CHAPTER EIGHT
Joinder and Severance
Table of Contents

CHAPTER EIGHT

JOINDER AND SEVERANCE

I. OFFENSES

A. JOINDER OF OFFENSES

Indiana's joinder rules permit the linking of offenses and parties, thereby avoiding multiple trials. Defendants who commit the same crime or defendants involved in related charges can be joined. Other grounds for joinder include identity of offenses, conspiracy, joint enterprise, or difficulty in separate proof.

1. Joinder of Related Offenses

Ind. Code § 35-34-1-9 and Ind. Code § 35-34-1-10 do not require the State to file all related charges simultaneously; the sections operate only on those charges that have been filed before the first trial begins so that the court can decide at that time whether conduct in each separately charged offense is part of a common plan that should be tried together. Seay v. State, 550 N.E.2d 1284 (Ind. 1990), *superseded by statute on other grounds as recognized in* Davidson v. State, 763 N.E.2d 441, 445 (Ind. 2002).

Chanley v. State, 583 N.E.2d 126 (Ind. 1991) (Seay does not apply to crimes in other states because they could not be tried together with crimes committed in Indiana).

a. Test

Pursuant to Ind. Code § 35-34-1-9(a), before trial, two or more offenses may be joined when offenses charged are: (1) same or similar character; or (2) part of single scheme or plan.

Dorsey v. State, 490 N.E.2d 260 (Ind.1986) (consolidation of cases on prosecutor's motion was "before trial" where pretrial motions were still being made and considered, voir dire was not finished, and the rescheduled trial date was four days away), *overruled in part on other grounds by* Wright v. State, 658 N.E.2d 563, 570 (Ind. 1995).

When offenses are joined *solely* because they are of the "same or similar character," the defendant has a right to have counts tried separately. See IPDC Pretrial Manual, Chapter 8 § I.B, *below*.

b. When Joinder Permitted

Offenses which are merely similar in character cannot be joined by the State or the court; offenses which are part of a single scheme or plan may be joined under Ind. Code § 35-34-1-9(a)(2).

Jamieson v. State, 268 Ind. 599 (1978) (burglaries of gas stations in same area, same mode of entry, same kind of stolen goods constituted single scheme or plan).

(1) Offenses Part of Single Scheme or Plan

Joinder of offenses in same indictment or information is permitted when offenses are based on same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. Ind. Code § 35-34-1-9(a)(2).

Defendant, prosecutor, or court may move to join offenses which are part of a common scheme or plan. Court must grant motions for joinder of two or more offenses which might have been properly pleaded in a single indictment under Ind. Code § 35-34-1-9(a)(2) ["common scheme or plan"], unless, in interests of justice, court orders one or more of such offenses shall be tried separately. Ind. Code § 35-34-1-10(b).

(a) Separate Incidents - Robbery/Burglary/Murder

Evans v. State, 542 N.E.2d 546 (Ind. 1989) (theft of car during robbery and burglary three days later were not separate and distinct offenses and could be joined for trial).

(b) Sex Offenses

Pierce v. State, 29 N.E.3d 1258 (Ind. 2015) (defendant was not entitled to severance of charges for separate incidents of sexual molestation of his three grandchildren where he committed the crimes in substantially the same way against similar victims, making the crimes part of a single scheme or plan under Ind. Code § 35-34-1-9(b)(2)).

Ennik v. State, 40 N.E.3d 868 (Ind. Ct. App. 2015) (defendant not entitled to severance as of right where he exploited his position as a babysitter by molesting three young girls entrusted to his care, and his method was consistent).

Runyon v. State, 537 N.E.2d 475 (Ind. 1989) (no error in refusing to grant defendant's motion for severance of two incidents joined for trial; only difference between two incidents was that in former incident defendant abandoned his attack, apologized, and left, while in latter incident he completed attack and raped victim).

Turnpaugh v. State, 521 N.E.2d 690 (Ind. 1988) (child molesting and attempted child molesting charges were part of a single scheme or plan because victims were sisters staying with defendant, offenses occurred on same night, and delay between charges was due to defendant's absence from the jurisdiction).

Philson v. State, 899 N.E.2d 14 (Ind. Ct. App. 2008) (because defendant's rape and child molest charges were based on sexual acts against his siblings in the same house over the same one-year time period, and rapes surfaced in course of investigation into the molestations, the crimes were sufficiently linked together such that severance was not mandated).

Heinzman v. State, 895 N.E.2d 716 (Ind. Ct. App. 2008) (common *modus operandi* linked defendant's crimes in that he abused his position as a caseworker to perpetuate his child molesting scheme).

Piercefield v. State, 877 N.E.2d 1213 (Ind. Ct. App. 2007) (defendant was not entitled to severance as of right when molestation offenses involved unique circumstances and similar modus operandi).

Booker v. State, 790 N.E.2d 491 (Ind. Ct. App. 2003) (trial court did not err in denying defendant's request for severance of three child molesting charges; evidence showed victims were placed in defendant's care; molestations had occurred in victims' bedrooms; both victims testified defendant used his hand to touch them; and both victims and defendant tested positive for gonorrhea. This was sufficient to show *modus operandi*, establishing that charges were joined because they were work of same person).

(c) Drugs

Richter v. State, 598 N.E.2d 1060 (Ind. 1992) (where both counts were the result of an ongoing investigation over a relatively short period of time, they were not joined "solely because they were of the same or similar character" and trial court had discretion to grant or refuse severance).

Chambers v. State, 540 N.E.2d 600 (Ind. 1989) (each count grew out of single intention of defendant to deal in drugs; therefore, counts did not have to be severed and tried separately).

(d) Forgery, Perjury

Kindred v. State, 524 N.E.2d 279 (Ind. 1988) (perjury count was properly joined with forgery counts; defendant gave false information to acquire driver's license in name of another individual, and defendant uttered forged checks made to other individual).

(e) Theft

Snuffer v. State, 461 N.E.2d 150 (Ind. Ct. App. 1984) (theft counts relating to two trucks properly joined where trucks were discovered in same "chop shop").

(f) Multiple Charges

Barajas v. State, 627 N.E.2d 437 (Ind. 1994) (charges of murder, dealing in cocaine, and corrupt business influence were properly tried together; State alleged that victim was murdered because of drug debts, and corrupt business influence count was based on defendant's drug dealing and his commerce with street drug sellers).

(2) Offenses Same or Similar in Character

Ind. Code § 35-34-1-9(a) (1) permits joinder of offenses if they are of same or similar character, even if not part of a single scheme or plan. When defendant has been charged in two indictments, but offenses could be joined under same indictment as offenses of same or similar character, indictments may be joined for trial.

Pardo v. State, 585 N.E.2d 692 (Ind. Ct. App. 1992) (charges of theft by breaking

into cars committed two months apart were of same or similar character, but court found lack of evidence to show that September theft and November attempted theft were connected or part of single scheme or plan).

The defendant, but not the State, may move to have two or more offenses joined for trial if they were same or similar in character, but were initially pleaded in separate indictments or informations. Grant or denial of such a motion is discretionary. Ind. Code § 35-34-1-10(a).

c. Co-defendants are Charged as Parties to the Same Offense

Consolidation of co-defendants' causes is permitted when defendants are charged as parties to the same offense. Sapp v. State, 513 N.E.2d 178 (Ind. 1987).

In cases involving multiple defendants, joinder is determined by Indiana Code § 35-34-1-9(b).

2. Later Prosecution May be Barred by Former

Indiana's successive prosecution statute, Ind. Code § 35-41-4-4, bars prosecution if all of the following exist:

(1) There was a former prosecution of the defendant for a different offense or for the same offense based on different facts;
(2) The former prosecution resulted in an acquittal, conviction, or improper termination under Ind. Code § 35-41-4-3; and
(3) The instant prosecution is for an offense with which the defendant ***should have been charged*** in the former prosecution.

