JOINDER AND SEVERANCE

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I. Introduction.

This Chapter discusses joinder and severance of offenses and defendants. The North Carolina Defender Manual, Ch. 6, Joinder and Severance (2d ed. 2013), and the North Carolina Prosecutors' Trial Manual, Joinder, Severance, and *Bruton* Issues, 115-36 (5th ed. 2012), are comprehensive resources on these subjects. I gratefully acknowledge the incorporation in part of excerpts from these publications.

II. Joinder and Severance of Offenses.

A. Standard for Joinder of Offenses.

The key question in determining whether joinder is appropriate is whether there is a transactional connection, or a factual nexus, among the charged offenses. G.S. 15A-926(a) provides that offenses--felonies, misdemeanors, or both--may be joined for trial if they are based on

1. "the same act or transaction," or
2. "a series of acts or transactions connected together or constituting parts of a single scheme or plan."

Offenses that meet one of these two criteria are called joinable offenses. The law favors trying joinable offenses in a single trial. *See* G.S. 15A-926(c)(1) (defendant's timely motion to join factually related offenses for which he or she has been indicted or charged must be granted unless doing so would defeat the ends of justice); State v. Nelson, 298 N.C. 573, 586 (1979) ("[P]ublic policy strongly compels [joinder] as the rule rather than the exception"); State v.

Manning, 139 N.C. App. 454, 459 (2000) (public policy favors consolidation of offenses because it expedites administration of justice, reduces congestion, and lessens burden on jurors and witnesses), *aff'd per curiam*, 353 N.C. 449 (2001).

Offenses that are not "joinable" under G.S. 15A-926 should be tried separately. *See* State v. Silva, 304 N.C. 122, 126 (1981) (if charges joined for trial did not possess transactional connection, then joinder is improper as a matter of law). Even joinable offenses may be severed for trial if joinder would impair the defendant's ability to present a defense. See Sections II.B.1. and II.C.2.

Joinder is "addressed to the discretion of the trial court and, absent a showing of abuse of discretion, its ruling will not be disturbed on appeal." State v. Avery, 302 N.C. 517, 524 (1981).

1. Factors When Deciding Sufficient Nexus. In deciding whether offenses have a sufficient factual nexus to be joined for trial, courts have considered such factors as:

- temporal proximity;
- geographical proximity;
- similarities among victims;
- whether the same evidence or witnesses will be used to prove both offenses;
- whether the offenses are similar in type or circumstance;
- whether the defendant had a similar motive to commit both offenses; and
- whether a similar modus operandi was used in committing both offenses.

See generally State v. Bracey, 303 N.C. 112, 118 (1981) (on motion for joinder, courts consider similarity in time, place, motive, victims, and circumstance); State v. Evans, 99 N.C. App. 88, 94 (1990) (joinder of two burglaries of different apartments in same complex several days apart not abuse of discretion when modus operandi, time, place, and motive all similar).

2. Mutually Exclusive Offenses. Even when offenses are mutually exclusive and a defendant cannot be convicted of both, *see generally,* State v. Mumford, 364 N.C. 394, 400 (2010) (defining mutually exclusive verdicts), the defendant may be indicted for and tried jointly for both offenses. However, if joinder of the offenses would unduly confuse the issues, severance may be appropriate, as discussed in the following section. If joinder is allowed and the evidence supports both charges, the jury must be instructed to select and convict the defendant on only one of the mutually exclusive charges. *See* State v. Melvin, 364 N.C. 589, 593 (2010) (trial court erred in failing to instruct the jury that it could convict the defendant of either first-degree murder or accessory after the fact to murder, but not both); State v. Speckman, 326 N.C. 576, 578-79 (1990) (defendant could be tried but not convicted for both embezzlement and obtaining property by false pretenses); State v. Jewell, 104 N.C. App. 350, 353-54 (1991) (holding that accessory after the fact to murder is a joinable offense with aiding and abetting murder even though defendant

could not have been convicted of both), *aff'd per curiam*, 331 N.C. 379 (1992). *Cf.* State v. Johnson, 208 N.C. App. 443, 449 (2010) (felony entering into dwelling and discharging a firearm into an occupied dwelling inflicting serious bodily injury were, in the circumstances of the case, offenses that occurred in succession rather than mutually exclusive ones).

B. Standard for Severance of Offenses.

1. Pretrial Motion. When a severance motion is made before trial, it must be granted whenever the trial court determines that doing so is "necessary to promote a fair determination of the defendant's guilt or innocence of each offense." G.S. 15A-927(b)(1).

