CHAPTER 22

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Joinder and Severance

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[*] With thanks to John Brooks for research assistance.

§ 22.1 INTRODUCTION

This chapter deals with joinder and severance — that is, when the Commonwealth may try more than one offense[1] or more than one defendant[2] in a single trial.

Although there are rare cases where the defendant may benefit from a joinder of offenses[3] or defendants,[4] ordinarily it is important to go to trial facing the fewest number of charged offenses and joined with no other defendants. The more allegations the jury has before it of defendant's bad conduct, or of the bad conduct of defendant's confederates, the more likely that it will convict on the basis of the impermissible inference that with so many charges in the air, or so many associated bad actors in the courtroom, the defendant must surely be guilty of something. In fact, in some cases the success of the defense may turn on whether counsel succeeds in severing offenses or defendants.[5]

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[1] This is the issue of joinder and severance of offenses. Duplicity and multiplicity of charges will not be reviewed here, but are discussed *supra* § 20.4.D. Duplicity is the improper joining in a single count of two or more separate offenses. Multiplicity is the improper charging of one offense in more than one count. Counsel faced with a multicount indictment should be sensitive to the possibility of challenging the indictment on these grounds.

Where the defense plans to rely on a defense of insanity, counsel should consider moving pretrial for a bifurcated trial on the merits and then on the issue of criminal responsibility. The decision rests within the discretion of the trial judge. *See* Commonwealth v. Blanchette, 409 Mass. 99, 108 (1991) (citing Commonwealth v. Siegfriedt, 402 Mass. 424, 431 (1988)).

[2] This is the issue of joinder and severance of defendants.

[3] For instance, the defendant with limited resources may wish to get all charges resolved in a single trial, even though doing so may increase the chance of conviction. Also, there are the rare cases where the defendant will benefit from joinder of offenses. For example, when it appears likely that the jury will know of other allegations against defendant, *and* when the other allegations are not supported by substantial evidence, joinder of the offenses will be in defendant's interest.

[4] Where the defendant is a very minor player in the alleged criminal activity, where the evidence against him is thin, where the prosecution will not be able to produce evidence that the defendant had other, noncriminal relationships with the defendants against whom the evidence is stronger, and where a separate trial would otherwise occur at which the prosecutor might adduce more cogent evidence against defendant, joinder rather than severance should benefit the defendant. *See, e.g.*, United States v. Ellis, (D. Mass. 1982) (No. 82-62) (minor player in drug case acquitted).

[5] For instance, in United States v. Anzalone, the defendant was charged in a single indictment with extortion and various currency violations. The extortion charge was factually weak; the currency offenses were factually stronger, although legally questionable. While the jury might otherwise be disinclined to believe the informant when he claimed an $8,000 extortion, the jury might think again when it learned that defendant had also made questionable bank deposits of more than ten times that amount. While a conviction on the currency offenses was vulnerable on appeal, a conviction on extortion, depending as it would on the jury's credibility determinations, would have been relatively unassailable.

After the court allowed the motion to sever and scheduled two separate trials, defendant was acquitted of extortion, and convicted of the currency offenses. That conviction was overturned on appeal in United States v. Anzalone, 766 F.2d 676 (1st Cir. 1985).

For cases where joinder of the offenses may have made the difference resulting in defendant's conviction, see Commonwealth v. Martinez, 47 Mass. App. Ct. 839, 843–844

Nevertheless, courts too often prize judicial economy, which argues for joinder, above fairness to the criminal defendant. Certainly the published opinions contain numerous decisions rejecting defendant's challenges to joinder below, with only a handful of reversals. But conclusions should be drawn from this cautiously, since it is to be expected that the published opinions will seldom reflect those decisions at the trial court where severance was allowed. In this area of the law, as in most others, the issue must be vigorously litigated at the trial court.

§ 22.2 THE RULE

Rule 9 of the Massachusetts Rules of Criminal Procedure governs joinder and severance.

§ 22.2A. JOINDER OF OFFENSES

Rule 9(a) states that two or more offenses may be joined in a single trial of a single defendant if they are *"related"*, that is, if they (1) are based on the same criminal conduct or episode or (2) arise out of a course of criminal conduct or series of criminal episodes connected together or constituting parts of a single scheme or plan.[6] In these circumstances, either party (or the court)[7] may move for joinder, which the judge must allow "unless he determines that joinder is not in the best interests of justice."[8] Unrelated offenses may be joined for trial only on the defendant's motion, or with his written consent.[9] More stringent requirements control joinder of offenses in a single indictment or complaint.[10]

(1999) (defendants' knowledge of one drug transaction charged could be inferred from proof of their active participation in other); Commonwealth v. Mahar, 21 Mass. App. Ct. 307 (1985) (where defendant had reasonably strong defenses to rape and attempted rape charges, joinder of the offenses appeared to contribute to jury's conviction on both); Commonwealth v. Drew, 4 Mass. App. Ct. 30 (1976) (defendant was present in the car at three robberies, but otherwise there was little evidence that she participated in the crimes — in separate trials her chances for acquittal would no doubt have been significantly greater).

[6] MASS. R. CRIM. P. 9(a)(1), (3).

[7] MASS. R. CRIM. P. 9(c) provides that the judge may order consolidation of complaints or indictments for trial if the offenses could have been joined in a single complaint or indictment — a stricter standard than a moving party faces. *See infra* note 10.

[8] MASS. R. CRIM. P. 9(a)(3).

[9] MASS. R. CRIM. P. 9(a)(4).

[10] Under Rule 9(a)(2), offenses must not only be related, but must also be "of the same or similar character" in order to be charged in the same indictment or complaint. *See* United States v. Werner, 620 F.2d 922, 926 (2d Cir. 1980) (Court, relying on WEBSTER'S NEW INTERNATIONAL DICTIONARY, notes that "similar" means "nearly corresponding; resembling in many respects; somewhat alike; having a general likeness"). While (a)(2) would appear to afford significant protection to defendant, in fact it is a minor provision, since it governs only what may be charged in a single indictment or complaint. The primary fact is that related offenses pled in separate indictments or complaints may be joined at trial even if the offenses are not of the same or similar character. Rule 9(a)(3). Nevertheless, counsel should be aware of the requirement contained at 9(a)(2) and prepared to use it when the Commonwealth has prematurely joined related but dissimilar offenses at the indictment stage rather than through the later motion practice as required by 9(a)(3).

The Massachusetts rule is thus on its face more stringent than its federal counterpart,[10.5] which allows joinder of offenses "of the same or similar character."[11] The Reporter's Notes to Rule 9 state the reason for the difference: "Rule 9 takes the position that the goal of judicial economy will rarely be paramount to affording the defendant a trial as free from prejudice as possible, therefore, joinder of unrelated offenses is prohibited."[12]

Finally, Rule 9(e) prohibits joinder of substantive offenses with charges of conspiracy to commit those offenses, except on motion of the defendant.[12.5] The purpose of this provision is to prevent convictions as a matter of course on the substantive offenses by juries that have been treated to "the much broader scope of admissibility of evidence permitted to prove the conspiracy charge."[13]

§ 22.2B. JOINDER OF DEFENDANTS

Rule 9(b) governs joinder of defendants. Under it, defendants may be joined if the charges against them either arise out of the same criminal conduct or episode, or

[10.5] Commonwealth v. Sullivan, 436 Mass. 799, 804 n. 5 (2002); Commonwealth v. Jacobs, 52 Mass. App. Ct. 38, 45-46 (2001).

