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Criminal Procedure - Duty to Comment and the Per Se Severance Rule in Multiple Defendant Trials - United States v. McClure

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CASE NOTES

Criminal Procedure—Duty to Comment and the Per Se Severance Rule in Multiple Defendant Trials. *United States v. McClure,* 734 F.2d 484 (10th Cir. 1984).

Walter H. McClure and Anthony Tafoya were tried together and were convicted of crimes in the United States District Court for the District of New Mexico.[1] On appeal to the United States Court of Appeals for the Tenth Circuit, both defendants argued, among other things,[2] that the trial court's denial of their respective motions to sever the trial violated their constitutional rights and deprived them of a fair trial.[3]

Specifically, defendant McClure contended that his sixth amendment right to confrontation had been violated when the trial court refused to allow his counsel to comment on the co-defendant's failure to testify.[4] Relying heavily on *DeLuna v. United States,*[5] McClure maintained that because his counsel was under a "duty to comment" on Tafoya's failure to take the stand, the trial court was required to sever their trials. In addition, McClure argued that the "duty to comment" created a conflict between his sixth amendment right to confront his accusers and Tafoya's fifth amendment right to remain silent, free from adverse inferences.[6]

The Court of Appeals for the Tenth Circuit rejected McClure's arguments and affirmed his conviction.[7] The court held that the trial court had not abused its discretion in denying the motions to sever.[8] The court

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1. Brief for Appellant McClure at 2, United States v. McClure, 734 F.2d 484 (10th Cir. 1984) [hereinafter Appellant's Brief].

2. United States v. McClure, 734 F.2d 484, 487 (10th Cir. 1984). Both defendants argued "that the district court had abused its discretion by refusing to grant a severance, by denying their motion to discover, and by refusing a requested jury instruction." *Id.* at 487. Tafoya argued separately that denial of his bill of particulars was error. McClure specifically contended that the court erred "by refusing to allow a particular witness to testify because of the witness' presence in the courtroom in violation of the sequestration rule." *Id.*

3. *Id.* at 487.

4. Appellant's Brief, *supra* note 1, at 12.

5. 308 F.2d 140 (5th Cir. 1962). The *DeLuna* majority stated in dictum that "[i]f an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's *duty* is to order that the defendants be tried separately." *Id.* at 141 (emphasis added).

> [A]nd considering the case from Gomez's point of view, his attorneys should be free to draw all rational inferences from the failure of a co-defendant to testify, just as an attorney is free to comment on the effect of any interested party's failure to produce material evidence in his possession or to call witnesses who have knowledge of pertinent facts. Gomez has rights as well as DeLuna, and they should be no less than if he were prosecuted singly. *His right to confrontation allows him to invoke every inference from DeLuna's absence from the stand.*

Id. at 143 (emphasis added).

6. Appellant's Brief, *supra* note 1, at 12.

7. *McClure,* 734 F.2d at 491.

8. *Id.* The court addressed all contentions in a four-part opinion. Part I, entitled *Severance,* dealt with the issues of antagonistic defenses and the duty to comment which are discussed in this note. *See supra* note 2.

also found that McClure's sixth amendment confrontation rights had not been impaired and that both defendants received a fair trial.[9] The Tenth Circuit Court of Appeals clearly renounced the dictum of the *DeLuna* opinion[10] and held "that under no circumstances can it be said that a defendant's attorney is obligated to comment upon a co-defendant's failure to testify."[11]

Since the *DeLuna* opinion was handed down in 1962, it has generated much confusion among the members of the bench and bar. This confusion pertains to whether a defense counsel has a "duty to comment" on a co-defendant's failure to testify, and if so, whether the resulting conflict between a defendant's sixth amendment rights[12] and a co-defendant's fifth amendment rights[13] requires severance.[14] The *McClure* opinion addresses these issues squarely and should dispel any confusion created by the Fifth Circuit Court of Appeals decision in *Deluna*.[15]

