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JOINDER & SEVERANCE OF OFFENSES
Paul C. Giannelli

This article discusses joinder and severance of offenses. An article examining joinder and severance of defendants was published in the last issue. See generally 2 Katz & Giannelli, Baldwin's Ohio Practice Criminal Law ch. 57 (1996).

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 (Cipes ed. 1993).

Criminal Rule 8(A) covers the joinder of offenses in one indictment, information, or complaint. Rule 13 governs the consolidation for trial of offenses where there is more than one charging instrument. Finally, Rule 14 governs severance of offenses. Joinder issues arise under two circumstances. The first arises when the defendant argues that the joinder of offenses does not satisfy the explicit language of Rule 8(A) — i.e., misjoinder. The second arises when joinder is proper under Rule 8(A) but is prejudicial to the defendant in some manner. The defendant would then invoke Rule 14, which allows the court to bifurcate the offenses into separate trials should circumstances warrant.

UNDERLYING POLICIES


"Joinder conserves judicial and prosecutorial time, lessens the not inconsiderable expenses of multiple trials, diminishes inconvenience to witnesses, and minimizes the possibility of incongruous results in successive trials before different juries." State v. Thomas, 61 Ohio St.2d 223, 225, 400 N.E.2d 401 (1980). See also State v. Torres, 66 Ohio St.2d 340, 421 N.E.2d 1288 (1981); State v. Dunkins, 10 Ohio App.3d 72, 460 N.E.2d 688 (1983).

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 harassing 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.

Joinder can, however, also be prejudicial to defendants. Evidence of guilt of one offense may lead a jury to convict on a joined offense, which might have resulted in acquittal had there been separate trials.

JOINDER OF OFFENSES: RULE 8(A)

Rule 8(A) provides that two or more offenses may be charged together in one indictment, information, or complaint if the offenses (1) are of the same or similar character, (2) are based on the same act or transaction, (3) are based on two or more acts or transactions constituting parts of a common scheme or plan, or (4) are part of a course of criminal conduct. See State v. Hamblin, 37 Ohio St.3d 153, 524 N.E.2d 476 (1988), cert. denied, 488 U.S. 975 (1988).

Moreover, felonies and misdemeanors may be joined in one charging instrument. See State v. Hammer, 82 Ohio App.3d 663, 612 N.E.2d 1300 (1992); Becker v. State, 39 Ohio App. 496, 177 N.E. 605 (1930).

Examples of offenses that may properly be joined include charges of:

(1) aggravated burglary with a different case involving aggravated murder and aggravated burglary, State v. Franklin, 62 Ohio St.3d 118, 580 N.E.2d 1 (1991), cert. denied, 504 U.S. 960 (1992);

(2) breaking & entering and larceny, Carter v. Maxwell,
177 Ohio St. 35, 201 N.E.2d 705 (1964);

(3) forgery and uttering a forged instrument, State v. Atkinson, 4 Ohio St.2d 19, 211 N.E.2d 665 (1965);
(4) aggravated burglary and theft, State v. Durham, 49 Ohio App.2d 231, 233, 360 N.E.2d 743 (1976) (both offenses based on the same act or transaction);
(5) armed robbery stemming from separate and distinct incidents, State v. Mills, 62 Ohio St.3d 357, 582 N.E.2d 972 (1992), cert. denied, 505 U.S. 1227 (1992); and

The Ohio Supreme Court in State v. Lott, 51 Ohio St.3d 160, 555 N.E.2d 293 (1990), cert. denied, 498 U.S. 1017 (1990), upheld the joinder of 1983 aggravated burglary and petty theft charges with 1986 aggravated murder, robbery, burglary, arson, and kidnapping charges involving the same victim and house.

Limitations

While Criminal Rule 8(A) appears by its broad language to permit joinder of a wide range of offenses, courts have established limits on the nature of crimes that may be joined. For example, in Ohio, offenses connected only in the "discovery" of their commission may not be joined. In State v. Atkinson, 4 Ohio St.2d 19, 211 N.E.2d 665 (1965), the indictment contained counts of (1) forging a check, (2) uttering a forged instrument, and (3) carrying a concealed weapon. The weapon had been found during a search for the forged documents, and the Ohio Supreme Court held that the concealed weapon charge was improperly joined since its only relationship with the forgery charges was their common discovery. Some federal decisions reach the opposite result. While the federal counterpart to Criminal Rule 8(A) is nearly identical, a federal court has found that the discovery nexus for joinder, which Ohio has rejected, is a proper justification for joinder. In United States v. Pietras, 501 F.2d 182 (8th Cir. 1974), cert. denied, 419 U.S. 1071 (1974), an unregistered gun was discovered in a search of a getaway van used for a robbery and kidnapping. Although the gun was not used in those activities, the Eighth Circuit upheld the joinder of the gun charge. See also United States v. Park, 531 F.2d 754 (5th Cir. 1976) (finding drugs and gun in a search was a sufficient nexus).

