

Faculty Publications

1979

Joinder and Severance

Paul C. Giannelli

Peter Joy

Follow this and additional works at: https://scholarlycommons.law.case.edu/faculty_publications

 Part of the [Criminal Procedure Commons](#)

Repository Citation

Giannelli, Paul C. and Joy, Peter, "Joinder and Severance" (1979). *Faculty Publications*. 417.
https://scholarlycommons.law.case.edu/faculty_publications/417

This Article is brought to you for free and open access by Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

PUBLIC DEFENDER REPORTER

P
P 9732
5.1

Vol. 2, No. 6

November-December, 1979

JOINDER AND SEVERANCE

Paul C. Giannelli

Professor of Law, Case Western Reserve University

and

Peter A. Joy

Staff Attorney, Clinical Program

Case Western Reserve University

Joinder and severance issues may arise from either (1) the joinder of offenses allegedly committed by one defendant or (2) the joinder of defendants. The importance of joinder cannot be overestimated. As one commentator has noted: "The way in which the prosecutor chooses to combine offenses or defendants in a single indictment is perhaps second in importance only to his decision to prosecute. Whether a defendant is tried *en masse* with many other participants in an alleged crime, or in a separate trial of his own, will often be decisive of the outcome. Equally decisive may be the number of offenses which are cumulated against a single defendant, particularly if they are unconnected." 8 Moore's Federal Practice 8-3 (R. Cipes ed. 1979).

In Ohio joinder and severance are governed by the Rules of Criminal Procedure. Rule 8 covers the joinder of offenses and defendants in one indictment, information, or complaint. Rule 13 governs the consolidation for trial of offenses and defendants in situations in which there is more than one indictment, information, or complaint. Finally, Rule 14 governs severance of offenses and defendants.

This article examines the joinder and severance of offenses and defendants. Some issues, however, are common to both types of joinder and are discussed in the following section.

PRELIMINARY ISSUES

The Relationship Between the Ohio and Federal Rules

The joinder and severance rules found in the Federal Rules of Criminal Procedure are, in many respects, identical to the Ohio Rules. Thus, it is not surprising that federal cases would provide interpretive guidance for issues arising under the Ohio Rules. See *State v. Owens*, 51 Ohio App.2d 132, 145, 366 N.E.2d 1367, 1375 (1975) ("[T]he construction of Fed. R. Crim. P. 14 by the federal courts is of help in this case.").

There are, however, several important differences between the Ohio and Federal Rules that should not be ignored. In *State v. Durham*, 49 Ohio App.2d 231, 360 N.E.2d 743 (1976), for example, the court emphasized that the decision to grant a severance "rests in the sound discretion of the [trial] court" and "[u]nless the discretion has been exercised to the manifest injury of the accused, there is no error." *Id.* at 233, 360 N.E.2d at 746. This statement overlooks the explicit language of Rule 14, which specifies that once prejudice has been found, "the court shall order an election or separate trial of counts, grant severance of defendants, or provide other relief as justice requires" (emphasis added). In contrast, Federal Rule 14 provides that the court may sever in the case of prejudice. The drafters of the Ohio Rules clearly made a conscious choice to limit the trial court's discretion once prejudice has been established. See *State v. Owen*, 51 Ohio App.2d 132, 145, 366 N.E. 2d 1367, 1375 (1975) ("[W]hile the federal courts have discretion in granting severance, our rule provides that if prejudice is shown 'the court shall order' severance."); 2 O. Schroeder & L. Katz, *Ohio Criminal Law* 183 (1974) ("By the use of the word *may* the federal courts are permitted to balance the possible prejudice to the defendant against convenience, while the use of the word *shall* requires Ohio courts to provide relief whenever prejudice is demonstrated.").

The decision to make Rule 14 a mandatory rather than a permissive provision probably resulted from criticism of the federal courts' reluctance to grant severance liberally under the federal rule. See 8 Moore's Federal Practice and Procedure 8-4 (R. Cipes ed. 1979) ("Rule 14 is available, but such availability tends to be more theoretical than real."); 1 C. Wright, *Federal Practice and Procedure* 305 (1969) ("Given the evident reluctance of trial and appellate courts to grant separate trials under Rule 14, a broad interpretation of Rule 8 means broad joinder, whether or not

Public Defender: Hyman Friedman
Cuyahoga County Public Defender Office, 1200 Ontario Street, Cleveland, Ohio 44113
Editor: Paul C. Giannelli, Professor of Law, Case Western Reserve University
Associate Editor: Thomas S. Hudson

Telephone: (216) 623-7223

Publication of the Public Defender Reporter is made possible by a grant from the Cleveland Foundation. The views expressed herein are those of the author and do not necessarily reflect those of the Public Defender or the Cleveland Foundation.

Copyright © 1979 by Paul C. Giannelli

this is just or fair.”). Federal authorities, therefore, cannot be employed in an unthinking fashion; the Ohio Rule was designed to overrule some of these authorities.