BACKGROUND

Much has been written on the significance of the fifth amendment right to silence.[16] Assertion of the privilege has been protected since 1878 when Congress enacted a federal statute prohibiting any presumption to be drawn against an accused for refusing to take the stand.[17] Beginning with *Wilson v. United States*,[18] the United States Supreme Court also articulated a standard that an accused has an absolute right to be free from adverse inferences from his silence. The Court stressed that one of the basic functions of the privilege is to protect innocent persons.[19] In *Ullman v. United States*, the Court declared that "[t]oo many, even those who

9. *Id.*

10. DeLuna v. United States, 308 F.2d at 141, 143 (5th Cir. 1962). *See also supra* text accompanying note 5.

11. *McClure*, 734 F.2d at 491.

12. U.S. CONST. amend. VI provides that "the accused shall enjoy the right. . . to be confronted with the witnesses against him."

13. *Id.* amend. V provides "nor shall any person . . . be compelled in any criminal case to be a witness against himself."

14. *Id.* at 490-91. The number of cases citing *DeLuna* is overwhelming, but as the *McClure* opinion notes, there does not seem to be any decision, including *DeLuna*, which has ordered a severance based upon this supposed obligation.

15. In *DeLuna*, the majority held that DeLuna's fundamental right to assert the privilege against self- incrimination free from any adverse inference of guilt had been violated. The court reversed and remanded on these grounds, *not* on the finding that Gomez' sixth amendment confrontation rights had been violated. In addition, the court did not cite any authority for the proposition that defense counsel was "duty bound" to comment on the failure of a co-defendant to take the stand.

16. Kemp, *The Background of the Fifth Amendment in English Law: A Study of Its Historical Implications*, 1 WM. & MARY L. REV. 247 (1958); E. GRISWOLD, THE FIFTH AMENDMENT TODAY (1955); L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968). *See also* note 44.

17. 18 U.S.C. § 3481 (1982) provides in pertinent part:
> In trial of all persons. . .the person charged shall, at his own request, be a competent witness. His failure to make such request *shall not create any presumption against him* (emphasis added).

18. 149 U.S. 60, 65 (1893); *See also* Johnson v. United States, 318 U.S. 189, 197 (1943); Stewart v. United States, 366 U.S. 1, 2 (1961).

19. Grunewald v. United States, 353 U.S. 391, 421 (1957).

should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege."[20]

In the 1964 case of *Malloy v. Hogan,* the Supreme Court held that the fifth amendment privilege against self-incrimination was fully applicable to the states by incorporation in the fourteenth amendment.[21] To avoid inconsistent determinations of the validity of the claim, the states were required to adopt the federal standard.[22] After the fifth amendment was made applicable to the states, the Supreme Court emphasized again that allowing comment upon an accused's failure to take the stand "is a penalty [which] cuts down on the privilege by making its assertion costly."[23] The fifth amendment forbids "either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."[24] The Court condemned adverse comment by bench and bar on a defendant's failure to testify as reminiscent of the "inquisitorial system of criminal justice."[25]

The Supreme Court also recognized that a penalty may be imposed on a defendant's assertion of the privilege when, even without adverse comment, the jury is left unguided as to the law, free to draw from a defendant's silence broad inferences of guilt.[26] Therefore, a defendant is entitled to an instruction to the jury that no inference may be drawn from his asserting the privilege.[27] In *Lakeside v. Oregon,* the Supreme Court held that a no-inference instruction to the jury over a defendant's objection was of such importance that it outweighed the defendant's own preferred tactics to have no instructions at all.[28]

To further protect the assertion of the privilege against self-incrimination as well as the claim of other privileges, the Court proposed rule 513 for the Federal Rules of Evidence.[29] The rule forbids comment by judge and counsel upon the exercise of any privilege,[30] in accord with

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20. 350 U.S. 422, 426 (1956).
21. 378 U.S. 1 (1964).
22. *Id.* at 11.
23. Griffin v. California, 380 U.S. 609, 614 (1965).
24. *Id.* at 615.
25. *Id.* at 614, *quoting* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).
26. *See infra* note 28.
27. *Id.*
28. 435 U.S. 333, 339-41 (1978).
29. 2 J. WEINSTEIN, WEINSTEIN'S EVIDENCE ¶ 513[02], at 513-1, 513-4 to -7 (1980) [WEINSTEIN'S EVIDENCE]. Rule 513 provides:

> (a) Comment or inference not permitted.—The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.
> (b) Claiming privilege without knowledge of jury.—In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.
> (c) Jury Instruction.—Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

30. *Id.*

the great weight of authority.[31] It should be noted, however, that although Congress has not adopted rule 513, the provision still has utility as a standard.[32] The 1974 Uniform Rules of Evidence, Rule 512[33] is identical to Supreme Court rule 513 and has been adopted by numerous states.[34]

Recently, in *Carter v. Kentucky*,[35] the Court reaffirmed the significance of protecting a defendant's exercise of his constitutional right to remain silent. The Court held that a "criminal trial judge [in a state court] must give a 'no-adverse-inference' jury instruction when requested by a defendant to do so,"[36] to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify.[37]

The standard thus established in federal and state courts prohibits comment by the bench or bar on a defendant's failure to take the stand. The controversy surrounding the right to comment on the defendant's assertion of the fifth amendment privilege against self-incrimination appeared to be settled.[38] Yet the Fifth Circuit Court of Appeals in *DeLuna v. United States* announced a "per se severance rule" based on a "duty to comment."[39]

In *DeLuna v. United States*,[40] two defendants, DeLuna and Gomez, were indicted on a federal narcotic charge. They were tried jointly after their motions to sever were denied. At the trial in San Antonio, Texas, DeLuna, a Mexican national who could not speak English, did not take the stand. Gomez, a resident of the United States took the stand and produced members of his family and other witnesses to testify on his behalf. Claiming that he was an innocent victim of circumstances, Gomez put all the blame on DeLuna. He testified that he had never seen the package of narcotics until DeLuna handed it to him and told him to throw it out the window.[41]

DeLuna's attorney argued that his client was being made a scapegoat and that the sole culprit was Gomez. During closing argument, counsel for Gomez made direct reference to the failure of DeLuna to take the stand.

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31. 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 407 (1982); 8 J. WIGMORE, EVIDENCE §§ 2243, 2322, 2386 (J. McNaughton rev. 1961); Barnhart, *Privilege in the Uniform Rules of Evidence*, 24 OHIO ST. L. J. 131, 137-38 (1963). *See also* text accompanying notes 23-28.

32. 2 WEINSTEIN'S EVIDENCE, *supra* note 29, at 513-1.

33. UNIF. R. EVID. 512 (1974).

34. *See* WEINSTEIN'S EVIDENCE, *supra* note 29, ¶ 513[03], at 513-7 to -10.

35. 450 U.S. 288 (1981).

36. *Id.* at 300 (parenthetical material added).

37. This decision was based on an earlier case which addressed the same issue on the federal level. A unanimous court found that the defendant "had the indefeasible right" to have his proffered instruction be given to the jury. Bruno v. United States, 308 U.S. 287, 292 (1939).

38. *See* Reeder, *Comment Upon Failure of Accused to Testify*, 31 MICH. L. REV. 40 (1932); Bruce, *The Right to Comment on the Failure of the Defendant to Testify*, 31 MICH. L. REV. 226 (1932); *Legislation*, 25 FORDHAM L. REV. 381 (1956).

39. *See supra* text accompanying note 5.

40. 308 F.2d 140 (5th Cir. 1962).

41. *Id.* at 142. The police had seen Gomez throw the package but had seen no movement in the car even though they were along side it.

Gomez's attorney told the jury, among other things, that an honest man is not afraid to take the stand and testify, emphasizing that they hadn't heard a word from DeLuna. DeLuna's attorney objected to these comments and the court admonished the jury to disregard the fact that DeLuna didn't testify.[42] Gomez was acquitted; DeLuna was found guilty.