[11] FED. R. CRIM. P. 8. The "same or similar character" provision of the federal rule would appear to allow extremely broad joinder. For instance, a defendant charged with unconnected robberies widely separated in time and place could apparently be tried in a single proceeding based on 8(a). However, the federal courts have generally been reluctant to rely exclusively on the rule's "same or similar character" language, both because of the obvious risk of unfairness to the defendant from overly easy joinder, and because joinder of offenses based solely on the same general character of the offenses does not serve the goal of judicial economy, and thus appears without a purpose beyond that of facilitating conviction. *See, e.g.,* United States v. Jawara, 474 F.3d 565 (9th Cir. 2006) (discussing scope and differing interpretations by federal circuits of "same or similar character" provision); United States v. Randazzo, 80 F.3d 623, 627 (1st Cir. 1996) ("It is obvious why Congress provided for joinder of counts that grow out of related transactions-ones that are 'connected' or 'part of a common scheme or plan'; the reason for allowing joinder of offenses having 'the same or similar character' is less clear"); United States v. Chambers, 964 F.2d 1250 (1st Cir. 1992) (proper joinder of six robbery charges involving similar institutional victims, mode of operation, and time period); United States v. Halper, 590 F.2d 422, 430 (2d Cir. 1978); United States v. Foutz, 540 F.2d 733, 737–38 n.4 (4th Cir. 1976).

[12] The Reporter's Notes to Rule 9 are an important source of information, as well as language supportive of defendant's right to a fair and not merely efficient trial.

[12.5] *See* Commonwealth v. D'Amour, 428 Mass. 725, 749–750 (1999).

[13] Reporter's Notes at subdivision (e). While the Massachusetts rule against joint trial of conspiracy and substantive charges has been questioned (*see* Commonwealth v. French, 357 Mass. 356, 375 n.20 (1970); Commonwealth v. Gallarelli, 372 Mass. 572 (1977) (Kaplan, J., concurring)), it serves both the purpose described, *supra* in the Reporter's Notes, and also avoids a special joinder problem that has arisen, inter alia, in the federal cases, where the conspiracy charge was dismissed for lack of evidence, leaving various defendants in joint trial but charged in fact with distinct and different substantive offenses. *See* Schaffer v. United States, 362 U.S. 511 (1960) (five-member majority held that the defendants were still properly joined). The Massachusetts rule thus serves the salutary function of discouraging prosecutional overreaching to allege conspiracy in order to get before the jury evidence as to substantive offenses that the jury would not otherwise hear, or in order to join defendants essentially accused of unrelated substantive crimes.

"out of a course of criminal conduct or series of criminal episodes" constituting a single scheme, conspiracy, or joint enterprise.[14]

§ 22.2C. RELIEF FROM MISJOINDER OR PREJUDICIAL JOINDER

The Massachusetts rule, like its federal counterparts,[15] provides two conceptually distinct issues that are relevant to whether relief from joinder will be granted: *First,* there is the issue of *misjoinder,* whether the offenses or defendants were properly joined.[16] Only related offenses may be joined, and only defendants charged essentially with related offenses may be tried jointly.[17] If offenses or defendants have been misjoined it appears from the clear language of Rule 9 that on motion the court has no discretion but to sever.

Second, there is the issue whether, with offenses or defendants otherwise properly joined, severance should nevertheless be granted in order to avoid unfair prejudice to defendant.[18] This issue of *prejudicial joinder* is addressed in Rule 9(d), which states that if it appears that joinder of offenses or of defendants "is not in the best interests of justice," the judge, sua sponte or on motion from either party, may grant severance.[19] The burden is on the defendant to show prejudice from joinder.[19.5] A motion from the defendant for relief from prejudicial joinder must be made in writing, prior to trial, and must be supported by affidavit setting forth the basis for the claim of prejudice.[20] Unlike the misjoinder provisions, the language of Rule 9(d) suggests the

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[14] Commonwealth v. Sullivan, 436 Mass. 799, 804 (2002); Commonwealth v. Green, 52 Mass. App. Ct. 98, 102 (2001); Commonwealth v. Jacobs, 52 Mass. App. Ct. 38, 40 (2001). *See* full discussion *infra* at §22.6. Rule 9(b) is essentially identical to its federal counterpart and also incorporates the language of federal rule 8(a), thus avoiding the disharmony in the federal rules that may allow joinder of unrelated offenses as to some defendants in a multidefendant case. *See* Fed. R. Crim. P. 8(a), 8(b).

Mass R. Crim. P.9(c) allows otherwise permissible joinder of defendants (or offenses) to be accomplished by motion of the trial court.

[15] Fed. R. Crim. P. 8, provides the threshold standard that must be met before offenses or defendants may be joined. Fed. R. Crim. P. 14 allows discretionary relief from otherwise proper joinder on the ground of prejudice. *See also* Fed. R. Crim. P. 12(b)(3)(D) which requires that a Rule 14 motion to sever charges or defendants be made pre-trial.

[16] *See* full discussion of criteria *infra* at §§ 22.4 and 22.6.

[17] As the Reporter's Notes to Subdivision 9(d) explain: "[I]t is important to know what the minimal grounds for joinder of defendants or offenses are when considering a claim of misjoinder because such a claim is an assertion that the minimal requirements have not been satisfied. Thus, when a motion for severance of defendants or for separate trials [of offenses] is based on the ground that the consolidated offenses should not have been joined, . . . the standards upon which the motion is to be judged are stated in subdivisions (a) (1)–(2) of this rule."

[18] *See* full discussion *infra* at §§ 22.5 and 22.7.

[19] *See* Reporter's Notes at subdivision (d): "The assertion of prejudicial joinder does not challenge the propriety of the initial order for consolidation. Rather the prejudice is found in facts peculiar to a defendant's case."

[19.5] Commonwealth v. Sullivan, 436 Mass. 799, 805 (2002).

[20] MASS. R. CRIM. P. 9(d)(2). A motion for severance may be made first at trial only "if based upon a ground not previously known." Rule 9(d)(2). *See also* Commonwealth v. Martinez, 37 Mass. App. Ct. 948, 950 (1995) (where counsel knew of codefendant's potentially

discretionary nature of the judge's decision whether to grant severance because the prejudice in the case is sufficiently strong that the interests of justice require it.[21]

While the distinction between misjoinder and prejudicial joinder is clear from the rule and well established in federal jurisprudence,[22] the Massachusetts cases rarely allude to the distinction, and often merely state that the matters of joinder and severance are entrusted to "the sound discretion of the trial judge".[23] But it makes no sense to suggest that the trial judge has the discretion to violate the rule by misjoining offenses or defendants, and certainly the cases should not be read to support such a contention.[24]

§ 22.3 PROCEDURAL ISSUES IN CHALLENGING JOINDER

There are a few procedural issues of importance. *First*, in considering a challenge to joinder, counsel should *evaluate whether a challenge may lie on*

antagonistic defense and could have anticipated his decision to testify at trial, failure to ask for severance pretrial was fatal).

[21] MASS. R. CRIM. P. 9(d)(l) states that "[i]f it appears that joinder is not in the best interests of justice," the judge "may" grant a severance. As to the decision whether justice would be better served by joint or separate trials, the Reporter's Notes to this subdivision state: "The countervailing considerations affecting this decision are the defendants' interests and the interests of the court and prosecution in having the adjudication as short and as inexpensive as possible. The merits of each side's claims will differ from case to case. Only the trial judge is in a position to balance effectively the competing interests, and in most cases, his discretion is very broad."

[22] *See, e.g.,* United States v. Yefsky, 994 F.2d 885, 895, 897 (1st Cir. 1993) (proper joinder of two distinct conspiracies and fraud charges). The federal rule is that the threshold question whether joinder was proper is "a question of law, subject to full appellate review." United States v. Werner, 620 F.2d 922, 926 n.5 (2d Cir. 1980). Federal appellate courts differ on whether "the validity of joinder is determined solely by the allegations in the indictment" or determined "by examining the indictment and evidence presented at trial." United States v. Jawara, 474 F.3d 565, 572, 573 (9th Cir. 2006). In the First Circuit "a rational basis for joinder of multiple counts should be discernible from the face of the indictment." United States v, Nathanel, 938 F.2d 302, 306 (1st Cir. 1991). If there is misjoinder, the trial court has no discretion and must grant the motion to sever. Ingram v. United States, 272 F.2d 567, 569 (4th Cir. 1959) (joinder of defendants); United States v. Franke, 331 F. Supp. 136, 139 (D. Minn. 1971) (same). However, a federal appellate court may avoid the question of misjoinder by assuming the error and finding that it was harmless. *See, e.g.,* United States v. Josleyn, 99 F.3d 1182 (1st Cir. 1996) (citing United States v. Lane, 474 U.S. 438 (1986)). Misjoinder may also be harmless error in Massachusetts, *see* text accompanying note 42, infra.

