
6.2 Joinder and Severance of Defendants

A. Ethical Considerations

If more than one defendant is charged with an offense, counsel should decide whether a joint trial is advisable. Deciding whether to seek or challenge a joint trial requires assessing the respective trial postures of your client and all codefendants. Listed in the next section are some strategic considerations that may come into play.

A number of ethical considerations may also come into play when more than one defendant is charged with an offense. Most importantly, different defendants generally require separate counsel. There is often a conflict of interest when one attorney represents two defendants charged with the same crime because the clients' defenses may be or become antagonistic. Joint representation requires a written waiver of a conflict by both represented parties and is generally inadvisable. *See infra* Appendix 12-1, Dealing with Conflicts in Criminal Defense Representation (2d ed. 2013). (For similar reasons, defendants charged with the same crimes should not employ the same experts. Experts' testimony in favor of one defendant may be antagonistic as to other joined codefendants.)

While the decision whether to seek or oppose a joint trial is one that likely will be made after consulting with the codefendant (or his or her attorney), it is important to remember that by the time of trial, the codefendant may well end up being an adversary rather than an ally. Thus, counsel should be cautious about disclosing strategy or other information. Certain ethical constraints also apply to discussions with codefendants or their counsel. For example, counsel may not interview a represented party, including a codefendant, without the consent of the party's attorney. *See* N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT Rule 4.2 (2003) (communication with person represented by counsel); North Carolina State Bar Ethics Opinion RPC 93 (1990) (opinion states that attorney should not interview represented criminal client's codefendant without consent of codefendant's attorney). Counsel also may not disclose client confidences without the client's consent. *See* N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT Rule 1.6 (2003) (confidentiality of information).

Practice note: If codefendants and their attorneys want to work together to defend the charges despite the risks, a joint defense agreement may be advisable, under which the parties agree to share confidential information with one another. Such agreement should specify the goals, scope, and limits of the joint defense efforts, including when a party may withdraw from the agreement (such as when an unforeseen conflict of interest arises). The implications of any such agreement should be carefully considered by defense counsel and thoroughly explained to the defendant, who should consent to the agreement.

B. Strategic Considerations

Advantages of joinder of defendants for trial. In some situations it may benefit your client to be tried jointly with a codefendant.

- If the defendants share common witnesses and are employing a common defense strategy, a joint trial will minimize inconvenience to defense witnesses.
- Your client may want to be tried with a codefendant to highlight the codefendant's culpability for the charged offenses, notwithstanding the possibility of "guilt by association."
- A sympathetic codefendant's presence may benefit your client.
- A joint trial may be advantageous if the codefendant's statement contains exculpatory information as to your client *and* the statement must be introduced to make the case against the codefendant.
- If a codefendant has a stronger defense than your client (e.g., a stronger alibi) that does not inculpate your client, the association may benefit your client.
- The complexity of the evidence in a multi-defendant trial may make it more difficult for the prosecution to prove the case against any one defendant.

Advantages of severance of defendants for trial. Often a joint trial will prejudice your client.

- Codefendants may have antagonistic defenses.
- Your client may be tainted by "guilt by association."
- A non-testifying codefendant's statement may inculpate your client.
- A codefendant may decide to take the stand and testify on his or her own behalf and incriminate your client.
- In a joint trial, your client's statement may have to be altered or sanitized to redact references to a codefendant in a way that is prejudicial to your client or undermines your theory of defense.
- A joint trial may be too confusing for a fair determination of issues.
- A joint trial may serve to deprive your client of the exculpatory testimony of a codefendant if the codefendant chooses not to testify.
- If a codefendant is tried first, you may be able to get a preview of the testimony of potential witnesses and obtain a transcript of the trial.

C. Standard for Joinder of Defendants

Basic requirements. Just as in the case of the joinder of offenses, there are two distinct determinations that the 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 *infra* in § 6.2D, Standard for Severance of Defendants.

For reasons of judicial economy, the law generally favors the joinder of defendants where they were engaged in the same criminal act. *See, e.g.*, *State v. Paige*, 316 N.C. 630 (1986). With respect to the prosecution of multiple defendants (as opposed to the prosecution of multiple offenses against a single defendant), there is nothing akin to double jeopardy considerations. Generally, there is no bar to the successive trial of different defendants for the same crime. In some instances, however, the acquittal of one defendant may bar conviction of another. *Compare State v. Suites*, 109 N.C. App. 373 (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). *See also* 2 NORTH CAROLINA DEFENDER MANUAL § 34.7E (Inconsistent Verdicts) (2d ed. 2012).