2. Motion Made during Trial. When a severance motion is made during trial, it must be granted whenever the trial court determines that doing so is "necessary to achieve a fair determination of the defendant's guilt or innocence of each offense." G.S. 15A-927(b)(2). For these motions, the trial court "must consider whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense." *Id*.

C. Factors in Determining Whether Joinder Would Hinder or Deprive Defendant's Ability to Defend Against Charges. In ruling on a motion to join offenses, the trial judge must consider whether the defendant can receive a fair hearing on more than one charge at the same trial; "if [joinder] hinders or deprives the accused of his ability to present his defense, the charges should not be [joined]." State v. Silva, 304 N.C. 122, 126 (1981) (so stating, and although defendant made pretrial motion for severance of offenses, he waived his right to severance by failing to renew motion at close of all the evidence; see G.S. 15A-927(a)(2)).

Sometimes joinder may result in the receipt of otherwise inadmissible evidence. *See, e.g.*, State v. Williams, 113 N.C. App. 686, 692 (1994) (the trial court properly severed a seat belt violation charge from a DWI trial when, under G.S. 20-135.2A, evidence of a seat belt violation was inadmissible in a trial of DWI case (a result that is not affected by subsequent amendment to seat belt statute)).

One common example of the potential receipt of otherwise inadmissible evidence is when the State seeks to join a charge of possession of a firearm by a felon with other charges. The possession charge requires the State to prove a prior felony conviction as an element of the offense, and the evidence of the defendant's prior criminal history might not otherwise be admissible. However, at least two cases have declined to find that joinder of such charges is error. *See* State v. Cromartie, 177 N.C. App. 73, 77-78 (2006) (joinder of charges of possession of a firearm by a felon and assault with a deadly weapon with intent to kill inflicting serious injury did not unjustly or prejudicially hinder the defendant's ability to defend himself or receive fair hearing); State v. Hardy, 67 N.C. App. 122, 125-26 (1984) (no prejudicial error in consolidating count of possession of a firearm by a felon with charge of larceny of firearm, although it was not clear from opinion that the defendant's prior criminal history would have been admissible in separate trial for larceny charge).

If a charge of possession of a firearm by a felon is joined with another charge, defense counsel may seek to limit the potential prejudice by offering to stipulate that the defendant has been convicted of a felony and requesting that the nature of the prior felony conviction not be allowed into evidence. North Carolina cases have not required the acceptance of such a stipulation, however. *Compare* Old Chief v. United States, 519 U.S. 172, 192 (1997) (under federal rules of evidence, stipulation satisfies prior conviction element of possession of firearm by a felon; in those circumstances the risk of prejudice of evidence of the nature of the conviction outweighs its probative value), *with* State v. Little, 191 N.C. App. 655, 661 (2008) (trial court did not err in allowing State to offer evidence about nature of prior felony conviction in lieu of defendant's stipulation to conviction). For an extensive discussion of *Old Chief* and the related North Carolina cases, see pages 5-6 in Jessica Smith, *Criminal Evidence: Rule 403* in this Benchbook.

Courts also have considered whether the defendant's ability to defend against the charges is hindered when the defendant has a separate defense against each charge. *Cf.* State v Huff, 325 N.C. 1, 24 (1989) (rejecting defendant's contention that joinder of two murders precluded him from presenting an insanity defense in one murder case), *vacated on other grounds*, 497 U.S. 1021 (1990).

Sometimes joinder of multiple offenses is prejudicial simply because of the volume and complexity of the evidence. *See* State v. Williams, 74 N.C. App. 695, 699 (1985) (joinder of thirteen different charges confused jury).

D. Illustrative Cases.

1. Cases in Which Joinder of Offenses Found to Be Proper.

State v. Williams, 355 N.C. 501, 531 (2002) (proper joinder of fourteen separate charges, including two counts of first-degree murder and two counts of first-degree rape involving seven victims and a fifteen month time span, when the victims were all prostitutes, African-Americans, and drug users or addicts; the defendant employed the same modus operandi in the assaults, using a knife or box cutter and strangling the victims leaving scratch marks; and all of the offenses took place within a one square mile radius).

State v. Chapman, 342 N.C. 330, 342 (1995) (joinder of two murder charges was proper despite a two month gap between the homicides because of similarity in the circumstances of the crimes). *See also* State v. Moses, 350 N.C. 741, 751 (1999) (similar ruling; murders two months apart).

State v. Hunt, 323 N.C. 407, 421 (1988) (when a second murder was committed to avoid detection for a first murder, a transactional connection supported joinder of offenses), *vacated on other grounds*, 494 U.S. 1022 (1990).

State v. Huff, 325 N.C. 1, 23 (1989) (the defendant killed his infant son and mother-in-law in same 24-hour period; joinder was proper because both killings were motivated by fear that the defendant's wife would leave

him and take custody of his son), *vacated on other grounds,* 497 U.S. 1021 (1990).

