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# Criminal Procedure

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# CRIMINAL PROCEDURE

## I. SEARCH AND SEIZURE

In *Payton v. United States*,[1] the Supreme Court held that the warrantless arrest of an individual within the home is prohibited by the fourth amendment.[2] Its decision, however, did not disturb earlier rulings that warrantless arrests could be made within the home under "exigent circumstances."[3] Thus, under *United States v. Santana*,[4] police may arrest an individual without a warrant when the suspect takes refuge in his house as the police arrive. Similarly, under *Warden v. Hayden*,[5] if in "hot pursuit" of a fleeing felon, the police may follow him into his home, conduct a limited "protective" search, and make a warrantless arrest. Once the suspect has been arrested, *Chimel v. California*[6] establishes that the person and the area within his immediate control may be searched without a warrant as an incident to the arrest. Police may seize weapons, instrumentalities of crime, and destructible evidence.[7]

The cases involving warrantless arrests, searches under "exigent circumstances", and those involving searches incident to lawful arrests have spawned some confusion as to the permissible scope of warrantless searches upon the arrest of a defendant within the home. In *Warden v. Hayden*,[8] the Supreme Court approved the seizure of items during a warrantless search of the entire house before and contemporaneous with the defendant's arrest.[9] The Court found that the police were justified in

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1. 445 U.S. 573 (1980).

2. *Id.* at 590.

3. In Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970), the United States Court of Appeals for the District of Columbia Circuit set forth five material considerations in determining whether exigent circumstances exist:

> (1) a grave offense is involved; (2) the suspect is reasonably believed to be armed; (3) a clear showing of probable cause to believe the suspect committed the offense; (4) strong reason to believe that the suspect is in the premises being entered; (5) a likelihood that the suspect will escape if not swiftly apprehended.

*Id.* at 392-93.

4. 427 U.S. 38, 43 (1976).

5. 387 U.S. 294, 298-99 (1967).

6. 395 U.S. 752, 762-63 (1969).

7. *Id.* at 763.

8. 387 U.S. 294 (1967).

9. *Id.* at 298-300. In *Warden*, the police, while in "hot pursuit" of an armed robbery suspect, entered a house where the suspect had apparently fled. The police separated and

searching wherever the suspect or weapons might be hidden. Items inadvertently found during that search could legitimately be seized. Thus, *Warden* can be read as allowing a protective search before and contemporaneous with a defendant's arrest. Once the suspect has been arrested, however, *Chimel* indicates that the police may only search the area within the defendant's immediate control.

In *Ruth v. United States*,[10] the District of Columbia Court of Appeals refused to adopt such an interpretation of *Warden* and *Chimel*. After two victims were beaten and shot by two men, the police were directed to defendant's home by a gas station attendant.[11] As they approached Ruth's house, the police saw defendant Ruth in an illuminated room on the second floor, placing something behind a dresser. A woman was seen in the room with him.[12] When the defendant's uncle answered the front door, the police immediately entered, seized Ruth, and after spotting Ruth's accomplice in a nearby room, seized him.[13] The police took both men outside for a show-up and, after they were positively identified by an eyewitness, placed them under arrest.[14] The police then reentered the house, went to the second floor room where they had previously observed the defendant, and conducted a search. They seized certain items of blood-stained clothing from the room, and a blood-stained bag of money found behind the dresser.[15] After returning later with a search warrant, the police conducted a more thorough search and seized additional items.[16] Defendant challenged both searches, arguing that the first search was unlawful, because no exigent circumstances remained after he and his accomplice had been arrested, and that the second search was also unlawful because the warrant had been based on evidence illegally seized during the first search.[17]

The District of Columbia Court of Appeals disagreed.[18] Relying primar-

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began searching the house. Several officers found the suspect "asleep" upstairs and arrested him while others, in their simultaneous search for the "man or money" downstairs, seized clothes, of the type the suspect had allegedly worn, from a cellar washing machine. Moreover, incident to the suspect's arrest upstairs, the police conducted a rapid search and found a pistol in the flush tank of the upstairs toilet; a clip of ammunition for the pistol under the suspect's mattress, and ammunition for the gun in a dresser drawer in the suspect's room.

10. 438 A.2d 1256 (D.C. 1981).
11. *Id.* at 1258.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 1258-59.
16. *Id.* at 1259.
17. *Id.*
18. *Id.* at 1260.

ily on the United States Court of Appeals for the District of Columbia Circuit's decision in *United States v. Miller*[19] and its own decision in *Vance v. United States*,[20] the court refused to interpret *Warden* as allowing warrantless searches within the home only prior to or immediately contemporaneous with an arrest. In *Miller*, the circuit court upheld the search of an entire dentist's suite even though the police had apprehended the defendant immediately upon entering.[21] In *Vance*, the District of Columbia Court of Appeals upheld the search of a back bedroom after the defendants had been arrested.[22] Thus, the court of appeals was persuaded that the search in *Ruth* was similarly valid. It particularly emphasized such factors as the police having observed the defendant place something behind the dresser, their seeing another person in the room with him, and, the police not finding any weapons on the defendant and his accomplice when apprehended (although an eyewitness had described them as armed). Under these circumstances, the court determined that the limited search for and seizure of items in the bedroom upstairs was a legitimate warrantless search while in "hot pursuit" of Ruth and his accomplice.[23]