[23] Commonwealth v. Jervis, 368 Mass. 638, 645–46 (1975) (collecting cases); Commonwealth v. Gallison, 383 Mass. 659, 671 (1981); Commonwealth v. Ellis, 12 Mass. App. Ct. 612, 619–20 (1981) (court appears to acknowledge that decision on improper joinder of offenses is not a matter of discretion). *Cf.* Commonwealth v. Cappelano, 392 Mass. 676 (1984) (recognizing difference between misjoinder and prejudicial joinder); Commonwealth v. Dickerson, 17 Mass. App. Ct. 960 (1983) (similar).

[24] *See* Commonwealth v. Pillai, 445 Mass. 175 (2005) (court implicitly acknowledges charges must be related and decision on joinder of offenses is not a matter of discretion). While the courts may sometimes have overstated the "discretionary nature" of the trial judge's decision as to joinder and severance, it appears also that defendants usually argue not misjoinder but prejudicial joinder, which, of course, brings the issue into Rule 9(d)' s discretionary realm.

misjoinder grounds as well as on grounds of prejudice, and frame papers accordingly; if so, this should be clearly distinguished in the papers.[25] Similarly, counsel should be sensitive to a possible challenge under Rule 9(a)(2) (misjoinder at the indictment or complaint stage).

Second, whatever the specific grounds for joinder, they must be raised *pretrial* in a written motion, as required by Rule 9(d), accompanied by affidavit.[26] In filing the motion, counsel must carefully and thoroughly review the facts and evidence of the case, because resolving claims of misjoinder or prejudicial joinder will require that the court do the same.[27] Discovery and investigation are essential to pinpoint differences in evidence that will necessarily be presented as to different offenses or defendants, sources of likely prejudice, and so forth. Barebones motions have virtually no chance of success.

Last, motions for severance may be made later if based on a newly discovered ground,[28] and counsel should be prepared to identify new grounds that may only emerge at trial through unexpected testimony or other evidence. In fact, even where the motion was made pretrial and denied, if subsequent events at trial arguably show that the initial grounds pressed were meritorious, *counsel must explicitly reassert the motion* and supporting grounds in order to preserve appeal rights.[29] Moreover, the trial court's discretion as to whether or not to grant the motion, first properly made pretrial but then renewed in the face of trial developments, may be narrower than the discretion it initially enjoyed.[30]

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[25] If misjoinder can be urged, undue prejudice can usually be as well, because if the offenses are arguably unrelated, or defendants arguably not participants in the same offense or enterprise, the prejudice from joinder is more likely to outweigh its minimal contribution to judicial economy.

[26] For cases where the written, pretrial motion to sever was not filed, probably to defendant's detriment, *see* Commonwealth v. Bienvenu, 63 Mass. App. Ct. 632 (2005) (severance denied on procedural grounds; both defendants made oral pretrial motions to sever but motions were not set forth in writing); Commonwealth v. Mahar, 21 Mass. App. Ct. 307 (1985); Commonwealth v. Ellis, 12 Mass. App. Ct. 612 (1981). The federal rule requiring the pretrial, written motion is the same. Fed. R. Crim. P. 12(b)(3)(D). *See* United States v. Rodriguez-Lozada, 558 F.3d 29 (1st Cir. 2009); United States v. DeLeon, 641 F.2d 330, 337 (5th Cir. 1981). Including the affidavit is also essential. *See* Commonwealth v. Burr, 33 Mass. App. Ct. 637, 638 (1992) (citing Commonwealth v. Williams, 399 Mass. 60, 65 (1987)). The requirement that the issue be raised pretrial follows from the fact that if the motion is allowed, it will not merely affect minor aspects of the trial, but will determine the essential shape of the trial — who will be tried and for what offense.

[27] "Resolving claims of misjoinder . . . involves a careful consideration of the facts of the case, rather than an interpretation of law . . . . [i]t is important to remember that each case will turn on its own facts, and no strict rules can be drawn." 8 MOORE'S, FEDERAL PRACTICE 8.05(1) at 8-19 to 8-20 (1983).

[28] MASS. R. CRIM. P. 9(d)(2).

[29] Commonwealth v. Corradino, 368 Mass. 411, 420 n.8 (1975). See also, Commonwealth v. DeJesus, 71 Mass. App. Ct. 799, 809 (2008) quoting Commonwealth v. Moran, 387 Mass. 644, 659-660 (1982) ("a premature request for severance, not renewed when the necessity to sever has been established, is not sufficient").

[30] Jones v. Commonwealth, 379 Mass. 607, 610, 617 (1980), reversed for failure of court to sever during trial: "Although the judge's denial of a severance at the start of the trial was well within his discretion, judicial discretion is much narrower after the trial starts" because jeopardy has attached.

§ 22.4 MISJOINDER OF OFFENSES

The first question for defense counsel is whether the offenses are "related" within the meaning of the rule. If not, counsel should move to sever on grounds of misjoinder.

As noted, *supra*, offenses are related if they are based on the same criminal conduct or episode. This form of "relatedness" is conceptually simple and has occasioned little commentary or case law. For instance, if the defendant is accused of robbing a store and simultaneously assaulting a customer in the store, the two offenses obviously arose from the same episode and are related.

The more interesting situation, and the one that allows for more plausible challenge to joinder, is when the two offenses are separated in time and usually in place — for instance, the defendant is accused of robbing a store and, at some subsequent point, of assaulting another person. In order for these two offenses to be tried together, the judge must find that they arose "out of a course of criminal conduct" or were otherwise connected together such that they constituted "parts of a single scheme or plan."[31] The leading cases on this issue are *Commonwealth* v. *Sullivan*[32] and *Commonwealth* v. *Jacobs*.[33]

[31] MASS. R. CRIM. P. 9(a)(1). *See also* Commonwealth v. Gaynor, 443 Mass. 245, 261 (2005) (joinder proper in trial of aggravated rape and murder of four women where each victim had history of cocaine abuse, murders occurred over three and one-half months in neighborhoods known for drugs and prostitution, and defendant used common modus operandi); Commonwealth v. Pillai, 445 Mass. 175, 179-184 (2005) (four or five month intervening time period does not make offenses unrelated where there is a similarity in method by which the defendant committed the offenses against two victims); Commonwealth v. Walker, 442 Mass. 185 (2004) (joinder of four indictments covering three separate incidents against different victims upheld where over seventeen-month period defendant used common modus operandi of drugging and sexual assaulting victims); Commonwealth v. Rushworth, 60 Mass. App. Ct. 145 (2003) (joinder of five indictments proper where offenses committed against mother were the direct result of mother's allegations of sexual offenses committed against daughter and occurred over four day period); Commonwealth v. Ferraro, 424 Mass. 87, 89 & n.7 (1997) (error to deny Commonwealth motion to join seven sexual assault offenses against seven different victims, where common modus operandi; "modus operandi" defined as a "pattern of criminal behavior so distinct that separate crimes or wrongful conduct are recognized as work of [the] same person"); Commonwealth v. Delaney, 425 Mass. 587 (1997) (joinder of offenses of violating protective order, stalking, and intimidating witness proper where crimes involved same victim, occurred within seven months, and would have been admissible at separate trials to show common scheme); Commonwealth v. Auguste, 414 Mass. 51, 60 (1992) (proper joinder of offenses of robbery of participants at card game and, six days later, murder of card game participant during similar robbery at same address, and defendant identified as assailant in both crimes); Commonwealth v. Cogswell, 31 Mass. App. Ct. 691, 695–96 (1991) (joinder of sex offenses against two children proper where common modus operandi); Commonwealth v. Montanez, 410 Mass. 290 (1991) (offenses of distributing drugs and, four months later, of trafficking were "connected in single course of conduct," where evidence of continuous drug sales from same location in interim); Commonwealth v. McGann, 20 Mass. App. Ct. 59, 63 (1985) (joinder proper where crimes on different dates shared common elements of proof, modus operandi, and common witnesses); Commonwealth v. Pope, 392 Mass. 493, 502 (1984) (related offenses are closely related in time and space and of same general nature).

