no conversation.

   In argument, the prosecutor contended the non-confessing defendant could not testify truthfully and admit to hearing the conversation between the co-defendant and third party because to do so would make the non-confessing defendant a co-conspirator. This argument was improper and error, according to the Richardson court. Since the only evidence of a conversation was the redacted confession of the co-defendant, and this evidence could not be used against the non-confessing defendant, there was no basis for the prosecution to urge the jury to consider the conversation against the non-confessing defendant. Consequently, the Supreme Court did not uphold the conviction; rather, it remanded the case for further consideration.

2. People v. Vasquez Diaz (1991) 229 CA3d 1310: Torres and Diaz entered a market. The latter simulated carrying a handgun, demanded and received money and fled with Torres. One week later, Diaz and Torres robbed another store. The following week, the defendants returned to the original victim market and robbed it. Minutes later, Diaz and Torres were arrested in the getaway car, Diaz driving. In a redacted confession, Diaz stated:

   > "He and another person ... drove to Vista..|and parked their car on the north end of a parking lot|of a market. He was the second person to enter. When asked if he was armed, Diaz said he was holding a silver ratchet tool he obtained from his vehicle. After the

money was taken, they left the store. Diaz admitted he entered the store so he could rob it. Diaz said he was wearing sunglasses."

Torres' severance motion was denied. Although the appellate court conceded that Diaz's statement conceivably linked Torres to the crime because Diaz admitted he and another person drove a car to the victim market and other evidence suggested Diaz and Torres were arrested together in a car, the linkage neither identified Torres nor addressed any disputed issue; therefore, severance was not required (see also People v. Mitcham (1992) 1 C4th 1027 at pp. 1043-1049.

3. Caveat: Redaction is ineffective where, for example, the confession includes a reference to "the other guy" which in the context of other evidence, implicates the nondeclarant defendant (People v. Jacobs (1987) 195 CA3d 1636 at p.1652)" see People v. Mitcham (1992) 1C4th 1027 at 1046.

   a. The use of neutral pronouns which gave no indication that the statement contained real names prior to its redaction was approved in U.S. v. Tutino (2nd Cir. 1989) 883 F2d 1125 at pp. 1134-135 see also:

      i. U.S. v. Garcia (8th Cir. 1987) 836 F2d 385

      ii. U.S. v. Alvarado (2nd Cir. 1989) 882 F2d 645

      iii. U.S. v. Martopoulos (10th Cir. 1988) 848 F2d 1036

      iv. U.S. v. Sherlock (9th Cir. 1989) 865 F2d 1069

      v. U.S. v. Vogt (4th Cir. 1990) 910 F2d 1184

      vi. Compare with: U.S. v. DiCarlantonio (6th Cir. 1989) 870 F2d 1058

4. Caveat: A statement is improperly redacted when the editing prejudices the declarant-defendant. Thus, where the defendant's extrajudicial statement shifts blame to a co-defendant and exculpates or mitigates the conduct of the declarant-defendant, deleting the exculpatory portion of the statement impermissibly prejudices the declarant-defendant, thereby violating Aranda. See: People v. Douglas (1991) 234 CA3d 273 at pp. 280-288 (see also Evid. Code Section 356).

B. CONFRONTATION: BOYD AND /OR ADMISSIBLE HEARSAY

1. In People v. Boyd (1990) 222 CA3d 541 at pp 558 to 563, the prosecutor cross-examined a defendant concerning statements he made implicating a co-defendant. When the defendant denied making those statements, the prosecutor introduced several witnesses who testified to extrajudicial statements made by the defendant in which he implicated the co-defendant. (The prosecutor applied the same technique when he cross-examined the co-defendant). Citing Nelson v. O'Neil (1971) 402 U.S. 622 [91 Sct 1723] for the proposition that when a co-defendant takes the stand in his own defense, denies making an extrajudicial statement implicating the defendant, and proceeds to testify and exonerate the defendant, there is neither a Sixth nor Fourteenth Amendment violation in failing to exclude the extrajudicial statement implicating the defendant, Boyd held that "to the extent Aranda required exclusion of inculpatory extrajudicial statements of co-defendant's, even when the co-defendant testified and was available for cross-examination at trial, Aranda was abrogated by Proposition 8." Boyd supra at p. 562.

   a. Caution: Boyd does not sanction the admission of a testifying co-defendant's extrajudicial statements implicating a defendant to be used against the defendant per se. Extrajudicial statements are hearsay and unless an exception to the hearsay rule can be found (e.g. E.C. 1235) an extrajudicial admission by a testifying co-defendant is inadmissible against the other defendant (See People v. Pitts (1990) 223 CA3d 606 at pp 857-859).