The words "should have been charged" must be read in conjunction with Indiana's joinder statute, Ind. Code § 35-34-1-10(c), which reads in part: "A defendant who has been tried for one (1) offense may thereafter move to dismiss an indictment or information for an offense which could have been joined for trial with the prior offenses under [Ind. Code § 35-34-1-9]."

Williams v. State, 762 N.E.2d 1216 (Ind. 2002) (reversing defendant's conviction on the statutory ground of successive prosecution, without reaching any constitutional double jeopardy issue).

Ind. Code § 35-34-1-10(c) provides:

A defendant who has been tried for one (1) offense may thereafter move to dismiss an indictment or information for an offense which could have been joined for trial with the prior offenses under [Ind. Code § 35-34-1-9]. The motion to dismiss shall be made prior to the second trial and shall be granted if the prosecution is barred by reason of the former prosecution.

Two or more offenses within jurisdiction of same court and which could have been joined in one prosecution constitute related offenses. Ind. Code § 35-34-1-10(e).

Williams v. State, 762 N.E.2d 1216 (Ind. 2002) (because charges in two counties were based on series of drug-related acts so connected that they constituted part of single

scheme or plan, they should have been charged in single prosecution).

Thompson v. State, 529 N.E.2d 877 (Ind. Ct. App. 1988), *trans. denied* (while better practice might have been for State to join all charges, dismissal under successive prosecution statute was not required because there was no evidence that defendant's driving while suspended offense was part of a single scheme or plan with the drug offenses in this case).

State v. McDonald, 954 N.E.2d 1031 (Ind. Ct. App. 2011) (where new evidence that defendant molested his son was discovered after defendant had been investigated for molesting all his children, was charged with neglect of all the children and molesting his daughter, and pled guilty to a lesser charge, the subsequent prosecution of defendant for molesting his son was not prohibited because probable cause of molestation did not exist at time of original charges; thus, such charge should not have been joined).

Honeycutt v. State, 974 N.E.2d 525, 529 (Ind. Ct. App. 2012) (distinguishing McDonald (above) and reversing when State was aware of basis of OWI charges and had evidence to support charges when it filed possession of marijuana and traffic infraction two days after defendant's arrest).

Allen v. State, 956 N.E.2d 195 (Ind. Ct. App. 2011) (prosecuting defendant for Class A felony dealing in heroin after he pled guilty to Class B misdemeanor visiting a common nuisance was barred under Ind. Code § 35-41-4-4; it was reasonable to assume defendant went to apartment intending to sell heroin and visit a common nuisance).

Dixon v. State, 924 N.E.2d 1270 (Ind. Ct. App. 2010) (where defendant was charged with criminal recklessness after he pled guilty to OWI, trial court abused its discretion by granting motion to dismiss criminal recklessness charge; criminal recklessness charge, which was based on defendant having gun in his cell day after he was arrested for the OWI, was not part of single scheme or plan requiring joinder of charges).

Haywood v. State, 875 N.E.2d 770 (Ind. Ct. App. 2007) (defendant's offenses charged in City Court occurred within a short period of time and in a limited locale, and thus were part of a "single scheme or plan" such that they should have been joined in the initial prosecution).

Martakis v. State, 450 N.E.2d 128 (Ind. Ct. App. 1983) (if defendant's burglary conviction was barred because of his prior theft prosecution, trial court should have granted motion to dismiss under this section).

Miller v. State, 167 Ind. App. 271, 338 N.E.2d 733 (1975) (motion to dismiss an indictment must be granted if prosecution is barred by reason of a former prosecution, yet motion may not be granted as a matter of right unless this requirement is met).

Richardson v. State, 800 N.E.2d 639 (Ind. Ct. App. 2003) (that property stolen in a robbery was used eleven days later in the commission of a forgery at a different bank did not make the offenses part of a single scheme or plan requiring joinder).

(1) Move to Dismiss Before Start of Second Trial

A motion to dismiss for failure to join offenses must be made before the start of the

second trial, or the issue is waived. The requirements of Ind. Code § 35-34-1-10(c) control, and not the general statute on motions to dismiss (Ind. Code § 35-34-1-4). Hamer v. State, 771 N.E.2d 109, 112 (Ind. Ct. App. 2002). Defendant need not request joinder before pleading guilty in the first matter.

Allen v. State, 956 N.E.2d 195 (Ind. Ct. App. 2011) (express language of statute contemplates that dismissal of a subsequent matter is still available after resolution of the first matter so long as defendant requests the dismissal before the beginning of the second trial).

b. Simultaneous Filing Not Required

Ind. Code § 35-34-1-9 and Ind. Code § 35-34-1-10 do not require State to make simultaneous filings of all related charges.

Seay v. State, 550 N.E.2d 1284 (Ind. 1990) (trial court was not required to join similar offenses separated by time and place from charged offenses; statutes barring subsequent prosecution on related charges did not preclude prosecution for dealing in controlled substance after conviction for two prior sales of same substance; charges were not filed as to other offenses until deliberations on charged offenses; State brought separate prosecutions to avoid jeopardizing simultaneous drug investigations being conducted by two separate agencies), *superseded by statute on other grounds as recognized in* Davidson v. State, 763 N.E.2d 441, 445 (Ind. 2002).

State v. Burke, 443 N.E.2d 859 (Ind. Ct. App. 1983) (judgment in indictment for one offense does not bar later prosecution for related offenses; I.C. § 35-41-4-4(a) (3) not interpreted to apply to all offenses committed in same relative time frame or as part of same general criminal episode).

c. Plea Agreement May Bar Prosecution on Related Offenses

Ind. Code § 35-34-1-10(d) provides:

A defendant who has been sentenced on a plea of guilty to one (1) offense may move to dismiss an indictment or information for a related offense. The motion shall be granted if the plea of guilty was entered on the basis of a plea agreement in which the prosecutor agreed to seek or not to oppose dismissal of other related offenses or not to prosecute other potential related offenses.

Richardson v. State, 456 N.E.2d 1063 (Ind. Ct. App. 1983) (where defendant, who pled guilty to sale of a controlled substance in one county, submitted uncontroverted evidence that a subsequent conspiracy charge filed in another county was a related offense that prosecutor agreed not to prosecute in exchange for defendant's guilty plea, the defendant was entitled to dismissal of subsequent prosecution for conspiracy, even though it was filed in another county).

Gregory v. State, 596 N.E.2d 270 (Ind. Ct. App. 1992) (neither Indiana's permissive joinder statute nor double jeopardy provision obligated State to pursue all charges against Defendant arising from series of cocaine deliveries in one action; Defendant's conviction of four cocaine counts based on February 26, March 1, March 2, and March 7 incidents did not bar subsequent prosecution for

March 8 incident).

d. Refiling Charge After Joinder Order

If court orders joinder and the State elects to dismiss one of the offenses, the State is barred from later attempting to re-prosecute that offense. State v. Burke, 443 N.E.2d 859 (Ind. Ct. App. 1983).

3. Examples of Improperly Joined Offenses

a. Offenses of Same or Similar Character

Pardo v. State, 585 N.E.2d 692 (Ind. Ct. App. 1992) (alleged thefts arising out of defendant's scheme with his brothers to steal car radios on one night were joined for trial with later alleged attempted theft simply because offenses were of same or similar character, and, thus, defendant was entitled to severance; alleged thefts and alleged attempted theft were not part of single scheme or plan and involved different modus operandi).

b. Separate, Unrelated Offenses

Martin v. State, 488 N.E.2d 1160 (Ind. Ct. App. 1986) (escape and failure to appear charge, in addition to arson charge which prompted arrest from which defendant made his escape, are separate and unrelated for purposes of both habitual and joinder statutes).

c. Prejudice

Duncan v. State, 274 Ind. 144, 409 N.E.2d 597 (1980) (conspiracy to commit a felony (burglary) and possession of burglar's tools by convicted felon should have been severed, because prior conviction, material to possession charge, was prejudicial to defense of conspiracy charge).