The Relationship Between Rules 8 and 14

An appreciation of the relationship between Rules 8 and 14 is fundamental to an understanding of joinder and severance. Severance under Rule 14 requires a showing of prejudice. That provision, however, is only operable in the case of a *proper* joinder under Rule 8. If the joinder is improper (misjoinder), then severance is automatic, prejudice need not be shown. Both of the major commentators on the Federal Rules agree on this point. Professor Wright has written: “[Motions for misjoinder] raise only a question of law. If there has been misjoinder, the trial court has no discretion to deny the motion, and the appellate court may not consider the failure to do so harmless error.” 1 C. Wright, *Federal Practice and Procedure* 337 (1969). See also *id.* at 432 (“Rule 14 comes into play only if the original joinder was proper. It permits a severance, despite the propriety of the original joinder, if needed to avoid prejudice.”). Similarly, Professor Moore’s treatise contains the following passage: “[A] pleading which fails to comply with the minimum standards of joinder should be treated as conclusively prejudicial. This means that where the trial judge determines that offenses or defendants have been misjoined, he has no discretion to deny relief.” 8 Moore’s *Federal Practice* 8-14 (R. Cipes ed. 1979). See *U.S. v. Placente*, 490 F.2d 661, 665 (7th Cir. 1973) (“When joinder is improper, severance is the appropriate remedy and there is no discretion in the court’s ruling.”)

This point was ignored in *State v. Durham*, 49 Ohio App.2d 231, 360 N.E.2d 743 (1976), in which the court stated: “Where an indictment charges two or more distinct offenses, *even if improperly joined*, the exercise of authority to compel the prosecutor to make an election [or grant a severance] rests in the sound discretion of the court, to be exercised in the promotion of justice and upon good cause shown. . . .” *Id.* at 233, 360 N.E.2d at 746 (emphasis added). This passage is dictum because the two counts in *Durham*—aggravated burglary and theft—were properly joined under Rule 8(A) since both offenses were “based on the same act or transactions.”

Durham illustrates the necessity for counsel to inform the court of the precise basis for a motion to sever. If there is a misjoinder, of either offenses or defendants, a motion to sever should specify that Rule 8, rather than Rule 14, is the basis of the motion. Otherwise, counsel may be required to establish prejudice as specified in Rule 14. Motions for severance based on misjoinder are made pursuant to Rule 12(B)(2); motions for severance based on prejudicial joinder are made pursuant to Rule 12(B)(5).

Waiver

In *State v. Owens*, 51 Ohio App.2d 132, 366 N.E.2d 1367 (1975), the court stated: “[T]he motion to sever was made before trial. It was not renewed either after the state rested or at the conclusion of all of the evidence. When not renewed, it is waived.” *Id.* at 146,

366 N.E.2d at 1376. This statement is troublesome for several reasons. First, the *Owens* court cited federal authorities to support its position. Its citations, however, were selective. The federal courts have not followed a uniform rule on the waiver issue. Indeed, the U.S. Supreme Court in *Shaffer v. U.S.*, 362 U.S. 511 (1960), spoke of the trial judge’s “continuing duty at all stages of the trial to grant a severance if prejudice does appear.” *Id.* at 516. See also 8 Moore’s *Federal Practice* 14-11 to -19 (R. Cipes ed. 1979). Second, Rule 12(B)(5) requires severance motions under Rule 14 to be made prior to trial. Motions not made prior to trial are waived under subsection (G) of Rule 12. Therefore, the waiver issue is explicitly covered in the Rules and the Rules do not require that the motion be renewed during trial. Nevertheless, a prudent attorney should renew the motion to avoid any problem.

Proof in Support of a Motion to Sever

When making a motion to sever, counsel should specify the grounds on which the motion is based and introduce evidence or make an offer of proof in support of the motion. A mere allegation of prejudice will not be sufficient. Two pre-Rules cases address this issue. In *State v. Perod*, 15 Ohio App.2d 115, 239 N.E.2d 100 (1968), the court overruled a motion to sever, stating: “The record shows a request by motion for a separate trial but a total failure to show cause.” *Id.* at 122, 239 N.E.2d at 105. In *State v. Fields*, 29 Ohio App.2d 154, 279 N.E.2d 616 (1971), the court adopted a somewhat different position. According to that court, good cause may be shown “in any manner consistent with proof of motions generally, including a showing by the *professional statement of counsel*.” *Id.* at 158, 279 N.E.2d at 619 (emphasis added). Examples of severance motions and supporting memoranda are found in 9 G. Messerman, *Ohio Forms of Pleading and Practice, Criminal Rules* (1979).

JOINER AND SEVERANCE OF OFFENSES

Rule 8(A) provides:

Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or part of a course of criminal conduct.

Duplicity, Multiplicity, and Crimes of Similar Import

Section 8(A) prohibits the misjoinder of offenses—the unauthorized charging of unrelated offenses in an indictment. This section also prohibits duplicitous charging—charging two offenses in the same count of an indictment. A related problem is known as multiplicitous charging. Multiplicity is the opposite of duplicity; it is the charging of a single crime in multiple counts. While the problems of duplicity and multiplicity are beyond the scope of this article, it should be noted that the Ohio Multiple Counts Statute, R.C. 2941.25, which provides that a defendant can be convicted of only one offense if charged with “two or

more allied offenses of similar import" based on the same conduct, is directed at a related problem—the prevention of multiple convictions for a single transaction. See *State v. Weind*, 50 Ohio St.2d 224, 364 N.E.2d 224 (1977), *vacated*, 438 U.S. 911 (1978); *State v. Osborne*, 49 Ohio St.2d 135, 359 N.E.2d 78 (1976); *Maumee v. Geiger*, 45 Ohio St. 2d 238, 344 N.E.2d 133 (1976); *State v. Fisher*, 52 Ohio App.2d 133, 368 N.E.2d 324 (1977).