Judge Mack, in dissent, strongly disagreed with the majority's holding that the police search could be justified under the theory of "hot pursuit." Once the suspects were placed under arrest, the police were no longer in "hot pursuit." Moreover, since the police made no attempt to frisk the woman seen upstairs with Ruth, and since they searched what was immediately apparent as a vacant bedroom, their search could not be characterized as the limited protective search authorized by *Warden*.[24] Nor were any of the items sufficiently within the defendant's control to trigger the *Chimel* type warrantless search incident to arrest.[25] Finally, because the defendant posed no danger once arrested, and because the presence of police at the house eliminated any danger of evidence being destroyed, the search could not be justified as an emergency search conducted under "exigent circumstances."[26]

The court's holding in *Ruth* seems to expand the scope of warrantless searches authorized by *Warden*. The Supreme Court in *Warden* approved a warrantless search made immediately before and contemporaneous with

19. 449 F.2d 974 (D.C. Cir. 1971).
20. 399 A.2d 52 (D.C. 1979).
21. *Miller*, 449 F.2d at 977.
22. *Vance*, 399 A.2d at 58.
23. *Ruth*, 438 A.2d at 1260.
24. *Id.* at 1263.
25. *Id.*
26. *Id.* (citing Mincey v. Arizona, 437 U.S. 385, 394 (1978)).

the defendant's arrest. The basis for the Court's decision in *Warden* was that:

> The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that . . . the police had control of all weapons which could be used against them or to effect an escape.[27]

These considerations are altogether absent in *Ruth*.[28] The police neither suspected nor searched for other suspects; the two known suspects had been arrested before the search and were incapable of doing any harm. Indeed, the one person whom it was logical to suppose might still endanger them, the woman who had been seen in the room with defendant Ruth, was at no time searched by the police. The court's reading of *Warden*, therefore, seems inaccurate. The protective search allowed when in "hot pursuit" of a fleeing felon does not seem authorized where the defendant has been arrested and is incapable of harming the police or destroying any evidence. Moreover, *Chimel* instructs that only those areas within the defendant's immediate control may be searched incident to his arrest.[29] By characterizing this post-arrest search of the entire house as conducted while in "hot pursuit," the court of appeals has undermined the *Chimel* holding. Judge Mack, in his dissent, seems correct in concluding that "the majority's sanctioning conduct under the umbrella of 'exigent circumstances' . . . does violence to the Fourth Amendment."[30]

## II. GRAND JURY

The grand jury is charged with supervising "the enforcement of law and order, the preservation and protections of morals and social order, and the care of bringing to light for examination, trial, and punishment all violence, outrages, and indecencies."[31] It has been said that the most valuable function of the grand jury, however, is to act as a buffer between the prosecutor and the accused.[32] To this end, the panel is given broad investigatory power to determine as accurately as possible whether an individual has actually committed the crime of which he is suspected.[33]

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27. *Warden*, 387 U.S. at 298-99.
28. 438 A.2d at 1258-59.
29. *Chimel*, 395 U.S. at 763.
30. 438 A.2d at 1263.
31. 38 AM. JUR. 2D *Grand Jury* § 26 (1968).
32. *Id.* (citing Hoffman v. United States, 341 U.S. 479 (1952)).
33. 38 AM. JUR. 2D *Grand Jury* § 26 (1968). *See also* United States v. Collins, 272 F.2d 650 (2d Cir. 1959), *cert. denied*, 362 U.S. 911 (1960).

Nevertheless, the grand jury's power is not unlimited. In *In re Kelley*,[34] for example, the Distict of Columbia Court of Appeals, sitting en banc, used its indirect supervisory power over the grand jury to restrict the enforcement of the panel's subpoena power. Kelley had been called to testify before the grand jury with regard to an investigation of suspected arson. While there, he was served with a grand jury directive to appear in a line-up later that day. As Kelly had neither been indicted nor arrested at that time, he challenged the constitutionality of the directive.[35] At a subsequent hearing, Kelley's attorney argued that the government was required by the fourth amendment to show some reasonable basis for linking Kelly with the arson before it could so intrusively interfere with his right of privacy.[36] The government argued that no such showing was required to enforce the directive.[37] When the trial judge agreed, the District of Columbia Court of Appeals initially affirmed that ruling.[38]

In its first decision, the court of appeals relied on two Supreme Court cases, *United States v. Dionisio*[39] and *United States v. Mara*,[40] as dispositive of the issue. The Supreme Court had approved grand jury subpoenas of a voice recording in *Dionisio* and handwriting exemplars in *Mara*.[41] The Court had reasoned that defendants' fourth amendment privacy interests were not offended by being compelled to produce that which they "knowingly exposed to the public" everyday.[42] Thus, in seeking to enforce these grand jury subpoenas, the government had no duty to make a showing of the subpoenas' "reasonableness." The court of appeals found that line-ups were no different from voice recordings or handwriting exemplars for constitutional purposes. Indeed, it interpreted the two Supreme Court decisions as approving grand jury subpoenas for any evidence of a "physical characteristic" that is "constantly exposed to the public."[43] Thus, it

34. 433 A.2d 704 (D.C. 1981).