MULTIPLE INDICTMENTS & COMPLAINTS: RULE 13

Criminal Rule 13 governs joinder where there is more than one charging instrument. Here, again, the law favors joinder for policy reasons. There are times that the defendant may want to consolidate charges for one trial. 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.

At other times, however, a defendant may not want unrelated offenses joined for trial. In State v. Clemens, 98 Ohio App.3d 797, 649 N.E.2d 912 (1994), the defendant was indicted for burglary and on a later date for aggravated robbery with a firearms specification. The court of appeals ruled that the defendant was denied a fair trial when the trial court denied a defense motion objecting to the joinder of those charges where the offenses occurred at different times and locations, involved different victims, different witnesses, and different evidence.

Multiple Charges for One Offense

Occasionally, a prosecutor may attempt to charge a defendant for one offense in multiple indictments or in multiple counts in the same indictment. Under Criminal Rule 14, the court may require the prosecutor to elect which indictment to proceed upon where the offenses charged arise out of a single act. But election is not required under Criminal Rule 13 if the offenses could properly have been joined in a single indictment or complaint.

While this appears clear, some statutes may not specify whether they cover one criminal offense or more than one. For example, in State v. Trocodaro, 40 Ohio App.2d 50, 317 N.E.2d 418 (1973), the defendant was charged under the same statute in separate indictments for felony murder and premeditated murder arising out of the same act. The court found that election was not required because the two offenses are separate and distinct under the "same evidence" test even though the offenses are defined in the same statute. "Murder committed in the perpetration of a robbery and murder committed with deliberate and premeditated malice are not one and the same offense, even though the victim is one and the same person." Id. at 52 (quoting State v. Ferguson, 175 Ohio St. 390, 394, 195 N.E.2d 794 (1964)).

Also, in Reed v. Maxwell, 176 Ohio St. 356, 199 N.E.2d 737 (1964), cert. denied, 379 U.S. 866 (1964), the Supreme Court held that robbery and rape committed on the same victim within a short span of time are separate and distinct crimes and may properly be charged as such in separate indictments or counts.

SEVERANCE: RULE 14

If offenses are properly joined under Rule 8(A), the defendant may nonetheless seek a severance pursuant to Rule 14. Where it appears that either the defendant or the state will be prejudiced by joinder of offenses, Rule 14 provides that "the court shall order an election or separate trial of counts . . . or provide such other relief as justice requires."

In Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964), the court of appeals outlined how a defendant might 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 confused 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.

Similarly, the United States Supreme Court in McElroy v. United States, 164 U.S. 76, 80 (1896), commented:
[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.

**Prejudice**

The burden is on the party seeking severance to demonstrate prejudice. State v. Richey, 64 Ohio St.3d 353, 595 N.E.2d 915 (1992), cert. denied, 507 U.S. 989 (1993). "The burden of demonstrating prejudice is a difficult one, and the ruling of the trial judge will rarely be disturbed on review. The defendant must show something more than the fact that a separate trial might offer him a better chance of acquittal." State v. Henderson, No. 963, 964, 965 (11th Dist. Ct. App., Geauga, 7-23-82) (citing Spencer v. Texas, 385 U.S. 554 (1967)).