State v. Effler, 309 N.C. 742, 752 (1983) (a charge of first-degree sexual offense of the defendant's stepson on May 15 was properly joined with charges of first-degree rape and incest of his daughter on June 8; the offenses were part of single plan by the defendant to take sexual advantage of his children).

State v. Avery, 302 N.C. 517, 525 (1981) (assault on jailer, larceny of handgun, larceny of jailer's truck, and murder of police officer the following day were properly joined because all offenses were related to the defendant's escape from jail and desire to avoid recapture).

State v. Peterson, 205 N.C. App. 668, 673 (2010) (a charge of assault with a deadly weapon with intent to kill inflicting serious injury was properly joined with a charge of possession of a stolen firearm, when the firearm that was the basis of the stolen firearm charge was used in the assault; the evidence was not complicated and the defendant could not show prejudice from joinder).

State v. Guarascio, 205 N.C. App. 548, 553 (2010) (no error to join two misdemeanor charges of impersonating a law enforcement officer in April 2006 with five counts of felony forgery and five counts of misdemeanor impersonating an officer in March 2006 when the circumstances of the offenses were "strikingly similar").

State v. Anderson, 194 N.C. App. 292, 297 (2008) (twenty felony counts of exploitation of a minor were properly joined with the defendant's appeal of his misdemeanor peeping conviction; the defendant had a similar modus operandi with respect to the exploitation and peeping charges, using the same computer to view pictures of young women during the same time period).

State v. Simpson, 159 N.C. App. 435, 437 (2003) (two charges of obtaining property by false pretenses were properly joined when the defendant sold cameras to the same pawn shop dealer on two occasions within a ten day period and the cameras had been stolen at the same time from the same store), *aff'd per curiam*, 357 N.C. 652 (2003).

State v. Bullin, 150 N.C. App. 631, 636 (2002) (it was proper to join trafficking, conspiracy, and possession with intent to sell or deliver controlled substances charges when all charges stemmed from one general transaction).

State v. Floyd, 148 N.C. App. 290, 293 (2002) (it was proper to join armed robberies of check cashing businesses, robberies of individuals at gunpoint, robbery of a car at gunpoint, and larceny of a car from a parking lot when the charges stemmed from a two week crime spree).

State v. Breeze, 130 N.C. App. 344, 354 (1998) (twelve robbery charges arising out of ten incidents were properly joined for trial when the robberies committed by one man in same county over a seven week period and most of the victims were female).

State v. Hammond, 112 N.C. App. 454, 458 (1993) (although incidents of sexual abuse occurred over a ten month period, sexual offense and indecent liberties charges were properly joined when the charges involved same child victim and surrounding circumstances).

State v. Bruce, 90 N.C. App. 547, 552 (1988) (four sexual abuse charges involving the same victim were properly joined even though the events underlying one charge took place six months after the events underlying other charges; policy favors consolidation of cases involving the same child victim).

2. Cases in Which Joinder of Offenses Found to Be Improper.

State v. Weathers, 339 N.C. 441, 447 (1994) (error to join 1989 murder charge and 1991 willful failure to appear because offenses were not transactionally related).

State v. Corbett, 309 N.C. 382, 388 (1983) (error to join charges arising out of three separate assaults against different victims that occurred on different nights over a period of several weeks when there was no evidence that assaults were part of single scheme; the error however was harmless because evidence of the other assaults would have been admissible in separate trials to show identity).

State v. Perry, 142 N.C. App. 177, 181 (2001) (reversible error to join possession of stolen property and credit card fraud cases arising out of thefts from automobiles in Chapel Hill with robbery charges arising out of home invasions in Durham; both the nature of crimes different and accomplices were different).

State v. Bowen, 139 N.C. App. 18, 30 (2000) (error to join sexual offenses that occurred over twelve years against different victims and were not committed in a special way or place, and defendant did not have a single scheme or plan; however, the error was not prejudicial).

State v. Owens, 135 N.C. App. 456, 459 (1999) (improper to join sexual offenses by the defendant against his girlfriend's three minor daughters that occurred over seven years and were different; however, the defendant failed to articulate any resulting prejudice).

State v. Williams, 74 N.C. App. 695, 699 (1985) (prejudicial error to join thirteen different charges arising out of events that occurred on two different weekends three months apart; the sheer number of charges led to jury confusion and untrustworthy verdicts).

State v. Smith, 70 N.C. App. 293, 296 (1984) (the trial court properly denied the defendant's motion for joinder of a Scotland County burglary with Robeson County burglaries; joinder is not required simply because charges are of the same type).