[32] 436 Mass. 799 (2002). *Sullivan* effectively overruled Commonwealth v. Blow, 362 Mass. 196 (1972), which had held that, to be "related" so as to allow joinder under a statute then in force, charges had to be "the result of a single line of conduct growing out of one

In *Jacobs*, the defendant, a licensed chiropractor, was charged with indecent assault and battery on two of his patients, by massaging the buttocks of one patient in November, 1996, and touching the breast tissue of the other in July, 1993. The two offenses were joined for trial. The Appeals Court reversed the convictions on the ground that joinder of the charges had been improper because the offenses were not "related." "The offenses . . . were based on distinct acts or omissions or occurrences. The separateness was apparent from the empty time of more than three years that intervened between the chiropractic treatments of the two individuals. The lapse of time also repelled any idea that there was a single course of conduct or a connected series of episodes or parts of a single scheme."[34] Joinder was "not only unauthorized but gravely discountenanced."[35]

Key to the determination of whether alleged offenses are "related" so as to permit their joinder for trial is the test for cross-admissibility of evidence -- that is, whether evidence tending to prove one offense would be admissible at a separate trial of the other.[36]

"Indictments involving one victim may not be joined with indictments involving another victim unless the evidence as to one victim would be admissible in a separate trial as to the other."[39] This question of evidence should be the centerpiece of

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transaction." *Id*. at 201. The *Sullivan* court held that, since the statute applied in *Blow* was more restrictive as to joinder than the standard set out in MASS. R. CRIM. P. 9(a)(1), reliance can no longer be placed on *Blow* in assessing the appropriateness of joinder of separate criminal charges for trial. *See Sullivan*, 436 Mass. At 804 & n.4. "The criteria for joinder are now somewhat broader than when the *Blow* case was decided, as it is now expressly permissible to join offenses concerning separate episodes where they are connected together or constitut[e] parts of a single scheme or plan." *Sullivan* at 804, quoting from MASS. R. CRIM. P. 9(a)(1).

The impact of the *Sullivan* decision extends well beyond its repudiation of *Blow*. It also reduces the precedential value of all joinder decisions between July 1, 1979 (the date on which the Rules of Criminal Procedure entered into force) and May 15, 2002 (the date of the *Sullivan* decision) to the extent that those decisions applied the test of *Blow* for whether charges are "related." *See Sullivan* at 804 n.4 ("Decisions subsequent to the adoption of the rules in 1979 that have cited the *Blow* case when upholding joinder are inapposite to the analysis [of relatedness]; because joinder was upheld in those cases under the stricter, statutorily defined standard, it would have been upheld under the broader, rules-based standard as well").

[33] 52 Mass. App. Ct. 38 (2001). Although *Jacobs* was decided prior to the decision in *Sullivan*, it fully anticipated that decision by omitting any reference to *Blow* (see note 32) in its textual analysis of the joinder issue it addressed.

[34] Commonwealth v. Jacobs, 52 Mass. App. Ct. 38, 40 (2001).

[35] Commonwealth v. Jacobs, 52 Mass. App. Ct. 38, 40-41 (2001).

[36] Commonwealth v. Jacobs, 52 Mass. App. Ct. 38, 43-44 (2001). *See also* Commonwealth v. Gaynor, 443 Mass. 245, 260 (2005); Commonwealth v. Rushworth, 60 Mass. App. Ct. 145, 148 (2003); Commonwealth v. Sullivan, 436 Mass. 799, 805-806 (2002); Commonwealth v. Mamay, 407 Mass. 412, 417 (1990); Commonwealth v. Sylvester, 388 Mass. 749, 755-758 (1983).

[37] [Reserved]

[38] [Reserved]

[39] Commonwealth v. Sylvester, 388 Mass. 749, 761 (1983)(O'Connor, J., concurring). *Compare* Commonwealth v. Zemistov, 443 Mass. 36 (2004) (joint trial of defendants upheld where evidence of assault with intent to rape one victim would have been admissible to prove intent at trial of assault with intent to rape other victim); Commonwealth v. Gaynor, 443 Mass. 245, 248 (2005) (evidence of rape and murder of four victims cross-admissible to show

counsel's analysis to determine whether the offenses have been properly joined.[40] This is also often the main emphasis in the opinions of the federal courts, whose reversals on misjoinder grounds are relevant in Massachusetts.[41]

common scheme and was relevant to question of defendant's intent and motive); Commonwealth v. Wilson, 427 Mass. 336, 346–47 (1998) (no error to join murder charges with charges, arising at time of resisting arrest, of weapon possession and assault on police; evidence of standoff with police would have been admissible at separate murder trial to show consciousness of guilt, and evidence at murder trial would have been admissible in separate assault trial to give "full picture" of surrounding events); Commonwealth v. Cruz, 424 Mass. 207, 209 (1997) (no error to join stalking charge with murder and assault charges, where evidence of stalking would have been admissible to prove mens rea in separate trial of latter charges); Commonwealth v. Ferraro, 424 Mass. 87 (1997) (error to deny Commonwealth motion to join seven sexual assault offenses against seven different victims, where evidence of common modus operandi would have rendered all seven incidents admissible in separate trials); Commonwealth v. Feijoo, 419 Mass. 486, 494–95 (1995) (upholding joinder of sexual abuse indictments charging "common scheme or plan"); Commonwealth v. Souza, 39 Mass. App. Ct. 103, 111 (1995) (joint trial of defendants on charges of sexual abuse against three of their grandchildren justified by common quality of the charges, likely admissibility of same evidence if tried separately, and burden of separate trials).*Feijoo* has been criticized for misapplying the "bad acts" exception. *See* CPCS Training Bulletin, vol. 5, no. 2 (June 1995).

[40] The rules of evidence, and specifically when evidence of one offense is admissible in the trial of another offense, is beyond the scope of this chapter. As a general matter, however, it is well recognized that evidence of other criminal conduct is not admissible to prove the propensity of the defendant to commit the indicted offense, but it may be admissible for other purposes, such as to show a common scheme or pattern of operation. Commonwealth v. Pillai, 445 Mass. 175, 181 (2005). The courts appear somewhat inconsistent in applying this rule. *See* Commonwealth v. Mamay, 407 Mass. 412, 417 (1990) (admitting evidence); Commonwealth v. Helfant, 398 Mass. 214 (1986) (admitting evidence); Commonwealth v. Elliot, 393 Mass. 824 (1985) (excluding evidence); Commonwealth v. Maguire, 392 Mass. 466 (1984) (excluding evidence); Commonwealth v. Gallison, 383 Mass. 659, 672 (1981) (evidence admissible); Commonwealth v. Sylvester, 388 Mass. 749 (1983) (issue of discretion); Commonwealth v. King, 387 Mass. 464 (1982) (admitting evidence); Commonwealth v. Welcome, 348 Mass. 68 (1964) (excluding evidence); Commonwealth v. Ellis, 321 Mass. 669 (1947) (excluding evidence); Commonwealth v. Stone, 321 Mass. 471 (1947) (excluding evidence).