4. Seeking Joinder - File Motion before Trial

Ind. Code § 35-34-1-10 provides:

(a) When a defendant has been charged with two (2) or more offenses in two (2) or more indictments or informations, and the offenses could be joined in the same indictment or information under section 9(a) (1) of this chapter [Ind. Code § 35-34-1-9(a) (1)], the court, upon motion of the defendant, may order that the indictments or informations be joined for trial. Such motion shall be made before commencement of trial on either of the offenses charged.

(b) When a defendant has been charged with two (2) or more offenses in two (2) or more indictments or informations and the offenses could have been joined in the same indictment or information under section (9) (a) (2) of this chapter [Ind. Code § 35-34-1-9(a) (1)], the court, upon motion of the defendant or the prosecuting attorney, or on its own motion, shall join for trial all of such indictments or informations unless the court, in the interests of justice, orders that one (1) or more of such offenses shall be tried separately. Such motion shall be made before commencement of trial on either of the offenses charged.

Dorsey v. State, 490 N.E.2d 260 (Ind.1986) (consolidation of cases on prosecutor's motion was "before trial" where pretrial motions were still being made and considered, voir dire was not finished, and the rescheduled trial date was four days away), *overruled in part on other grounds by* Wright v. State, 658 N.E.2d 563, 570 (Ind. 1995).

5. Appellate Review for Abuse of Discretion

Appellate courts review decision regarding joinder for abuse of discretion, which entails looking at what actually happened at trial. Dudley v. State, 480 N.E.2d 881, 891 (Ind. 1985).

Brown v. State, 683 N.E.2d 600 (Ind. Ct. App. 1997) (defendant who is entitled to severance of counts must renew at trial his objection to joinder or motion for severance or waive appellate review of the issue).

B. SEVERANCE OF OFFENSES

1. Right to Severance When Offenses Joined "Same or Similar Character"

When two or more offenses are joined ***solely*** because they are of a similar character, the defendant has an absolute right to have them tried separately. Ind. Code § 35-34-1-11(a). Benner v. State, 580 N.E.2d 210 (Ind. 1991); Pardo v. State, 585 N.E.2d 692 (Ind. Ct. App. 1992).

Davidson v. State, 558 N.E.2d 1077 (Ind. 1990) (murder charges in deaths of defendant's two infant children were sufficiently connected to preclude severance as matter of right; charges were not joined solely because they were of same or similar character; defendant allegedly engaged in pattern of insuring infants' lives before suspicious drownings).

Grimes v. State, 454 N.E.2d 388 (Ind. 1983) (escape and theft charges were not joined solely because they were of same or similar character but arose from a single ongoing scheme and were based upon series of acts that constituted parts of scheme; defendant stole truck and fled in furtherance of escape from jail; denying severance was not error).

Cf. Wells v. State, 983 N.E.2d 132 (Ind. 2013) (in dissent from denial of transfer, Justices Rucker and Dickson wrote that when offenses are joined solely due to their similar character, there is danger the jury, hearing all the evidence about all the offenses, could make the "forbidden inference," prohibited by Rule 404(b), based on the weight of the accusations or cumulative effect of the evidence; dissent would follow other jurisdictions and hold that if under Rule 404(b) evidence of the crimes on trial would be inadmissible in a separate trial for the other, a defendant is entitled to severance as of right under I.C. § 35-34-1-11(a)).

a. Failure to Object to Joinder or Move to Sever = Waiver

Trial courts do not have a *sua sponte* duty to sever charges absent a motion from the defendant. Norton v. State, 137 N.E.3d 974 (Ind. Ct. App. 2019).

Hodges v. State, 524 N.E.2d 774 (Ind. 1988) (defendant waived right to have similar offenses tried separately by failing to object to joinder or moving to sever charges for trial).

Maymon v. State, 870 N.E.2d 523 (Ind. Ct. App. 2007) (trial counsel was ineffective for failing to request a severance of his four burglary charges, which involved four separate victims over a span of almost three months; defendant was entitled to severance of charges as a matter of right because they were joined for trial solely on ground that they were of same or similar character). See also Wilkerson v. State, 728 N.E.2d 239 (Ind. Ct. App. 2000).

If the motion is *overruled*, it must be renewed at trial to avoid waiver. See Ind. Code § 35-34-1-12(b).

2. Severance When Necessary for "Fair Determination of Guilt or Innocence": Factors

Severance shall be granted when appropriate to promote a fair determination of guilt or innocence. Burst v. State, 499 N.E.2d 1140, 1144 (Ind. Ct. App.1986).

Pursuant to Indiana Code § 35-34-1-11(a):

> Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:
>
> (1) the number of offenses charged;
> (2) the complexity of the evidence to be offered; and
> (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

a. Compelling Severance – "Highly Prejudicial" Evidence

To compel severance, defendant must show impossibility of fair trial, when proof allowed on an element of one offense is "highly prejudicial" to defendant concerning another count of indictment. It is not enough to show only that a separate trial offers the defendant a greater chance of acquittal.

Duncan v. State, 274 Ind. 144, 409 N.E.2d 597 (1980) (refusal to sever conspiracy and possession charges was error that had substantial potential for harm; jury unnecessarily heard evidence of prior felony conviction during trial of principal charges; conspiracy conviction reversed).

(1) Spillover Effect

Adverse inferences about defendant charged with certain offenses may have spillover effect to other offenses.

United States v. Terry, 911 F.2d 272 (9th Cir. 1990) (government improperly joined charge of a felon in possession of a weapon with unrelated drug distribution charge; joinder was prejudicial because jurors would be more concerned about drug dealer in possession of firearm than if weapon charge was tried separately and jury never learned about defendant's drug involvement).

Cf. Wells v. State, 983 N.E.2d 132 (Ind. 2013) (in dissent from denial of transfer, Justices Rucker and Dickson wrote that when offenses are joined solely due to their similar character, there is danger the jury, hearing all the evidence about all the offenses, could make the "forbidden inference," prohibited by Rule 404(b), based on the weight of the accusations or cumulative effect of the evidence; dissent would follow other jurisdictions and hold that if under Rule 404(b) the evidence of the crimes on trial would be inadmissible in a separate trial for the other, a defendant is entitled to severance as of right under Ind. Code § 35-34-1-11(a)).

b. When Joined as a "Single Scheme or Plan"

Conner v. State, 580 N.E.2d 214 (Ind. 1991) (no error in denying severance where murders all occurred within short period of time and were connected with one another; trial court determined that trying the counts together would not be too confusing and complex for jury to distinguish between them).

Grimes v. State, 84 N.E.3d 635 (Ind. Ct. App. 2017) (trial court did not abuse its discretion in denying defendant's motion to sever obstruction of justice charge from incest charges because charges were intertwined).

Vasquez v. State, 174 N.E.3d 623, 630 (Ind. Ct. App. 2021) (no error in denying severance as matter of right when defendant exploited his position as trusted member of household to sexually abuse young female family members who stayed there, which resulted in overlapping investigations and were acts connected as part of single scheme).

Baird v. State, 604 N.E.2d 1170, 1184 (Ind. 1992) (trial court did not abuse its discretion in denying severance of one count of murder and one count of feticide from two other counts of murder; all were based on series of acts connected together or constituting parts of single scheme or plan).