State v. Wilson, 57 N.C. App. 444, 449 (1982) (error to join two charges of obtaining money by false pretenses when the victims were different and the charges arose from two different incidents that occurred almost three weeks apart; same type of crime not sufficient grounds to support joinder).

E. Statutory Right to Dismissal of Joinable Offenses under Certain Circumstances. G.S. 15A-926(c) provides that a defendant who has been tried for an offense may move to dismiss a later charge of any joinable offense, and this motion must be granted unless certain exceptions apply. *See also* G.S. 15A-926 Official Commentary (statute was intended to bar successive trials of offenses absent some reason for separate trials). For example, if a defendant is tried for felony breaking and entering, the defendant has a statutory right to dismissal of a later larceny charge that the prosecution could have joined with the earlier offense. North Carolina's statutory right to dismissal is broader than double jeopardy protections, because it bars subsequent prosecutions of related offenses, not just the same or lesser offenses. For the related constitutional issues of double jeopardy and collateral estoppel, see Robert Farb, *Double Jeopardy and Related Issues* in this Benchbook. There are a number of limits to this right, however. First, the statute applies only to charges brought after the first trial. It creates no right to dismiss joinable charges that were pending at the time of the first trial. G.S. 15A-926(c)(2)a., b. (no right to dismissal if the defendant fails to move to join charges thereby waiving the right to joinder, or if defendant makes such a motion for joinder and the motion is denied). Second, the right to dismissal of a successor charge does not apply if the defendant pled guilty or no contest to the previous charge. G.S. 15A-926(c)(3). Third, the court may deny a motion to dismiss if it finds that the prosecution did not have sufficient evidence to try the successor charge at the time of trial or that the ends of justice would be defeated by granting the motion. G.S. 15A-926(c)(2)c.

Case law has further delineated the right. In *State. v. Furr*, 292 N.C. 711 (1977), after the defendant's first trial for murder ended in a mistrial, he was charged with several counts of the related offense of solicitation to commit the murder. At the second trial, the solicitation charges were tried with the murder charge and he was convicted of all charges. Before the second trial, the defendant had moved to dismiss the solicitation charges under G.S. 15A-926(c), but the trial court denied the motion. The supreme court upheld the trial court's ruling, pointing out that there were no solicitation charges when the murder case was tried, and it noted that there was no evidence to indicate that the prosecution had held the solicitation charges in reserve pending the outcome of the murder trial. 292 N.C. at 724.

The court in the later case of *State v. Warren*, 313 N.C. 254 (1985), made clear that the joinder statute applies to successor charges that were not pending at the time of trial and would have been joinable had the State brought them. The Court specifically stated that it was qualifying *Furr* by providing that a defendant is entitled to a dismissal of joinable offenses only if the defendant meets the burden of showing the sole reason that the State withheld indictment on the

offenses was to circumvent the statutory joinder requirements. The defendant may show that the State had substantial evidence of the later charge at the time of the first trial or that the State's evidence at a second trial would be the same as at the first trial. *Id*. at 260. In *Warren,* the court found that the defendant failed to make such a showing and that there were valid reasons for the State's failure to seek an indictment charging larceny and burglary before the defendant was tried on a related murder charge. *See also* State v. Tew, 149 N.C. App. 456, 459 (2002) (relying on *Warren*, court found that the State did not circumvent statutory joinder requirements, and the trial court did not err in denying the defendant's motion to dismiss a later felony assault charge; the defendant had originally been convicted of attempted second-degree murder, and the North Carolina Supreme Court had vacated the conviction based on the rationale, not established at the time of the charge, that the offense of attempted second-degree murder did not exist).

III. Joinder and Severance of Defendants. Just as with joinder of offenses, there are two distinct determinations that the trial court must make in deciding whether to join or sever codefendants for trial. First, the court must determine whether the defendants are potentially joinable under G.S. 15A-926(b). Second, if the defendants are potentially joinable, then the court must decide whether joinder would deny any of the defendants a right to a fair trial; if a joint trial would do so, the court must sever the trials, as discussed in Section III.B., below.

For reasons of judicial economy, the law generally favors the joinder of defendants when they were engaged in the same criminal act. *See, e.g.*, State v. Nelson, 298 N.C. 573, 586 (1979) ("public policy strongly compels consolidation as the rule rather than the exception" when each defendant is sought to be held accountable for the same crime or crimes).

There is no bar to the successive trial of different defendants for the same crime; however, in some instances, the acquittal of one defendant may bar conviction of another. *Compare* State v. Suites, 109 N.C. App. 373, 378 (1993) (acquittal of named principal bars conviction of defendant as accessory before the fact), *with* State v. Reid, 335 N.C. 647, 657 (1994) (acquittal of named principal does not bar conviction of other principals based on aiding and abetting).