35. *Id.* at 705. In fact, Kelley was at no time indicted or arrested on any criminal charge.

36. *Id.*

37. *Id.* The only fact that the government proffered at the hearing was that one eyewitness had seen the perpetrator of the arson throw a "Molotov cocktail" through the complainant's window.

38. *In re* Kelley, No. 79-1045, slip op. (D.C. Feb. 8, 1980).

39. 410 U.S. 1 (1973) (no preliminary showing of reasonableness necessary to enforce a grand jury subpoena for voice recordings).

40. 410 U.S. 19 (1973) (no preliminary showing of reasonableness necessary to enforce a grand jury subpoena for handwriting exemplars).

41. 410 U.S. at 14, 21.

42. 410 U.S. at 14 (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

43. *In re* Kelley, No. 79-1045, slip op. at 7 (D.C. Feb. 8, 1980) (quoting United States v. Mara, 410 U.S. at 21).

ruled that the government need not show any reasonable nexus between an unindicted suspect and the crime, before it could, through a grand jury directive, compel him to appear at a line-up.[44]

The court of appeals subsequently vacated its decision and, sitting en banc, reached a different result.[45] It began its analysis by citing its 1971 decision in *Wise v. Murphy*.[46] There, the court had ruled that, to procure a line-up *order* from the court, an investigatory officer must articulate why the line-up order is reasonable.[47] The court noted that the government had since placed that decision in "mothballs."[48] Rather than applying to the court directly for a line-up order, the government had relied on the *Dionisio* and *Mara* decisions, and "passed through" police requests for line-ups to the grand jury.[49] By issuing line-up requests through grand jury directives rather than by court order, the government successfully avoided the necessity of a "reasonableness" showing as required by *Wise*.[50]

The court disapproved of this evasive tactic. It disagreed primarily with its earlier conclusion that line-ups were no more constitutionally intrusive than voice or handwriting samples; line-ups involved greater humiliation, stigma, and risk of misidentification. However, the court determined that its decision should be made on nonconstitutional grounds. The court invoked its inherent supervisory power over the superior court, which in turn supervises the grand jury, to require a minimal showing of reasonableness when the government attempts to enforce a grand jury directive.[51] The court was concerned with the government's evasion of a "reasonableness" showing by using the grand jury to obtain line-up directives. It pointed out that in so doing, the government threatened to commingle the separate responsibilities of grand jury, prosecutor, and judge.[52] If not actually involving abuse, this system certainly created the possibility of abuse and, at

44. *In re* Kelly, No. 79-1045, at 10.

45. *Kelley*, 433 A.2d at 707.

46. 275 A.2d 205 (D.C. 1971).

47. *Kelley*, 433 A.2d at 706. The court noted that in light of Terry v. Ohio, 392 U.S. 1 (1968), the *Wise* court had reduced the former requirement in the District of Columbia that an investigating officer show that he had probable cause to arrest before he could obtain a line-up order.

48. *Kelley*, 433 A.2d at 706.

49. *Id.*

50. *Id.*

51. *Id.* at 707. The court emphasized that its standard covered the *enforcement* rather than the issuance of a grand jury subpoena. It was only when the government invoked the judiciary's assistance, with its contempt power, that it was required to show that the directive was issued for a proper purpose. *Id.* at 709.

52. *Id.* at 707.

the very least, gave an appearance of impropriety.[53] Consequently, in order to ensure that the government and grand jury act in good faith, the court held that when seeking enforcement of a grand jury directive to appear in a line up, the government must make a "minimal factual showing sufficient to permit the judge to conclude that there is a reason for the line-up which is consistent with the legitimate function of the grand jury."[54]

Thus, in *Kelley*, the court of appeals required a showing of "proper purpose" before a grand jury line-up directive would be judicially enforced. The standard seems sound as it requires a good faith showing that the grand jury system is not being used to harass a suspect. This allows immediately the grand jury to fulfill its "historic role as a protective bulwark . . . between the ordinary citizen and an overzealous prosecutor,"[55] while not restricting its investigatory power by requiring something akin to proof of misconduct before it can order a suspect to attend a line-up. Moreover, because the "proper purpose" standard is similar to the "reasonableness" requirement of *Wise*, the government will now have little incentive to pass line-up requests through the grand jury rather than to directly petition the court.