2. Note: Neither redaction of a co-defendants extrajudicial statement implicating a defendant, nor the testimony of a co-defendant whose extrajudicial statement implicated a defendant are necessary conditions precedent to the admissibility of an extrajudicial statement implicating another defendant. The Evidence Code provides several hearsay exceptions which may allow an extrajudicial statement by a co-defendant to be used against a defendant. E.g.:

   a. Evidence Code Section Section 1230. Declaration Against Penal Interest.

      i. Requires unavailability of declarant (e.g., assertion of privilege against self-incrimination People v. Leach (1975) 15 C3d 419, 438; or refusal to testify because of fear: People v. Rojas (1975) 15 C3d at 551)

ii. Requires the declaration to be contrary to the declarant's pecuniary or proprietary interest, or subject the declarant to criminal liability or makes the declarant an object of hate, ridicule, or social disgrace.

iii. To determine if statement is "against interest", the test is whether a reasonable person would recognize it as such.

iv. Courts have held that only the portion of the statement which is directly against the interest of the declarant is admissible (Leach supra at pp. 438-443; People v. Coble (1976) 65 CA3d 187, 191-197; People v. Rios (1985) 163 CA3d 852, 866-868; most recently People v.Harvey (1991) 233 CA3d 1206 at 1224-1225.

v. In People v. Gordon (1990) 50 C3d 1223 at pp 1248-1254: The Supreme Court upheld the trial court's ruling, admitting pursuant to E.C. 1230 a declarant's statement which indicated he attended to the defendant who had suffered gunshot wounds. The court noted that the risks of criminal liability to the declarant resulting from the statement (made to detectives) were "not the highest"; however, the court noted the risks were significant in that the declarant "all but confessed that he was an accessory to the crimes committed..."

vi. In People v. Frutos (1984) 158 CA3d 979 at pp 982-987: The Appellate Court upheld the trial court decision to allow the extrajudicial statement to a cell mate by an unavailable declarant in which he said he had participated in a shooting by driving a car to a specific location and providing two specific weapons to two unidentified individuals who accompanied him. The Appellate Court found this statement sufficiently reliable because of the detailed information provided by the declarant, the fact that the statement subjected the declarant to criminal liability, and the fact the statement was spontaneous and made at a time when the declarant had no apparent reason to lie, and the declarant did not attempt to shift culpability (i.e., the statement was "specifically disserving" to the declarant).

vii. Proposition 8 and E.C. 1230: Leach (1975) 15 C3d 419 noted that both the text of and comments to E.C.1230 are silent on the subject of collateral assertions (i.e., assertions within the extrajudicial statement which are not specifically disserving to the declarant's interest). Leach then created a judicial limitation on the admissibility of collateral assertions, holding that E.C. 1230 does not countenance the admissibility of statements not specifically disserving to the interests of the declarant (ibid at 441). This limitation was predicated on the absence of any legislative declaration to the contrary.

It may be argued that California Constitution Article I Section 28 which unequivocally mandates that "relevant evidence shall not be excluded" is a legislative declaration and a constitutional repeal of the Leach E.C. Section 1230 limitation.

Furthermore, the Confrontation Clause is not offended by the admission of collateral assertions which fall within firmly rooted hearsay expections (Ohio v. Roberts (1980) 44 BU.S. 56 100 SCt. 2531.)

viii. E.C. Section 1230: Application and Advantages - An extrajudicial statement against penal interest which is not merely an attempt to shift blame, may be admissible against a defendant if made by a co-defendant to a party other than the police.

Whereas a redacted statement of a co-defendant cannot be used against the defendant, an E.C. Section 1230 statement can be used against the defendant, if Confrontation Clause criteria are met. See U.S. v. Roberts (8th Cir. 1988) 844 F2d 537 pp. 544-547; U.S. v. Riley (8th Cir. 1981) 667 F2d 1377, pp. 1380-1387.

b. E.C. Section 1221 - Adoptive Admission (see Evidence Benchbook 2d Ed, Jefferson Section 33.) Where a defendant/party by words or conduct manifests a belief in the truth of another's hearsay statement, including the statement of a co-defendant, evidence of the other person's hearsay statement is admissible. (People v. Preston (1973) 9 C3d 308, pp. 313-317 specifically held that statements of one defendant in the presence of, heard by, and adopted by a co-defendant do not violate Aranda.)

i. "To warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether the defendants conduct actually constituted an adoptive admission becomes a question for the jury to decide" People v. Edelbacher (1989) 47 C3d 983 at 1011. E.g., In People v. Medina (1990) 51 C3d at 889-891 the court held admissible as an adoptive admission defendant's silence when asked by his sister "Why did you shoot those boys?" Defendant was in custody at the time (Caveat: This result would be different if defendant felt he was being monitored); In People v. Silva (1988) 45 C3d 604 pp 23-625 the court held admissible as an adoptive admission defendant's conduct of smiling in response to a third party's description of the murder.

