

Chapter 6

Joinder and Severance

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This chapter focuses on issues that arise when a defendant is charged with multiple offenses or when several defendants are charged with related offenses. Counsel then must decide whether to pursue joinder of offenses or defendants for trial or, if the State moves for joinder, to request severance of offenses or codefendants. The joinder or severance of offenses, and the joinder or severance of defendants, present distinct legal issues. Section 6.1 discusses the joinder and severance of offenses. Section 6.2 discusses the joinder and severance of defendants. The right to joinder or severance is primarily statutory, although certain constitutional protections also apply. To preserve your client's rights, you must comply with certain procedural requirements, discussed in Section 6.3.

6.1 Joinder and Severance of Offenses

A. Strategic Considerations

If a criminal defendant is charged with multiple offenses, counsel must evaluate whether to seek or oppose joint resolution of the charges. Joinder sometimes is advantageous to a defendant. A good result in one trial may be undone by a later trial, and a defendant tried multiple times for offenses arising out of the same conduct may be prejudiced at sentencing. On the other hand, joinder of offenses is not always helpful. The joinder of factually distinct offenses risks turning the trial into a trial of the defendant's criminal propensity, rather than his or her guilt or innocence of any one offense. Listed below are some strategic considerations that may play a role in deciding whether to seek or oppose joinder.

Advantages of joinder of offenses. The benefits of joinder include the following:

- Generally, if the cases are disposed of at the same time, structured sentencing rules treat the convictions as a single prior conviction for purposes of assigning prior record points for sentencing in subsequent cases. *See infra* § 6.1F, Sentencing Implications of Joinder.
- Joint disposition of offenses may increase the likelihood of concurrent sentences for those offenses or for some other relief from the sentencing court, such as consolidated sentences, mitigated sentences, or suspension of some or all of the sentences.
- The defendant may want a joint trial of charged offenses to resolve his or her situation as quickly as possible and avoid the time, expense, and trauma of multiple trials.
- Sympathetic or compelling evidence presented in one case might increase the chance of a favorable disposition of a jointly tried offense.
- Witnesses for the defense who have knowledge of multiple offenses are more likely to appear and testify if they only have to do so on one occasion.
- The defendant's willingness to group offenses may encourage a better plea offer or sentencing agreement.

Advantages of severance of offenses. Drawbacks to joinder of offenses and advantages of severance may include the following:

- Accumulation of evidence from several cases may be prejudicial.
- The number of charges and complexity of the evidence may confuse the jury.
- Postponing the second and successive trials may benefit the defendant.
- The defendant may want to employ a different defense strategy for each case.
- The defendant may want to testify in one case and not in the other (although the testimony from one case may be admissible in a later case).
- A joint trial may lead to the receipt of otherwise inadmissible evidence.

B. Standard for Joinder of Offenses

Basic requirements. 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, whether felonies, misdemeanors, or both, may be joined for trial if the offenses are based on

- “the same act or transaction,” or
- “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. Manning*, 139 N.C. App. 454 (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” as defined by G.S. 15A-926 should be tried separately. *See State v. Corbett*, 309 N.C. 382 (1983). Even joinable offenses may be severed for trial if joinder would impair the defendant’s ability to present a defense. *See infra* § 6.1C, Severance of Joinable Offenses.

Key factors. 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 (1981) (on motion for joinder, courts consider similarity in time, place, motive, victims, and circumstance); *State v. Evans*, 99 N.C. App. 88 (1990) (joinder of two burglaries of different apartments in same complex several days apart not abuse of discretion where modus operandi, time, place, and motive all similar). Illustrative cases are discussed *infra* in § 6.1D, Illustrative Cases.

Mutually exclusive offenses. Even when offenses are mutually exclusive in that a defendant cannot be convicted of both offenses, the defendant may be indicted for and tried jointly for both offenses. However, if joinder of such 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 (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 (1990) (defendant could be tried but not convicted for both embezzlement and obtaining property by false pretenses; the charges are mutually exclusive because embezzlement requires that property be obtained lawfully and then wrongfully converted while obtaining false pretenses requires that property be obtained unlawfully at the outset); *State v. Surcey*, 139 N.C. App. 432 (2000) (defendant could be tried but not convicted of both burglary and shooting into an occupied dwelling because these are mutually exclusive offenses; one requires entry, the other remaining outside the dwelling); *State v. Jewell*, 104 N.C. App. 350 (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 (2010) (felony entering into dwelling and discharging a firearm into an occupied dwelling inflicting serious bodily injury were, in circumstances of case, offenses that occurred in succession rather than mutually exclusive ones).