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 regarding the admissibility of blame-shifting confessions, discussed in more detail below.

Statute governing 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.

Basis for joinder. Where 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 (1994) (joinder of defendants charged with homicide and assault arising out of same transaction); *State v. Barnett*, 307 N.C. 608 (1983) (joinder of defendants proper when all charged in same felony murder as actors in concert); *State v. Harrington*, 171 N.C. App. 17 (2005) (joinder proper where defendants were charged with same offenses and the evidence showed they had a common scheme to

distribute marijuana). Even where defendants are not charged with identical offenses, they may be joined if there is a transactional connection among the offenses. In the following cases, the appellate courts have upheld the joinder of defendants, even though they were charged with nonidentical offenses, on the basis of common scheme or plan, same act or transaction, or close connection in time, place, and occasion:

State v. Privette, 218 N.C. App. 459 (2012) (joinder upheld where defendant was convicted of possessing stolen property and codefendant was convicted of possessing stolen property, extortion, and conspiracy to commit extortion; defendant was not harmed by admission of evidence pertaining to actions of codefendant, and evidence against 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 (1990) (joinder upheld where different defendants were charged with separate counts of disseminating pornography but all acts were pursuant to same conspiracy)

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

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

State v. Ervin, 38 N.C. App. 261 (1978) (joinder of two defendants not error although one charged with additional weapons offense not charged against other; jury received limiting instructions and could separate evidence)

D. Standard for Severance of Defendants

Statute governing 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 needed 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 needed to protect the defendant's right to a speedy trial (G.S. 15A-927(c)(2)).

Basis for severance. Potentially joinable defendants should receive separate trials where a joint trial would impair any of the defendants' right to a fair determination of guilt or

innocence. The most common reason for severing codefendants' cases is where 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: antagonistic defenses; where joinder would result in the admission of otherwise inadmissible evidence; where joinder would preclude the defendant from presenting exculpatory evidence; or where joinder would result in jury confusion. Each reason for severance is discussed below.

E. Blame-Shifting and Blame-Spreading Confessions

Generally. Any extrajudicial statement, such as a confession to police 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, as interpreted in *Crawford v. Washington*, 541 U.S. 36 (2004). Two, it must satisfy North Carolina's hearsay and other evidence rules.

With respect to the defendant who made the out-of-court statement, admission of the statement is permissible under the Confrontation Clause because that provision assures a criminal defendant the right to cross-examine the witnesses against him or her and does not apply to the defendant's own statements. *See* Jessica Smith, *Crawford v. Washington: Confrontation One Year Later*, at 28 (UNC School of Government, Apr. 2005) (citing decisions rejecting argument that *Crawford* bars admission of defendant's own statements). The defendant's own statement also satisfies N.C. Rule of Evidence 801(d) as an admission of a party-opponent.

In contrast, any portion of an extrajudicial confession that names or blames an accomplice is generally inadmissible against the non-declarant accomplices. When made to the police, such statements ordinarily constitute "testimonial" statements and are barred by the Confrontation Clause unless the declarant testifies or an exception applies. *See Crawford*, 541 U.S. 36, 51; *Davis v. Washington*, 547 U.S. 813 (2006) (recognizing Confrontation Clause's broad application to statements to police). Also, blame-shifting confessions typically will not fall within the scope of a hearsay exception under North Carolina's evidence rules.[1] In light of these cases, counsel should always object to the admission of hearsay not only under the N.C. Rules of Evidence, but also under the Confrontation Clause and N.C. Constitution article I, section 23.