Spindler v. State, 555 N.E.2d 1319 (Ind. Ct. App. 1990) (charges of disorderly conduct, public intoxication, and resisting law enforcement were properly joined initially with charges of possession of marijuana and possession of paraphernalia that arose from search of defendant's purse at jail after being arrested on former charges, and trial court could deny defendant's motion for severance; evidence was not so complex that jury could not distinguish evidence applicable to each charge, as shown by jury's acquittal of defendant of public intoxication).

Waldon v. State, 829 N.E.2d 168 (Ind. Ct. App. 2005) (activities within a span of few days showed a common scheme or plan with motive to steal made severance not available as a matter of right).

But see

Maymon v. State, 870 N.E.2d 523 (Ind. Ct. App. 2007) (IAC found where severance not sought for four burglaries involving four separate victims over span of almost three months; facts of each charge did not demonstrate defendant committed series of connected acts or that incidents were part of single scheme or plan).

3. Other Factors Affecting Ruling on Motion to Sever

a. Admissibility of Evidence of Other Crimes

If evidence of the other crime would be admissible in any event, a joint trial is fair. Douglas v. State, 464 N.E.2d 318 (Ind. 1984).

Grimes v. State, 84 N.E.3d 635 (Ind. Ct. App. 2017) (trial court did not abuse its discretion in denying defendant's motion to sever obstruction of justice charge from incest charges because charges were intertwined).

Stovall v. State, 477 N.E.2d 252 (Ind. 1985) (suggesting that where rape shield statute prevents admission of evidence otherwise admissible on other charges, severance could be had).

Shuman v. State, 489 N.E.2d 126 (Ind. Ct. App. 1986) (no prejudice to defense by joining reckless homicide and OWI resulting in death charges with driving with suspended license charge).

b. Joint Trial Hinders Defense

(1) Fifth Amendment Concerns - Separate Defenses

Generally, there is no Fifth Amendment problem in requiring a defendant to choose whether to testify as to all or none of charges. Holmes v. Gray, 526 F.2d 622 n.4 (7th Cir. 1975). See Lafave & Israel, *Criminal Procedure*, §17.1 (West, 1984). But prejudice by joinder of two offenses may develop when an accused wishes to testify on one but not the other of the two joined offenses that are clearly distinct in time, place, and evidence. In this situation, the moving party must make a convincing showing both that they have important testimony to give concerning one count and a strong need to refrain from testifying on the other. People v. Washington, 517 P.3d 706 (Colo. App. 2022); United States v. Jardan, 552 F.2d 216, 220 (8th Cir. 1977).

Cross v. U.S., 335 F.2d 987 (D.C. Cir. 1964) ("[An accused's] decision whether to testify will reflect a balancing of several factors with respect to each count: the evidence against him, the availability of defense evidence other than his testimony, the plausibility and substantiality of his testimony, the possible effects of demeanor, impeachment, and cross-examination. But if the two charges are joined for trial, it is not possible for him to weigh these factors separately as to each count. If he testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus, he bears the risk on both counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging in the face of his express denial of the other. Thus, he may be coerced into testifying on the count upon which he wished to remain silent." (*footnotes omitted*)).

To demonstrate reversible error, a showing of actual prejudice first must be made and then balanced against the policy favoring joint trials.

Davidson v. State, 558 N.E.2d 1077 (Ind. 1990) (defendant failed to show what difference separate trials would have made regarding her decision to testify).

Cf.

Baker v. U.S., 401 F.2d 958 (D.C. Cir. 1968) (defendant has burden to show joint trial would be prejudicial by making convincing showing that he has important testimony as to one count and strong need not to testify on other count).

U.S. v. Best, 235 F. Supp. 2d 923 (N.D. Ind. 2002) (district court severed murder charge from drug and firearm charges based on defendant's desire to testify with respect to the murder charge so he could provide an alibi defense, but to remain silent as to the remaining charges; the possible prejudice to defendant if the charges were tried together outweighed the cost of conducting separate trials because: (1) the case was a death penalty case and it was important that defendant not be deterred from presenting testimony to support his alibi defense, which could result in an acquittal, and (2) the drug distribution conspiracy charge was an actual offense element for the capital murder charge, such that an acquittal on the drug charge would almost certainly foreclose a conviction on the murder charge).

Johnson v. Weber, 2006 WL 704842 (D.S.D. 2006) (joinder of two burglary charges for trial impermissibly interfered with defendant's right to testify in his own defense because he could not testify as to one of the charges without facing cross-examination on the other, which involved unrelated incidents separated by over 11 months; the improper joinder of these counts allowed the prosecution to argue that the person who committed one offense must have committed the other due to alleged similarities in modus operandi, thus violating Defendant's right to be tried only on the facts of each separate incident; further, joinder of the two counts violated Defendant's right to testify in his own defense, as he was unable to elect to testify as to only one of the charges).

PRACTICE POINTER: This problem can be alleviated somewhat by the judge keeping cross-examination within the scope of direct. See Ind. R. Evid. 611(b) (cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness) and Ind. R. Evid.104(d) (accused does not become subject to cross-examination as to other matters in the case by testifying about a preliminary matter). However, defendant's testimony about one offense, while remaining silent on other, is likely to have impact on jurors. See Adams and Blinka, *Pretrial Motions in Criminal Prosecutions*, §12.5, at p. 556 (Michie 1995).

c. Complexity

Bowser v. State, 984 N.E.2d 236 (Ind. Ct. App. 2013) (even with many charges, evidence was not complex when it involved testimony from five witnesses and twenty-one exhibits, mostly photographs; scientific testimony about techniques for accident reconstruction not complex as to require severance; charged offenses differed only in levels of mental culpability, harm inflicted on victims, and if deadly weapon was used).

d. Possibility of Conviction on Accumulation of Evidence

Jurors may cumulate evidence and decide that guilt of one crime in a series of acts proves the defendant is guilty of other acts in the series. The trial court has discretion to decide whether risk is substantial of a conviction on one offense as a result of the jury confusing and lumping together evidence on a number of counts. See, e.g., U.S. v. Pacente, 490

F.2d 661 (7th Cir. 1973).

United States v. Fortenberry, 914 F.2d 671 (5th Cir. 1990) (jurors were able to separate evidence relating to each individual offense).

See also LaFave & Israel, Criminal Procedure, §17.1 (2015) and Andrew D. Leipold, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 Vand. L. Rev. 349 (2006).

PRACTICE POINTER: If severance is denied, ask for an instruction that the jury's determination of guilt or innocence on one count should not affect results on a second count.

e. Prejudicial Impression on Jury

(1) Charging Multiple Offenses

Merely charging multiple offenses may create the impression that the defendant has a criminal disposition and must have committed the charged offenses.

United States v. Fortenberry, 914 F.2d 671 (5th Cir. 1990) (court stated that because nature of charged offenses was different, jury would not infer from one offense a criminal disposition to commit other offense).

(2) Non-Testifying Co-Defendant Invokes Fifth

Tucker v. State, 534 N.E.2d 1110 (Ind. 1989) (confederate should not have been called by State as witness during criminal prosecution where all parties knew in advance that he would invoke Fifth Amendment; natural inference raised in jury's mind when **an alleged accomplice refuses to testify** is that withheld testimony would be damaging, not only to witness but to defendant; if defendant requests an admonishment that jury disregard the refusal, trial court is required to give it).

4. Time for Filing Motion

Ind. Code § 35-34-1-12 provides:

(a) A defendant's motion for severance of crimes or motion for a separate trial must be made before commencement of trial, except that the motion may be made before or at the close of all the evidence during trial if based upon a ground not previously known. The right to severance of offenses or separate trial is waived by failure to make the motion at the appropriate time.

(b) If a defendant's pretrial motion for severance of offenses or motion for a separate trial is ***overruled***, the motion may be renewed on the same grounds before or at the close of all the evidence during trial. The right to severance of offenses or separate trial is waived by failure to renew the motion.

