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Recent Decisions - State and Federal: Prejudicial Joinder

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ATTORNEY-CLIENT PRIVILEGE

While the court viewed this privilege as necessary to maintain the quality and independence of agency decision-making, it ordered the disclosure of the three documents on remand unless the Air Force could meet its burden by sufficient demonstration of the applicability of the privilege to this situation. Agreeing that the documents were products of the attorney-client relationship, the court, however, refused to hold them exempt under the privilege absent a showing by the Air Force that one document was confidential in itself and that two others were based on confidential information provided by the client. In the first case, one document sought to be withheld was known and disclosed to parties outside of the attorney-client relationship (West Publishing Co.); as to the other two the Air Force sought to protect under the privilege theory, it was found that they were not based on information "supplied by the Air Force with the expectation of secrecy." *Id.* at 14-18.

DELIBERATIVE PROCESS PRIVILEGE (Internal Memoranda)

This privilege turns on the distinction between information which is essentially factual and documents involving deliberation and policy-making. The Supreme Court held that the former requires disclosure, *EPA v. Mink*, 410 U.S. 72 (1973), while documents revealing agency policy making and deliberative processes may be withheld. *Id.* at 19-20.

Of the four documents the Air Force sought to withhold under this privilege, one was found to be exempt from disclosure. As to two others, the court stated that its policy of "promoting the free flow of ideas" protected from disclosure those parts of the documents reflecting the opinions of Air Force employees concerning the status of negotiations with West. Slip op. at 22. The court found that the fourth document, dealing with various offers and counter-offers by both West and the Air Force, was not exempt simply because it reflected "negotiating positions" prior to a final contract. While such deliberations within an agency structure



photo by John Clark Mayden

are protected, those involving an outside party are not. The court remanded to compel disclosure of this document and any parts of the others dealing with specific negotiations with West. *Id.* at 22-24.

SEGREGABILITY

The court went on to hold that the Air Force had not adequately justified its claim that the requested documents contained no non-exempt information that could be "reasonably segregable" from that information the Air Force asserted to be privileged under exemption five. The court further directed that an agency is required to provide an adequate description of a document's content and its reasons for believing the information to be non-segregable before refusing to disclose. *Id.* at 2.

"The focus of the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing it contains some exempt material." Slip op. at 27-28.

On remand, the Air Force was ordered to provide a detailed justification for withholding the seven documents. In addition, the court stated that a further requirement of a party asserting that the information in a document was not segregable from exempted information is a description of the portion of information contained in a file that is non-exempt and how that information is dispersed throughout the entire document. The court reasoned that this information would better enable a court to establish the validity of an agency's assertion that non-privileged information was not segregable from that which was exempt. *Id.* at 29-30, 34.

A narrow construction of exemption five places it in its proper context. For the attorney-client privilege to possess any gravity it must be circumscribed to protect communication between the lawyer and her client which is made with reliance on secrecy. The expectation of confidentiality is often a condition precedent to any communication at all. Where parties' deliberations are protected to permit the "free flow of ideas" without threat of disclosure, opinion making and discussion flourishes. In the agency milieu, however, that crucial expectation of confidentiality is limited. Where attorney-client consultations demand secrecy in order to meet an objective, and where administrative deliberations must be confidential to avoid a chill on the "free flow of ideas," the exemption shall apply. Not intended by the Congress was protection of the mundane communication within the agency context, information necessarily subject to examination by third parties or the frustration of the public's reasonable right to access to information of its government.

Prejudicial Joinder

by John Jeffrey Ross

John Lee McKnight was arrested and accused of committing four robberies within the same area of Baltimore during a single month in 1974. After an unsuccessful motion to sever the informations joined in a single prosecution under Mary-

land Rule 734 (now Rule 745A), McKnight was convicted on five counts in all and the Court of Special Appeals affirmed. *McKnight v. State*, 33 Md. App. 280, 364A.2d 116 (1976). Even though evidence on each information would not be admissible in a separate trial of another, the Court upheld joinder because of the "similarity of circumstances and of the conduct of" McKnight in the alleged offenses. 33 Md. App. at 285-86, 364 A.2d at 119. See generally, *Ross v. State*, 276 Md 664, 670, 350 A.2d 680, 684 (1976); McCormick, Evidence sec. 190 (2d Ed. 1972).

After granting certiorari, the Court of Appeals reversed. *McKnight v. State*, 280 Md. 604, 375 A.2d 552 (1977).

The issues involved in the joinder or severance of indictments or charges demonstrate an essential dichotomy between the rights of the people and those of the accused.

As in pretrial release, for example, where the right to a reasonable opportunity for liberty of the defendant conflicts with the State's interest in protecting the community (see 23 D.C. Code sec. 1303-13), joinder of indictments in one prosecution for the sake of efficient administration of justice collides with the prejudicial effects on a defendant facing a multiplicity of charges.