1. Blame-shifting or blame-spreading portions of a self-incriminating confession to the police will ordinarily be both testimonial under the Confrontation Clause and outside the scope of any hearsay exception. Thus, they will not fall within the scope of the statement against interest exception in Evidence Rule 804(b)(3). *See Lilly v. Virginia*, 527 U.S. 116, 133–34 nn.4–5 (1999) (in pre-*Crawford* case, court finds inadmissible blame-shifting confession by codefendant; expansive reading of "statement against penal interest" exception by commonwealth of Virginia was inconsistent with jurisprudence from around the country and was not "firmly rooted" under then-existing test for Confrontation Clause violations); *Williamson v. United States*, 512 U.S. 594 (1994) (under federal equivalent of Rule 804(b)(3), exception to hearsay rule allowing statements against penal interest applies only to portions of statement within whole that are individually self-incriminating); *see also Lee v. Illinois*, 476 U.S. 530 (1986) (blame-shifting confessions to police are presumptively unreliable). Confessions or admissions to lay witnesses are more likely to be nontestimonial, but they still must satisfy a North Carolina hearsay exception, such as the "excited utterance" exception in Rule 803(2) or the "co-conspirator's" exception in Rule 801(d)(E).

Relationship of *Crawford* and *Bruton*. The *Bruton* decision, discussed next, places restrictions on the joint trial of defendants if the State wishes to offer out-of-court statements of one of the defendants that incriminate another defendant and that are not independently admissible against the other defendant. *Crawford* does not appear to alter the basic *Bruton* principles except to the extent that it alters what is admissible under the Confrontation Clause. *See, e.g.*, *United States v. Ramos-Cardenas*, 524 F.3d 600, 609–10 (5th Cir. 2008) (per curiam) (analyzing *Bruton* requirements in light of *Crawford* standards on admissibility of codefendant's statements). If a statement of a jointly-tried codefendant is not testimonial, *Crawford* and therefore *Bruton* do not apply. *Bruton* issues continue to arise when police procure a codefendant's confession implicating the defendant, a situation in which the statement is usually testimonial. *See* Jessica Smith, *Crawford's Implications on the Bruton Rule*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 7, 2012). For a further discussion of this issue, see *infra* "Exceptions to *Bruton* requirements in light of *Crawford*" in this subsection E.

The *Bruton* decision. In *Bruton v. United States*, 391 U.S. 123 (1968), two defendants were tried jointly, one of whom had made an extrajudicial confession that incriminated both his codefendant and himself. Neither defendant testified for the State or on his own behalf. The trial court admitted the confession into evidence but gave a limiting instruction to the jury that it could only consider the confession as evidence against the declarant and not against the non-declarant defendant. The U.S. Supreme Court held that such a solution is unworkable, and where the State wishes to rely on an inculpatory statement of one defendant to make its case against that defendant, then that defendant's trial must be severed from any of the named and blamed codefendants. The North Carolina Supreme Court adopted the rule of *Bruton* in *State v. Fox*, 274 N.C. 277 (1968), and the *Bruton* rule is codified in G.S. 15A-927(c)(1).

G.S. 15A-927(c)(1) states that if a defendant objects to the joinder of two or more defendants because an out-of-court statement of a codefendant makes reference to the defendant but is not admissible against him or her, the court must require the prosecutor to choose among:

- a joint trial at which the statement is not admitted into evidence, or
- a joint trial at which a sanitized version of the statement is admitted with all reference to the moving defendant deleted so that the statement doesn't prejudice the defendant, or
- a separate trial for the objecting defendant.

Hearing on *Bruton* issue. Under G.S. 15A-927(c)(3), the prosecutor may be ordered to disclose, out of the presence of the jury, any statements made by codefendants that he or she intends to introduce at trial, if that information would assist the court in ruling on an objection to joinder of defendants for trial or a motion for severance of defendants. The prosecution has a broad obligation to disclose such statements to the defense before trial as part of its discovery obligations (*see supra* Chapter 4, Discovery (2d ed. 2013)), but a *Bruton* hearing may provide additional discovery opportunities.

Redactions. One solution permitted by G.S. 15A-927 is the redaction of any codefendants' statements to remove references to the non-declarant defendants. *See also Richardson v. Marsh*, 481 U.S. 200 (1987) (admission of non-testifying codefendant's statement did not violate defendant's rights under Confrontation Clause where the statement was redacted to eliminate not only defendant's name, but also any reference to her existence); *State v. Tirado*, 358 N.C. 551 (2004) (joinder was not error where the confession of codefendant was admitted into evidence but was redacted to eliminate references to codefendant); *State v. Brewington*, 352 N.C. 489 (2000) (same); *see also State v. Boozer*, 210 N.C. App. 371 (2011) (codefendant's extrajudicial confession, "I only hit that man twice," did not mention the defendant, so admission did not implicate defendant's constitutional rights or violate statutes or case law).