The Ohio Supreme Court in State v. Torres, 66 Ohio St.2d 340, 343, 421 N.E.2d 1288 (1981), adopted a three-part test which must be met to show error on the part of the trial court in refusing to sever charges. Part one states that "[a] defendant claiming error in the trial court's refusal to allow separate trials under multiple charges under Criminal Rule 14 has the burden of affirmatively showing that his rights were prejudiced." Part two requires that the defendant furnish "the trial court with sufficient information so that it can weigh considerations favoring joinder against the defendant's right to a fair trial." Part three requires that "he must demonstrate that the court abused its discretion in refusing to separate the charges for trial." A reviewing court will reverse the trial court's decision only on a showing of abuse of discretion which "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." See State v. Adams, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

A defendant demonstrated prejudice in a aggravated murder case where the trial court refused to sever a charge of abuse of a corpse. Although the victim was the same, the crimes occurred four days apart. The court of appeals found that the prosecution did not overcome defendant's showing of prejudice because the videotape that proved the lesser offense would not have been admissible in a separate trial for aggravated murder. State v. Van Sickle, 90 Ohio App.3d 301, 629 N.E.2d 39 (1993) (any limited probative value that videotape had was outweighed by prejudice resulting from its gruesome depiction of body burned beyond recognition).

It is not error for a court to refuse to separate offenses arising out of the same conduct where the defendant has demanded a jury trial for the more serious offense and has not for the less serious offenses. State v. Hammer, 82 Ohio App.3d 663, 612 N.E.2d 1300 (1992).

**Federal Rule**

The joinder and severance rules found in the Federal Rules 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. In State v. Durham, 49 Ohio App.2d 231, 233, 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." 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."

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. As one court has noted: "While the federal courts have discretion in granting severance, our rule provides that if prejudice is shown 'the court shall order' severance." State v. Owens, 51 Ohio App.2d 132, 145, 366 N.E.2d 1367, 1375 (1975).

The decision to make Rule 14 mandatory rather than permissive 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 (Cipes ed 1979) ("Rule 14 is available, but such availability tends to be more theoretical than real."); 1 Wright, Federal Practice and Procedure 305 (1969) ("Given the evidence of the 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 this is just or fair."). Federal authorities, therefore, cannot be used in an unthinking fashion; the Ohio Rule was designed to overrule some of these authorities.

**SEPARATE DEFENSES**

Prejudice under Rule 14 may arise, as illustrated by Cross v. United States, 335 F.2d 987, 989 (D.C. Cir. 1964), where the accused has separate defenses. Cross was charged with two counts of robbery. In a joint indictment, Cross was charged in count I with robbery of a church rectory on February 23, 1962 and in count II with robbery of a tourist home on May 2, 1962. Prior to trial, the defendant moved to sever the two offenses so that he could testify on one count only. His testimony on count II was convincing—that he was a victim and not a cohort of the armed robbers who entered the tourist home behind him. His testimony on count I was evasive and unconvincing. The denial of his motion to sever 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.

To prevail on this ground, however, the defendant must make a convincing showing. The defendant must produce sufficient information regarding the nature of the testimony he wishes to give in the one case and the reasons for not wishing to testify in the other to satisfy the court that the claim of prejudice is genuine. State v. Roberts, 62 Ohio St.2d 170, 405 N.E.2d 247 (1980), cert. denied, 449 U.S. 879 (1980). A showing that a defendant would prefer to testify on one count but not on the other count does not demonstrate that joinder was prejudicial. State v. Grunden, 65 Ohio App.3d 777, 585 N.E.2d 487 (1989).
CUMULATION OF EVIDENCE

Defendants seeking severance of charges often argue that trying the charges together will encourage cumulation of evidence by the jury. That is, a jury may not be able to distinguish the evidence for each particular charge and will tend to apply or accumulate evidence from one count to another count. "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."


Gregory v. United States, 369 F.2d 185, 189 (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."


The Ohio Supreme Court addressed this issue in State v. Torres, 66 Ohio St.2d 340, 343, 421 N.E.2d 1288 (1981), where the defendant was tried on two separate indictments of selling drugs. The Court found that the evidence as to each charge was uncomplicated but noted, "Joinder may be prejudicial when the offenses are unrelated and the evidence as to each is very weak." Where the evidence relative to the various charges is simple, distinct, and uncomplicated, however, the jury is believed capable of segregating the proof on each charge and obeying trial court instructions. Thus, any effects of a spill-over between the offenses are insubstantial, and any prejudice harmless. State v. Roberts, 62 Ohio St.2d 170, 405 N.E.2d 247 (1980), cert. denied, 449 U.S. 879 (1980).