For a further discussion of mutually exclusive offenses, see 2 NORTH CAROLINA DEFENDER MANUAL § 34.7E (Inconsistent Verdicts) (2d ed. 2012).

C. Severance of Joinable Offenses

“Fair determination” requirement. Even when two offenses are potentially joinable in that they have a common factual nexus, the offenses may be severed and tried separately if “necessary to promote a fair determination of the defendant’s guilt or innocence of each offense.” G.S. 15A-927(b)(1); *see also State v. Corbett*, 309 N.C. 382 (1983) (ultimate issue in deciding whether joinder is proper is whether joinder hindered the defendant’s ability to defend against one or more charges); *State v. Moses*, 350 N.C. 741 (1999) (if joinder would hinder or deprive defendant of ability to present defense, motion for joinder of offenses should be denied); *State v. Breeze*, 130 N.C. App. 344 (1998) (to grant motion to consolidate trial, court must first find that the offenses took place within common scheme or plan and then find that consolidation does not hinder the defendant’s ability to receive fair trial and present defense).

Key factors. Courts have considered various factors in determining whether joinder would impair a defendant’s ability to defend against the charges.

Sometimes joinder may result in the receipt of otherwise inadmissible evidence. *See, e.g., State v. Weathers*, 339 N.C. 441 (1994) (error to join murder charge with charge of failing to appear at murder trial because evidence supporting conviction for murder would be inadmissible at trial on failure to appear; judgment on failure to appear arrested); *State v. Williams*, 113 N.C. App. 686 (1994) (seat belt violation properly severed from DWI trial where, under G.S. 20-135.2A, evidence of seat belt violation was

inadmissible in trial of DWI case [result not affected by subsequent amendment to seat belt statute]).

One common example of the potential receipt of otherwise inadmissible evidence is where 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. *See State v. Long*, 721 P.2d 483, 495 (Utah 1986) (refusal to sever is abuse of discretion "because of the unwarranted prejudice inherent in informing the jury that a defendant is a convicted felon"). *Compare State v. Cromartie*, 177 N.C. App. 73 (2006) (joinder of charges of possession of firearm by felon and assault with a deadly weapon with intent to kill inflicting serious injury did not unjustly or prejudicially hinder defendant's ability to defend himself or receive fair hearing); *State v. Hardy*, 67 N.C. App. 122 (1984) (no prejudicial error in consolidating count of possession of firearm by felon with charge of larceny of firearm, although it was not clear from opinion that defendant's prior criminal history would have been admissible in separate trial on larceny charge); *United States v. Daniels*, 770 F.2d 1111 (D.C. Cir. 1985) (joinder did not cause defendant undue prejudice in light of trial judge's "scrupulous regard" for defendant's right to fair trial).

A defendant who seeks severance on this ground should be prepared to meet the argument that limiting instructions would serve to dispel any prejudice from joinder. *Cf. infra* § 6.2G, Effect of Limiting Instructions. If a charge of possession of a firearm by a felon is joined with another charge, counsel may be able 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. Under the specific facts of a given case, defense counsel may have a more compelling case for acceptance of the stipulation. For instance, where the underlying felony in a firearm by felon prosecution is also a firearms offense, the potential prejudice to the defendant is arguably higher. *Compare Old Chief v. United States*, 519 U.S. 172 (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 (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).

Another example of the potential receipt of inadmissible evidence at a trial of joined offenses is where the testimony of a witness is admissible on one charge but not the other. For instance, in *State v. Voltz*, ___ N.C. App. ___, 804 S.E.2d 760 (2017), the trial judge joined charges occurring seven months apart over the defendant's objection. One set of charges alleged sexual assault and strangulation of the victim, and the later set of charges alleged that the defendant had broken and entered the home of a separate witness to look for the victim. That witness was prepared to testify that the victim in the first set of charges had a volatile relationship with a lot of people. This evidence was inadmissible character evidence as to the sexual assault and strangulation charges but, according to the

defendant, raised a question about whether a third party had broken into the witness's home. The court rejected that argument, finding that the witness's testimony was inadmissible because it was insufficient, under the standards for evidence of third-party guilt, to show that another person had broken into the witness's home. Notwithstanding the result in *Voltz*, where witness testimony may be necessary to defend one charge but may be barred because it would result in the admission of inadmissible evidence as to another charge, counsel should consider moving for severance.