The U.S. Supreme Court and N.C. appellate courts have held that the redactions must eliminate *all reference* to non-declarant defendants. It is not enough that names are deleted, or pronouns are substituted for proper names, because the jury is certain to assume that the pronoun or substitution refers to the jointly tried defendants. *See Gray v. Maryland*, 523 U.S. 185 (1998) (court distinguishes *Richardson v. Marsh*, holding that *Bruton* prohibits use of redacted statement in which defendant's name is replaced by "deleted" or a blank; defendant's existence and identity still obvious in factual context of trial); *State v. Gonzalez*, 311 N.C. 80 (1984) (error to admit statement by one codefendant, "I didn't rob anyone, they did" where jury was sure to infer that "they" were the other codefendants); *State v. Roope*, 130 N.C. App. 356 (1998) (following *Gray* and finding that court erred by replacing defendant's name with the word "blank"; error was harmless because there was overwhelming evidence of the defendant's guilt other than the improperly redacted confession). *See generally* Jessica Smith, The *Bruton* Rule: Joint Trials & Codefendants' Confessions, N.C. SUPERIOR COURT JUDGES' BENCHBOOK (May 2012).

If you represent the defendant who made the confession, make sure that the redactions do not damage your client's defense. *See Tirado*, 358 N.C. at 565 (recognizing potential for prejudice by redactions); *State v. Littlejohn*, 340 N.C. 750 (1995) (defendant who had made confession argued that redaction made confession incoherent and less credible and increased likelihood that jury would find confessing defendant to be an actor in concert); *see also* N.C. R. EVID. 106 (where one portion of writing or recorded statement is admitted into evidence, opposing party is entitled to proffer the remaining portion). Also, if three or more defendants are joined in a case, a redaction that protects one joined defendant may hurt the others. For instance, if Defendant A confesses that he and Defendant B committed a crime, Defendant C would want the unredacted version of A's confession admitted into evidence and probably could not be tried together with Defendant B.

Interlocking confessions. Even if your client also has made a confession, the rule of *Bruton* applies—a codefendant's confession still is inadmissible against him or her. *See Cruz v. New York*, 481 U.S. 186 (1987) (rule of *Bruton* not obviated by interlocking confessions). However, in this situation you may have a prejudice problem. If your client's confession is virtually identical to the codefendant's, or so damaging that admission of the codefendant's confession is not going to affect the outcome of the trial,

then it will be harder to convince a court to try the defendants separately. *See State v. Hayes*, 314 N.C. 460 (1985) (admission of interlocking confessions harmless error in view of "overwhelming" evidence against defendants).

Exceptions to *Bruton* requirements in light of *Crawford*. The statutory requirements of G.S. 15A-927(c)(1) and of *Bruton* do *not* apply if the codefendant testifies on his or her own behalf and is subject to cross-examination. *See Nelson v. O'Neil*, 402 U.S. 622 (1971) (sufficient opportunity for confrontation where codefendant takes stand and repudiates statement that implicated defendant); *State v. Evans*, 346 N.C. 221 (1997) (codefendant testified on his own behalf at joint trial; no error in admitting prior confession because principles of *Bruton* apply only to extrajudicial statement of codefendant who is unavailable for cross-examination); *State v. Escoto*, 162 N.C. App. 419 (2004) (same).

Also, if the out-of-court statement is admissible against the nondeclarant, then the rule of *Bruton* and G.S. 15A-927(c)(1) does not apply and joinder may not be prejudicial. *See State v. Fink*, 92 N.C. App. 523 (1989) (statements made in furtherance of conspiracy held independently admissible; *Bruton* and G.S. 15A-927(c)(1) inapplicable).

The above decisions, decided before *Crawford*, do not conflict with the principle that *Bruton* applies if the out-of-court statements are testimonial and inadmissible under the Confrontation Clause. In the circumstances of the above cases, admission of the out-of-court statements would not have violated the Confrontation Clause as interpreted in *Crawford*. However, other pre-*Crawford* cases, which allowed admission of a codefendant's statement because it satisfied a hearsay exception and was reliable, are no longer good law because they are based on an interpretation of the Confrontation Clause superseded by *Crawford*. *See, e.g., State v. Porter*, 303 N.C. 680, 695–97 (1981). To be admissible, an out-of-court statement must satisfy Confrontation Clause principles, as interpreted by the U.S. Supreme Court in *Crawford* and subsequent decisions, as well as North Carolina's rules on hearsay. For more information on *Crawford* and cases interpreting it, see Jessica Smith, *A Guide to Crawford and the Confrontation Clause*, N.C. SUPERIOR COURT JUDGES' BENCHBOOK (July 2018).