[41] *See* Commonwealth v. Jacobs, 52 Mass, App. Ct. 38 (2001) (citing federal joinder rule and federal cases); Commonwealth v. Gallison, 383 Mass. 659, 672 (1981) (citing federal cases); Commonwealth v. Ellis, 12 Mass. App. Ct. 612, 621 (1981) ("The definition of 'related offenses in Massachu
import from that in the similar Federal rule 8(a)").

Federal misjoinder cases that may be helpful to defense counsel include the following: United States v. Hawkins, 589 F.3d 694 (4th Cir. 2009) (charges stemming from carjacking and felon-in-possession of gun, not of "same of similar character," reversal required); United States v. Jawara, 474 F.3d 565 (9th Cir. 2006) (document fraud and conspiracy to commit marriage fraud to avoid immigration laws misjoined, but error harmless, charges not of "same or similar character" except that both charges involved immigration and same defendant); United States v. Randazzo, 80 F.3d 623 (1st Cir. 1996) (charges from use of prohibited chemicals in shrimp, and tax evasion charges misjoined but error harmless); United States v. Terry, 911 F.2d 272 (9th Cir. 1990) (where search of defendant's home two weeks subsequent to drug possession arrest turned up illegal gun; misjoined offenses constituted reversible error because offenses not part of common scheme, same transaction, or provable by same evidence); United States v. Diaz-Munoz, 632 F.2d 1330, 1335–36 (5th Cir. 1980) (misjoinder and prejudicial joinder); United States v. Halper, 590 F.2d 422 (2d Cir. 1978) (improper joinder where proof of one offense neither constituted nor depended on proof of the other); United States v. Foutz, 540 F.2d 733, 738 n.4 (4th Cir. 1976); United States v. Graci, 504 F.2d 411 (3d Cir. 1974); King v. United

Three notes of caution are in order. *First*, misjoinder of offenses may be harmless error,[42] which points to the need to litigate the matter vigorously before the trial court and not hope for appellate reversal. *Second*, the Massachusetts opinions frequently discuss what are essentially misjoinder issues in terms suggesting that the trial court has broad discretion as to whether to allow joinder or severance.[43] This problem should be addressed by counsel through reference to the rule itself, to the Reporter's Notes, to the relevant analogous federal case law, and to the occasional Massachusetts cases that appear to acknowledge that the trial judge does not have discretion to misjoin offenses.[44]

Third, counsel should be aware of the fact that the courts frequently allow joinder of offenses that appear unrelated simply because the second offense either occurred or was uncovered at the time of defendant's arrest for the first offense.[45] While such joinder may minimally serve the interest of judicial economy by requiring the testimony of the arresting officer to be given only once, it certainly appears inconsistent with Rule 9 and with Rule 2(a)' s insistence that the Massachusetts Rules of Criminal Procedure are intended to provide just determination of criminal charges. *Commonwealth v. Hoppin*[46] provides some support for opposition to indiscriminate joinder of offenses that appear related only by the fact that evidence of one offense was uncovered at the time of defendant's arrest for the other.

States, 355 F.2d 700 (1st Cir. 1966). *See also* United States v. Buchanan, 930 F. Supp. 657, 664–65 (D. Mass. 1996) (two sets of charges not "connected" where brought under different statutes, involve different victims, and different modus operandi) (citing United States v. Edgar, 82 F.3d 499 (1st Cir. 1996)).

[42] *See* Commonwealth v. Green, 52 Mass. App. Ct. 98, 102-103 (2001); Commonwealth v. Garafolo, 23 Mass. App. Ct. 905 (1986).

[43] *See, e.g.*, Commonwealth v. Blow, 362 Mass. 196, 200 (1972); Commonwealth v. Gaynor, 443 Mass. 245, 247 (2005) ("decision to join offenses for trial is committed to the sound discretion of the trial judge"); Commonwealth v. Hoppin, 387 Mass. 25, 34 (1982). In *Hoppin*, the court stated that when "offenses are wholly unrelated, the judge should generally exercise his discretion in favor of separate trials." The rule, by its clear terms, does not allow joinder of "wholly unrelated" offenses, except with the defendant's consent.

[44] *See* Commonwealth v. Green, 52 Mass. App. Ct. 98, 102-103 (2001); Commonwealth v. Jacobs, 52 Mass. App. Ct. 38, 40-41 (2001); Commonwealth v. Garafolo, 23 Mass. App. Ct. 905 (1986).

[45] *See* Commonwealth v. Ellis, 12 Mass. App. Ct. 612, 619-621 (1981) (court strains to find the drug offense, uncovered at the time of defendant's arrest, connected with the extortion offenses); Commonwealth v. Garafolo, 23 Mass. App. Ct. 905 (1986) (joint trial of larceny of car and of robbery several days later in which car used); Commonwealth v. Wilson, 427 Mass. 336, 345–47 (1998) (charges of murder with charges, from resisting arrest the next day, of assault and possession of weapons); Commonwealth v. Todd, 394 Mass. 791 (1985) (charges of murder and assault with intent to murder trooper at time of arrest two hours later).

[46] 387 Mass. 25 (1982).

§ 22.5 PREJUDICIAL JOINDER OF OFFENSES

If the offenses are properly joined, defendant may still move for severance on the grounds that the joinder is not in the best interests of justice.[47] Even if there is substantial overlap of evidence, and even if the evidence of one offense may technically be admissible at the separate trial for the others, severance may be called for because of prejudice to the defendant.[48]

The burden is on the defendant to show that prejudice will result from failure to sever[48.5] and that the prejudice "is beyond the curative powers of the court's instructions."[49] At least on the appellate level, counsel has the heavy burden of showing

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[47] Commonwealth v. Sullivan, 436 Mass. 799, 805 (2002); MASS. R. CRIM. P. 9(d); *see also* Rule 9(a)(3) ("The trial judge shall join the [related] charges for trial unless he determines that joinder is not in the best interests of justice").

[48] Commonwealth v. Sylvester, 388 Mass. 749, 757–58 (1983). The case states: "[T]he admissibility of evidence of other criminal acts is not dispositive of the question whether the several indictments should be severed under MASS. R. CRIM. P. 9(d). In considering the question, the judge must do more than determine that the technical requirements of joinder under rule 9 are satisfied. Rather, the judge must decide the question in the context of the guarantee of a fair trial for every defendant. The determination of what will be in the 'best interests of justice' requires weighing, in each case, the defendant's interests against judicial economy. If the judge determines that prejudice to the defendant would outweigh the interests of the court, the Commonwealth, and the public in a shortened adjudication, severance should be granted. . . . Even if we assume the evidence of each criminal act to be admissible in each case, the judge could still determine that undue prejudice would result from such evidence and from joinder of the indictments." *Sylvester, supra*, 388 Mass. at 757.

There is an important and potentially troublesome conceptual issue raised here. Assume that the defendant is charged with two offenses and claims unfair prejudice will result from joint trial. The prosecutor argues that even if the defendant were to have separate trials, the evidence of both offenses would be admissible at each trial. *Sylvester* correctly rejects this argument because, even if it appears pretrial that evidence of both offenses may be admissible at separate trials, what actual evidence will be admissible at trial cannot be known with certainty before trial. Also, even if some evidence of one offense will probably be admissible at the trial of the other, this does not mean that the prosecutor will be free at separate trials to offer full proof of the offense not at issue, and, in any event, the judge may decide at trial to exclude the otherwise admissible evidence on prejudice grounds.

[48.5] Commonwealth v. Sullivan, 436 Mass. 799, 805 (2002).