## III. JOINDER/SEVERANCE

Where a court is presented with a criminal case involving either multiple defendants or multiple offenses, the challenge of joinder and severance is raised. In determining whether to try each offense separately, a court must weigh the competing interests. The state seeks judicial efficiency through a single trial of multiple defendants and offenses. Balanced against the state's interest is the defendant's desire to be free from unwarranted prejudice caused by joinder of charges[56] or defendants.[57]

The District of Columbia Court of Appeals recently made important rulings on the issues of severing trials of multiple defendants[58] and of-

53. *Id.*

54. *Id.*

55. *Id.* at 707 (quoting United States v. Dionisio, 410 U.S. at 17-18).

56. *See* Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964). There is no possibility of such prejudice where evidence of the crimes is simple and distinct. Dunaway v. United States, 205 F.2d 23, 26-27 (D.C. Cir. 1953).

57. *See* Rhone v. United States, 365 F.2d 980 (D.C. Cir. 1966). *See also* Dawson, *Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices*, 77 MICH. L. REV. 1379 (1979).

58. Carpenter v. United States, 430 A.2d 496 (D.C.), *cert. denied*, 102 S. Ct. 295 (1981); Sweet v. United States, 438 A.2d 447 (D.C. 1981) (allegations of error for pretrial denial of motion to sever and for failure to grant mistrial after prejudicial testimony elicited during trial).

fenses,[59] and has delineated the scope of discovery within the discretion of a trial judge to decide a motion to sever.[60]

Severance of trial of a single defendant accused of two crimes was addressed by the District of Columbia Court of Appeals in *Winestock v. United States*.[61] At trial, the accused asserted it was improper to join, in an indictment, two robbery counts where the alleged actions occurred an hour apart in the same neighborhood. The rationale underlying the motion to sever was that evidence concerning each separate robbery would not be automatically admissible at separate trials of the two crimes.[62] The defendant argued that the differences between the circumstances surrounding each robbery were greater than the similarities. The formal motion requesting severance claimed that the counts had been improperly joined under Superior Court Rule 8(a).[63]

The court of appeals instructed that the standard for proper joinder of offenses in an indictment was whether the offenses were of the same or similar nature.[64] Whether evidence offered on each crime would be reciprocally admissible at a trial of the other crime was irrelevant in examining a motion to sever under Rule 8(a). The court did note, however, that reciprocal admissibility would be a proper consideration when a pretrial motion to sever was brought pursuant to Rule 14.[65] Nevertheless, because the ap-

59. Winestock v. United States, 429 A.2d 519 (D.C. 1981).

60. United States v. Jones, 438 A.2d 444 (D.C. 1981).

61. 429 A.2d 519 (D.C. 1981).

62. *See* Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964). In that case the court set forth five issues for which similar crimes evidence would be admissible. The court explained that such evidence is relevant when it concerns "(1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other, and (5) the identity of the person charged with the commission of the crime on trial." *Id.* at 90. In Warren v. United States, 436 A.2d 821 (D.C. 1981), the defendant urged at retrial that the trial court should have severed the trials of the three rapes for which he had been convicted. The court of appeals held that it was not an abuse of discretion for the trial judge to deny the severance motion since the evidence for each rape would have been admissible at the trials of the other two. The court found that since circumstances surrounding each were so distinctively similar, the evidence would have been admissible based on the issue of identity, the last *Drew* exception. *Id.* at 832.

63. D.C. SUPER. CT.—CRIM.R. 8(a); *see generally*, Note, *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 YALE L.J. 553 (1965).

64. 429 A.2d 519, 524 (D.C. 1981); 8 MOORE'S FEDERAL PRACTICE ¶ 8.04(2) at 8-14 (1980).

65. D.C. SUPER. CT.—CRIM.R. 14. Denial of a Rule 14 motion to sever may be appealed on grounds of abuse of trial court discretion where evidence of such abuse is properly preserved.

For another example of Rule 14's application, see United States v. Jones, 438 A.2d 444 (D.C. 1981). Rule 14 provides: "In ruling on a motion by a defendant for severance the court may order the prosecution to deliver to the court for inspection *in camera* any statements or

pellant had based the appeal solely on Rule 8(a), and had not preserved Rule 14 grounds for relief in the record of trial, the court of appeals rejected the argument and upheld the trial court.

In *Sweet v. United States*,[66] the District of Columbia Court of Appeals considered the appellants' assertion that the trial court had erred in denying their motions to sever. Appealing convictions of kidnapping, armed robbery, and assault with intent to commit rape, both defendants claimed that separate trials should have been ordered. The appeal was based on the argument that at trial, the defendants had presented conflicting defenses of alibi and coercion, and the weight of evidence against each was so disproportionate as to permit a conviction solely on the basis of guilt by association. One appellant also argued that severance should have been ordered during trial after a defendant testified concerning one of appellant's prior convictions.