Misjoinder of Offenses

The most troublesome aspect of joinder under Rule 8(A) concerns joinder of offenses "of the same or similar character," which are not part of a single scheme or plan. This is because the rationale underlying the joinder of offenses—"avoiding duplicitous, time-consuming trials in which the same factual and legal issues must be litigated"—is not applicable in this instance. ABA Standards Relating to Joinder and Severance 29 (1968). "[S]ince the offenses on trial are distinct, trial of each is likely to require its own evidence and witnesses. The time spent where similar offenses are joined may not be as long as two trials, but the time saved by impanelling only one jury and by setting the defendant's background only once seems minimal." Note, *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 Yale L.J. 553, 560 (1965). While the Rule permits joinder of the same or similar offenses, the absence of strong policy reasons for this type of joinder should be considered by a court in ruling on a motion to sever offenses because of prejudice under Rule 14. See ABA Standards Relating to Joinder and Severance § 2.2(a) (1968) (providing for severance as a matter of right when the same or similar offenses are joined).

Prejudicial Joinder

If offenses are properly joined pursuant to Rule 8(A), the defendant may nonetheless seek a severance pursuant to Rule 14. If prejudice is established, the court must grant the motion. Under some circumstances joinder of offenses may accrue to a defendant's advantage. As two commentators have pointed out: "Being called upon to defend himself in a number of trials may be harrassing to a defendant and be a disadvantage far outweighing the prejudice which may result from a joinder. It is possible for the prosecutor to withhold some of the charges and file them as detainers, thus making it difficult for defendant to get parole." Remington & Joseph, *Charging, Convicting, and Sentencing the Multiple Criminal Offender*, 1961 Wis. L. Rev. 528, 538-39. Furthermore, joinder of offenses may result in concurrent sentences. Orfield, *A Note on Joinder of Offenses*, 41 Ore. L. Rev. 128, 130 (1962). If the prosecutor obtains separate indictments in order to try a defendant several times for related offenses, the defendant may move to consolidate under Rule 13. Moreover, the prosecutor runs the risk that the doctrine of collateral estoppel may preclude a second trial if the defendant is acquitted at the first trial. See generally, Katz, *Double Jeopardy*, 2 Public Defender Rptr. (July-August 1979).

In *Drew v. U.S.*, 331 F.2d 85 (D.C. 1964), the court outlined how a defendant could be prejudiced by the

joinder of offenses.

The argument against joinder is that the defendant may be prejudiced for one or more of the following reasons: (1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible but perhaps equally persuasive element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one. *Id.* at 88.

See also *McElroy v. U.S.*, 164 U.S. 76, 80 (1896) ("[T]he multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our States, to confine the indictment to one distinct offense or restrict the evidence to one transaction.").

The first type of prejudice is illustrated by *Cross v. U.S.*, 335 F.2d 987 (D.C. Cir. 1964), in which the defendant was charged with two counts of robbery. Prior to trial the defendant moved to sever the two offenses so that he could testify on one count but not the other. The denial of the motion was held to be reversible error.

If he testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus he bears the risk on both counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging in the face of this express denial of the other. Thus he may be coerced into testifying on the count upon which he wished to remain silent. It is not necessary to decide whether this invades his constitutional right to remain silent, since we think it constitutes prejudice within the meaning of Rule 14. *Id.* at 989.

See also *U.S. v. Placente*, 490 F.2d 661, 662 (7th Cir. 1973); *People v. Edwards*, 63 Ill.2d 134, 345 N.E.2d 496 (1976).

A second type of prejudice involves the possibility that the jury will convict because the defendant possesses a criminal disposition. Shielding the defendant from this possibility underlies the rule, long recognized in Ohio, that the state may not introduce evidence of the defendant's bad character or reputation unless the defendant first introduces evidence of his good character. See *State v. Lytle*, 48 Ohio St.2d 391, 402, 358 N.E.2d 623, 630 (1976); *State v. Cochrane*, 151 Ohio St. 128, 84 N.E.2d 742 (1949). Even if evidence of a defendant's bad character is not introduced, the jury may nonetheless infer a bad character or criminal disposition because multiple offenses are tried together. Severance, however, may not obviate this problem because even if the offenses are tried separately, the state may be permitted to introduce evidence of the severed offenses under the Similar Acts statute. R.C. 2945.59. In this event, the defendant would still face the risk that the jury would improperly infer criminal disposition. See *State v. Owens*, 51 Ohio App.2d 132, 366 N.E.2d 1367 (1975). It should be noted, how-

ever, that the joinder requirements of Rule 8(A) are broader than the admissibility requirements of the Similar Acts statute; in many cases evidence of other crimes would not be admissible in a separate trial. See *U.S. v. Foutz*, 540 F.2d 733 (4th Cir. 1976) (similar acts rule not applicable; severance required because inference of criminal disposition was prejudicial). For a discussion of the Similar Acts statute, see Giannelli, *Character Evidence*, 2 Public Defender Rptr. (March-April 1979).