In his appeal McKnight claimed that the charges were misjoined, resulting in substantial prejudice to his defense. Concerning relief from prejudicial joinder, Rule 735 (since the trial, Rule 735 has been superseded by Rule 745 (c)) relevantly provides:

If it appears that an accused . . . will be prejudiced by a joinder of offenses . . . in an indictment, or by joinder for trial together, the Court may order an election or separate trials of counts, . . . or provide such other relief justice requires.

Rule 735 and its descendant, Rule 745 (c), are based in the common law. *McKnight, supra.*, 280 Md. at 608, 375 A.2d at 554; *DiNatale v. State*, 8 Md. App. 455, 260 A.2d 669 (1970). Similar in tenor to Rule 14 of the Federal Rules of Criminal Procedure, they provide for the application of judicial discretion to sever misjoined counts if necessary.

There is considerable commentary on the problems of misjoining charges, especially the danger where the evidence necessary to prove each is mutually exclusive. Joinder can be considered prejudicial *per se*. In *Spencer v. Texas*, 385 U.S. 554, 653 (1967), the Supreme Court stated:

All joint trials, whether of several codefendants or of one defendant charged with multiple offenses, furnish inherent opportunities for unfairness when evidence submitted as to one crime . . . may influence the jury as to a totally different charge.

See also 8 Moore's Federal Practice, ¶ 14.04(1); See generally, Walsh, *Fair Trials and the Federal Rules of Criminal Procedure*, 49 A.B.A.J. 853, 856-857 (1963); 1 Wright, *Federal Practice and Procedure*, Sec. 223, p. 441 n. 32. Only when the interest in trial economy outweighs the prejudice to a defendant should a joinder be permitted. As Professor Wright notes, however, this balancing of interests is a dangerous practice to follow when a due process right is involved. He states in his *Federal Practice and Procedure* in Sec. 141 at Pp. 305-306:

Justice and fairness should control over the demands of efficiency. Given the evident reluctance of trial and appellate courts to grant separate trials under Rule 14 [the pattern for Maryland Rule 745 (c), *McKnight, supra.*, 280 Md at 608, 375 A.2d at 554], a broad interpretation of Rule 8 [Md Rule 745(a)] means broad joinder, whether or not this is just or fair. *** (I)t is a novel doctrine that the right of an accused to a fair trial can be balanced against competing considerations of efficiency.*** It seems strange indeed that one presumably innocent may be made to undergo something less than a fair trial, or that he may be prejudiced in his defense if the prejudice is "not substantial", merely to serve the convenience of the prosecution.

In noting the analogy between the Maryland and Federal rules in this regard, the Court of Appeals in *McKnight* listed as three possibilities for prejudice (articulated in *Drew v. United States*, 11.8 U.S. App. D.C. 11, 14-15, 331 F.2d 85, 88-89 (1964)): 1) potential to embarrass or confound the defense; 2) the danger that "the jury may cumulate the evidence of the various crimes charged and find guilt

when, if the offenses were considered separately, it would not do" so and 3) the jury may incorrectly, from evidence of one charge, make an unfair inference of criminal disposition in another. 280 Md. at 609, 375 A.2d at 554-555. See, *Simmons v. State*, 165 Md. 155, 165-166, 167 A.60, 64 (1933).

The court pointed to two lines of authority on relief from prejudicial joinder when the evidence as to each offense would not be mutually admissible at separate trials. The first rule allows joinder of offenses when the government can present its case(s) without confusing the jury. It is theorized that a clear and distinct presentation of each count at trial will result in a separate jury consideration of each. This is eminently unrealistic and therefore the court followed the more stringent theory that "a severance should be ordered where there has been a joinder of similar but unrelated offenses, if the evidence as to each crime would not be mutually admissible at separate trials." 280 Md at 610, 375 A.2d at 555. The court thus joins the Fourth circuit in noting there is the potential for a serious misapplication by the jury of a finding of guilt on one charge as probative of a defendant's guilt on another. This danger may occur even when the jury is presented with "Simple and Distinct" charges. 280 Md. at 611, 375 A.2d at 555; *United States v. Foutz*, 540 F.2d 733, 738 n.5 (4th Cir. 1976).

In addition to rejecting the Government's contention, which the Court of Special Appeals sanctioned, that the offenses were so identical in nature as to point to one man as their author the court saw no merit in the fact that the trial judge gave instructions designed to caution the jury to consider each charge separately. *McKnight*, 280 Md. at 615, 375 A.2d at 557. Instructions simply cannot overcome prejudice. The jury cannot erase its memory as it proceeds to consider each separated offense.

As Justice Jackson stated in a celebrated passage from *Krulwitch v. United States*, 336 U.S. 440, 453 (1949): "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."