The court of appeals held that the trial court did not abuse its discretion in denying the appellants' motions to sever. It specified that severance must be ordered only when the defendants' defenses are so inconsistent that the jury would conclude that both defendants were guilty by merely considering the facts alone.[67] The court held that there could be no such prejudice against these defendants since there was other strong incriminating evidence against each defendant and the jury had been instructed to compartmentalize the evidence as to each defendant.

Furthermore, no error was found regarding the weight of the evidence against each defendant. The court of appeals ruled that severance should only be granted where one defendant's involvement in a joint act is *de minimus*.[68] The court noted, moreover, that the jury could not have con-

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confessions made by the defendants which the government intends to introduce in evidence at trial." In *Jones*, the trial court requested the government to produce statements made by one of the two defendants to a private citizen. The statements were to be inspected *in camera* to consider defendant severance under Rule 14 as requested by the other accused.

After the inspection, the trial court ordered oral argument on the severance issue. Consequently, the government was directed to provide the statements to the defense to allow for proper preparation for argument. 438 A.2d at 447. This order ran counter to the holding of Heighligh v. United States, 379 A.2d 689 (D.C. 1979) (statement by defendant for trial preparation). Additionally, the prosecution argued that such production would jeopardize witness safety and that the trial court lacked authority to order oral argument. In response, the trial court prohibited the government from introducing any of the defendant's statements to private citizens. The District of Columbia Court of Appeals concurred with the prosecution's argument that the trial court had abused its discretion. 438 A.2d at 447.

66. 438 A.2d 447 (D.C. 1981).

67. *Id.* at 451. *See, e.g.*, Johnson v. United States, 398 A.2d 354, 368 n.11 (D.C. 1979); Williams v. United States, 382 A.2d 1, 8 (D.C. 1978).

68. Sweet v. United States, 438 A.2d at 451 (quoting Christian v. United States, 394 A.2d 1, 21 (D.C. 1978), *cert. denied*, 442 U.S. 944 (1979)).

victed appellants on the basis of guilt by association since both defendants were not convicted of all charges.[69]

Additionally, the court of appeals found no error in the trial court's denial of one defendant's motion for mistrial and severance. At trial, the accused submitted the motion following testimony concerning his prior conviction; the testimony was given by the codefendant. In sustaining the ruling, the court of appeals held that the purpose of the evidence offered was to demonstrate the witness' innocence and not to associate the previously convicted defendant in wrongdoing. The testimony, therefore, lacked prejudice sufficient to require it to be stricken.[70] The appellate court thus distinguished this case from those where inadmissible evidence had been introduced by the government for the purpose of implicating the defendant.[71] It is important to note, however, that in this case the government had provided other evidence sufficient to convict the defendant.[72]

In an en banc hearing, the United States Court of Appeals for the District of Columbia Circuit considered whether one defendant's impeachment prejudicially implicated the codefendant. In *Carpenter v. United States*,[73] two defendants were tried for second-degree burglary, grand larceny, and destruction of property. Defendant Kitching was the subject of impeachment. On appeal, defendant Carpenter argued that the trial court's denial of his severance motion after the government announced that it intended to use the impeaching statement was an abuse of discretion. After discussing a trial judge's alternatives for curtailing the inherent prejudice of such statements,[74] the court of appeals upheld the lower court's decision that the government's attempt to sanitize the statement was sufficient.[75]

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69. 438 A.2d 447, 451. This issue was also presented in *Carpenter*, 430 A.2d 496 (D.C. 1981).

70. 438 A.2d at 453. *See, e.g.*, Fields v. United States, 396 A.2d 522, 528 (D.C. 1978) (prosecutor's questioning of defendant about his prior conviction for possession of an unregistered firearm immediately after defendant denied instant charge of carrying a pistol without a license deemed by the court to be a "highly suggestive and prejudicial sequence" of questioning requiring reversal of conviction).

71. *See, e.g.*, Fields v. United States, 396 A.2d 522 (D.C. 1978); United States v. Carter, 482 F.2d 738 (D.C. Cir. 1973).

72. *Sweet*, 438 A.2d at 453.

73. 430 A.2d 496 (D.C. 1981).

74. *Id.* at 501-05. *See* Sousa v. United States, 400 A.2d 1036 (D.C. 1979). The alternatives are redaction, where the trial court substitutes words with lesser prejudicial effect such as "codefendant" for "accomplice," exclusion from the statement of any reference to the codefendant or severance of trials. Sometimes the admission of the statement with limiting instructions is deemed to be a fourth alternative available to the judge. *See* Carpenter v. United States, 430 A.2d at 505. *But see id.* at 509 (Ferren, J., concurring) (fourth option is impermissible because of inherent prejudice in statement).