Courts also have considered whether the defendant's ability to defend against the charges is hindered where the defendant has a separate defense against each charge. *See United States v. Foutz*, 540 F.2d 733, 739 (4th Cir. 1976) (joinder of robberies prejudicial error where defendant had alibi defense to one charge but not to the other; good explanation of how joinder of offenses creates risk of introducing evidence of criminal propensity; court states that jury may have found defendant guilty "under the rationale that with so much smoke there must be fire" and that had the offenses not been joined for trial, these "spillovers" could not have occurred); *Cross v. United States*, 335 F.2d 987 (D.C. Cir. 1964) (where defendant wishes to testify as to one count but not another, joinder of offenses is prejudicial because joinder violates defendant's right to silence on one offense); *cf. State v. Huff*, 325 N.C. 1 (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 (1985) (joinder of thirteen different charges confused jury). Joinder of even a small number of charges may be confusing to the jury (and prejudicial to the defendant) where each offense raises complex evidentiary issues. For instance, in a sexual assault prosecution where the State intends to offer multiple witnesses about prior bad acts of the defendant under Evidence Rule 404(b), joinder of a firearm by felon offense might overwhelm the jury with limiting instructions as to the uses of different types of evidence (in addition to the potential for prejudice to the defendant).

D. Illustrative Cases

Cases in which joinder found to be proper.

State v. Williams, 355 N.C. 501 (2002) (joinder was proper 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, where the victims were all prostitutes, African-Americans, and drug users or addicts; defendant used same modus operandi in 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 (1995) (joinder of two murder charges proper, despite two month gap between homicides, because of similarity in circumstances of crimes)

State v. Huff, 325 N.C. 1 (1989) (defendant killed infant son and mother-in-law in same 24-hour period; court found joinder proper because both killings were motivated by fear that defendant's wife would leave him and take custody of son), *vacated on other grounds*, 497 U.S. 1021 (1990)

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

State v. Jenrette, 236 N.C. App. 616 (2014) (no error to join twelve charges occurring over the course of two months, including drugs, weapons, assaults, and two murder charges where all charges were part of a related series of events; one murder to cover up another murder was a sufficient transactional nexus, and the other charges showed a direct link to the murders)

State v. McCanless, 234 N.C. App. 260 (2014) (joinder was proper of indecent exposure and indecent liberties with a minor charges occurring nine months apart where both victims were minor children, the events occurred at the same department store, and the defendant had the same modus operandi and motive as to each charge)

State v. Guarascio, 205 N.C. App. 548 (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; court concluded the circumstances of the offenses were "strikingly similar")

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

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

State v. Simmons, 167 N.C. App. 512 (2004) (no error to join common law robbery and first-degree murder charges that involved two different victims and occurred five days apart where the murder resulted from an argument that stemmed from the robbery)

State v. Simpson, 159 N.C. App. 435 (2003) (two charges of obtaining property by false pretenses were properly joined where 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 (2002) (joinder of trafficking, conspiracy, and possession with intent to sell or deliver controlled substances was proper when all

charges stemmed from one general transaction)

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

State v. Breeze, 130 N.C. App. 344 (1998) (twelve robbery charges arising out of ten incidents properly consolidated for trial where robberies occurred in same county over seven week period and victims were all female)

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

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

Cases in which joinder of offenses found to be improper.

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

State v. Perry, 142 N.C. App. 177 (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; nature of crimes different and accomplices different)

State v. Bowen, 139 N.C. App. 18 (2000) (error to join sexual offenses that occurred over twelve years against different victims and that were not done in a special way or place, although error was not prejudicial; court states that when trial court erroneously allows joinder, appellate court must determine whether there was any prejudice, but court cautions that at trial level a motion for joinder is “controlled by the higher standard” in G.S. 15A-926)

State v. Owens, 135 N.C. App. 456 (1999) (charges were improperly joined where sexual offenses by defendant against girlfriend’s three minor daughters occurred over seven years and were different in nature; however, on appeal defendant failed to articulate any resulting prejudice)