The joinder of defendants is more likely to be prejudicial than the joinder of offenses because of the possibility of antagonistic defenses and of issues concerning the admissibility of blame-shifting confessions, discussed in Section III.B.1. and III.B.3, below.

A. Standard for Joinder of Defendants. G.S. 15A-926(b) permits joinder of defendants for trial if:

- each defendant is alleged to be accountable for each offense—that is, each is charged with exactly the same crime or crimes;
- the defendants are charged with different offenses, but the offenses are part of a common scheme or plan;
- the defendants are charged with different offenses, but the offenses are part of the same act or transaction; or
- the defendants are charged with different offenses, but the offenses are so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

Applying the statute, cases hold that when defendants are charged with the same crimes as actors in concert, principals and accessories, or co-conspirators, the defendants may be joined for trial. *See* State v. Abraham, 338 N.C. 315, 350 (1994) (proper to join defendants charged with homicide and assault arising out of the same transaction); State v. Barnett, 307 N.C. 608, 619 (1983) (joinder was proper when all defendants were charged in same felony murder as actors in concert); State v. Harrington, 171 N.C. App. 17, 22 (2005) (joinder was proper when the defendants were charged with the same offenses and the evidence showed that they had a common scheme to distribute marijuana).

As noted above, the statute allows for joinder of defendants when the defendants are charged with different offenses if the offenses are part of a common scheme or plan; are part of the same act or transaction; or are so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others. In the following cases, the appellate courts have upheld the joinder of defendants for these reasons:

State v. Privette, 218 N.C. App. 459, 465 (2012) (joinder upheld when the defendant was convicted of possessing stolen property and a codefendant was convicted of possessing stolen property, extortion, and conspiracy to commit extortion; the defendant was not harmed by the admission of evidence pertaining to actions of the codefendant, and the evidence against the defendant was so strong that there was no reasonable possibility that a jury would have reached a different conclusion if cases had not been joined).

State v. Cinema Blue of Charlotte, Inc., 98 N.C. App. 628, 633 (1990) (joinder upheld when different defendants were charged with separate counts of disseminating obscenity but all acts were pursuant to the same conspiracy).

State v. Jenkins, 83 N.C. App. 616, 617 (1986) (joinder upheld when a husband and wife were charged with indecent liberties against children for whom they provided day care; the court found that the offenses—four counts against the wife and two against the husband—were part of common scheme or plan).

State v. Overton, 60 N.C. App. 1, 12 (1982) (joinder of seventeen defendants charged with drug conspiracy and different substantive offenses emerging from the conspiracy was not error; ruling was decided on a finding of a single conspiracy).

State v. Ervin, 38 N.C. App. 261, 265 (1978) (joinder of two defendants was not error although one defendant was charged with an additional weapons offense not charged against the other; the jury received limiting instruction that certain evidence was not admissible against one of the defendants and thus the jury could separate the evidence).

B. Standard for Severance of Defendants. G.S. 15A-927 governs the severance of defendants for trial. Even if defendants are charged with the same or related offenses, their trials should be severed if:

- the State intends to introduce an extrajudicial confession or admission of a codefendant that incriminates the moving defendant, and the State is unwilling or unable to delete all references to the moving defendant, G.S. 15A-927(c)(1);
- severance is necessary to "promote a fair determination of the guilt or innocence" of one or more of the defendants, G.S. 15A-927(c)(2); or
- severance is necessary to protect the defendant's right to a speedy trial, G.S. 15A- 927(c)(2).

The most common reason for severing codefendants' cases is when one codefendant makes an extrajudicial confession, incriminating the others, that is admissible against the declarant but not against the non-declarant codefendants. Other reasons for severance include when: (1) there are antagonistic defenses; (2) joinder would result in the admission of otherwise inadmissible evidence; (3) joinder would preclude the defendant from presenting exculpatory evidence; or (4) joinder would result in jury confusion. All of these reasons for severance are discussed below.

1. Blame-Shifting and Blame-Spreading Confessions. Any extrajudicial statement, such as a confession to law enforcement or to a lay witness, must meet two basic requirements to be admissible against a criminal defendant. One, it must satisfy the Confrontation Clause of the Sixth Amendment to the United States Constitution. Bruton v. United States, 391 U.S. 123 (1968); Crawford v. Washington, 541 U.S. 36 (2004). Two, it must satisfy North Carolina's hearsay and other evidence rules. For a comprehensive discussion of these issues, see the following three sections in this Bench Book: (1) Jessica Smith, *The Bruton Rule: Joint Trials & Codefendants' Confessions*, (2) Jessica Smith, *A Guide to Crawford and the Confrontation Clause*, and (3) Jessica Smith, *Criminal Evidence: Hearsay*.