[49] Commonwealth v. Gallison, 383 Mass. 659, 671 (1981). *See also* Commonwealth v. Helfant, 398 Mass. 241, 230 (1986). On the issue of curative instructions, *see* Commonwealth v. Gaynor, 443 Mass. 245 (2005) (judge's instructions to jury to consider each indictment separately sufficient to offset any prejudice from joinder); Commonwealth v. Walker, 442 Mass. 185, 202 (2004) (any prejudice from admission of prior bad act evidence to show common scheme or pattern of operation ameliorated by judge's curative instructions immediately after testimony and during final instructions); Commonwealth v. Errington, 390 Mass. 875, 882 (1987) (jury is presumed to have followed instructions); Commonwealth v. Cameron, 385 Mass. 660, 668 (1982) ("jurors are expected to follow instructions to disregard matters withdrawn from their consideration"); Commonwealth v. Jackson, 384 Mass. 572 (1981) (similar); Commonwealth v. DiMarzo, 364 Mass. 669, 681–82 (1974) (Hennessey, J., concurring) (where "the evidence subject to limitations has an extremely high potential for unfair prejudice, we have a duty to be skeptical as to the effectiveness of limiting instruction"); Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J. concurring) ("the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction").

that the prejudice from joinder was "so compelling that it prevented the defendant from obtaining a fair trial."[50]

Although the nature of prejudice arising from joinder in a specific case may vary widely,[51] certain prototypes of prejudice sufficient to call for severance emerge from the cases.[52] *First*, there is the joinder of a weak case with one that is stronger. If a plausible argument can be made that the evidence as to one offense is weak, counsel should move for severance under Rule 9(d) so that the defendant is not deprived of an acquittal on that offense by prejudicial spillover evidence from the stronger case.[53] Because there is an obvious benefit to a prosecutor of joining his weaker case with his

[50] Commonwealth v. Delaney, 425 Mass. 587, 595 (1997) (quoting Commonwealth v. Moran, 387 Mass. 644, 658 (1982)). The test for "compelling prejudice" is whether evidence of the defendant's commission of one of the crimes charged would be admissible in a separate trial of one of the other crimes charged. *See* Commonwealth v. Gagnon, 45 Mass. App. Ct. 584, 590–591 (1998).

[51] *See, e.g.*, United States v. Wirsing, 719 F.2d 859 (6th Cir. 1983) (reversing on grounds of prejudice where defendant's counsel had recently entered the case and was prepared to go forward on the straightforward drug count but not on more complicated tax evasion counts); United States v. Colon, 165 F.Supp.2d 67 (D.Mass. 2001) (allowing pre-trial severance motion where government took "all or nothing" approach and defendant wished to plead guilty to substantive drug offense to gain benefit of "acceptance of responsibility" sentencing departure under federal guidelines but wished to go to trial on conspiracy count to challenge quantity of drugs and possibly avoid mandatory minimum five year prison sentence).

[52] For discussion of types of prejudice recognized by the First Circuit as potentially arising from joinder of offenses, *see* United States v. Richardson, 515 F.3d 74, 81-84 (1st Cir. 2008) (citing United States v. Jordan, 112 F.3d 14, (1st Cir. 1997)).

[53] *See* Commonwealth v. Blow, 362 Mass. 196, 201 (1972), where the court noted that the evidence of one housebreak was weak, and it concluded that conviction of that housebreak "was influenced by the accumulating effect of evidence as to the separate offenses." *Blow*, *supra*, 362 Mass. at 201, cites various federal cases that concern the problem of accumulating evidence that prejudices defendant: United States v. Quinn, 365 F.2d 256 (7th Cir. 1966) (weak case, strong case); Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964) (reversing conviction because juries in single trials would not have been entitled to know of other charge); McElroy v. United States, 164 U.S. 76 (1896) (unrelated offenses). For other cases where the courts found the risk of spillover evidence to be excessive, *see* United States v. Foutz, 540 F.2d 733 (4th Cir. 1976) (weak case, strong case); United States v. Ragghianti, 527 F.2d 586 (9th Cir. 1975) (similar); Cross v. United States, 335 F.2d 987 (D.C. Cir. 1964) (similar); Bridges v. United States, 381 A.2d 1073 (D.C. App. 1977). *But see* United States v. Fenton, 367 F.3d 14 (1st Cir. 2004) (in trial on narcotics and explosives charges no prejudicial spillover of evidence where acts committed in furtherance of conspiracy and evidence would likely be admissible in separate trials); United States v. Baltas, 236 F.3d 27, 34-36 (1st Cir. 2001) (cautionary instructions sufficient to limit prejudicial effect of spillover evidence); United States v. Yefsky, 994 F.2d 885, 895, 896 (1st Cir. 1993) ("[i]ncidental spillover prejudice, which is almost inevitable in multi-defendant trial," insufficient; defendant must show specific ways in which he was prejudiced).

If evidence on one case is so weak it is likely to result in a directed verdict, the prejudice on the remaining counts would be especially harmful. This was the defense argument in Commonwealth v. Cappelano, 392 Mass. 676 (1984), which was unavailing since the whole case did go to the jury. *See also* Commonwealth v. Washington, 39 Mass. App. Ct. 195, 199 (1995) (where judge granted required finding of not guilty on weak charge and defendant was convicted of strong charge, weakness of former and strength of latter supported finding of no prejudice from failure to sever).

better case in a single trial, the necessity for defense counsel to move for severance on these grounds may occur with some frequency.

Second is the situation where defendant wishes to testify on one offense but not on the other. The case law generally holds that the defendant must offer more than a general statement of this intent and must instead make a particularized showing of her need to testify on one or more counts while remaining silent on others.[54] The rationale for severance in this situation is that, with the offenses joined, the defendant is essentially placed in the position either of remaining silent on all counts or testifying reluctantly on all counts, while in separate trials she would enjoy her constitutional rights to testify as to certain charges and remain silent on others.[55]

Third is the similar situation of antagonistic defenses to different offenses, such that a joint trial makes it difficult effectively to present both defenses.[56]

Fourth, the offenses may be so similar (though not emerging from a single criminal incident) and so potentially inflammatory that counsel can argue with special forcefulness that the jury will not be able properly to separate the evidence as to each offense.[57]

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[54] *See* United States v. Richardson, 515 F.3d 74 (1st Cir. 2008) (no error where defendant showed strong need to testify on two firearms and drug counts but failed to demonstrate need to refrain from testifying about two other drug counts); Commonwealth v. Gaynor, 443 Mass. 245 (2005); Commonwealth v. Allison, 434 Mass. 670, 680 (2001); Commonwealth v. Williams, 18 Mass. App. Ct. 945, 947 (1984); United States v. Jordan, 112 F.3d 14 (1st Cir. 1997) (joinder of charges violated defendant's Fifth Amendment right to testify, as only he could, to "good faith" defense to tax charges); Commonwealth v. Wilson, 427 Mass. 336, 346–47 (1998) (no error in denying severance where defendant failed to show how testimony would have differed at separate trial); Commonwealth v. Baran, 21 Mass. App. Ct. 989 (1986) (rescript); United States v. Benz, 740 F.2d 903 (11th Cir. 1984); United States v. Burrell, 720 F.2d 1488 (10th Cir. 1983); United States v. Bronco, 597 F.2d 1300 (9th Cir. 1979); Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968); Cross v. United States, 335 F.2d 987 (D.C. Cir. 1964). It should be noted that, to explain defendant's desire to remain silent on certain counts, it is not to be expected that counsel will suggest defendant's need for silence because of her guilt. However, there are many other plausible reasons for silence on a particular count or counts, including the scope of cross-examination to which defendant's particular testimony on the offense in question will subject her.

[55] The problem was noted in Cross v. United States, 335 F.2d 987, 989 (D.C. Cir. 1964): "[The defendant'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."