(c) If a defendant's motion for severance of offenses or separate trial is granted during the trial, the granting of the motion shall not bar a subsequent trial of that defendant on the offenses charged.

Motion to sever may be made before or at close of all the evidence during trial based

upon ground not previously known. Ind. Code § 35-34-1-12(a). If defendant's pretrial motion is denied, renew motion to sever on same grounds before or at the close of all evidence. Ind. Code § 35-34-1-12(b). Failure to renew motion at trial waives right to severance.

Shaffer v. United States, 362 U.S. 511, 516 (1960) ("[T]he trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear.").

Stevens v. State, 580 N.E.2d 274 (Ind. Ct. App. 1991) (defendant waived right to have similar offenses tried separately when he made pretrial motion for severance but failed to renew at trial). See also Brown v. State, 683 N.E.2d 600 (Ind. Ct. App. 1997).

Townsend v. State, 533 N.E.2d 1215 (Ind. 1989) (failure to timely file motion to sever waives defendant's right to severance).

Hodges v. State, 524 N.E.2d 774 (Ind. 1988) (where defendant responded to joinder of additional charges of child molestation involving same victim by making motion to dismiss counts, but did not object to joinder, or move to sever charges for trial or to continue trial, he waived any alleged error resulting from joinder).

PRACTICE POINTER: Renew the motion to sever at every opportunity when prejudice from joinder reveals itself at trial. Renewing the motion multiple times is not required to preserve the issue for appeal, but appellate courts may be inclined to take a severance motion more seriously when a defendant diligently pursued it at trial. See generally United States v. Free, 841 N.E.2d 324-25 (9th Cir. 1988).

II. DEFENDANTS

A. JOINDER OF DEFENDANTS

"Joint trials do conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial." Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968).

1. Tactical Advantages and Disadvantages for Defense

Advantages of multiple defendant trials may include:

(1) having more lawyers on defense side to spread work around and "gang up" on a prosecutor working alone; and
(2) least culpable defendant in better shape to demonstrate insignificance of his or her role in front of jury or sentencing judge.

See Nissman and Hagen, *Law of Confessions* at §17.10 (Clark Boardman Callaghan 1994).

In Indiana, when several defendants are tried together, they are required to "join their [peremptory] challenges." Indiana Jury Rule 18(a). This rule long predates the adoption of the Jury Rules, see Ind. Code § 35-37-1-3(d), and has been held not to violate equal protection. See Martin v. State, 262 Ind. 232, 317 N.E.2d 430 (1974).

2. When Permitted

Joinder of multiple defendants determined by Ind. Code § 35-34-1-9(b) which provides:

> Two (2) or more defendants can be joined in the same indictment or information when:
>
> (1) each defendant is charged with each offense included;
> (2) each of the defendants is charged as a conspirator or party to the commission of the offense and some of the defendants are also charged with one or more offenses alleged to be in furtherance of the conspiracy or common scheme or plan; however, a party to the commission of an offense or conspirator need not be designated as such in the indictment or information; or
> (3) conspiracy is not charged and not all of the defendants are charged in each count, if it is alleged in the indictment or information that the offenses charged:
>
> (A) were part of a common scheme or plan; or
> (B) were so closely connected in respect to time, place, and occasion that it would be difficult to separate proof of one (1) charge from proof of the others.

Gordon v. State, 609 N.E.2d 1085 (Ind. 1993) (joint trial of two or more defendants within discretion of trial judge).

A trial court must grant severance where there are mutually antagonistic defenses for the codefendants only if one party's mutually antagonistic defense precludes acquittal of the other. Underwood v. State, 535 N.E.2d 507, 514 (Ind. 1989).

a. Identity of Charges

Two or more defendants can be joined in the same indictment or information when each defendant is charged with each offense included in the charging document. Ind. Code § 35-34-1-9(b)(1).

> Sapp v. State, 513 N.E.2d 178 (Ind. 1987) (joinder on State's motion).

b. Conspiracy/Joint Enterprise

Two or more defendants can be joined in the same indictment or information when each of the defendants is charged as a conspirator or party to the commission of the offense and some of the defendants are also charged with one or more offenses alleged to be in furtherance of the conspiracy or common scheme or plan; however, a party to the commission of an offense or conspirator need not be designated as such in the indictment or information. Ind. Code § 35-34-1-9(b)(2).

> Maynard v. State, 508 N.E.2d 1346 (Ind. Ct. App. 1987) (trial court did not abuse its discretion in trying defendant with two other defendants who were charged with conspiracy and theft of some of the vehicles which defendant was charged with stealing).

c. Part of Common Scheme or Plan

Two or more defendants can be joined in the same indictment or information in the absence of identity of offenses or conspiracy when the indictment or information alleges that the offenses charged were part of a common scheme or plan. Ind. Code § 35-34-1-9(b)(3)(A).

d. Difficulty in Separate Proof

Two or more defendants may be joined when the offenses are so closely connected in respect to time, place, or occasion to make it too difficult to separate proof of one charge from proof of others. Ind. Code § 35-34-1-9(b)(3)(B).

Mauricio v. State, 476 N.E.2d 88 (Ind. 1985) (felony murder and aiding felony murder arising out of the same robbery and killing exemplify an "offense connected in time, space, or occasion").

Smith v. State, 465 N.E.2d 1105 (Ind. 1984) (conspiracy to commit murder and murder prosecution arising out of same death).

B. CO-DEFENDANT'S HEARSAY STATEMENTS

1. Request Separate Trials Before Trial

Ortiz v. State, 265 Ind. 549, 561, 356 N.E.2d 1188, 1195 (1976), *overruled on other grounds by* Smith v. State, 689 N.E.2d 1238 (Ind. 1997) (motion to sever should be made before trial unless defendant is unaware of existence or incriminating content of statement).

2. Non-Testifying Co-Defendant's Statement - Bruton Issues

Admission of non-testifying co-defendant's statements implicating defendant violates Sixth Amendment right to confront witnesses. Curative instructions inadequate to cure prejudice to defendant. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968).

Lilly v. Virginia, 527 U.S. 116, 119 S.Ct. 1887 (1999) (admission of accomplice's out-of-court statement implicating the defendant violated the Confrontation Clause).

Crawford v. Washington, 124 S.Ct. 1354 (2004) (admission of testimonial statements, against a defendant without the opportunity to cross-examine the declarant, violates the Confrontation Clause regardless of the statement's "reliability").

Roberts v. Russell, 392 U.S. 293, 88 S.Ct. 1921 (1968) (Bruton retroactive and applicable to states).

a. Indiana Statute

When two or more defendants have been joined for trial, a defendant may move for a separate trial because another defendant has made an out-of-court statement which makes reference to the moving defendant but is not admissible evidence against him.

Under Ind. Code § 35-34-1-11(b) the prosecutor must elect:

(1) a joint trial at which the statement is not admitted into evidence;
(2) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted; or
(3) a separate trial for the moving defendant.

b. Redacted Confessions

To alleviate Bruton problem, prosecutor has option of insisting on a joint trial if State agrees to delete all references to defendant if confession of co-defendant is introduced at trial.

Use, at joint trial, of non-testifying co-defendant's confession that has been redacted so as to replace defendant's name with a space or the word "deleted," violates the 6th Amendment right to confrontation. Where confession refers directly to defendant, merely replacing his name with a blank, or the word deleted, is not likely to fool anyone. Gray v. Maryland, 523 U.S. 185, 118 S.Ct. 1151 (1998).

Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702 (1987) (a confession so edited as to omit any reference to the defendant is not prohibited by Bruton, even though it could be read, in light of other evidence, to incriminate defendant. Unlike confession in Gray v. Maryland, here the confessions did not refer directly to the defendant and required evidentiary linkage for their incriminating effect.)