CHARACTER & BAD ACTS

Joinder of offenses may have a negative impact on the jurors' feelings about the defendant. "Improper joinder may not only confuse a jury but may create an unfavorable impression in their minds as to an appellant's character before any evidence has been admitted as to his guilt or innocence." State v. Minneker, 27 Ohio St.2d 155, 157-58, 271 N.E.2d 821 (1971). For example, where a particularly heinous or disgusting crime is joined with an offense of an entirely different and less offensive character, the prosecutor's opening statement alone might predispose the jurors against defendant because of the more heinous charge and lead them to find guilt on the unconnected charge.

Moreover, the possibility that the jury will convict because the defendant possesses a criminal disposition is always a risk. 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, 400-02, 358 N.E.2d 623 (1976), vacated in part, 438 U.S. 910 (1976); State v. Cochrane, 151 Ohio St. 128, 84 N.E.2d 742 (1949). Even if character evidence is not introduced, the jury may nonetheless infer a bad character or criminal disposition because multiple offenses are tried together.

This risk is especially troublesome when Rule 8(A) joinder is based on crimes "of the same or similar character" that are not part of a single scheme or plan. Here, the justifications for joinder — "avoiding duplicitous, time consuming trials in which the same factual and legal issues must be litigated" — are not applicable. 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 impaneling 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 ruling on a motion to sever offenses 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).

Evidence Rule 404(B)

Severance, however, may not obviate this problem because even if the offenses are tried separately, the severed offenses may be admissible under Evidence Rule 404(B). 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). Note, however, that the joinder requirements of Rule 8(A) are broader than the admissibility requirements of Rule 404.

See 1 Giannelli & Snyder, Baldwin's Ohio Practice Evidence § 404.16 (1996).

Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964), is a leading case on this issue. Drew was convicted of robbery and attempted robbery. The robbery occurred at a High's Diary store on July 27, 1962. The perpetrator was a male with sunglasses who said, "This is a holdup." When the clerk hesitated, the robber brandished a gun. The attempt occurred on August 13 at another High's Diary store. The perpetrator was a same-race male wearing sunglasses. He told the clerk, "Give me the money." The clerk responded by saying "come and get it." The perpetrator repeated the demand several times and then said, "You are not going to give it." The clerk said, "No." When a customer entered the store, the perpetrator fled. Drew was arrested within 25 minutes and identified. The Court concluded that these offenses would not be admissible as "other crimes" evidence because they were not sufficiently similar. Moreover, the two incidents were confused. The witness responses showed confusion as to which crime counsel referred to and the prosecutor "lumped the two together" during summation.

The Ohio Supreme Court has addressed this issue on several occasions. In these cases, admissibility under the Evidence Rule 404(B) is first determined:

"[T]he Wilson and Jackson crimes share a similar modus operandi with the murder. In each case, Waddy entered a woman's apartment at night; he bound the victim's wrists behind her back and tied her ankles; he used a knife; he called each victim a 'bitch'; he took the victim's car or car keys; and he stole or demanded bank cards or credit cards. The crimes oc-


See also State v. Coleman, 37 Ohio St.3d 286, 292, 525 J.E.2d 792 (1988) (“[S]imilarities in the crimes indicate there is strong likelihood that the offender in the solved crime also committed the unsolved crime.”), cert. denied, 488 U.S. 900 (1988).

MOTION TO SEVER

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 operable only in the case of a proper joinder under Rule 8. If the joinder is improper (misjoinder), then severance is automatic and prejudice need not be shown. Leading 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 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.”). See also 8 Moore’s Federal Practice 8-14 (Cipes ed. 1993) (“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.”); United States 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, 233, 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 prosecution 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.” 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 offenses, 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). Both motions, however, must be made before trial. Motions not made prior to trial are waived under Rule 12(G).

Renewal at Trial

It is critical, however, that a motion, when denied, be renewed at trial to preserve the right to appeal. For example, in State v. Owens, 51 Ohio App.2d 132, 146, 366 N.E.2d 1367 (1975), the defendant appealed the denial of his pretrial motion to sever, but the motion “was not renewed either after the state rested or at the conclusion of all of the evidence. When not renewed, it is waived.” 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 United States Supreme Court in Shaffer v. United States, 362 U.S. 511, 516 (1960), spoke of the trial judge’s “continuing duty at all stages of the trial to grant a severance if prejudice does appear.” 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. 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 Motion

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 suffice. Two pre-Rules cases addressed this issue. In State v. Perod, 15 Ohio App.2d 115, 122, 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.” In State v. Fields, 29 Ohio App.2d 154, 158, 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.”