F. Other Grounds for Severance of Defendants

Receipt of otherwise inadmissible evidence. Severance is also appropriate when 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. *See State v. Wilson*, 108 N.C. App. 575 (1993) (one defendant was charged with several additional crimes not charged against codefendant; new trial awarded where 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); *United States v. Chinchic*, 655 F.2d 547, 551 (4th Cir. 1981) (error to join defendants charged with separate burglaries where State failed to show transactional connection between burglaries; 4th Circuit rule is that misjoinder of defendants is reversible error "unless substantially all of the evidence adduced at the joint trial would

be admissible at separate trials"). *Compare State v. Ellison*, 213 N.C. App. 300 (2011) (distinguishing *Wilson* and finding no error where trafficking charges were joined against two defendants and State introduced evidence of codefendant's drug-related activities six years earlier; defendant failed to show he was prejudiced by evidence involving an incident unrelated to him and court gave proper limiting instruction), *aff'd on other grounds*, 366 N.C. 439 (2013).

Antagonistic defenses. Severance also may be required where two defendants have antagonistic defenses. Some discrepancy between the trial strategy, testimony, and defense posture of jointly tried codefendants is inevitable and does not necessarily rise to the level of an antagonistic defense. *See United States v. Chavez*, 894 F.3d 593 (4th Cir. 2018) (defenses not antagonistic where one defendant claimed to be unaware of the plan to commit murder; the codefendants' defenses also focused on a lack of proof as to who knew about the murders and which defendants participated; court found that defenses were "perfectly consistent" with one another). Further, the existence of antagonistic defenses does not automatically require severance. *See generally Zafiro v. United States*, 506 U.S. 534 (1993) (under federal criminal procedure rules, antagonistic defenses require severance only if joint trial would compromise defendant's trial rights or prevent jury from reliably determining guilt or innocence). 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 either the codefendants and the State. *See State v. Nelson*, 298 N.C. 573 (1979); *accord State v. Johnson*, 164 N.C. App. 1 (2004) (recognizing principle but finding that defenses were not irreconcilable).

The leading case on antagonistic defenses is *State v. Pickens*, 335 N.C. 717 (1994). In *Pickens*, joinder of the defendants was held to be error. The N.C. Supreme Court noted that one defendant who wanted to testify had struck a deal with the State whereby the State agreed not to cross-examine the defendant on some prior offenses. The codefendant, however, refused to accept the deal and wanted to fully cross-examine his alleged accomplice, thereby preventing the first defendant from testifying. Also, one defendant wanted to present some inculpatory evidence against the other, which the State believed to be admissible but the trial court ruled inadmissible based on the objection of the codefendant. The court noted that the trial created the spectacle of the State standing by as a witness to the combat between the two defendants. *See also* Wade R. Habeeb, Annotation, *Antagonistic Defenses as Ground for Separate Trials of Codefendants in Criminal Case*, 82 A.L.R.3d 245 (1978).

Defendant deprived of exculpatory evidence. A particularly lethal type of prejudice sometimes resulting from the joinder of codefendants for trial is that a defendant may be deprived of the benefit of exculpatory evidence or testimony. *See State v. Boykin*, 307 N.C. 87 (1982) (joinder of two brothers 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 (1976) (new trial granted where State did not offer into evidence codefendant's confession because it also exculpated the defendant, who could not call codefendant to testify at codefendant's own trial), *vacated sub nom. on other*

grounds, *Carter v. North Carolina*, 429 U.S. 809 (1976). The desired remedy in situations like the one in *Alford* is severance followed by separate trials, with the codefendant's trial first, so that the defendant can then 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.