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

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

E. Standard of Review on Appeal

The N.C. appellate courts have stated (1) that the question of whether two charges have a transactional connection and are joinable under G.S. 15A-926(a) is a question of law (*see, e.g., State v. Silva*, 304 N.C. 122 (1981)), which is fully reviewable on appeal; and (2) that joinder of offenses is committed to the sound discretion of the trial court and is reviewable under an abuse of discretion standard (*see, e.g., State v. Bracey*, 303 N.C. 112 (1981)). In *State v. Corbett*, 309 N.C. 382, 387 (1983), the N.C. Supreme Court said both. “A motion to consolidate charges for trial is addressed to the sound discretion of the trial judge and that ruling will not be disturbed on appeal absent an abuse of discretion. . . . If, however, the charges consolidated for trial possess no transactional connection, then the consolidation is improper as a matter of law.” *See also Silva*, 304 N.C. at 126. These holdings appear somewhat inconsistent with one another, and on appeal you should proceed under both standards.

Where the defendant is contending on appeal that offenses were improperly joined for trial, the defendant has the burden of showing prejudice. *See State v. Williams*, 41 N.C. App. 287, 290 (1979) (“In determining whether a defendant has been prejudiced by joinder pursuant to G.S. 15A-926, the question which must generally be addressed is whether the offenses are so separate in time and place and so distinct in circumstances as to render joinder unjust and prejudicial to the defendant.”).

One key component of demonstrating prejudice is to show that evidence of the joined offense would not otherwise be admissible under N.C. Rule of Evidence 404(b). This is not the standard for determining joinder at trial, however. The trial court should not join offenses simply on the ground that one of the offenses would be admissible under Rule 404(b) in a separate trial of the other offense. *See State v. Bowen*, 139 N.C. App. 18, 30 (2000) (motion for joinder is “controlled by the higher standard” in G.S. 15A-926); *see also State v. Locklear*, 363 N.C. 438, 446 (2009) (explaining that whether offenses may be joined is a separate question from whether evidence of one offense may be admitted at trial of another, though both questions often involve similar considerations); *State v. Owens*, 135 N.C. App. 456, 460 (1999) (charges were improperly joined where sexual offenses by defendant against girlfriend’s three minor daughters occurred over seven years and were different in nature; however, court finds that defendant failed to articulate any resulting prejudice, stating that if the offenses had not been joined, then at trial of any one offense, evidence of the other molestations would have been admissible under Rule

404(b)). For additional discussion of reasons offenses should not be joined, see *supra* § 6.1C, Severance of Joinable Offenses.

F. Sentencing Implications of Joinder

Use of joined offense at sentencing in future case. Under structured sentencing, criminal defendants are assigned a prior record level based primarily on their prior criminal record. G.S. 15A-1340.14(d) provides that for purposes of determining a defendant's prior record level, if a defendant is convicted of more than one offense in superior court during a calendar week, or more than one offense in district court during a single session, only the most serious offense is used. This is a powerful incentive for a defendant to have offenses heard together. *Cf. State v. Fuller*, 179 N.C. App. 61 (2006) (trial judge did not err in assigning points to two convictions obtained on same day in same county when one conviction was in district court and the other was in superior court).

Note, however, that the N.C. appellate courts have held that when offenses are resolved during a single week of superior court (or, presumably, during a single session of district court), even when joined for disposition, one offense can be used to establish prior record level and another can be used as a predicate felony for habitual felon status. *See State v. McCrae*, 124 N.C. App. 664 (1996). A different rule also exists for convictions of driving while impaired that occur on the same day. Each conviction is a separate aggravating factor for DWI sentencing under G.S. 20-179, and each may be used as predicate offenses in any later habitual impaired driving prosecution. *See State v. Mayo*, ___ N.C. App. ___, 807 S.E.2d 654 (2017). Under the reasoning of *Mayo*, convictions of joined assault offenses may count as separate predicate convictions in a later prosecution for habitual misdemeanor assault. *See also State v. Smith*, 139 N.C. App. 209 (2000) (defendant had two assault on female convictions from same day; court approved of one being used as a predicate offense for habitual assault, the other for prior record level points).

A conviction obtained on the same day or term as another conviction, if not joined, has also been found to support a recidivist determination for purposes of sex-offender registration and satellite-based monitoring. *See State v. Bishop*, ___ N.C. App. ___, 805 S.E.2d 367 (2017) (defendant pled guilty to separate offense after being found guilty at trial; trial conviction counted for recidivist purposes for conviction on guilty plea). However, if the offenses are joined for trial or plea, one conviction cannot be counted as a prior conviction to establish recidivist status for the other conviction. *State v. Springle*, 244 N.C. App. 760, 767 n.3 (2016) (simultaneous convictions could not be counted as a prior conviction for recidivist purposes).