Examples (predating Gray v. Maryland):

Jenkins v. State, 274 Ind. 140, 409 N.E.2d 591 (1980) (confession referring to co-defendant and to third person who was not on trial).

Townsend v. State, 533 N.E.2d 1215, 1224-25 (Ind. 1989) (co-defendant's name was replaced with the word "blank" and the words "other person" and "another person").

Carter v. State, 266 Ind. 140, 361 N.E.2d 145 (1977) (redaction insufficient; each statement was so interlaced with reference to co-defendants and their alleged role in crime that effective deletion of all such references would have resulted in loss of all context and remaining sentences would have virtually no meaning; error harmless).

Sims v. State, 265 Ind. 647, 358 N.E.2d 746 (1977) (insertion of word "blank" or "X" for defendant's name inadequate redaction; separate trials should have been ordered).

Fox v. State, 179 Ind. App. 267, 384 N.E.2d 1159 (1979) (statement may implicate co-defendant and be inadmissible in joint trial even if all references to co-defendant have been deleted).

(1) Inadmissible - Other Evidence Links Defendant to Confession, No Proper Limiting Instruction

Even if a co-defendant's confession does not directly implicate the defendant, its admission against the co-defendant may prejudice the defendant if other evidence at trial links defendant to the redacted confession. It may be error to admit the co-defendant's confession in a joint trial without a limiting instruction advising jury that confession was limited to confessor only.

Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702 (1987) (use in joint trial of confession of non-testifying co-defendant, which has been edited to remove all reference to defendant's existence and becomes incriminatory only through linkage provided by other evidence, does not violate Confrontation Clause only if jury instructed not to use it in any way against defendant. The prosecutor must not invite the jury to violate the limiting instruction in his final argument).

Taggart v. State, 595 N.E.2d 256 (Ind. 1992) (reversible error to admit non-testifying co-defendant's redacted confession without a limiting instruction; rule in Richardson v. Marsh given retroactive application).

Harbert v. State, 51 N.E.3d 267 (Ind. Ct. App. 2016) (it was not fundamental error to admit co-defendant's statement that his wallet was stolen a few weeks before robbery around time he was with defendant and several other people; statement did not facially incriminate defendant in the robbery).

c. "Interlocking Confession" - Error To Admit

(1) Confrontation Clause

Where a non-testifying co-defendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him. Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714 (1987).

Cruz v. New York held that a court might use a defendant's interlocking confession on appeal to assess whether a confrontation clause violation was harmless error. Cruz also held that a court might use a defendant's interlocking confession at trial to assess whether co-defendant's confession had sufficient "indicia of reliability" to be directly admissible against defendant despite lack of opportunity for cross-examination. But the U.S. Supreme Court later held in Crawford v. Washington, 124 S.Ct. 1354 (2004), that the admission of a co-defendant's testimonial statement against a defendant who is denied the opportunity to cross-examine the co-defendant violates the Confrontation Clause regardless of the statement's "indicia of reliability."

PRACTICE POINTER: Be sure the record reflects the nature of the prejudice your client faces because of the Confrontation Clause violation.

(2) Error Often Found Harmless

Appellate courts often find harmless error in the admission of a co-defendant's interlocking confession. See Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714 (1987).

Gutierrez v. State, 270 Ind. 639, 388 N.E.2d 520 (1979) (harmless error to admit co-defendant's confession where defendant's own confession has been admitted and does not differ substantially from that of his confederate).

Morrison v. State, 516 N.E.2d 14 (Ind. 1987) (consolidating attempted robbery

cases against defendant was at most harmless error, notwithstanding co-defendant's statements implicating defendant in robbery and failure to take stand, where defendant's confession standing alone was sufficient to sustain conviction; co-defendant's statements were in essence admitted by defendant in his own statement to police).

Vickers v. State, 466 N.E.2d 3, 8 (Ind. 1984) ("The improper admission of a defendant's confession which implicates a jointly tried co-defendant will be considered harmless error [...] where the co-defendant's own confession has been lawfully introduced and where it does not materially differ from that of his confederate") (*quoting* Jefferson v. State, 399 N.E.2d 816 (Ind. Ct. App. 1980)).

d. Harmless Error - Other Evidence Establishes Guilt

Violations of the right to cross-examine are subject to harmless-error analysis. The same is true of Bruton violations, which are a species of the denial of the right of cross-examination. Fayson v. State, 726 N.E.2d 292, 294-95 (Ind. 2000).

Townsend v. State, 533 N.E.2d 1215 (Ind. 1989) (where each defendant's own confession and other evidence presented at trial clearly established his guilt, and both confessions were substantially same and were redacted and supported by an instruction to the jury, the admission of the confessions presents no reversible error).

Johnson v. State, 445 N.E.2d 107 (Ind. 1983) (trial court properly denied severance motion where co-defendant's pretrial statement exculpating defendant was contradicted by later statement claiming defendant was present on night of offenses, and defendant made no representation that co-defendant was likely to testify at separate trial; co-defendant had refused to testify at hearing outside presence of jury).

e. Cured if Co-Defendant Testifies

Alleged Bruton violations (confessions improperly introduced in a joint trial) can be cured if, in joint trial, co-defendant takes the stand and is available for cross-examination. Nelson v. O'Neil, 402 U.S. 622, 91 S.Ct. 1723 (1971); Ferrier v. State, 514 N.E.2d 285 (Ind. 1987).

Castro v. State, 580 N.E.2d 232 (Ind. 1991) (fact that co-defendant, declarant of extrajudicial statement implicating defendant, took stand in joint homicide trial did not establish prejudice so as to require severance, where declarant testified at trial and was available for cross examination by defendant).

Blacknell v. State, 502 N.E.2d 899 (Ind. 1987) (defendant was not prejudiced because declarant could be cross-examined).

f. *In Camera* Inspection of Confessions

Court may order prosecutor to disclose *in camera* any information concerning statements made by defendants which prosecutor intends to introduce in evidence at trial if this information would assist court in ruling on a motion for a separate trial. Ind. Code § 35-34-1-11(c).

3. When *Bruton* Violation Not Reversible Error

a. If Statements do not Incriminate Defendant

If content of non-testifying co-defendant's statement does not facially incriminate defendant, admission of statement at joint trial is not reversible error. Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702 (1987); Smith v. State, 516 N.E.2d 1055, 1060 (Ind. 1987).

Fayson v. State, 726 N.E.2d 292, 294 (Ind. 2000) (non-testifying co-defendant's statement to police, that she concealed murder defendant because she did not want him to go to jail, was facially incriminating and its admission violated Bruton; co-defendant was charged with assisting a criminal, and reasonable juror could conclude that her statement implied that she knew that defendant had committed crime).

Brock v. State, 540 N.E.2d 1236 (Ind. 1989) (officer's statement in defendant's trial that defendant's non-testifying co-defendant told police "you guys were lucky that we didn't decide to shoot it out with you," and that they could have held off police for long time, did not facially incriminate defendant; thus, admission of statement did not violate defendant's right to confrontation).

b. If Co-Defendant's Confession used for Non-Hearsay Purposes

Use of confession of non-testifying co-defendant may be admitted not for proving truth of matter asserted, but, e.g., for non-hearsay rebuttal purposes.

Tennessee v. Street, 471 U.S. 409, 105 S.Ct. 2078 (1985) (defendant's rights under confrontation clause were not violated by introduction of co-defendant's written confession for non-hearsay purpose of rebutting defendant's testimony that his own confession was coercively derived from co-defendant's confession; judge's instruction restricting purpose of admitting confession properly limited the jury's use of that evidence; after instruction, prosecutor elicited sheriff's testimony emphasizing differences between defendant's confession and co-defendant's confession; confrontation clause protection satisfied by sheriff's presence on witness stand).