Joinder of offenses is also prejudicial if the jury cumulates the evidence. "We all know that, if you can pile up a number of charges against a man, it is quite often the case that the jury will convict, where, if they were listening to the evidence on one charge only, they would find it wholly insufficient . . ." Maguire, *Proposed New Federal Rules of Criminal Procedure*, 23 Ore. L. Rev. 56, 58-59 (1943). *Gregory v. U.S.*, 369 F.2d 185 (D.C. Cir. 1966), exemplifies this point. In reversing the defendant's conviction, the court commented: "The point is that a severance should have been granted because . . . the joinder was prejudicial under Rule 14 Here there was not only the danger of the evidence with respect to the two robberies cumulating in the jurors' minds tending to prove the defendant guilty of each, but the evidence as to one of the robberies was so weak as to lead one to question its sufficiency to go to the jury. Thus its primary usefulness in this trial was to support the Government's case as to the robbery which resulted in the murder." *Id.* at 189. See also *U.S. v. Carter*, 475 F.2d 349 (D.C. Cir. 1973); *State v. Jonas*, 363 A.2d 1378, 1382 (Conn. 1975).

JOINDER AND SEVERANCE OF DEFENDANTS

Rule 8(B) provides:

Two or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Section 8(B) differs from section 8(A) in one important respect. Section (A) permits the joinder of offenses that "are of the same or similar character." A comparable provision relating to the joinder of defendants does not appear in section (B); defendants may be tried together only if they are alleged to have participated in the same acts or transactions or in the same course of criminal conduct. Moreover, sections (A) and (B) operate independently of each other. Thus, if X has committed one robbery by himself and a second robbery with Y, all charges cannot be tried at one time because Y did not participate in the first robbery. The prosecutor could try X alone for both robberies by joining offenses under section (A), in which case Y would be tried separately for the second robbery. Alternatively, X and Y could be tried jointly under section (B) for the second robbery, in which case X would be tried alone for the first robbery.

If codefendants are properly joined pursuant to Rule 8(B), severance may nevertheless be required under Rule 14, provided prejudice is established. The

meaning of the term prejudice in this context involves a number of different factors, some of which are examined in the following sections.

Confessions of Codefendants

The admission in a joint trial of a codefendant's confession which implicates the accused is an example of prejudice under Rule 14. Because the U.S. Supreme Court has decided several cases involving this issue on Sixth Amendment grounds, the nonconstitutional analysis of Rule 14 prejudice has been overshadowed. In *Delli Paoli v. U.S.*, 352 U.S. 232 (1957), the Court upheld the practice of introducing a codefendant's confession in a joint trial because the Court was willing to assume that the jury would follow the trial court's instruction to consider the confession only in deciding the guilt of the codefendant. By 1968 the Court was no longer willing to subscribe to this assumption. In *Bruton v. U.S.*, 391 U.S. 123 (1968), the Court wrote: "[T] here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial." *Id.* at 135-36. Once the Court concluded that there existed a "substantial risk that the jury, despite the cautionary instruction to the contrary, looked to the incriminating extrajudicial statements in determining the petitioner's guilt," it ruled that the defendant had been denied his Sixth Amendment right to confrontation because his right to cross-examine the codefendant about the statement had been foreclosed. Subsequently, the Court held *Bruton* applicable in state trials, *Roberts v. Russell*, 392 U.S. 293 (1968), and subject to the harmless error doctrine, *Harrington v. California*, 395 U.S. 250 (1969). Ohio cases discussing *Bruton* include *State v. Utsler*, 21 Ohio App.2d 167, 255 N.E.2d 861 (1970); *State v. Parsons*, 18 Ohio App.2d 123, 123 n. 1, 247 N.E.2d 482, 483 n.1 (1969).

The simplest way to avoid the *Bruton* problem is for the prosecutor to try the defendants separately or to refrain from offering the codefendant's statement in evidence. *Bruton*, however, can be avoided in several other ways. First, redaction or deletion of all references to the defendant which appear in the codefendant's statement would satisfy *Bruton*. While the *Bruton* majority acknowledged this possibility in a footnote, the acknowledgment could be characterized as unenthusiastic because in the same footnote the Court cited authorities "suggesting that deletions (redaction) from the confession are ineffective . . ." 391 U.S. at 134 n.10. In his dissent, Justice White elaborated on the pitfalls of this procedure: "Effective deletion will probably require not only omission of all direct and indirect inculpations of codefendants but also of any statement that could be employed against those defendants once their identity is otherwise established. Of course, the deletion must not be such that it will distort the statements to the substantial prejudice of either the declarant or the government." *Id.* at 143. The ABA Criminal Justice Standards also com-

ment on these problems: "There are, of course, instances in which such editing is not possible; the references to the codefendant may be so frequent or so closely interrelated with references to the maker's conduct that little would be left of the statement after editing." ABA Standards Relating to Joinder and Severance 38 (1968).