Case law establishes that to obtain severance on the basis that a codefendant may testify for your client at a separate trial, counsel 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 (1986) (unsupported statement of counsel that codefendant would testify for defendant insufficient to show that defendant was deprived of opportunity to present defense; court contrasts case to *Alford*, in which defendant presented signed, sworn statement of codefendant confessing to offense and exculpating defendant); *State v. Distance*, 163 N.C. App. 711 (2004) (joinder did not deprive defendant of a fair trial; defendant's wife, an interested witness, claimed that 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; defendant offered no other evidence to corroborate claim that codefendant would have testified for defendant at a separate trial and, as in *Paige*, there was no sworn statement of the codefendant exculpating defendant). If possible, the defendant should offer an affidavit or sworn statement as to the proposed testimony that would be excluded in a joint trial as well as its materiality.

Different degrees of culpability. A defendant may seek to avoid 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 (1997) (court considers this argument but upholds joinder on facts of case); *State v. Thobourne*, 59 N.C. App. 584 (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 where the codefendant committed additional offenses in which the defendant did not participate. *See State v. Bellamy*, 172 N.C. App. 649 (2005) (codefendant's sexual assault of the store manager during the course of a robbery was not a natural or probable result of other defendant's participation in the robbery and the trial court erred in failing to dismiss the sexual assault against the other defendant; joinder was not improper, however, because conflict in positions taken by defendants at trial was minimal); *see also United States v. Chavez*, 894 F.3d 593 (4th Cir. 2018) (considering but rejecting this argument; severance not required based solely on different murder charges for different codefendants where all defendants were part of a conspiracy, all were charged with a murder in furtherance of the conspiracy, and all had similar degrees of culpability).

Jury confusion. In some situations a joint trial would be too complex or confusing for the jury to isolate the evidence applicable to your client. Although the resultant prejudice may seem intuitively obvious, courts often have upheld the joinder of multiple defendants. *See State v. Overton*, 60 N.C. App. 1 (1982) (joinder upheld of seventeen

codefendants charged with drug offenses). In an appropriate situation, counsel should still advance this argument.

G. Effect of Limiting Instructions

If codefendants are tried jointly and the evidence against each is different, the defendants are entitled to limiting instructions parsing the evidence. *See Blumenthal v. United States*, 332 U.S. 539 (1947) (joint trial requires clear rulings on admissibility of evidence, limitations on relevance of evidence as to specific defendant, and careful jury instructions). The defendant who seeks severance should be prepared to meet the argument that limiting instructions would serve to diffuse any prejudice resulting from a joint trial. *See State v. Paige*, 316 N.C. 630 (1986) (joinder upheld despite admission of evidence admissible against only one codefendant; court relies on trial court's limiting instructions). Counsel should argue that limiting instructions would not sufficiently counteract prejudice. *See State v. Wilson*, 108 N.C. App. 575 (1993) (new trial awarded to jointly-tried defendant; court holds that trial court's limiting instructions not enough to dispel prejudice). A limiting instruction is less likely to "cure" prejudice where the State introduces copious evidence that is inadmissible against the defendant as part of its case against the codefendant. *Compare Wilson*, 108 N.C. App. at 589 (so holding where State presented the testimony—inadmissible against the defendant—of eleven witnesses over two and a half days before testimony against the defendant began), *with State v. Ellison*, 213 N.C. App. 300 (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 on other grounds*, 366 N.C. 439 (2013).

H. Standard of Review on Appeal

Our courts have often held that the decision to join defendants is committed to the sound discretion of the trial court and its ruling will not be reversed absent an abuse of discretion. *See, e.g.*, *State v. Hayes*, 314 N.C. 460 (1985). However, where an objection to joinder is based on an alleged Confrontation Clause violation under *Bruton*, then the error is of constitutional dimension and the abuse of discretion standard of review should not apply. Instead, the State should carry the burden of showing that the improper joinder of the defendants was harmless beyond a reasonable doubt.

I. 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 (1976). The N.C. 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 (2000) (defendant failed to show that he did not receive individualized consideration in capital sentencing hearing held jointly with his brother).

Even if two defendants are tried together at the guilt phase of a capital trial, you may have grounds to sever at the sentencing phase if joint sentencing would impair your client's ability to make his or her own individualized case for life imprisonment as opposed to a sentence of death. Especially when defendants are related or are long time friends and some of the mitigation witnesses know or knew both defendants, joint sentencing proceedings can be very damaging. Witnesses may be hesitant in fully testifying for your client for fear of damaging the codefendant's chances of receiving a life sentence, or character witnesses for the codefendant may place blame on your client. Rarely, if ever, is it advantageous to a capital defendant to be sentenced jointly with a codefendant.