Cf.

Lilly v. Virginia, 527 U.S. 116, 119 S.Ct. 1887 (1999) (admission of accomplice's out-of-court statement implicating defendant violated Confrontation Clause).

C. JOINT DEFENSE AGREEMENT

1. Widely Recognized in Federal Courts

Written joint defense agreement substantiates an attorney-client privilege among co-defendants and their respective attorneys when they converse on matters of common interest concerning a case. These formal pooling agreements encourage full disclosure, spread burdens and costs of legal research and investigation, and help insure a united defense. See, Lefcourt & Dratel, "Joint Defense Planning in a Conspiracy Trial," in *The Defense of Drug Cases* (NORML, 2d ed. 1985).

United States v. McPartlin, 595 F.2d. 1321 (7th Cir. 1979) (joint defense agreements have received widespread acceptance in white collar criminal prosecutions in federal courts; the agreement in this case dealt with privilege issues).

Before using a joint defense, agreement counsel should always evaluate whether it is in the client's best interest. See Bookin & Burford, *Potential Problems Arising from the Joint Defense Privilege and the Use of Joint Defense Agreements*, ABA's Seventh Annual National Institute, White Collar Crime 1993, at I-15, I-22.

2. Indiana Law

Appellate courts have not ruled on the applicability of the joint defense privilege.

Work product doctrine may provide some protection for communications pursuant to a joint defense agreement.

Spears v. State, 401 N.E.2d 331 (Ind. 1980) (work product privilege protects the privacy of the attorney's mental processes), *overruled in part on other grounds by* WTHR v. Cline, 693 N.E.2d 1 (Ind. 1998).

PRACTICE POINTER: Written or oral agreements should be between attorneys, not clients. Include a statement that attorney-client privilege is not waived, and each attorney does not have client's authority to waive privileged nature of communication. Client's statements communicated to co-counsel should be in form of attorney's impressions of what client would say if testifying, rather than the client's verbatim statement.

a. Privileges

Ind. Code § 34-46-3-1(1) provides:

Except as otherwise provided by statute, the following persons shall not be required to testify regarding the following communications: (1) Attorneys, as to confidential communications made to them in the course of their professional business, and as to advice given in such cases.

Indiana Rule of Evidence 501(b) provides:

[A] person with a privilege against disclosure waives the privilege if the person or person's predecessor while holder of the privilege voluntarily and intentionally discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

Indiana Rule of Professional Conduct 1.6 also limits the extent to which an attorney may disclose client confidences.

Gubitz v. State, 360 N.E.2d 259, 265 (Ind. Ct. App. 1977) (attorney-client privilege can be waived by client, but only by client).

Webster v. State, 302 N.E.2d 763 (Ind. 1973) (conversation between attorney and third person at request of client not considered confidential).

D. SEVERANCE OF DEFENDANTS

1. Discretion

Defendant or prosecutor may move for severance. The decision to grant or deny severance is within the trial judge's discretion. Dudley v. State, 480 N.E.2d 881 (Ind. 1985); Gordon v. State, 609 N.E.2d 1085 (Ind. 1993).

Averhart v. State, 470 N.E.2d 666 (Ind. 1984) (soundness of exercise of discretion is measured by what actually occurred at trial).

Johnson v. State, 423 N.E.2d 623, 629 (Ind. Ct. App. 1981) (court may refuse to order separate trials on basis that defendant may be found guilty by association where the evidence presents clearly defined and distinctive roles for each defendant and there is no confusion over who may have spoken certain words or may have done certain acts).

a. Circumstances Not Automatically Requiring Severance

(1) Co-Defendants Blaming Each Other

Holifield v. State, 572 N.E.2d 490 (Ind. 1991) (where several defendants are being tried jointly, reversible error does not occur simply because one defendant gives testimony that incriminates other defendants).

(2) Co-Defendant's Prior Misconduct

Adams v. State, 490 N.E.2d 346 (Ind. Ct. App.1986) (denial of defendant's motion for separate trial in prosecution for robbery and conspiracy to commit robbery was not abuse of discretion; while evidence of other crimes committed by co-defendants was presented, defendant was not implicated in any other criminal activity and no evidence of his prior criminal record was admitted, and only in-court testimony by co-defendant was favorable to defendant).

(3) Co-Defendant Pleading Guilty During Trial

Gordon v. State, 609 N.E.2d 1085 (Ind. 1993) (defendant not entitled to mistrial on basis of co-defendant's guilty plea entered after defendant's trial began; plea was not entered in presence of jury, and jurors were questioned whether they had read articles published in local news media present at plea; jurors indicated they had not read articles, and were instructed to disregard absence of co-defendant and his attorney for remainder of trial).

2. Must Show Impossibility of Fair Trial

When a defendant would be prejudiced by a joint trial, the defendant is entitled to severance. The defendant must show the impossibility of a fair trial and not merely that separate trials would offer a greater chance of acquittal.

Cunningham v. State, 469 N.E.2d 1 (Ind. Ct. App. 1984) (where wife failed to show prejudice, trial court's refusal to grant separate trials did not deny her right to fair trial).

Peck v. State, 563 N.E.2d 554 (Ind. 1990) (defendant, who claimed that joint murder trial forced him to share peremptory challenges with co-defendant, his brother, that he was forced to allow jury to hear confusing instructions, and that consolidating cases led to admission of incriminating evidence which would not have been admissible if defendant were tried alone, failed to establish actual prejudice as the result of consolidation, and thus failed to establish that consolidation was an abuse of discretion; co-defendant used two strikes in manner defendant did not agree with, resulting in defendant being unable to strike a juror, but incriminating statements by co-defendant were not as damaging to defendant as defendant's own admission that he thought he killed victim).

Maynard v. State, 508 N.E.2d 1346 (Ind. Ct. App. 1987) (evidence concerning co-defendant did not prejudice defendant and co-defendant's post-arrest statement inadmissible due to possible prejudice to defendant).

a. Factors Affecting "Fair Trial" Determination

(1) Mutually Antagonistic Defenses

Mutually antagonistic defenses require severance of trials of multiple defendants only if acceptance of one party's mutually antagonistic defense precludes acquittal of other. Rouster v. State, 705 N.E.2d 999, 1004 n.3 (Ind. 1999). See also 22A C.J.S. *Criminal Law* § 569 (1989).

Underwood v. State, 535 N.E.2d 507 (Ind. 1989) (murder defendant was not entitled to separate trial on basis of co-defendants' statements that they merely tapped victim and that defendant beat victim with tire iron, in light of evidence that defendant maimed victim in other ways sufficient to cause his death).

Huffman v. State, 543 N.E.2d 360 (Ind. 1989) (denial of severance in murder case was not abuse of discretion, although defendant and co-defendant accused each other of being the principal perpetrator, and co-defendant attempted to discredit each of defendant's witnesses), *overruled in part on other grounds by* Street v. State, 567 N.E.2d 102, 105 (Ind. 1991).

PRACTICE POINTER: Underwood and Huffman were co-defendants in a capital murder case and were actually tried separately when their cases were remanded.

United States v. Zafiro, 945 F.2d 881 (7th Cir. 1991) (defenses must be not only conflicting, but irreconcilable, and a situation where acceptance by the jury of one party's defense compels disbelief of the other party's defense).

(2) Incriminating Statements

A factor to consider is whether statements of co-defendant incriminate defendant. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968). See IPDC Pretrial Manual, Chapter 8 § II.B., *above*.

(3) Exculpatory Statements

When co-defendant's testimony is necessary to exculpate defendant, but unavailable under the Fifth Amendment if both defendants are tried jointly, the defendant may

have the right to severance to gain co-defendant's testimony. United States v. Echeles, 352 F.2d 892 (7th Cir. 1965).