Second, the *Bruton* problem can be avoided, at least in some instances, if the codefendant testifies at trial. Under these circumstances the defendant would have the opportunity to cross-examine the codefendant on the accuracy of the out-of-court statement, thereby removing the confrontation issue. The Supreme Court took this position in *Nelson v. O'Neill*, 402 U.S. 622 (1971): "We conclude that where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments." *Id.* at 629-30. See also *State v. Doherty*, 56 Ohio App.2d 112, 381 N.E.2d 960 (1978). Eliminating the *Bruton* problem in this way, however, is of little help to the prosecutor at the time a motion to sever is made because the prosecutor has no way of knowing or discovering whether the codefendant will waive his Fifth Amendment right and testify at trial. Furthermore, the *Nelson* rationale would be inapplicable if both defendants were represented by the same attorney because cross-examination of the testifying codefendant would present a conflict of interest. See *Courtney v. U.S.*, 486 F.2d 1108 (9th Cir. 1973); *Holland v. Henderson*, 460 F.2d 978 (5th Cir. 1972); *Baker v. Wainwright*, 422 F.2d 145 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970).

Third, some courts have held that *Bruton* does not apply when both defendants have confessed, implicating each other. See *Ignacio v. Guam*, 413 F.2d 513 (9th Cir. 1969), *cert. denied*, 397 U.S. 943 (1970). The Supreme Court considered, but did not resolve, the issue in *Parker v. Randolph*, 99 S. Ct. 2132 (1979). The plurality opinion in *Parker* took the position that *Bruton* was not applicable to cases involving interlocking confessions. Justice Stevens, joined by two other Justices, dissented. The dissenting opinion criticized two assumptions which supported the plurality opinion. "First, [the plurality opinion] assumes that the jury's ability to disregard a codefendant's inadmissible and highly prejudicial confession is invariably increased by the existence of a corroborating statement by the defendant. Second, it assumes that all unchallenged confessions by a defendant are equally reliable." *Id.* at 2145. Justice Powell did not participate in the decision, and Justice Blackmun, who concurred in the judgment on harmless error grounds, disagreed with the plurality's position. Thus, there exists a 4-4 split on this issue with Justice Powell's position unknown. The Sixth Circuit, however, has taken the position that the *Bruton* rule applies to interlocking confessions. See *Hodges v. Rose*, 570 F.2d 643 (6th Cir. 1978); *accord*, *U.S. v. DiGilio*, 538 F.2d 972 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

Finally, the codefendant's confession in *Bruton* was clearly inadmissible against the accused under the hear-

say rule. If the codefendant's statement fell within the *coconspirator* exception to the hearsay rule, the *Bruton* problem would apparently be obviated; in a footnote in *Bruton*, the Court stated: "We emphasize that the hearsay statement inculcating petitioner was clearly inadmissible against him under traditional rules of evidence . . . There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." 391 U.S. at 128 n.3. In *Dutton v. Evans*, 400 U.S. 74 (1970), the Court examined the confrontation problems associated with the *coconspirator* exception. Although the Court upheld a liberal interpretation of the *coconspirator* exception in *Dutton*, the Court did *not* take the position that statements falling within that exception automatically pass constitutional muster. Instead the Court scrutinized the statement to determine whether it possessed sufficient "indicia of reliability." This is consistent with the Court's approach in other cases. See *California v. Green*, 399 U.S. 149, 155-56 (1970) ("[I]n deed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception."). Thus, the availability of the *coconspirator* exception may remove the *Bruton* issue, but it would not necessarily dispose of all confrontation issues.

State v. Rosen, 151 Ohio St. 339, 86 N.E.2d 24 (1949), decided by the Ohio Supreme Court prior to *Bruton*, should also be noted. In *Rosen*, the Court reversed a conviction because a codefendant's confession was admitted during a joint trial. The Court commented: "The fact must be recognized . . . that in many cases the admission of such ex parte statements creates impressions so adverse that they may not be eradicated from the minds of the members of the jury. The prejudicial matter should be stricken out or deleted before the confession is admitted in evidence." *Id.* at 342, 86 N.E.2d at 26. *Rosen* is significant because the Ohio Supreme Court did not rely on the confrontation clause as was the case in *Bruton*; instead, the Court was construing a joinder statute which was a forerunner of Rule 14. Thus, even if an appellate court should find that confrontation guarantees have not been violated, either because the codefendant testified or because interlocking confessions were introduced, the prejudicial impact of the statement on the minds of the jury may require reversal. See also *State v. Shafer*, 71 Ohio App. 1, 47 N.E.2d 669 (1942).

One other procedural point deserves attention. Rule 14 requires the court, in ruling on a motion for severance, to "order the prosecuting attorney to deliver to the court for inspection pursuant to Rule 16(B) (1) (a) any statements or confessions made by the defendants which the state intends to introduce in evidence at trial."

Antagonistic Defenses

"[I]t has long been the view that defendants joined for trial should be granted a severance whenever their defenses are antagonistic to each other." ABA Standards Relating to Joinder and Severance 41 (1968). The problem presented by antagonistic defenses is il-

illustrated by *DeLuna v. U.S.*, 308 F.2d 140 (5th Cir. 1962), in which two defendants were tried jointly for narcotics offenses. One of the defendants, Gomez, moved for severance prior to trial, but the motion was denied. Although the second defendant, DeLuna, did not testify at trial, Gomez took the stand and blamed DeLuna for the offense. In closing argument, Gomez' counsel commented that "at least one man was honest enough and had courage enough to take the stand and subject himself to cross-examination . . . You haven't heard a word from [DeLuna]." *Id.* at 143. This tactic apparently worked—Gomez was acquitted, DeLuna convicted. On appeal the Fifth Circuit reversed DeLuna's conviction. The court believed that Gomez' attorney had acted properly; "his attorneys should be free to draw all rational inferences from the failure of a codefendant 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." *Id.* Nevertheless, from DeLuna's perspective, the comments prejudiced the exercise of his Fifth Amendment right to remain silent. This conflict could have been avoided; the court noted, "for each of the defendants to see the face of Justice they must be tried separately." *Id.* at 155.