On appeal, DeLuna's conviction was reversed. The Fifth Circuit Court of Appeals held that comment on DeLuna's silence violated the well-established rule which prohibited such comment.[43] The principal holding in this case dealt with protecting the fifth amendment rights of a non-testifying defendant.[44] The majority noted, however, that the testifying defendant also had constitutional rights requiring protection; namely, the sixth amendment right of confrontation. Thus, the court recognized that a conflict existed between DeLuna's fifth amendment rights and Gomez' sixth amendment rights as a result of the two defendants being tried jointly.[45] The particular facts of the case and "a proper sense of duty"[46] by Gomez's counsel to contrast Gomez' willingness with DeLuna's unwillingness to take the stand, created the conflict which denied each defendant his right to a fair trial. The court found that separate trials were required to avoid these constitutional violations.[47]

Concurring specially, Judge Bell expressed great concern regarding the majority's opinion that there existed a "duty to comment" on a co-defendant's failure to testify, thereby creating a "per se severance rule." He believed that the situation was governed by the concept of fundamental fairness rather than by finding individual constitutional deprivations. Judge Bell also warned that the majority's opinion would create an intolerable procedural problem.[48]

Since *DeLuna*, other courts have recognized a "duty to comment" but only in certain circumstances.[49] There are also those courts which go to great lengths to distinguish the facts of a particular case from *DeLuna* to avoid addressing the "duty to comment" issue.[50] Finally, there are those courts which reject the notion that a defendant's counsel is under an ab-

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42. *Id.* at 142-43.

43. *Id.* at 141.

44. *Id.* at 154. The court discussed at great length the history of the fifth amendment and its significance, past and present. *Id.* at 144. *See supra* note 15.

45. *Id.* at 143. The court stated, "Thus, the joint trial of the two defendants put Justice to the task of simultaneously facing in opposite directions. And Justice is not Janus-faced." *See also supra* note 5.

46. *DeLuna*, 308 F.2d at 142.

47. *Id.* at 155. The court stated that "for each of the defendants to see the face of Justice, they must be tried separately."

48. *Id.* at 155-56 (Bell, J., specially concurring).

49. Gurleski v. United States, 405 F.2d 253, 265 (5th Cir. 1968), *cert. denied*, 395 U.S. 981 (1969); United States v. Lemonakis, 485 F.2d 941, 952 (10th Cir. 1973), *cert. denied*, 415 U.S. 989 (1974); State v. Gibbons, _____ R.I. _____, 418 A.2d 830, 835 (1980). These cases recognize a duty to comment where defenses raised are truly antagonistic. The duty diminishes as the antagonism lessens.

50. United States v. DiGiovanni, 544 F.2d 642, 644 (2d Cir. 1976); United States v. White, 482 F.2d 485, 488 (4th Cir. 1973), *cert. denied*, 415 U.S. 949 (1974).

solute obligation to comment on a co-defendants failure to testify.[51] The confusion is obvious.

THE PRINCIPAL CASE

In November, 1982, Walter H. McClure and Anthony Tafoya were indicted for possessing cocaine with intent to distribute, and for distributing cocaine.[52] Prior to trial, both McClure and Tafoya filed motions to sever.[53] Each defendant alleged that joinder would result in an unfair trial because their defenses differed in form and substance and were separate, inconsistent, and antagonistic.[54] The trial court denied their motions to sever.[55] McClure testified at the trial, but Tafoya asserted the fifth amendment. The jury found Tafoya and McClure guilty of both offenses.[56]

On appeal to the United States Court of Appeals for the Tenth Circuit, McClure relied on *Deluna,* arguing that the trial court abused its discretion by refusing to grant his motion to sever. Severance was required, he contended, because the theories of defense were truly antagonistic, creating an obligation on the part of his attorney to comment on the co-defendant's silence. In addition, he claimed that the trial court had also interfered with his sixth amendment confrontation rights by prohibiting comment.[57]