ii. E.C. Section 1221 - Application: Where defendant and co-defendant in each others presence manifest a belief in the truth of an extajudicial statement, the extrajudicial statement is admissible against both defendants.

c. E.C. Section 1222 - Admission of A Co-Conspirator (People v.Brawley (1969) 1 C3d 277, 286-291)

+ a statement

+ made by a declarant/co-defendant

+ while participating in a conspiracy

+ made in furtherence of committing an object of the conspiracy

+ made during the time the party against whom the statement will be used is participating in the conspiracy or

+ made before the time the party against whom the statement will be used joined the conspiracy

(see People v. Sailing (1972) 7 C3d 844)

i. Admissibility of statements

- Acts and declarations of the co-conspirators are admissible as to each other. (People v. Saling 7C3d, 844, 852).

- Such acts and declarations are admissible even though there is no proof that theywere expressly authorized by other members of the conspiracy. (People v. Griffin 98 C.A.2d 1).
- Acts and declarations of a co-conspirator are not made inadmissible by the fact that he is not joined with the defendant for trial. (People v. Arnold 199 C.471).

- A conspirator against whom statements are being introduced does not have to be present during the communication. (People v. Frankfort 114 C.A.2d 680).

- Only prima facie evidence of a conspiracy need by shown before conspirator statements are admissible. (People v. Earnest 53 C.A.3d 734).

- A count of conspiracy does not have to be charged for the admission of otherwise inadmissible hearsay evidence of declarations of a co-conspirator. (People v. Leach (1975) 15 C3d 419, 428).

- Statements made by conspirators during the course of and in furtherance of the conspiracy that implicate co-conspirators are not subject to the Aranda-Bruton rule. (People v. Brawley (1969) 1 CA3d 410, 449.

ii. Generally, a conspiracy ends when the crime has been completed. However, it can continue beyond the actual commission of the crime:

   - "The common design of the conspiracy may extend in point of time beyond the actual commission of the act constituting the crime such as concealing the crime, securing the proceeds thereof, or bribing or influencing witnesses". (People v. Wells (1960) 187 C.A.2d 324).

iii. For a detailed discussion of Evidence Code Section 1223, see People v. Hardy (1992) 2 C 4th 86, 139 to 151.

C. DUAL JURIES: Aranda and Bruton recognized that where the incriminating extrajudicial statements of a co-defendant who stands side-by-side with a defendant are deliberately spread before the jury in a joint trial, the risk that the jury will not, or cannot, follow the court's instruction to not use the statements of the co-defendant against the defendant is so great and the consequences of failure to follow the instructions are so vital to the defendant, the practical and human limitations of the jury system cannot be ignored (see Richardson v. Marsh, supra 107 SCt. at 1707). Consequently, the Aranda/Bruton courts solved this problem by mandating redaction or severance. However, subsequent cases demonstrated the impossibility of editing a statement so that all parts of it which implicate the defendant, or which can be employed against a non-declarant defendant whose identity is otherwise established, can be acceptably redacted. On-the-other-hand, given the plethora of multi-defendant cases in which there are admissions by defendants and the logistical problems presented by trying the same case against each defendant individually, separate trials are also unacceptable. Thus, the need for dual juries.

The use of dual juries was sanctioned in People v. Harris (1989) 47 C3d 1047 at pp. 1070 to 1076.

1. People v. Wardlow (1981) 118 CA3d 375.

a. Facts: Wardlow and Wilson attempted to rob Mark and Ryan during a narcotics transaction. Mark escaped and in the process fired a shotgun at Wardlow next to whom stood Ryan. Ryan was killed during the robbery attempt, shot by a .22 caliber handgun (last seen with Wilson) and a shotgun. Mark and Ryans property was found near Wilson's van. After arrest, Wilson implicated Wardlow. This case was tried before dual juries. Defendants testified that they were the victims of an attempted robbery by Mark and Ryan.

b. Issue: Was it error to have separate juries simultaneously empaneled in the same courtroom?

c. Defendants Contentions:

i. The court was without P.C. 1098 authority.

ii. Two juries was conducive to juror misconduct.

iii. Since evidence had to be shared it was not readily available to both panels.

iv. The jurors may have interpreted the wrong evidence.

v. The jurors' decision was tainted because only one jury could sit in the jury box at a given time.

vi. Defendants' right to a 12 member jury was violated.

vii. Dual juries threatened defendants' Aranda rights.

d. Resolution:

i. Because the defendants were charged with identical offenses and offered identical defenses against essentially identical evidence (but for an extrajudicial statement by Wilson implicating Wardlow), the trial court did not err by empanelling two juries. In so doing, the court afforded both defendants a fair trial while at the same time maintaining judicial economy.