A defendant may obtain a separate trial (in effect, a severance) under certain circumstances by objecting to the joinder for trial of charges against two or more defendants because an out-of-court statement of a codefendant refers to the defendant but is not admissible against him. G.S. 15A-927(c)(1). Upon the defendant's objection, the trial court must require the prosecutor to select one of the following courses: (a) a joint trial at which the statement is not admitted into evidence; or (b) a joint trial at which the statement is admitted into evidence only after all references to the defendant have been effectively deleted so that the statement will not prejudice the defendant; or (c) a separate trial of the objecting defendant. G.S. 15A-927(c)(1)a.-c.

2. Admission of Otherwise Inadmissible Evidence. Severance may be appropriate when the joinder of defendants for trial would result in the jury's exposure to prejudicial evidence that would not have been admitted in a separate trial. *Compare* State v. Wilson, 108 N.C. App. 575, 588 (1993) (severance was required when one defendant was charged with several crimes not charged against a codefendant; a new trial was awarded when the State presented the testimony—inadmissible against the codefendant—of eleven witnesses over two and a half days before testimony against the codefendant began, and limiting instructions were insufficient to dispel prejudice), *with* State v. Ellison, 213 N.C. App. 300, 312 (2011) (distinguishing *Wilson* and finding no error when trafficking

charges were joined against two defendants and the State introduced evidence of a codefendant's drug-related activities six years earlier; the defendant failed to show that he was prejudiced by evidence involving an incident unrelated to him and the court gave proper limiting instruction), *aff'd*, 366 N.C. 439 (2013).

3. **Antagonistic Defenses.** Severance may be required when two defendants have antagonistic defenses. Although there may be some discrepancy between the trial strategy and testimony among jointly-tried codefendants, the existence of antagonistic defenses does not automatically require severance. However, severance should be granted when codefendants' positions are so conflicting that a joint trial would be more of a contest between the defendants than between the codefendants and the State. *See* State v. Nelson, 298 N.C. 573, 586-88 (1979) (stating that joinder should not be permitted if severance is necessary for a fair determination of guilt but finding that each defendant's respective conflicting testimony was not of such magnitude when considered in the context of other evidence that the jury was likely to infer from that conflict alone that both were guilty); *accord* State v. Johnson, 164 N.C. App. 1, 10 (2004) (recognizing this principle but finding that defenses were not irreconcilable).

   A leading case on antagonistic defenses is *State v. Pickens*, 335 N.C. 717 (1994), in which the court held that the joinder of defendants Pickens and Arrington was error. Pickens, who wanted to testify, had struck a deal with the State in which the State agreed not to cross-examine the defendant about some prior convictions. Arrington refused, however, to accept the deal and wanted to fully cross-examine his alleged accomplice. As a result of Arrington's position, Pickens did not testify, which he would have been able to do in a separate trial and thus present evidence on his behalf. Also, Pickens wanted to present significant inculpatory evidence against Arrington, which the State conceded to be admissible but the trial court ruled inadmissible based on Arrington's objection. The court noted that the trial created the spectacle of the State's watching combat between the two defendants. Arrington also identified many instances of his proffered evidence being excluded based solely on Pickens' objection.

4. **Defendant Deprived of Exculpatory Evidence.** Prejudice sometimes results from the joinder of defendants for trial when one defendant may be deprived of the benefit of exculpatory evidence or testimony. *See* State v. Boykin, 307 N.C. 87, 91 (1982) (joinder of two brothers was error; joinder prevented one brother from testifying that the reason for his false confession was to protect his brother and prevented him from presenting evidence that his codefendant brother had confessed to the offense); State v. Alford, 289 N.C. 372, 387-88 (1976) (new trial granted when the State did not offer into evidence a codefendant's confession because it also exculpated the defendant, who could not call codefendant to testify at the codefendant's own trial). A remedy in situations like the one in *Alford* is severance followed by separate trials, with the codefendant's trial first, so that the defendant may be able to call the codefendant to testify at the defendant's trial. If the codefendant is tried second, he or she may be unwilling to testify at the defendant's earlier trial and risk self-incrimination.