The Tenth Circuit rejected McClure's claims, first by citing the holding of the Supreme Court in *Johnson v. United States.*[58] There the Supreme Court asserted that the fifth amendment privilege is to be no part of the evidence submitted to the jury.[59] Second, the court of appeals cited *United States v. Marquez*[60] for the proposition that if asserting the privilege against self-incrimination permits no inference of guilt or innocence, then it is without probative value on the issue of a defendant's guilt or innocence.[61] Rejecting *Deluna*, the *McClure* court held that "under no circumstances can it be said that a defendant's attorney is obligated to comment . . . upon nonprobative evidence."[62]

The court of appeals also found that this holding did not impair a defendant's sixth amendment confrontation rights. Citing *Lutwak v. United States,*[63] the court of appeals stated that "a defendant is entitled

51. United States v. Kahn, 381 F.2d 824, 840 (7th Cir. 1967), *reh'g denied,* 392 U.S. 948 (1968); United States v. De La Cruz Bellinger, 422 F.2d 723, 726 (9th Cir. 1970), *cert. denied,* 398 U.S. 942 (1970); United States v. McKinney, 379 F.2d 259 (6th Cir. 1967); United States v. Marquez, 319 F. Supp. 1016 (S.D.N.Y. 1970), *aff'd,* 449 F.2d 89 (2d Cir. 1971).
52. Appellant's Brief, *supra* note 1, at 2.
53. *Id.* at 5.
54. *Id.* at 7.
55. *Id.* at 5.
56. *Id.* at 2.
57. *McClure,* 734 F.2d 484, 490 (10th Cir. 1984).
58. 318 U.S. 189, 196 (1943).
59. *Id.*
60. 319 F. Supp. 1016, 1022 (S.D.N.Y. 1970), *aff'd,* 449 F.2d 89 (2d Cir. 1971).
61. *McClure,* 734 F.2d at 491.
62. *Id.*
63. 344 U.S. 604, 619 (1953).

to a fair trial, not a perfect one."[64] McClure's sixth amendment confrontation rights were satisfied simply by allowing him to take the stand and to testify against Tafoya. In the court's view, "[s]uch testimony would be entitled to great probative value; a jury's decision resting upon this evidence would... rise to a fairer level than one influenced by self-serving implications drawn by an attorney regarding a co-defendant's silence."[65] Ultimately, the Tenth Circuit held that the trial court had not abused its discretion by denying the motions to sever. The *McClure* court rejected the *DeLuna* "per se severance rule" and found that both defendants had received a fair trial.[66]

ANALYSIS

The Tenth Circuit Court of Appeals' rejection of the *DeLuna* "per se severance rule" is supported first, by the strength of the fifth amendment right against compulsory self-incrimination. Second, the court's decision does not impair a defendant's sixth amendment confrontation rights if the duty of a defense attorney to comment on a co-defendant's failure to testify is non-existent. The analysis of the court of appeals centered on these fifth and sixth amendment concerns. Underlying both principles is ultimately the constitutional guarantee that a defendant has a right to a fair trial.[67]

The Fifth Amendment

The rule under the fifth amendment is clear: there is absolutely no right to comment on a defendant's silence. The judge and prosecution are fully barred from commenting.[68] It would therefore seem to follow that the defense counsel is also prohibited from commenting. In fact, in proposed rule 513 the Supreme Court used the term "counsel" which seems to include both the prosecutor and the defense attorney. In addition, the jury may not consider a defendant's or a witness' claim of the fifth amendment because it "is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right."[69]

If the claim against self-incrimination carries no implication of guilt, and the presumption of innocence remains in an accused's favor either as a defendant or witness, then it is illogical to suggest that a "duty to comment" and thus a "per se severance rule" is necessary to permit an inference of innocence in favor of a testifying defendant from a witness' or co-defendant's refusal to testify. To clarify this point, assume the "per se severance rule" was valid and separate trials were granted. Neither the prosecution nor the testifying defendant can compel the non-testifying

64. *McClure*, 734 F.2d at 491.
65. *Id.*
66. *Id.* at 495.
67. U.S. CONST. amend. VI; Lutwak v. United States, 344 U.S. 604, 619 (1953).
68. Griffin v. California, 380 U.S. 609, 614 (1965).
69. *Id., quoting* Johnson v. United States, 318 U.S. 189, 196 (1943).