75. The officer who testified to rebut defendant Kitching's denial of making the state-

The appellant also alleged error in the trial court's denial of his motion for a mistrial when, after Kitching denied making a prior statement incriminating himself and appellant, a police officer testified that such a statement was made. The trial court responded with an immediate cautionary instruction and repeated the instruction in its general charge to the jury. The District of Columbia Court of Appeals held that this was an appropriate response and that it was sufficient to negate the prejudicial effect to the appellant.

*Carpenter* provides a procedural framework for trial judges to analyze the competing interests of joined defendants. This scheme requires the trial judge to decide initially whether, as an alternative to granting severance, any prejudice to the defendant can be cured through the omission or redaction of the incriminating statement. In the event that redaction is ineffective, the trial judge may then determine whether limiting instructions would cure the prejudice and thus be a viable alternative to granting a mistrial. In determining the propriety of limiting instructions, a trial court may consider the nature and quantity of evidence against the defendant.[76] Judges Ferren and Kelly concurred in the result but stated that the option of counteracting prejudicial testimony with limiting instructions was an insufficient option to maintain the integrity of the trial.[77] In a separate opinion,[78] Judge Mack agreed that only these three alternatives should be available to the trial court.

*Sweet* and *Carpenter* are controversial decisions. Since the court in *Sweet* concentrated on the party eliciting the prejudicial evidence, as well as the purpose for its introduction, it did not reach the issue of the propriety of cautionary instructions in curing prejudice to a defendant. The *Sweet* court found no prejudice based on its finding that the prejudicial statement was elicited by counsel for another defendant, that the statement was not offered to prejudice appellant, and that there was other substantial evidence linking defendant to the crime. In *Carpenter*, the government elicited the prejudicial statement through the rebuttal testimony of one of the officers.

As Judge Mack observed in *Carpenter*, and applicable as well to *Sweet*,

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ments changed an explicit reference in pretrial proceedings to "Carpenter" to a reference at trial to the "codefendant." 430 A.2d at 499-500 n.3.

76. 430 A.2d at 506.

77. *Id.* at 509-11.

78. *Id.* at 511. Judge Mack concurred in part and dissented in part. She agreed with the other judges concerning the three alternatives of redaction, severance, or exclusion where one defendant's statements implicate a codefendant. The dissent viewed admission of the prejudicial statement as requiring reversal of Carpenter's conviction; prejudice to Carpenter could not be cured by a limiting instruction. *Id.* at 512.

the origin of and reason for the prejudicial statement is irrelevant with respect to whether a defendant has been prejudiced once the jury has heard the evidence. Other considerations forwarded by Judge Mack in *Carpenter* are well reasoned. Writing with specific reference to the facts in *Carpenter*, she noted that Kitching's statement provided the sole evidence of Carpenter's actual presence in the burglarized store and that the other evidence against Carpenter was only circumstantial. Thus, the statement of codefendant Kitching was unfairly prejudicial to Carpenter. Judge Mack's analysis complies with the court's consideration of the issue in *Brabham v. United States.*[79]

Furthermore, Judge Mack challenges the effectiveness of a trial judge's cautionary instructions in eliminating the prejudice to the defendant. Citing *Bruton v. United States*,[80] she notes, "too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors." Despite that the "possibility of inadmissible testimony being uttered inadvertently in front of the jury is a constant but acceptable risk inherent in all oral testimony,"[81] Judge Mack stressed that this is not a risk that should fall on the defendant. Rather, the government should bear the burden of testimony going awry when it chooses redaction instead of omission.[82] At the heart of her opinion is a recognition that the government's position is originally more favorable since it is in possession of the statement and has the choice of proposing a redaction or omission of the reference to a defendant. In the event that redaction of the incriminating statement falters, the defendant's only course of conduct is to move for a mistrial.[83]

The most important consideration in cases such as *Sweet* and *Carpenter* is minimizing the prejudice to the defendant from his codefendant's testimony. Where the statement adds little to the evidence in an already strong case against that defendant, a cautionary instruction will be sufficient; where such statements bolster an otherwise weak case or one, such as in *Carpenter*, with only circumstantial evidence linking a defendant to a

79. 326 A.2d 254 (D.C. 1974), *cert. denied*, 421 U.S. 989 (1975). In this case, the D.C. Court of Appeals held that cautionary instructions are inappropriate where "(1) the statement . . . directly implicates the [defendant]; (2) [was] made by one whose interest is adversely affected and who is not a government informant, and (3) the statement itself is as 'powerfully incriminating' as a confession [and] there must [also] be no independent evidence of guilt."

80. 391 U.S. 123, 129 (1968) (quoting Paoli v. United States, 352 U.S. 232, 247 (1957) (Frankfurter, J., dissenting)).

81. 430 A.2d at 511 (quoting majority opinion at 505-06).

82. *Id.* at 512.

83. *Id.* at 513.

crime, limiting instructions will not serve to protect adequately the defendant's right to a fair trial.