[56] In Commonwealth v. Cappellano, 392 Mass. 676, 678 (1984), the court appeared somewhat sympathetic to defendant's argument on appeal that his insanity defense on one group of charges and his lack of identification defense on the other charges might have been sufficiently antagonistic to cause defendant significant difficulty at trial, but the court found that defendant had failed to raise the issue below. For a related discussion of antagonistic defenses of various defendants as grounds for severance, *see infra.*

[57] *See* United States v. Henderson, 406 F. Supp. 417, 429 (D. Del. 1975) (commenting on offenses "apt to arouse irrational hostility against the defendant"); Drew v. United States,

Finally, in considering severance of offenses under 9(d), counsel should keep in mind the purpose for joinder, which is judicial economy. In light of the strong presumption in the law for fair trials, if counsel can argue that joinder in a particular case will not preserve the resources of the court, then little additional showing should be necessary for severance, since joinder of charges involves a presumptive risk of prejudice.[58]

In considering whether the joinder of particular offenses really serves the interests of judicial economy, defense counsel should ask such questions as: If the Commonwealth obtained a conviction on one offense, would it really go to trial on the other? Is the trial of one offense simple and straightforward and the trial of the other complex and difficult? Is it likely that the trial of one offense will necessitate a possibly meritorious appeal on untested legal issues, while the other offense involves few difficult legal issues? In fact, there are cases where counsel can argue plausibly that joinder actually wastes judicial resources, since it requires defendant to put on extensive evidence that would not be required in separate trials. In general, counsel should not assume that a single trial will be markedly more economical than two trials and should be prepared to argue the contrary.

§ 22.6 MISJOINDER OF DEFENDANTS

Defendants may be joined for trial if they are alleged to have participated (1) in the same criminal conduct or episode or (2) in a course of criminal conduct or in episodes that constituted a single scheme, plan, conspiracy, or joint enterprise.[59] As with joinder of offenses, the first basis for joinder of defendants is relatively uncomplicated. If, for instance, the defendants are alleged to have jointly committed a robbery, joinder is obviously permitted.

The second basis for joinder of defendants, however, is more complicated. For instance, defendants may be charged with facially similar crimes — like similar robberies close in time committed in the same area — and nevertheless be improperly joined because there is no evidence to support the Rule 9(b) requirement that the robberies were a joint enterprise.[60] Or two defendants may be charged with jointly committing one offense, to which an unrelated charge against one of the defendants is

331 F.2d 85, 88 (D.C. Cir. 1968). *But see* Commonwealth v. Delaney, 425 Mass. 587, 595 (1997) (no prejudice from joinder where jury acquitted defendant of some offenses and convicted him of others, thus showing ability to consider evidence regarding each crime charged); Commonwealth v. Sylvester, 388 Mass. 749 (1983) (rejecting a per se rule that would require severance where sexual offenses are at issue, while appearing sympathetic to severance on retrial).

[58] King v. United States, 355 F.2d 700, 703–04 (1st Cir. 1966).

[59] MASS. R. CRIM. P. 9(b).

[60] *See, e.g.*, United States v. Chinchic, 655 F.2d 547 (4th Cir. 1981); United States v. Diaz-Munoz, 632 F.2d 1330 (5th Cir. 1980); United States v. Whitehead, 539 F.2d 1023 (4th Cir. 1976); United States v. Gentile, 60 F.R.D. 686 (E.D.N.Y. 1973); Metheany v. United States, 365 F.2d 90 (9th Cir. 1966); United States v. Charnay, 211 F. Supp. 904 (D.C.N.Y. 1962); Ingram v. United States, 272 F.2d 567 (4th Cir. 1959). Misjoinder of defendants may be harmless error. See United States v. Joselyn, 99 F.3d 1182, 1188 (1st. Cir. 1996) ("misjoinder of defendants requires reversal only if resulting prejudice had substantial and injurious effect or influence in determining jury's verdict").

joined.[61] This is an issue for counsel to consider whenever multiple defendants are charged with multiple counts, both on misjoinder of defendants and misjoinder of offenses grounds.[62] In general, in a trial of various defendants on grounds of joint participation in a scheme or plan, there must be more than "mere identity of a small number of participants" in the plan, in order for joinder of all defendants to be justified.[63]

Not surprisingly, and as indicated by the cases already cited, there are few Massachusetts cases dealing with misjoinder of defendants,[64] probably because of the relative infrequency of conspiracy trials in the Commonwealth, and as well because of the Massachusetts rule prohibiting joint trials of conspiracy and substantive offenses,[65] which functions to preclude the frequent joinder problem in federal cases where substantive offenses not arising from the conspiracy may be joined with the conspiracy charge. There is, however, extensive Massachusetts case law on prejudicial joinder of defendants, which will be discussed below.

§ 22.7 PREJUDICIAL JOINDER OF DEFENDANTS

In Massachusetts as elsewhere, it is generally required that otherwise properly joined defendants be severed in the following specific situations.

§ 22.7A. EXCULPATORY TESTIMONY

[61] *See* Commonwealth v. Zemstov, 443 Mass. 36 (2004) (court concludes without discussion that factual scenario satisfies MASS. R. CRIM. P. 9(b), discusses under prejudicial joinder standard); United States v. Gougis, 374 F.2d 758 (7th Cir. 1967); King v. United States, 355 F.2d 700 (1st Cir. 1966); McElroy v. United States, 164 U.S. 76 (1896).

[62] For instance, assume a multidefendant case with all defendants accused of conspiracy to defraud, and only some of the defendants accused of a conspiracy to obstruct justice by interfering with this investigation of the fraud scheme. The two conspiracies may be improperly joined. (*see* United States v. Tashjian, 660 F.2d 829, 834 (1st Cir. 1981) (there must be some overall scheme known to and participated in by all defendants)), or severance otherwise is appropriate because the obstruction of justice charge will involve evidence of threats or other particularly bad activity not participated in by some defendants.

[63] United States v. Lane, 735 F.2d 799, 805 (5th Cir. 1984). *See* United States v. Bledsoe, 674 F.2d 647, 656 (8th Cir. 1982) (the series of acts or transactions constituting the offense must be part of one overall scheme in which all defendants knowingly participated); United States v. Marionneaux, 514 F.2d 1244 (5th Cir. 1975) (reversing for misjoinder in multiconspiracy case).

[64] For Massachusetts cases dealing with misjoinder of defendants, *see* Englehart v. Commonwealth, 353 Mass. 561, 563 (1968) (no reason for separate trials where defendants participated together in a crime involving a single chain of circumstances, citing cases); Commonwealth v. Nicholson, 4 Mass. App. Ct. 87 (1976); Commonwealth v. Smith, 353 Mass. 442 (1968) (similar). *See also* Commonwealth v. Hogg, 365 Mass. 290 (1974), where it appears there was misjoinder of defendants (two defendants were accused of a serious assault, while the third defendant, tried with them, had met up with them later and was charged only with unlawfully carrying a weapon), but the issue was apparently not raised.

[65] MASS. R. CRIM. P. 9(e). *See* Campagna v. Commonwealth, 454 Mass. 1006, 1009 (2009) (indictments should not have been joined where substantive offense joined with conspiracy offense).

Severance should be granted under Rule 9(d) if the defendant can show that (1) the codefendant will testify only if the trials are severed, (2) the testimony will be exculpatory, and (3) the defendant has substantial need for the testimony.[66] With this showing made, there is substantial support for severance to avoid depriving defendant of a codefendant's exculpatory testimony.[67]

§ 22.7B. HEARSAY

Severance may be required where hearsay statements from a codefendant incriminate the defendant but are admissible only against the codefendant. In such a situation, *Bruton v. United States*[68] held that if the codefendant does not testify, failure

[66] *See* Commonwealth v. Beneficial Finance Co., 360 Mass. 188, 222 (1971) (court, while not reversing for failure to sever, cited to various federal cases that enumerate the factors listed in text); Commonwealth v. Hogg, 365 Mass. 290 (1974) (claim that joint trial denied defendant opportunity to call codefendants as witnesses not adequately supported); Commonwealth v. Burke, 20 Mass. App. Ct. 489, 510–11 (1985) (severance not required for codefendant to testify at defendant's trial unless showing that evidence would exculpate the defendant; not enough that codefendant's testimony might incidentally cast doubt on defendant's guilt); Commonwealth v. Barrett, 6 Mass. App. Ct. 952, 953 (1978) (rescript); United States v. Smith, 46 F.3d 1223, 1231 (1st Cir.), *cert. denied*, 116 S. Ct. 176 (1995) (reviewing showing that must be made); United States v. Catalan-Roman 585 F.3d 453 (1st Cir. 2009) (same); United States v. Turner, 501 F.3d 59 (1st Cir. 2007). (same). United States v. Hernandez-Rodriguez, 443 F.3d 138 (1st. Cir. 2006) (motion for new trial allowed where codefendant's exculpatory testimony regarding defendant was "unavailable" at trial and defendant later submitted exculpatory affidavit from codefendant which, if believed by jury, would likely lead to defendant's acquittal).