co-defendant, who would be a witness now, to testify. In addition, "[i]t is improper to put the witness on the stand merely to have him exercise before the jury his privilege against self incrimination."[70] The witness is fully protected by the fifth amendment. There is no guarantee that he will be any more willing to testify in a separate trial than in a joint trial. If he does not testify, his silence still does not indicate that he is guilty of some crime and that the defendant is innocent. As the *McClure* court reasoned, if silence is not evidence, then it is indeed without probative value on the issue of a defendant's guilt or innocence.[71] An accused is innocent until proven guilty.[72]

Comment on a co-defendant's or witness' silence to indicate to the jury that such silence is in fact an admission of guilt, will not rebut the prosecution's evidence. Where there is no testimony, there can be no evidence.[73] The jury is only entitled to weigh the evidence which has been submitted and base its decision on that evidence. How then can a "duty to comment" exist where there is no right to comment and where silence is not evidence from which inferences can be legitimately drawn? As other courts have noted,[74] it would be folly to create a "per se severance rule" by demanding that a defense attorney be "duty bound" to comment on that which the jury may not consider.[75]

The Sixth Amendment Claim

Supporters of a "per se severance rule" claim that directly in conflict with one defendant's fifth amendment right to remain silent is the other defendant's sixth amendment right to confrontation. It is well established that the right to confrontation includes both the opportunity to cross-examine[76] and the opportunity for the jury to weigh the demeanor of the witness(es).[77] The argument advanced is that comment on a co-defendant's silence is proper to compare and contrast the demeanor of the non-testifying defendant to that of the testifying defendant.[78] In addition, supporters contend that the inference is necessary as a function of the sixth amendment right to confrontation when the defendants assert mutually

70. 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 407, at 448 (1982), *citing* Bowles v. United States, 439 F.2d 536 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 995 (1971).

71. United States v. Marquez, 319 F. Supp. 1016, 1022, (S.D.N.Y. 1970), *aff'd*, 449 F.2d 89 (2d Cir. 1971).

72. Wilson v. United States, 149 U.S. 60, 66 (1893).

73. *See supra* text accompanying note 24.

74. *See* United States v. McKinney, 379 F.2d 259, 265 (6th Cir. 1967); United States v. Kahn, 381 F.2d 834, 840 (7th Cir. 1967), *reh'g denied*, 392 U.S. 948 (1968); *Marquez*, 319 F. Supp. at 1022.

75. United States v. Herring, 582 F.2d 535, 542 (10th Cir. 1978). In that case the court held that the failure of a co-defendant to take the witness stand would not be a part of the record if the defendant would have been tried separately, thus the fact that a defendant would be deprived of making a comment on a co-defendant's silence would not be sufficient reason for wanting a severance.

76. Pointer v. Texas, 380 U.S. 400, 404-05 (1965).

77. Barber v. Page, 390 U.S. 719, 725 (1967); Mattox v. United States, 156 U.S. 237, 242-43 (1895); 21A AM. JUR. 2D *Criminal Law* § 720 (1981).

78. Appellant's Brief, *supra* note 1, at 13, *citing*, United States v. Aguiar, 610 F.2d 1296, 1302 (5th Cir. 1980).

exclusive and irreconcilable defenses.[79] Specifically, these cases state that the "duty to comment" arises to prevent prejudice from joinder when each defendant casts blame on the other as the sole culprit of the crime. When one defendant is the government's best witness against the other defendant,[80] this creates a situation in which if one defendant were believed, the other could not be believed. Consequently, it is contended that severance is required to avoid violating either defendants' constitutional rights.

Arguably, a testifying defendant's best chance for acquittal might include drawing the jury's attention to all possible inferences resulting from a co-defendant's silence.[81] One can readily see the impact that such comment would have on a jury which is already aware of the plain fact that one defendant chose to rebut the evidence against him, while the other remained mute.[82] In fact, it has been noted that "[t]he layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime."[83] Thus, comment encourages further speculation on the omission to explain or to contradict the evidence.