## IV. STATEMENTS

In *Miranda v. Arizona*,[84] the Supreme Court held that in the context of "custodial interrogation," certain procedural safeguards must be followed in order to protect the defendant's fifth and fourteenth amendment privilege against self-incrimination. Thus, no statements made by the defendant during "custodial interrogation" may be used unless he has been warned that

> he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[85]

Subsequent court decisions, in determining whether *Miranda* warnings are required, have focused on the meaning of "custody"[86] and "interrogation."[87]

In *Rhode Island v. Innis*,[88] the Supreme Court, for the first time, addressed the issue of "interrogation." Defendant had been arrested on charges of kidnapping, robbery, and murder, and after being given his *Miranda* warnings, requested to speak with a lawyer.[89] Although the victim had been murdered with a sawed off shotgun, the murder weapon was not discovered with the defendant at his arrest. Several policemen, therefore, converged on the area to search, and the captain ordered the defendant to be driven to the police station.[90] On the way to the station, one police

84. 384 U.S. 436 (1966).

85. *Id.* at 479.

86. See Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam) (defendant not in custody when voluntarily came to police station, was not arrested, and was allowed to leave after talking with police); Orozco v. Texas, 394 U.S. 324 (1969) (defendant in custody because not free to leave when police entered his bedroom at 4:00 a.m. and questioned him); Miranda v. Arizona, 384 U.S. 436 (1966) (defendant in custody at police station or whenever deprived of freedom of action in any significant way).

In 1981, the District of Columbia Court of Appeals decided that the police did not hold the defendants in custody when they came to the defendants' apartment to question them about a crime in which the defendants had been the victims and, while there, inadvertently saw firearms. *See* United States v. Ward, 438 A.2d 201 (D.C. 1981) (per curiam). *See also* United States v. Allen, 436 A.2d 1303 (D.C. 1981) (defendant not in custody when asked to sit in police car before being questioned as witness to a crime).

87. *See infra* note 88 and accompanying text.

88. 446 U.S. 291 (1980).

89. *Id.* at 294.

90. *Id.* at 294-95.

officer remarked to the other that, because there was a school for handicapped children nearby, "God forbid one of them might find a weapon with shells and . . . hurt [himself]."[91] Defendant then interrupted the conversation and offered to show the officers where the shotgun was.[92] In ruling that the officers' conversation was not interrogation, the Court clarified the meaning of the term. "Interrogation" included not only express questioning, but "the functional equivalent" of questioning.[93] Thus, it included "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[94]

In *Robertson v. United States*,[95] the District of Columbia Court of Appeals applied *Innis* to determine whether the defendant had been subject to interrogation. Defendant had been arrested in his home on charges of embezzlement.[96] When two police officers appeared at his apartment, he invited them in and was arrested. One officer then said, "do you know why I'm here?," whereupon defendant immediately began to explain that he had been "ripped off" by his employer.[97] Although the officer interrupted him and gave him his *Miranda* warnings, defendant continued to give a full explanation of his alleged innocence.[98] Defendant later moved unsuccessfully to suppress his entire statement as the result of impermissible custodial interrogation.[99]

The court of appeals upheld defendant's subsequent conviction.[100] Applying *Innis*, the court determined that the officer's comment, taken in context, would not normally elicit an incriminating response.[101] Therefore, it could not be said that the officer "should have known" that he was reasonably likely to evoke an incriminating answer.[102] Thus, defendant had not been subject to interrogation. The court, however, did not conclude that *Miranda* warnings were unnecessary because no custodial interrogation took place. In light of the fact that the warnings had been given, it ruled that defendant had voluntarily waived his right to remain silent when he

91. *Id.* at 295.
92. *Id.*
93. *Id.* at 300-01.
94. *Id.* at 301.
95. 429 A.2d 192 (D.C. 1981).
96. *Id.* at 193.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 196.
101. *Id.* at 195.
102. *Id.*

continued with his statement after being warned of his rights.[103] He therefore deserved no relief as he had voluntarily waived the *Miranda* protection to which he would otherwise be entitled.[104]

Although the court's decision in *Robertson* falls squarely within the Supreme Court's definition of "interrogation," its analysis is nevertheless somewhat confused. Two problems arise whenever *Miranda* warnings are at issue. The first concerns the point at which the warnings must be given; they must be given when the defendant is subject to "custodial interrogation."[105] The issue in *Robertson* was whether the officer's comment was "interrogation" and therefore impermissible because the defendant had not been issued his warnings *before* the comment was made. The second problem, found in *Innis*, arises when *Miranda* warnings are given and the police continue to interrogate the defendant in derogation of his right to remain silent until consultation with an attorney. In *Innis*, the defendant had been given his *Miranda* warnings and indicated that he wished to remain silent. And, it was only in deciding whether the police had unconstitutionally continued to question defendant, that the Supreme Court had to determine the meaning of "interrogation."