Appeals

If the defendant has preserved the right to appeal by renewing the motion for severance or election at trial, the proper means of raising the issue after trial is on appeal and not in habeas corpus. Braxton v. Maxwell, 1 Ohio St.2d 134, 136, 205 N.E.2d 397 (1965).

DUPLICITY

Criminal Rule 8(A) prohibits the misjoinder of offenses — the unauthorized charging of unrelated offenses in an indictment. Joinder also encompasses the more difficult problem of duplicity — alleging more than one distinct offense within a single count of an indictment or complaint. “The test of duplicity is whether proof of one [offense] would tend to establish guilt of the other.” State v. Peters, 112 Ohio St.2d 249, 260, 147 N.E.2d 81 (1924). But, duplicity is not fatal to an indictment. Rather than dismiss the indictment, the court should order that the duplicitous counts be separated.

Alternate Means

The Ohio Supreme Court has held that it is not duplicitous to charge in a single count alternative methods of committing a crime. In State v. Daniels, 169 Ohio St. 87, 157 N.E.2d 736 (1959), the defendant was charged with rape under a statute that defined rape of either a daughter or sister, or a child under twelve. The indictment charged rape of a daughter and, alternatively, rape of a child under twelve. The Court found no repugnancy between these charges because finding one did not necessarily preclude finding the other: “This court has recognized that, where a single offense may be committed in any one of two or more different ways, a count is not duplicitous which charges the commission of the offense conjunctively in two ways, provided there
is no repugnancy between the ways charged.” Id. at 103 (citing Hale v. State, 58 Ohio St. 676, 51 N.E. 154 (1898)).

Similarly, an indictment or count may contain specifications that do not necessarily lead to a single theory or motive. In State v. Hancock, 48 Ohio St.2d 147, 149, 358 N.E.2d 273 (1976), vacated in part, 438 U.S. 911 (1978), the Supreme Court construed an indictment charging the defendant with aggravated murder in which the three specifications presented differing theories — murder to escape detection, murder as part of a purposeful course of conduct, and murder while fleeing an aggravated robbery. In upholding the indictment, the Court was “not persuaded that three specifications of aggravation must be mutually exclusive. A consistent theory of an offense can encompass mixed motives.”

ALLIED OFFENSES OF SIMILAR IMPORT
R.C. 2941.25 provides that where the offenses with which the defendant is charged are allied offenses of similar import, “the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.” Ohio law allows the state to charge a defendant with two allied offenses, but convict on only one. The prosecution may introduce evidence as to both offenses and is not required to elect one of the two and to proceed to trial only on that charge. State v. Ryan, 17 Ohio App.3d 150, 478 N.E.2d 257 (1984).

Conversely, if the acts constitute offenses of dissimilar import or result in the same or similar offenses committed at different times or with separate animus, the defendant may be tried and convicted on each count. The statute is meant to prevent “shotgun” charges. The difficulty in applying the provision lies in construing the phrase “allied offenses of similar import.”

In State v. Brown, 7 Ohio App.3d 113, 117, 454 N.E.2d 596 (1982), the court of appeals stated the test as follows: "If (1) the state relies upon the same conduct to support both offenses, (2) ... the offenses and their elements correspond to such a degree that commission of one of the offenses ... will result in commission of the other, ... and (3) ... the commission of both offenses was motivated by the same purpose," the offenses are allied offenses of similar import. According to the court, if the acts complained of are allied offenses of similar import, the defendant may still be convicted of both if the offenses were “committed separately or with a separate animus as to each.” Id. at 116.

In Brown, the defendant burned an infant for whom he was babysitting. The infant later died of the burns, and subsequently the defendant was convicted and sentenced under both the child endangering statute and the involuntary manslaughter statute. The court concluded that proof of the greater offense required proof of the lesser, and thus the state relied on the same conduct to prove both offenses. There was no evidence of a separate purpose as to each offense. Therefore, the defendant had been improperly convicted of allied offenses of similar import.

MULTICIPICITY & DOUBLE JEOPARDY
Multiplicity is the opposite of duplicity; it is the charging of a single crime in multiple counts. Rule 8(A) specifically excludes multiplicity (where the offense is stated in several counts of the indictment). Several courts have held that multiplicitious charges may raise double jeopardy issues. For example, in State v. Stratton, 5 Ohio App.3d 228, 230, 451 N.E.2d 520 (1982), the court of appeals wrote: “If an indict-