Recognizing that comment is prohibited in a joint trial, the testifying defendant argues that separate trials would afford him/her the opportunity to fully exercise his/her sixth amendment confrontation rights. The co-defendant's fifth amendment rights would then not be violated since the co-defendant is not on trial. But this line of reasoning fails for several reasons.

First, as has already been discussed,[84] separate trials would not seem to secure the benefit the testifying defendant claims is necessary to protect his confrontation rights. A witness' silence does not constitute evidence either by itself or by implication (although as a practical matter, such silence may have an adverse impact on the jury).[85] As a result, it will not be probative on a defendant's innocence or guilt.

Second, although the purpose of the sixth amendment confrontation clause is to guarantee an accused a fair trial by securing his right to have the trier of fact weigh the demeanor of the witness,[86] the amendment is

79. DeLuna v. United States, 308 F.2d 140, 143 (5th Cir. 1962); United States v. Kopituk, 690 F.2d 1289, 1316 (11th Cir. 1982); United States v. Lemonakis, 485 F.2d 941, 952 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974).

80. United States v. Johnson, 478 F.2d 1129, 1133 (5th Cir. 1973).

81. Severance is not required, however, simply because a defendant might have a better chance of acquittal if tried separately. 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 223 (1982), *citing* United States v. Reed, 658 F.2d 624 (8th Cir. 1981); *see also* United States v. Calabrese, 645 F.2d 1379, 1385 (10th Cir. 1981), *cert. denied*, 451 U.S. 1018 (1981).

82. It has been almost universally thought that juries notice a defendant's failure to testify. *See* Reeder, *Comment Upon Failure of Accused to Testify*, 31 MICH. L. REV. 40, 46-47 (1932); Griffin v. California, 380 U.S. 609, 621, 622 (1965) (Stewart, J., dissenting).

83. 8 J. WIGMORE, EVIDENCE § 2272, at 426 (J. McNaughton rev. 1961).

84. *See supra* text accompanying notes 70-73.

85. United States v. Marquez, 319 F. Supp. 1016, 1022 (S.D.N.Y. 1970), *aff'd*, 449 F.2d 89 (2d Cir. 1971).

86. Barber v. Page, 390 U.S. 719, 725 (1968).

limited to the witnesses who testify *against* the accused.[87] At a separate trial, a witness has to take the stand and testify for the defendant to assert his confrontation rights. In a joint trial, a non-testifying co-defendant is not a witness. Notwithstanding these limitations, a defendant in a joint trial can accomplish the same goal by demonstrating his own credibility when he takes the stand, and by emphasizing in closing argument his willingness, honesty, and courage to testify.[88] The court of appeals recognized that a defendant also has the right to take the stand and lay all the blame on a non-testifying defendant. A comparison is then obvious to a jury who has already recognized the co-defendant's silence,[89] and any possible undue prejudice to the testifying defendant as a result of joinder is effectively avoided. The non-testifying defendant at this point would appear to be the one unduly prejudiced by joinder. The Federal Rules of Criminal Procedure, however, have not ensured that joint trials will be totally free from prejudice. As the *McClure* court acknowledged, "a defendant is entitled to a fair trial, not a perfect one."[90]

The third flaw in the "per se severance rule" is evident. The "duty to comment" arises out of necessity again to combat undue prejudice when the theories of defense are truly antagonistic.[91] As the antagonism of respective defenses lessens, so does the necessity for the "duty to comment." The existence of the "duty to comment" therefore depends on the particular facts of each case. Attorneys would be wiser to argue that the particular antagonism which exists among multiple defendants is so great as to go to the very essence of a fair trial and require severance under rule 14 of the Federal Rules of Criminal Procedure.[92]

Rule 14 provides relief from prejudicial joinder before and during trial.[93] Rule 14 imposes a continuing duty on the court to sever the trial if prejudice to one of the defendants appears; a duty that must be exercised in the light of developments at the trial.[94] If prejudice becomes apparent at a later stage of the trial, the court can sever as to one defendant, here the non-testifying defendant, and continue the trial with the