Therefore, to the extent that the District of Columbia Court of Appeals based its holding on Robertson's alleged *waiver* of his right to remain silent, its premise was incorrect. The only relevant factor in *Robertson* was whether the police had begun interrogating the defendant before they issued him his warnings. To the extent, however, that the court based its holding on the fact that no interrogation had taken place and no warnings were required, its decision carefully follows the Supreme Court's definition of "interrogation" and appears sound.

The District of Columbia Court of Appeals directly addressed whether the police had impermissibly continued interrogation in derogation of defendant's rights in *United States v. Alexander*.[106] There, police were called to aid a woman who was lying stabbed and unconscious on the sidewalk. After the defendant and her two daughters were taken to the station for questioning, one of defendant's daughters implicated defendant in the stabbing.[107] Defendant was then formally arrested and given her *Miranda* warnings. She indicated that she wished to remain silent until she had consulted with an attorney.[108] Shortly thereafter, however, a police officer

103. *Id.*
104. *Id.*
105. *Miranda*, 384 U.S. at 479.
106. 428 A.2d 42 (D.C. 1981).
107. *Id.* at 44-45.
108. *Id.* at 45.

warned her that he knew that she had been responsible for the stabbing and that she was going to jail. He then began filling out a form in front of her which he explained was the paperwork necessary to send her to jail.[109] A few minutes later, defendant said that she wished to explain the events of the morning. When *Miranda* warnings were reissued, the defendant stated that, although she understood her rights, she wished to speak without an attorney present. She then gave a full confession.[110] At the subsequent suppression hearing, the trial judge determined that her statements had been voluntarily given and allowed their introduction at trial.[111]

The court of appeals disagreed. Guided by the Supreme Court's decision in *Michigan v. Mosley*,[112] the court determined that defendant's exercise of her fifth amendment privilege against self-incrimination had not been "scrupulously honored" by the police.[113] In *Mosley*, defendant had been arrested for robbery and, upon receiving his *Miranda* warnings, refused to answer any questions. At no time, however, did he ask to consult with an attorney.[114] Two hours later, he was taken to another section of the police station and questioned by a different detective about an unrelated murder. Although defendant was reissued his *Miranda* warnings before being questioned about the murder, he made a statement that implicated him in the homicide.[115] He was convicted of the murder after the inculpatory statement made during the interrogation was introduced at his trial. The Supreme Court was persuaded that Mosley's rights had been "scrupulously honored" because (1) interrogation ceased when he requested it to do so; (2) there was a significant break before he was questioned on an unrelated matter; (3) the parties, place, and subject matter of the interrogation had changed; (4) new *Miranda* warnings were given before the second interrogation; and (5) his previous request to remain silent was not undermined because the second questioning involved a different offense.[116]

As the District of Columbia Court of Appeals pointed out, the situation in *Alexander* stood in stark contrast to the *Mosley* case. In *Alexander*, interrogation continued after defendant requested a lawyer; without making any attempt to find her a lawyer, the same police officer returned with another form and immediately advised defendant that he knew of her guilt; the parties, place, and subject matter were identical; no new *Miranda*

109. *Id.*
110. *Id.*
111. *Id.* at 47.
112. 423 U.S. 96 (1975).
113. *Alexander*, 428 A.2d at 50.
114. *Mosley*, 423 U.S. at 97.
115. *Id.* at 98.
116. *Id.* at 104-05.

warnings were given until defendant was well into her statement; and her exercise of rights was directly violated by resumed interrogation on the same offense.[117] Under the *Mosley* guidelines, the *Alexander* court concluded that the defendant's exercise of rights had not been "scrupulously honored."[118] Because the police conduct had deprived defendant of her constitutional protection under the fifth amendment, it was irrelevant whether, after the misconduct, any of her statements could be characterized as voluntary.[119]

The court's analysis in this case reflects the letter and spirit of *Mosley*. It determined that it must first examine whether defendant's exercise of rights had been "scrupulously honored" by the police before it looked at her ensuing statements. Thus, it implicitly rejected any notion that the initial taint created by police misconduct would be vitiated by the voluntary nature of any statements defendant subsequently made. It was insufficient that the police reissued *Miranda* warnings, and were assured that defendant clearly understood her rights before allowing her to complete her inculpatory statement. The court's method of analysis is in keeping with protections intended by the *Miranda* warnings. The warnings were considered necessary to protect an individual from the inherently coersive environment of custodial interrogation. The efficacy of the warnings would be significantly undermined if the police could compel an individual to speak and thereafter characterize his statements as "voluntary" simply because *Miranda* warnings were reissued. Once an individual feels compelled to speak, the reiterated warnings are probably unlikely to make him reconsider. Thus, it is crucial that the police "scrupulously honor" the defendant's right to remain silent. Only after passing this threshold test can the police reasonably argue that statements subsequently made by the defendant are not the product of coercion.

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117. *Alexander*, 428 A.2d at 50-51.
118. *Id.* at 50.
119. *Id.*