One Ohio appellate court has recognized this problem. In *State v. Parsons*, 18 Ohio App.2d 123, 247 N.E.2d 482 (1969), the court observed: "[I]t is easy to imagine further complications in a consolidated trial. For example, suppose one defendant takes the stand and the other does not. Is the failure to testify subject to comment by the lawyer for the testifying codefendant?" *Id.* at 124 n.2, 247 N.E.2d at 483 n.2. Although the court did not have to answer this question to decide that case, it did give some inkling as to how it would have decided the issue when it stated: "This court unanimously disapproves the consolidation as not consonant with good practice in criminal trials. . . ." *Id.* at 123, 247 N.E.2d at 483.

Other examples of reversals of joint trials because of antagonistic defenses include *People v. Hurst*, 396 Mich. 1, 9, 238 N.W.2d 6, 10 (1976) (joint trial improper because one defendant "would testify to exculpate herself and incriminate [the other]"); *Murray v. State*, 528 P.2d 739, 740 (Okla. Cr. 1974) ("Denial of a severance in the instant case resulted in pitting defendant against co-defendant."); *People v. Braune*, 363 Ill. 551, 557, 2 N.E.2d 839, 842 (1936) ("Any set of circumstances which is sufficient to deprive a defendant of a fair trial if tried jointly with another is sufficient to require a separate trial."). See also *Anno.*, 70 A.L.R. 1171, 1184-85 (1931).

Codefendant's Exculpatory Testimony

In some cases defendants have been prejudiced because a joint trial precluded them from calling codefendants who could have provided exculpatory evidence. The leading case is *U.S. v. Echeles*, 352 F.2d 892 (7th Cir. 1965), in which the defendant was charged with suborning perjury, impeding the administration of justice, and conspiracy. Echeles' codefendant had previously testified in another trial that Echeles was not involved in the events upon which the present charges were based. Echeles moved for a severance so

that the codefendant would testify in his behalf. The trial court denied the motion; the Seventh Circuit reversed. Under the circumstances of that case, the court found that (1) the trial court could have ordered the codefendant tried first, and (2) Echeles "should not be foreclosed of the possibility that [the codefendant] would testify in his behalf . . ." merely because the codefendant might claim his Fifth Amendment privilege even if separate trials were ordered. *Id.* at 898.

A mere allegation that the defendant contemplates calling a codefendant is insufficient. This has been the holding in the federal cases as well as in *State v. Perod*, 15 Ohio App.2d 115, 239 N.E.2d 100 (1968). Thus, counsel should disclose the exculpatory effect of the codefendant's anticipated testimony as well as the basis for believing why the codefendant would testify if severance is granted.

Support for the *Echeles* rule is found in *U.S. v. Martinez*, 486 F.2d 15 (5th Cir. 1973); *U.S. v. Shuford*, 454 F.2d 772 (4th Cir. 1971); *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970); *U.S. v. Gay*, 567 F.2d 916, 921 (9th Cir. 1978); *U.S. v. Gleason*, 259 F. Supp. 282 (S.D.N.Y. 1966).

Guilt by Association

In some cases the accumulation of evidence against one defendant may spill over on other defendants, resulting in a conviction of the latter even though the evidence against that defendant is weak or marginal—in short, guilt by association. In *United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966), the Second Circuit reversed a conviction on this ground, commenting that severance should have been granted "the moment it appeared that [the defendant] was likely to be prejudiced by the accumulation of evidence of wrongdoing by his codefendant." *Id.* at 756 (citing Fed. R. Crim. P. 14).

Kelly was followed in *U.S. v. Mardian*, 546 F.2d 973 (D.C. Cir. 1976). Mardian, one of the Watergate defendants, was tried along with Haldeman, Ehrlichman and Mitchell. His alleged participation in the Watergate coverup was minor compared to that of the more well-known codefendants. On appeal, the D.C. Circuit reversed because Mardian's motion to sever was not granted during trial. The court commented: "Particularly where there is a great disparity in the weight of the evidence, strongly establishing the guilt of some defendants, the danger persists that guilt will improperly 'rub off' on the others." *Id.* at 977.

Complexity

Where the number of charges and defendants is so numerous that the jury will be incapable of distinguishing the evidence and applying the law to each defendant separately, a severance should be granted. This problem is illustrated by *U.S. v. Moreton*, 25 F.R.D. 262 (W.D.N.Y. 1960), in which the trial court granted a severance, stating: "The complex involvement of the various defendants and the multiplicity of charges contained in the indictment would render it difficult, if not impossible, for the court to adequately charge a jury as to the applicable law with respect to each defendant and for the jury to apply that law intelligently

in reaching verdicts on the many charges involved." *Id.* at 263. For an Ohio case which reversed a defendant's conviction on this ground, see *City of Cincinnati v. Reichman*, 27 Ohio App.2d 125, 272 N.E.2d 904 (1971).