Use of joined offense at sentencing in current case. North Carolina's Fair Sentencing Act, repealed effective October 1, 1994, restricted the use of joined or joinable convictions, as well as the facts underlying such convictions, as aggravating factors at sentencing in the current case. Those restrictions likely no longer exist under structured sentencing. A number of cases have interpreted structured sentencing as allowing

evidence in support of a joined conviction to be used as an aggravating factor at sentencing for the other conviction. *See State v. Tucker*, 357 N.C. 633 (2003); *State v. Demos*, 148 N.C. App. 343 (2002); *see also State v. Wiggins*, 161 N.C. App. 583 (2003) (allowing as aggravating factor evidence of a joinable offense with which the defendant was not charged).

There remain some hurdles to the use of joined convictions at sentencing in the current case. Contemporaneous convictions may not be used in calculating the defendant's prior record level. *See State v. West*, 180 N.C. App. 664, 669 (2006) (stating that "assessment of a defendant's prior record level using joined convictions would be unjust and in contravention of the intent of the General Assembly"). Evidence necessary to prove an element of a conviction may not be used as an aggravating factor for that conviction. *See* G.S. 15A-1340.16(d) (so stating).

If the State wants to use evidence in support of a joined conviction as an aggravating factor for another conviction in the case, it still must comply with the procedures in G.S. 15A-1340.16 on giving notice of its intent to seek aggravating factors and, unless admitted by the defendant, proving them.

G. Bars to Successive Prosecutions

Statutory right to dismissal of joinable offenses. G.S. 15A-926(c) provides that a defendant who has been tried for an offense may move to dismiss a successor charge of any joinable offense, and this motion to dismiss 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); 2 ABA STANDARDS FOR CRIMINAL JUSTICE Standard 13-2.3 & Commentary (2d ed. 1980). 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, discussed below, because it bars subsequent prosecutions of related offenses, not just the same or lesser offenses.

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 dismissal with respect to joinable charges that were pending at the time of the first trial. *See* G.S. 15A-926(c)(2)a., b. (no right to dismissal if defendant fails to move to join charges, thus waiving right to joinder, or if defendant makes such a motion and 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. *See* G.S. 15A-926(c)(3). If defense counsel has concerns about this possibility, counsel should make an explicit part of any plea agreement that the State will not prosecute any other charges related to the transaction or occurrence. (Language in a plea transcript explicitly stating that the defendant enters the plea in lieu of any and all related charges will suffice and is advisable to include in any plea agreement). 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. *See* G.S. 15A-926(c)(2)c.

Case law has further limited the right. In *State v. Furr*, 292 N.C. 711 (1977), the N.C. Supreme Court held that the right to dismissal applies only where the defendant has been indicted for the joinable offenses at the time of the first trial. This holding effectively eviscerated the statutory right to dismissal because G.S. 15A-926(c)(2), discussed above, provides for no right to dismissal of a pending charge that the defendant failed to move to join or unsuccessfully moved to join. In a later case, *State v. Warren*, 313 N.C. 254 (1985), the N.C. Supreme Court rolled back *Furr*, recognizing that the joinder statute applies to successor charges that were not pending at the time of trial and that would have been joinable had the State filed them. The Court added, however, that a defendant who has been tried for an offense is entitled to dismissal of joinable offenses only if the sole reason that the State withheld indictment on the offenses was to circumvent the statutory joinder requirements. The Court ameliorated the potential strictness of this requirement by stating that the defendant may meet this burden by showing that the State had substantial evidence of the successor 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. 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 (2002) (relying on *Warren*, court found that State did not circumvent statutory joinder requirements and trial court did not err in denying defendant's motion to dismiss successor felony assault charge; defendant had originally been convicted of attempted second-degree murder, and N.C. Supreme Court vacated the conviction on the rationale, not established at the time of the charge, that the offense of attempted second-degree murder did not exist).

Double jeopardy. The Double Jeopardy Clause also may provide some protection against a subsequent prosecution of an offense not joined in an earlier trial. It protects against a second prosecution for the *same offense* after acquittal or conviction. A dismissal during trial for insufficiency of the evidence is an acquittal for double jeopardy purposes. *See Martinez v. Illinois*, 572 U.S. ___, 134 S. Ct. 2070 (2014). Two crimes constitute the "same offense" for double jeopardy purposes when they have the same elements or when the elements of one are subsumed within the elements of the other (in essence, one is a lesser offense of the other). *See Blockburger v. United States*, 284 U.S. 299 (1932).