ii. The procedure employed by the trial court safeguarded the impartiality of each jury:

a. The juries were chosen from mutually exclusive venires.

b. At trial, each jury viewed all of the evidence and heard all the witnesses.

c. During recesses, the juries were strictly admonished not to discuss the cases.

d. During recesses, the juries were sent to separate chambers.

e. Each jury heard only the closing argument pertinent to its respective defendant.

f. Each jury received separate instruction.

g. During deliberation evidence was shared and shuttled between the separate juries.

h. The trial court repeatedly emphasized to each jury throughout the trial that it was to consider only the evidence presented as to its respective defendant.

i. The officer who took the statement of Wilson tetified concerning that statement only before the Wilson jury.

- NOTE: Wilson testified in front of both juries; however, the Wardlow jury was excused when examination of Wilson concerned any part of his extrajudicial statement damaging to Wardlow. Given Boyd, supra, 222 CA3d 541, there is no longer a need to excuse the jury of the "non-confessing" defendant.

2. People v. Harris (1989) 47 C3d 1047.

a. Facts: Harris and Davison robbed, kidnapped, and killed Stanley Fahey. Three witnesses placed Davison's car at the dairy where the robbery began. One of those witnesses identified the defendants as being at the dairy. Several witnesses testified to extrajudicial statements by the defendants. One, a paid informant, stated Harris bragged about the crime, boasted about shooting the victim. However, the informant's description of the killing varied with the physical evidence. A second witness stated she heard Davison, in Harris' presence, admit to participating in the robbery and Harris admit to the shooting. An in custody inmate testified he heard Harris make incriminating statements and converse with Davison about relative culpability for the crime. There was no physical evidence linking either defendant to the crime. In his defense, Harris claimed alibi, presented evidence that someone other than he and Davison was the killer, and discredited prosecution witnesses.

b. Dual Juries Approved: Procedure

i. The information charging each defendant was read only to the jury impaneled to try that defendant (the other jury waited in the jury room).

ii. Both juries were together when pre-instructed (one jury in box; the other seated in the audience. The juries switched locations weekly).

iii. The juries were given the following admonition:

"Now, I am going to admonish you further, the jury seated in the jury box and the jury seated in the audience, during the pendency of this trial you are not to communicate with each other. If you see each other in the halls...we are trying to keep you separate and that is the purpose for this...you are not to ommunicate with anyone that you know is on another jury. You are not to have lunch with them. You are not to go anywhere with them. You are not to ride with them. You are to remain absolutely separate from each other.

"Further, you are not to, again, discuss the facts of this case among yourselves in this jury and the Davison jury."

iv. The prosecution's opening statement was given to both juries; however, defendant's opening statement was given only to the appropriate jury.

v. Extrajudicial statements of Harris or Davison, made in the presence of each other were admitted to both juries as adoptive admissions (the trial court limited cross-examination of witnesses to these statements to the jury trying the defendant whose counsel was cross-examining the witness; however, the limitation was <u>not</u> enforced and the witness testified before both juries).

vi. Eighteen (18) defense witnesses testified before <u>both</u> juries.

vii. After Harris rested his case, evidence presented by Davison went before only his jury. Rebuttal was before both juries.

viii. The verdict on Harris was sealed for six days, until the Davison jury reached its verdict.

NOTE: When a jury took evidence outside the presence of the other jury, the excused jury was told simply to return at a specific time, they were not told that evidence was being presented to the other jury.

c. Unless an alternative procedure is necessary to protect defendant's rights, the considerations favoring joint trial (conservation of funds; diminishing inconvenience to witnesses public authorities; avoiding delays in punishing the guilty) prevail. A dual jury procedure is a permissible means to achieve the goal of facilitating the legislative preference for the trial of jointly charged defendants together (see Harris supra at p. 1071)

d. The court rejected the below four defense arguments against dual juries as "sheer speculation": (1) it is "cumbersome" and causes inconvenience to the jurors; (2) by increasing the projected duration of the trial, decreases the number of jurors on the panel from which the jury is to be selected who are able to serve without hardship and thus threatens the defendant's right to a jury drawn from a representative cross-section of the community; (3) creates a danger that jurors frustrated by the delay and inconveniences caused by the procedure will blame the defendant for their discomfiture; and (4) invites each jury to speculate that, during the time it is excluded, evidence damaging to the defendant whose case that jury is trying is being presented to the second jury.

e. The Harris court, at page 1072, Fn10, noted a New York court's analysis of the factors a court should consider in deciding whether a dual jury is appropriate:

i. probability of successive protracted trials

ii. Prejudice to the prosecution due to an inability to repeatedly produce witnesses

iii. substantial delay, affecting speedy trial rights

iv. Significant negative impact upon available criminal justice resources.