Capital Offenses

In contrast to its federal counterpart, Ohio Rule 14 contains a provision specifically covering severance in capital cases: "When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately, unless the court orders the defendants to be tried jointly, upon application by the prosecuting attorney or one or more of the defendants, and for good cause shown." In effect, this provision presumes prejudice in joint trials of capital offenses. This provision follows R.C. 2945.20 and thus, cases interpreting that provision are still persuasive authority. The burden of establishing good cause for a joint trial in a capital case rests on the prosecutor. See *State v. Abbott*, 152 Ohio St. 228, 89 N.E.2d 147 (1949); *State v. Fields*, 29 Ohio App.2d 154, 279 N.E.2d (1971).

In establishing good cause, the Ohio Supreme Court has stated: "[G]ood cause must necessarily be some operative factor not present in every case of joint indictments of defendants in capital cases. For instance, the additional time and labor required of the state or court, or the expense to the state, made necessary by separate trials, cannot be assigned or considered as good cause." *State v. Abbott*, 152 Ohio St. 228, 236, 89 N.E.2d 147, 151 (1949). See also *State v. Dingedine*, 28 Ohio L. Abs. 685, 687-88, 33 N.E.2d 660, 662-63 (Ct. App.), *appeal dismissed*, 135 Ohio St. 251, 20 N.E.2d 6367 (1939) (crowded dockets insufficient to establish good cause.). Administrative and economic reasons for a joint trial were also rejected in *State v. Richardson*, 39 Ohio L. Abs. 608, 54 N.E.2d 160 (Ct. App. 1943). The court went on to hold, however, that joinder was proper under the circumstances of that case because it "enable[d] the jury to have a clearer insight into the testimony and enable[d] it to arrive more intelligently at a proper conclusion." *Id.* at 613, 54 N.E.2d at 162. See also *State v. Jenkins*, 76 Ohio App. 277, 64 N.E.2d 86, *appeal dismissed*, 144 Ohio St. 638, 60 N.E.2d 182 (1945). In *Gregory v. U.S.*, 369 F.2d 185 (D.C. Cir. 1966), however, the court observed: "It may be seriously questioned whether it is proper in any capital case to join for trial offenses occurring at different times and places. The danger arising from the cumulative effect of other offenses on the minds of the jurors is too great to tolerate in such cases." *Id.* at 189. Similarly, the danger of prejudice arising from a joinder of defendants may also be "too great to tolerate" in capital cases.

Failure to object to joinder in capital cases may constitute a waiver. See *State v. Williams*, 85 Ohio App. 236, 88 N.E.2d 20 (1947); *State v. Bohannon*, 64 Ohio App. 431, 28 N.E.2d 1010 (1940).

REFERENCES

ABA Standards Relating to Joinder and Severance (1968); 2 O. Schroeder & L. Katz, *Ohio Criminal Law* (1979) (Rules 8, 13 and 14); 9 G. Messerman, *Ohio*

Forms of Pleadings and Practice, Criminal Rules (1979) (Rules 8, 13 and 14); 1 C. Wright, *Federal Practice and Procedure* (1969) (Rules 8, 13, and 14); 8 Moore's *Federal Practice* (R. Cipes ed. 1979) (Rules 8, 13 and 14); Miller, *Misjoinder and Prejudicial Joinder of Offenses and Defendants*, in 1A *Criminal Defense Techniques* ch. 12 (S. Berstein ed. 1979); 2 Wharton's *Criminal Procedure* ch. 11 (12th ed. 1975).

RECENT DEVELOPMENTS

Prior Convictions of Government Witnesses

A prior conviction with which a prosecution witness might be impeached must be supplied to a criminal defendant upon request, according to the D.C. Circuit. The Court found that the "premises" of *Brady v. Maryland*, 393 U.S. 83 (1963), and *U.S. v. Agurs*, 427 U.S. 97 (1976), require the government to produce upon request evidence material to the outcome of the case. In light of the difficulty of showing how impeachment evidence may be material to the guilt or innocence of the particular defendant, the Court applied a *per se* rule dispensing with a showing of materiality in each case. The Court stated: "[T]he integrity of the criminal trial process requires uniformity of access to impeachable convictions of government witnesses when requested." *Lewis v. U.S.*, 25 Crim. L. Rptr. 2032 (D.C. Ct. App. 1979).

Stop and Frisk

The Eighth Circuit held that the random pedestrian stop of the defendant which turned up a concealed handgun was impermissible under the Fourth Amendment. The police officer had been ordered to intensify his evening patrol because of racially-motivated gang fights in the neighborhood during the day, and did so by means of "field interviews" of random pedestrians. During one such stop, the weapon was discovered. Citing *Delaware v. Prouse*, 99 S. Ct. 1391 (1979), and *Brown v. Texas*, 99 S. Ct. 2637 (1979), the Court held that "generalized racial unrest cannot obviate the requirement that law officers 'have a reasonable suspicion, based on objective facts, that the individual [seized] is involved in criminal activity.'" *U.S. v. Palmer*, 25 Crim. L. Rptr. 2455 (8th Cir. 1979).