If by opposing joinder or moving to sever the defendant is responsible for separate trials of offenses that are the "same" for double jeopardy purposes, the State is not barred from bringing successive prosecutions. *See Jeffers v. United States*, 432 U.S. 137 (1977) (while earlier conviction of conspiracy to distribute narcotics was a lesser included offense of engaging in a continuing criminal enterprise to violate drug laws, consecutive trials were not barred under Double Jeopardy Clause because defendant opposed motion to join charges and was solely responsible for successive prosecutions); *State v. Alston*, 82 N.C. App. 372 (1986) (State not collaterally estopped from prosecuting defendant for robbery with a firearm following acquittal of possession of firearm by a felon charge; no

double jeopardy claim where separate trials resulted from defendant's motion to sever charges), *aff'd on other grounds*, 323 N.C. 614 (1988) (court finds a rational jury could have based its verdict in the possession trial on an issue other than possession of a firearm during the armed robbery; court does not reach constitutional question).

Collateral estoppel. A defendant who is *acquitted* in a first trial may be able to rely on the doctrine of collateral estoppel, embodied in the Fifth Amendment bar against double jeopardy, to preclude a successive trial on a factually related crime. Collateral estoppel is also known as "issue preclusion", and bars the State from relitigating an issue of fact that has previously been determined against it. For example, in *Ashe v. Swenson*, 397 U.S. 436 (1970), armed masked men interrupted a poker game and robbed each of the six poker players. The defendant was acquitted of the robbery of Player A in a case in which the only issue of fact was the defendant's presence at the scene. The Court held that the State was collaterally estopped from a subsequent prosecution of the defendant for the robbery of Player B because the issue of his presence had already been decided adversely against the State. *See also State v. McKenzie*, 292 N.C. 170 (1977) (acquittal of DWI precludes State from relitigating issue at defendant's subsequent involuntary manslaughter trial); *State v. Parsons*, 92 N.C. App. 175 (1988) (trial court dismissed indictment for manslaughter of fetus on basis that unborn child was not "person" within meaning of statute and thus indictment did not state crime; State barred by collateral estoppel from bringing second indictment changing term "fetus" to "unborn child" because issue had already been litigated).

The application of collateral estoppel is contingent on the previous resolution of the *same* issue. The test is whether a second conviction would *require* the jury to find against the defendant on an issue already decided by a valid and final judgment in his or her favor. *See Dowling v. United States*, 493 U.S. 342 (1990) (acquittal of robbery of victim in her home no bar to showing that defendant was among the group in the house, as the acquittal need not have been based on issue of defendant's presence); *State v. Edwards*, 310 N.C. 142 (1984) (acquittal of larceny charge no bar to prosecution for breaking or entering with intent to commit larceny); *State v. Tew*, 149 N.C. App. 456 (2002) (acquittal of attempted first-degree murder did not bar prosecution for assault with a deadly weapon with intent to kill inflicting serious injury because the jury need not have decided that the defendant lacked the intent to kill). The moving party bears the burden of persuasion in establishing a collateral estoppel claim. *Edwards*, 310 N.C. at 145. Where the defendant consents to separate trials, he or she has waived any claims to issue-preclusion under the Double Jeopardy clause. *Currier v. Virginia*, ___ U.S. ___, 138 S. Ct. 2144 (2018) (defendant who agrees to severance waives double jeopardy protections against relitigation of issues decided by the previous trial; plurality of court would have held issue-preclusion claims inconsistent with text and history of Double Jeopardy Clause).

In some instances, North Carolina courts have approved the use of collateral estoppel by the State against the defendant. *See State v. Williams*, ___ N.C. App. ___, 796 S.E.2d 823 (2017) (applying collateral estoppel to deny defendant's motion to suppress in a second trial for drugs when the issue of the lawfulness of the search was the same and was fully litigated before the first trial). *But see* 2 NORTH CAROLINA DEFENDER MANUAL §31.10B

(Rulings from Previous Trials) (2d ed. 2012) (discussing whether pretrial rulings are binding after mistrial).

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 inculcate 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 inculcate 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.

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*

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).

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.

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.