To obtain severance on the basis that a codefendant may testify for the defendant at a separate trial, the defendant generally must present more than his or her own unsworn statement that a codefendant would do so. *See* State v. Paige, 316 N.C. 630, 641 (1986) (unsupported statement of counsel that a codefendant would testify for the defendant was insufficient to show that the defendant was deprived of opportunity to present defense; the court contrasted case to *Alford*, in which the defendant presented a signed, sworn statement of the codefendant confessing to offense and exculpating the defendant); State v. Distance, 163 N.C. App. 711, 715 (2004) (joinder did not deprive the defendant of a fair trial; the defendant's wife, an interested witness, claimed that a codefendant told her that if he had to make a statement or talk to the police, he would make sure that they knew the defendant was not involved; the defendant offered no other evidence to corroborate his claim that the codefendant would have testified for the defendant at a separate trial and, as in *Paige*, there was no sworn statement of the codefendant exculpating the defendant). A defendant could offer an affidavit or sworn statement about the proposed testimony that otherwise would be excluded in a joint trial.

5. Different Degrees of Culpability. A defendant may seek to avoid a trial with a codefendant perceived as more culpable or against whom the State will present more evidence. The defendant reasonably may fear being tarnished in the jury's eyes by his or her association with the codefendant. *See* State v. Barnes, 345 N.C. 184, 218 (1997) (court considers this argument but upholds joinder on facts of case); State v. Thobourne, 59 N.C. App. 584, 587 (1982) (court agrees that evidence against codefendant was "overwhelming" but upholds joinder, noting trial court's careful attention to limiting instructions).

Severance also may be appropriate when the codefendant committed additional offenses in which the defendant did not participate. *See* State v. Bellamy, 172 N.C. App. 649, 671 (2005) (a codefendant's sexual assault of the store manager during the course of a robbery was not a natural or probable result of the defendant's participation in the robbery, and the trial court erred in failing to dismiss the sexual assault against the defendant; joinder was not improper, however, because there was minimal conflict in positions taken by the defendants at trial).

6. Jury Confusion. In some situations a joint trial may be too complex or confusing for the jury to isolate the evidence applicable to a particular defendant. However, courts often have upheld the joinder of multiple defendants over this objection. *See, e.g.,* State v. Overton, 60 N.C. App. 1, 12 (1982) (joinder upheld of seventeen codefendants charged with drug offenses).

C. Limiting Instructions. If codefendants are tried jointly and the evidence against each is different, the defendants are entitled to limiting instructions parsing the evidence. *Cf.* State v. Paige, 316 N.C. 630, 641 (1986) (joinder upheld despite admission of evidence admissible against only one codefendant; the court relied on the trial court's limiting instructions). An example of a limiting instruction is: "Members of the jury, [*describe the evidence or statement*] is introduced solely as you might find it applies to the defendant [*give defendant's name*]. It has nothing to do with the defendant [*give other defendant's name*].

A limiting instruction, cannot always "cure" prejudice, such as when the State introduces copious evidence that is inadmissible against the defendant as part of its case against the codefendant. *Compare* State v. Wilson, 108 N.C. App. 575, 589 (1993) (so holding when State presented the testimony—inadmissible against the defendant—of eleven witnesses over two and one half days before testimony against the defendant began), *with* State v. Ellison, 213 N.C. App. 300, 314 (2011) (no error; scope and duration of testimony inadmissible against jointly tried defendant did not reach level of *Wilson* and court gave appropriate limiting instruction), *aff'd*, 366 N.C. 439 (2013).

D. Capital Sentencing. When two or more defendants are charged with a capital crime, the State may move to join the defendants for trial and sentencing. Special considerations apply when codefendants are sentenced together by a jury. The Eighth Amendment requires that capital sentencing be an individualized process that focuses on the unique character and record of the person being sentenced. *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The North Carolina Supreme Court has permitted the joinder of defendants for capital sentencing "with the caveat that there be individualized consideration given to each defendant's culpability." State v. Oliver, 309 N.C. 326, 366 (1983). *See also* State v. Golphin, 352 N.C. 364, 462 (2000) (defendant failed to show that he did not receive individualized consideration in capital sentencing hearing held jointly with his brother).

For summaries of cases involving joinder or severance of defendants at a capital trial or sentencing hearing, see JEFFREY B. WELTY, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK (3d ed. 2013).

IV. Miscellaneous Procedural and Motion Issues.

A. Form of Motions for Joinder or Severance of Offenses or Defendants. G.S. 15A-951(a) provides that a motion must be in writing unless made during a hearing or trial. *See* State v. Slade, 291 N.C. 275, 281 (1976) (prosecutor's motion for joinder made at beginning of trial is a motion made at trial and therefore an oral motion is permissible).

B. Time Limits for Motions; Waiver of Right to Make Motion.

1. Defense Motions. A defendant's motion for joinder of offenses or severance of offenses or defendants must be made (1) at or before arraignment or, (2) if arraignment is not requested, not later than 21 days from the date of the indictment. G.S. 15A-952(b)(6)d., e. However, a motion may be made before or at the close of the State's evidence if based on a ground not previously known. G.S. 15A-927(a)(1).