To warrant severance, moving party must demonstrate:

(a) bona fide need for testimony;
(b) substance of testimony;
(c) exculpatory nature and effect of testimony; and
(d) likelihood co-defendant will testify if severance granted.

Once movant makes threshold showing, trial court must then:

(1) examine significance of testimony in relation to defendant's theory of case;
(2) assess extent of prejudice caused by absence of testimony;
(3) consider effects on judicial administration and economy; and
(4) give weight to timeliness of the motion.

United States v. Ford, 870 F.2d 729, 731 (D.C. Cir. 1989). See also LaFave & Israel, *Criminal Procedure* §17.2 (1984).

(4) Size of Case

Number of defendants and complexity of issues may require severance of defendants to avoid jury finding of "guilt by confusion." U.S. v. Gallo, 668 F.Supp. 736 (E.D.N.Y. 1987).

United States v. Halliman, 923 F.2d 873 (D.C. Cir. 1991) (issue is whether jurors can reasonably compartmentalize the evidence introduced against each individual defendant).

(5) Degree of Culpability

One factor to consider is whether the evidence of a co-defendant's culpability is clearly greater than against the defendant seeking severance and will result in an unfair spillover effect. Proof must be so disparate that the jury will not be able to distinguish and separate relevant evidence as to each defendant even with cautionary instructions. United States v. Sampol, 636 F.2d 621 (D.C. Cir. 1980).

Hopper v. State, 539 N.E.2d 944 (Ind. 1989) (defendant in cocaine dealing case was not prejudiced by trial court's denial of request for severance from joint trial with co-defendant, even though co-defendant's involvement in transactions was more extensive and co-defendant absented himself from trial).

United States v. Thomas, 12 F.3d 1350 (5th Cir. 1994) (disparity of evidence against co-defendants does not warrant severance where other remedies are available, such as instructions to jury. Jurors are assumed to follow instructions).

United States v. Tarantino, 846 F.2d 1384 (D.C. Cir. 1988) (granting motion to sever requires clear disparities of weight, quantity, or type of evidence between movant and co-defendant).

But see

United States v. Helms, 897 F.2d 1293 (5th Cir. 1990) (disparity in weight of evidence does not show compelling prejudice), *overruled in part on other grounds by* United States v. Huntress, 956 F.2d 1309, 1317 (5th Cir. 1992).

(6) Guilt by Association

Defendant may be judged guilty by association with other defendants. U.S. v. Figueroa, 618 F.2d 934 (2d Cir. 1980).

United States v. Sutton, 801 F.2d 1346, 1363-64 (D.C. Cir. 1986) (conspiracy cases create risk of transferring guilt of one defendant to another). See Krulewitch v. United States, 336 U.S. 440, 69 S.Ct. 716 (1949).

Defendant must demonstrate defenses are "conflicting and irreconcilable" and "there is a danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." Rhone v. United States, 365 F.2d 980, 981 (D.C. Cir. 1966).

Johnson v. State, 423 N.E.2d 623, 629 (Ind. Ct. App.1981) (trial court does not abuse its discretion in refusing to order separate trials on the basis that a defendant may be found guilty by association, where the evidence presents clearly defined and distinctive roles for each defendant and there is no confusion over who may have spoken certain words or who may have done certain acts).

(7) Commenting on Defendant's Failure to Testify

Defendant who elects not to testify at trial may be prejudiced if co-defendant testifies and counsel highlights co-defendant's testimony creating an implicit contrast, and reference to, defendant's failure to testify.

United States v. McClure, 734 F.2d 484 (10th Cir. 1984) (co-defendant testified and his counsel emphasized that his client was credible because he testified and submitted to cross-examination. Defendant asserted that the argument violated defendant's Fifth Amendment right by commenting on the failure to testify. Court ruled against defendant, stating that closing argument would not naturally and necessarily be taken as a comment on defendant's silence).

(8) Disparity of Charges

Defendant charged with relatively minor offense may be prejudiced where co-defendants charged with substantially greater crimes. United States v. McLain, 823 F.2d 1457 (11th Cir. 1987).

United States v. Felix-Gutierrez, 940 F.2d 1200, 1210 (9th Cir. 1991) (although disparity of charges always provides some risk of prejudice, under the facts in this case prejudice did not reach the magnitude necessary for severance).

3. Filing Motion and Preserving Error

See Ind. Code § 35-34-1-12 and IPDC Pretrial Manual, Chapter 8 § II.B.4, *above*.

a. Timely Motion, Renewed at Trial

On appeal, defendant must show timely motion to sever, and timely renewal of motion to sever at trial. Stovall v. State, 477 N.E.2d 252 (Ind. 1985); Townsend v. State, 533 N.E.2d 1215 (Ind. 1989).

To show an abuse of discretion in refusal to sever, an appellant must show that in light of what occurred at trial, the denial of a separate trial subjected him to actual prejudice. Peck v. State, 563 N.E.2d 554, 557 (Ind. 1990).

Hatchett v. State, 503 N.E.2d 398 (Ind. 1987) (defendant adequately preserved issue of his desire for separate trial from co-defendant for appellate review, even though defendant filed no written motion for severance, where defendant objected to joinder twice before trial, objected during trial to being seated with co-defendant and to sharing voir dire time and peremptory challenges, and renewed his objection at close of evidence).

b. Must Show Harm

Rouster v. State, 600 N.E.2d 1342 (Ind. 1992) (defendant's motion for separate trial in capital murder prosecution was properly denied, where motion contained no specific allegations or facts to put trial court on notice of any mutually antagonistic defenses).

Stovall v. State, 477 N.E.2d 252 (Ind. 1985) (since prosecution stipulated to questions proffered by defense to be asked of victim witness in rape/robbery/confinement case, and questions were not in violation of rape shield law, and since questions were never asked of victim, no harm to defendant).

c. Cannot Rely on Co-Defendant's Motion to Sever

Rouster v. State, 600 N.E.2d 1342 (Ind. 1992) (defendant who failed to request separate trial cannot rely on co-defendant's motion for severance to preserve error for appellate review. Issue of whether defendant charged with murder was entitled to separate trial was waived, where defendant failed to renew pretrial motion for severance at close of evidence).

III. CHECKLIST

Reprinted with permission from *BNA Criminal Practice Manual*, 51:3351.

Joinder and severance are used in the interest of judicial economy or to clarify complex issues for the jury. Joinder and severance of offenses, or of defendants, centers on whether two offenses were common and whether a defendant's constitutional right to due process and a fair trial are impacted by joinder.

(1) Antagonistic defenses. Are the co-defendants' defenses conflicting and irreconcilable? Must the jury necessarily believe one defendant at the expense of the other?

(2) Relative strengths/weaknesses of defenses. Does the defendant have a stronger legal defense that will be diluted by the co-defendant's weak defense?

(3) Evidence. Will some prejudicial evidence be admissible against the co-defendants but

inadmissible against accused? By same token, will some inculpatory evidence be excluded if they are tried together?

(4) Relative strengths/weaknesses of defendants. Does evidence against the defendant make him appear less blameworthy than his co-defendant? Is he more attractive in demeanor or physical appearance? If the other defendants testify, is he more articulate?

(5) Testifying co-defendant. Will co-defendant testify, thus making the non-testifying defendant look to the jury as if he is "hiding something?"

(6) Non-testifying co-defendant. Would non-testifying co-defendant take stand and give exculpatory testimony for defendant if severance was granted?

(7) Mass trials. Will the number of defendants confuse the jury?

(8) Co-defendant's counsel. Is he or she easy to work with? Or will cooperation and coordination be nearly impossible?