87. U.S. CONST. amend. VI.
88. United States v. Blue, 440 F.2d 300, 302-03 (7th Cir. 1971).
89. *See supra* text accompanying notes 82-83.
90. *McClure*, 734 F.2d at 491.
91. *See supra* text accompanying notes 79-80.
92. Decker, *Joinder & Severance in Federal Criminal Cases*, 53 NOTRE DAME LAW. 147, 187 (1977).
93. FED. R. CRIM. P. 14 provides:

> 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. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial. (Emphasis in original.)

94. 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 221 (1982). *See also* Schaffer v. United States, 362 U.S. 511, 516 (1960).

other defendant. Where the defendants' defenses are in fact mutually exclusive and antagonistic, then the grounds for severance pursuant to rule 14 are satisfied.[95] Preferably before trial, counsel should explicitly point out how the defenses are antagonistic and zealously argue that the defendant cannot obtain a fair trial unless severance is granted.[96] Counsel has a better chance of having the trial severed before it begins than at a later stage in the proceedings, since the waste of judicial resources will not be as great. On appeal, the burden on counsel to show substantial prejudice is greater than before or during trial because appellate courts are hesitant to find that a trial court abused its sound discretion in denying the severance motion.[97]

A motion under rule 14 to sever defendants' trials because their defenses are irreconcilable, accomplishes the same purpose a "duty to comment" would, without violating either defendant's constitutional rights. As opposed to the self-serving duty, the federal rule serves to protect both defendants equally and fairly. The logical conclusion here is that there is no need for a "duty to comment," because there already exists a continuing duty on the part of the court to sever a multiple-defendant trial whenever prejudice appears.[98] Therefore, there is no need for a "per se severance rule."

One final argument to disprove the existence of a "duty to comment" and the need for a "per se severance rule" is that violation of the sixth amendment right to confrontation does not automatically result in prejudice.[99] Assuming that the right to confrontation includes a right to comment, even if the right were violated by prohibiting comment there may be no resulting prejudice to the testifying defendant which would require severance or reversal. "[U]nless he can show in addition thereto substantial prejudice in the form of a constitutional deprivation which renders the joint trial fundamentally unfair, appellate courts will uniformly affirm the denial of defendant's motion for severance."[100] In *McClure*, the court found that the government's case against the two defendants was so strong that little if any prejudice resulted from the joint trial in which counsel was not allowed to comment.[101] The joint trial was fair to both defendants.

CONCLUSION

Invoking the fifth amendment is a fundamental constitutional right. Assertion of the privilege is not part of the evidence. Therefore, by definition it has no probative value as to a defendant's guilt or innocence. There

95. United States v. Becker, 585 F.2d 703, 707 (4th Cir. 1978) *cert. denied*, 439 U.S. 1080 (1979); 75 AM. JUR. 2D *Trial* § 20 (1974).
96. Decker, *supra* note 92, at 185.
97. *Id.* at 170.
98. 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 221 (1982).
99. 21a AM. JUR 2D *Criminal Law* §§ 720-731 (1981).
100. Decker, *supra* note 92, at 170.
101. *McClure*, 734 F.2d at 491.

is no reason to find that the defense counsel has an obligation to comment on non-probative evidence.

If the "duty to comment" is dependent on the presence of truly antagonistic defenses, then the right to comment cannot be absolute. Moreover, rule 14 of the Federal Rules of Criminal Procedure adequately protects defendants from prejudicial joinder when their defenses are irreconcilable.

The Tenth Circuit Court of Appeals has correctly decided that under no circumstances is a defense counsel obligated to comment on a co-defendant's assertion of the fifth amendment privilege. Consequently, there is no need for a "per se severance rule." The defense counsel's only duty is to file timely motions for severance before and during the trial and to argue that his client will not obtain a fair trial unless severance is granted. Whatever does not contribute to the proper purposes of trial should be scrupulously avoided by counsel.

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