Any right to a severance is waived if a severance motion is not timely made. G.S. 15A-927(a)(1); *see* State v. Effler, 309 N.C. 742, 752

(1983) (court finds joinder of first-degree rape with first-degree sexual offense not compelling but upholds joinder, noting that defendant never moved for severance).

A defendant whose pretrial motion for severance is overruled may renew the motion on the same grounds before or at the close of all the evidence. G.S. 15A-927(a)(2). Any right to severance is waived by a failure to renew the motion. *Id.*; State v. Mitchell, 342 N.C. 797, 805 (1996) (citing statute); State v. McDonald, 163 N.C. App. 458, 464 (2004) (same).

If a defendant's motion for severance of offenses is granted during trial, a motion for mistrial must be granted. G.S. 15A-927(a)(4).

2. State's Motions. The time limits for defendants do not apply to the State. State v. Wilson, 57 N.C. App. 444, 447 (1982); State v. Street, 45 N.C. App. 1, 5 (1980). Of course, the State necessarily would need to make a motion to join offenses or defendants at some time before the trial begins. Any unfairness to the defendant's preparation for trial, including the State's provision of discovery to the defendant, by a last minute motion for joinder could be the basis to grant a continuance of the trial.

A prosecutor's motion for severance of offenses may be granted only before trial unless the motion is consented to by the defendant during trial. G.S. 15A-927(c)(2)b.

3. Court May Grant Relief from Time Limits. G.S. 15A-952(e) provides that the failure to timely file the motion constitutes a waiver of the motion. However, the statute permits a court to grant relief from any waiver (other than a motion to dismiss for improper venue). The statute does not set the standard to grant relief, so it is likely in the court's discretion.

C. Defense Motions for Joinder of Defendants Are Not Statutorily Authorized. There is no statutory authority for a defendant to move for the joinder of codefendants for trial. State v. Jeune, 332 N.C. 424, 434 (1992) (G.S. 15A-926(b)(2) does not support a defense motion to compel joinder of codefendants). Whether a trial court otherwise has the authority to do so based on a defendant's motion has not been decided by appellate case law.

D. Action on Court's Own Motion. The court may order a severance of offenses before trial or deny the joinder of defendants for trial on its own motion if the severance or denial of joinder could be obtained by a motion of the defendant or prosecutor. G.S. 15A-927(e). *See also* State v. Cottingham, 30 N.C. App. 67, 69 (1976) (the trial judge may direct that criminal cases be consolidated for trial when proper grounds for joinder exist and joinder will promote the ends of justice and facilitate the proper disposition of cases); State v. Poindexter, 68 N.C. App. 295, 298 (1984) (when grounds for joinder exist, such as existed in this case under G.S. 15A-926(b)(2), the court may order joinder on its own motion, citing *Cottingham*); State v. Thompson, 129 N.C. App. 13, 17 (1998) (no error under prior calendaring statute when the court joined calendared and non-calendared charges that were appropriate for joinder).

E. Procedure for *Bruton* Issues. The substantive issues involved with joint trials and codefendants' confessions are discussed in the Bench Book section, Jessica Smith, *The Bruton Rule: Joint Trials & Codefendants' Confessions*.

The statutory procedures involving *Bruton* provide that when a defendant objects to joinder of all charges against two or more defendants for trial because an out-of-court statement of a codefendant refers to the defendant but is not admissible against the defendant, the court must require the prosecutor to select one of the following courses:

- A joint trial at which the statement is not admitted into evidence; or
- A joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted so that the statement will not prejudice the defendant; or
- A separate trial of the objecting defendant.

G.S. 15A-927(c)(1).

V. Pleadings. Two or more offenses may be joined in one pleading (e.g., one indictment) for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. G.S. 15A-926(a). Each offense must be stated in a separate count (e.g., first-degree murder in one count and armed robbery in another count) as required by G.S. 15A-924.

Each defendant must be charged in a separate pleading. G.S. 15A-926(b)(1).

VI. Jury Instructions. There are no specific pattern jury instructions concerning joinder or severance issues. However, for an example of an instruction limiting the admission of evidence to one defendant in a multiple defendant trial, see Section III.C.

Pattern jury instructions involving multiple defendants that may be useful in multiple defendant trials include: (1) Multiple Defendants—One Defendant Pleads Guilty during Trial (N.C.P.I. Crim. 101.41); and (2) Multiple Defendants Charged With the Same Crime—Guilt Determined Separately (N.C.P.I. Crim. 101.42).