

6.3 Procedures for Joinder or Severance

- A. Motions for Joinder (Opposing Severance)
 - B. Motions for Severance (Opposing Joinder)
 - C. Court's Authority to Order Joinder or Severance
-

6.3 Procedures for Joinder or Severance

Motions for joinder or severance should address statutory and constitutional requirements as well as the issue of prejudice. Even if you are in accord with the State's motion to join or sever charges or defendants, for purposes of preserving the record it is important that you make your own motion or at least make a record that you concur in the State's motion. Details on the timing and scope of particular joinder and severance motions are discussed below.

Practice note: To preserve your objection, you should renew all motions to sever either charges or defendants at the close of the State's evidence and again at the close of all the evidence.

A. Motions for Joinder (Opposing Severance)

Defense motions for joinder of offenses. A defense motion for joinder is subject to the time limits of G.S. 15A-952(b) and thus should be made at or before arraignment or, if arraignment is waived, within 21 days of the return of the indictment. *See State v. Wilson*, 57 N.C. App. 444 (1982) (time limits of G.S. 15A-952(b) only apply to defense motions for joinder); *State v. Street*, 45 N.C. App. 1 (1980) (same). Under G.S. 15A-952(e), the court may waive this time limit, so defense counsel should not hesitate to raise the motion when needed (although the better practice is to file the motion within the statutory timeline).

Waiver of right to joinder of offenses. A defendant has a statutory right to joinder of joinable offenses. However, the right to joinder is waived in the absence of a motion. *See* G.S. 15A-926(c)(1). Inform the court, ideally by written notice, if you want to rely on the State's motion, as the right is not automatically protected by the State's motion for joinder. *See State v. Jones*, 50 N.C. App. 263 (1981) (defendant must inform court if he or she wishes to rely on the State's motion for joinder).

Defense motions for joinder of defendants. A defendant cannot compel joinder of defendants for trial. *See State v. Jeune*, 332 N.C. 424 (1992) (statute provides no basis for defendant to compel joinder of codefendants). However, the statute does not forbid such a motion, and in an appropriate case counsel may want to make the motion.

State's motion for joinder of offenses or defendants. The time limits of G.S. 15A-952, which requires that motions for joinder be made by arraignment, are not applicable to

prosecution joinder motions. However, the calendaring statute, G.S. 7A-49.4(e), which requires the prosecutor to publish the calendar at least ten days before trial, provides protection against untimely attempts by the State to join offenses or defendants. *See also State v. Cates*, 140 N.C. App. 548 (2000) (violation of requirement in G.S. 15A-943 of one-week period between defendant's arraignment and trial constitutes automatic reversible error). Also, offenses may not be joined after the start of trial, as that would deprive the defendant of the right to plead to all offenses and to evaluate potential jurors in terms of all offenses. *See State v. Dunston*, 256 N.C. 203 (1962).

Written and oral motions. Under G.S. 15A-951(a), a pretrial motion for joinder of either offenses or defendants should be in writing. The statute does not apply, however, to motions made during a hearing or trial. Thus, if the court waives the time limits of G.S. 15A-952 and permits a defendant to move for joinder after arraignment, the motion need not be in writing. *See generally State v. Slade*, 291 N.C. 275 (1976) (prosecutor's motion for joinder made orally just before trial acceptable). Although G.S. 15A-926(b)(2) refers to the "written motion of the prosecutor" for joinder of defendants, courts have permitted joinder of codefendants on oral motion in the absence of prejudice. *See State v. Pointdexter*, 68 N.C. App. 295 (1984) (permitting oral motion for joinder of defendants); *State v. Cottingham*, 30 N.C. App. 67 (1976) (same).

B. Motions for Severance (Opposing Joinder)

Timing of severance motions. A defense motion for severance of offenses generally should be made before trial, but it may be made before or at the close of the State's evidence if based on a ground that was discovered during trial. *See* G.S. 15A-927(a). If a defense motion for severance of offenses is granted during trial, the court also must grant a defense motion for mistrial. *See* G.S. 15A-927(a)(4).

Although typically made before trial, a motion for severance of defendants also may be made during trial if severance becomes necessary for the fair determination of guilt or innocence of any defendant. *See* G.S. 15A-927(c)(2)b. Also, if the State fails to prove at trial the allegations on which joinder of the defendants was based, the defendants may move for severance at the close of the State's evidence or at the close of all evidence. *See* G.S. 15A-927(d). Again, if a motion for severance is granted during trial, a mistrial is the appropriate remedy. Unless the defendant consents, a motion by the prosecutor for severance may only be granted before trial. *See* G.S. 15A-927(a)(3).

Waiver. A defendant who opposes joinder of offenses or defendants should always object to the State's motion to join and make a motion for severance. The right to severance is waived in the absence of a motion. *See* G.S. 15A-927(a)(1); *State v. Effler*, 309 N.C. 742 (1983) (court finds joinder of rape charge with sex offense "by no means compelling," but upholds joinder, noting that defendant never moved for severance).

Renewal of motion to sever. If a pretrial defense motion for severance of offenses or defendants is denied, the defendant must *renew* the motion at the close of all the evidence or the right to appellate review of the issue is waived. *See* G.S. 15A-927(a)(2); *State v.*

Mitchell, 342 N.C. 797 (1996) (right to severance lost where defendant failed to renew severance motion at close of all the evidence); *State v. Albert*, 312 N.C. 567 (1985) (applying statutory requirement for renewal of motion to sever offenses to motion to sever defendants); *State v. Silva*, 304 N.C. 122 (1981) (court finds waiver where defendant failed to renew motion); *State v. McDonald*, 163 N.C. App. 458 (2004) (defendant waived his right to sever his trial from that of his codefendant by failing to renew his pretrial motion to sever at the close of all evidence).

C. Court's Authority to Order Joinder or Severance

Under G.S. 15A-927(e), the court may order severance of offenses or defendants if grounds exist, even in the absence of a motion by the State or defendant. Case law establishes a court's authority to join offenses or defendants in the absence of a motion. *See State v. Thompson*, 129 N.C. App. 13 (1998) (no error under prior calendaring statute where court joined calendared and non-calendared charges that were otherwise appropriate for joinder); *State v. Pointdexter*, 68 N.C. App. 295 (1984) (when grounds for joinder exist, court may order joinder on its own; *State v. Cottingham*, 30 N.C. App. 67 (1976) (same)). If the court's action in joining or severing defendants or charges creates unfair surprise, the appropriate remedy to request would be a continuance.