Plea Negotiations

When plea negotiations in an assault case were unsuccessful, the defendant was reindicted for assault with intent to kill while armed. The D.C. Court of Appeals reversed the conviction, citing *North Carolina v. Pearce*, 395 U.S. 711 (1969), and *Blackledge v. Perry*, 417 U.S. 21 (1974), for the rule that due process forbids a defendant from being forced to waive his rights out of fear of a harsher penalty due to prosecutorial vindictiveness. The Court minimized the importance of *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), which had allowed the addition of a more serious charge upon the defendant's failure to plead guilty. *Washington v. U.S.*, 25 Cr. L. Rptr. 2499 (D.C. Ct. App. 1979).

Impoundment of Automobiles

The Court held that an automobile may not be im-

pounded by police when other alternatives, such as entrusting it to the driver's companion or locking it in a safe place, are available. The conviction had been based upon an inventory search of the impounded auto after the driver was stopped for drunk driving. The Court rejected prosecution arguments that the defendant's intoxication made him *per se* incompetent to entrust the auto to his sober passenger, since "it is the degree of the driver's intoxication that should be determinative of this issue." The State's failure affirmatively to show such incompetence invalidated the search. *Drinkard v. State*, 25 Cr. L. Rptr. 2477 (Tenn. Sup. Ct. 1979).

General Search

Pursuant to a warrant, F.B.I. agents entered and searched defendant's offices for stolen files and documents. The agents seized several hundred documents, far more than the 148 specifically described in the warrant. Many of the documents seized were admittedly "innocuous" and nearly half could "by no stretch of the imagination" be regarded as within the warrant's designated categories of documents to be seized. The Court found the mere return of non-incriminating items to be an inadequate remedy. Consequently, the Court held that the warrant was improperly executed and suppressed all seized evidence as the fruit of an impermissible general search. *In re Search Warrant (Church of Scientology)*, 25 Crim. L. Rptr. 2525 (U.S. Dist. Ct., D.C. 1979).

Improper Comment—Harmless Error

The Sixth Circuit discussed the requirements of the harmless error rule in the context of a prosecutor's comment on the defendant's failure to testify. According to the Court, several factors are relevant: the extent of the prosecutor's improper comments, the strength of the case against the defendant, the efficacy of corrective jury instructions, and the number of other errors at trial. Although the State had a strong case against the defendant, the evidence was not overwhelming nor undisputed. In light of other errors and the trial court's failure to give a curative instruction, the prosecutor's comment was deemed prejudicial error, and the defendant's conviction was reversed. *Eberhardt v. Bordenkircher*, 26 Crim. L. Rptr. 2036 (6th Cir. 1979).

Reporter's Notes

On First Amendment grounds, the Court denied the defendants' subpoena for materials gathered by a reporter for use in a book. The defendants claimed that the materials would yield information about two F.B.I. searches of their premises. Relying on the concurring opinion of Justice Powell in *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Court applied a balancing test to find the materials privileged: "the reporter is protected from the subpoena power of a criminal defendant unless the information is necessary to a fair hearing and there are no alternative avenues for access to the information in the reporter's possession." *U.S. v. Hubbard*, 26 Crim. L. Rptr. 2030 (U.S. Dist. Ct., D.C. 1979).

Telephonic Warrant

The Sixth Circuit held that a magistrate's failure to place under oath an FBI agent seeking a telephonic warrant prior to taking his testimony, rendered the warrant invalid. Although the agent was sworn at some point during the conversation, the Court held that such an oath cannot be considered "to relate back to the testimony already supplied." The strict reading of the rule was based upon the clear Congressional purpose "to impress on the telephone caller the solemnity of the proceeding in spite of the lack of formal appearance before a court." *U.S. v. Shorter*, 25 Crim. L. Rptr. 2356 (6th Cir. 1979).

Parental Consent to Search

The Court held that the warrantless search by police of the bedroom of a 17 year old youth violated his privilege against unreasonable search and seizure, although a parent had consented to the search. The decision was based strictly upon the State Constitution, but referred to U.S. Supreme Court language to support its holding. Noting the decreasing importance of parental consent in the areas of abortion and treatment of mental disorders, the Court stated, "it would be incongruous to conclude that parents, for good reason or no reason, may summarily waive their child's right to search and seizure protections." *In re Scott*, 25 Crim. L. Rptr. 1043 (Cal. Sup. Ct. 1979).

Impeachment Exception

Subsequent to his arrest for armed robbery, police elicited incriminating evidence from the defendant in violation of his *Miranda* rights. In a pretrial hearing the trial court ruled that the defendant's statement could be used to impeach him on cross-examination, even though his direct testimony did not refer to the statement. The First Circuit reversed the conviction, even though the trial court's ruling had been made in advance and the defendant consequently *never took the stand*. Said the Court, "A concrete issue existed at the time the ruling was made and, in our view, is no less present now because the immediate resolution of that issue caused [the defendant] not to testify." *U.S. v. Hickey*, 25 Crim. L. Rptr. 2178 (1st Cir. 1979).

Security Guard Interrogation

The New York Court of Appeals held that *Miranda* warnings must be given to a suspect being questioned by private store detectives under certain circumstances. The Court held that extensive police involvement in a suspect's arrest may create a custodial atmosphere, although the actual questioning is done by private security guards. In a case where police officers actively participated in the arrest, identifying themselves to the suspect as police officers and escorting the suspect to the interrogation room, *Miranda* warnings were necessary. *People v. Jones*, 25 Crim. L. Rptr. 2384 (N.Y. Ct. App. 1979).