[67] *See* the following cases granting severance: United States v. Ditizio, 530 F. Supp. 175 (D.C. Penn. 1982); United States v. Dennis, 645 F.2d 517 (5th Cir. 1981); Tifford v. Wainwright, 588 F.2d 954 (5th Cir. 1979); United States v. DePalma, 466 F. Supp. 920 (D.C.N.Y. 1979); United States v. Vigil, 561 F.2d 1316 (9th Cir. 1977); United States v. Veloz, 421 F. Supp. 1266 (D.C. Wis. 1976); United States v. Martinez, 486 F.2d 15 (5th Cir. 1973); United States v. Shuford, 454 F.2d 772 (4th Cir. 1971); Byrd v. Wainwright, 428 F.2d 1017 (5th Cir. 1970); United States v. Gleason, 259 F. Supp. 282 (S.D.N.Y. 1966); United States v. Echeles, 352 F.2d 892 (7th Cir. 1965). Note that if the codefendant conditions his offer of testimony on the prior completion of his trial, there is authority to deny the motion to sever. United States v. Haro-Espinosa, 619 F.2d 789 (9th Cir. 1979); United States v. Becker, 585 F.2d 703 (4th Cir. 1978), *cert. denied*, 439 U.S. 1080 (1979). *But see* United States v. Burns, 898 F.2d 819 (1st Cir. 1990) (after severing case so defendant could avail himself of codefendant's exculpatory testimony, court's refusal to grant continuance when codefendant, who was to be tried first, delayed his own trial, prejudiced defendant and warranted new trial; neither judicial economy nor public interest in speedy trial outweighed need for severance). The First Circuit has avoided squarely deciding the question raised by codefendant's conditional offer to testify. *See* United States v. Smith, 46 F.3d 1223, 1231 at n.3 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 176 (1995).

A defendant's right to present exculpatory evidence might also be defeated if, to protect a codefendant, the court limits the defendant's right of cross-examination or the scope of impeachment. *Cf.* Commonwealth v. Craig C., 44 Mass. App. Ct. 209, 213–16 (1998) (denial of severance did not compromise defendant's right to present his defense; although redaction of nontestifying witness's statements removed exculpatory references to codefendant, defendant was able to present the evidence by other means) (citing Commonwealth v. Smith, 418 Mass. 120, 127–28 (1994) (court must adequately protect defendant's right to fair trial)).

[68] 391 U.S. 123 (1968).

to sever constitutes a violation of defendant's confrontation rights that cannot be overcome by cautionary instructions.[68.5] If the codefendant takes the stand, confrontation clause problems are satisfied because the witness can be cross-examined concerning his statements.[68.7] Also, if the extrajudicial statement is admissible as to the defendant (such as a coconspirator's statement or an adoptive admission), he is not unfairly prejudiced by its going to the jury.[69]

The Massachusetts cases have enumerated certain subsidiary principles under *Bruton:*

1. The codefendant's statement does not have to either mention the defendant directly or necessarily be a confession[70] – but the statement, whatever its nature, must reasonably be seen to inculpate the defendant, either through direct reference to him or through "the context of the statement taken in connection with other evidence in the case," so that even "indefinite references" may implicate the defendant.[71] In the

[68.5] *See* Commonwealth v. Bacigalupo, 455 Mass. 485 (2009) (conviction reversed where nontestifying codefendant's confession made to testifying witness inculpated defendant); Commonwealth v. Vallejo, 455 Mass. 72 (2009); Commonwealth v. Lay, 63 Mass. App. Ct. 27 (2005); Commonwealth v. Adams, 416 Mass. 55, 58 (1993); Commonwealth v. Johnson, 412 Mass. 318, 321–324 (1992); Commonwealth v. Hawkesworth, 405 Mass. 664, 674–675 (1989); Commonwealth v. Cunningham, 405 Mass. 646, 649–651 (1989); Commonwealth v. Dias, 405 Mass. 131, 135–138 (1989).

[68.7] *See* Commonwealth v. Lay, 63 Mass. App. Ct. 27, 32 (2005).

[69] *See* Commmonwealth v. Leach, 73 Mass. App. Ct. 758, 765, (2009) (no *Bruton* violation where defendant's and codefendant's statements made in furtherance of joint venture); Commonwealth v. Rose, 47 Mass. App. Ct. 168, 175 (1999) (*Bruton* irrelevant if codefendant's statement made during and in furtherance of joint venture); Commonwealth v. Clarke, 418 Mass. 207 (1994) (no *Bruton* violation because statements admissible against defendant as statements made by joint venturer); Commonwealth v. Boutwell, 21 Mass. App. Ct. 201 (1985); Commonwealth v. Brown, 394 Mass. 510, 514–16 (1985) (no *Bruton* violation despite fact that witness couldn't distinguish between codefendants as to who said what regarding murder, because statements constituted adoptive admissions); Commonwealth v. Murphy, 6 Mass. App. Ct. 335 (1978).

[70] However, usually it will be confession-like in nature, because it must constitute some exception to the hearsay rule to be admitted against the codefendant. *Compare* Commonwealth v. Clark, 5 Mass. App. Ct. 673 (1977) (treating codefendant's flight after trial started as *Bruton* problem) *with* Commonwealth v. Pontes, 402 Mass. 311, 314–15 (1988) ("doubtful proposition" that codefendant's flight is an "extrajudicial admission of guilt within the meaning of *Bruton";* limiting instruction enough) *and* Commonwealth v. Steven, 29 Mass. App. Ct. 978, 979 (1990) (limiting instruction sufficed); Commonwealth v. Kincaid, 444 Mass. 381 (2005) (evidence of codefendant's flight, although prejudicial, may not constitutionally require severance when curative instruction given).

[71] Commonwealth v. LeBlanc, 364 Mass. 1, 8 (1973). *But see* Commonwealth v. James, 424 Mass. 770, 783 (1997) (no risk of contextual incrimination unless "the circumstances of the case and the nature of the codefendant's statement so obviously implicate the defendant in the crime itself as virtually to constitute direct incrimination"; test unsatisfied where, in discredited alibi statement, codefendant admitted being with defendant before the crime and speaking with him the next day). *See also* Commonwealth v. Keevan, 400 Mass. 557, 567–71 (1987) (reference by witness to severed codefendant's "confession" to crime was not sufficiently prejudicial to mandate mistrial); Commonwealth v. Cifizzari, 397 Mass. 560, 573–74 (1986) (same); Commonwealth v. Corradino, 368 Mass. 411, 419–20 (1975). The Supreme Court has held that the statement must facially incriminate the defendant rather than inferentially show guilt in combination with other evidence. Richardson v. Marsh, 107 S. Ct. 1702 (1987) (cautionary instruction is adequate to cure confrontation problem if confession redacted to

absence of direct inculpation, however, a cautionary judicial instruction has been held sufficient to protect the defendant's rights.[72]

2. While the court may handle the *Bruton* problem by excising references in the statement to the defendant, this must be done within the clear language and analysis of case law,[73] which requires that the "inculpatory connection" to the defendant be removed.[74]

3. Even if a *Bruton* violation occurs, it may be a harmless error, although the standard is a stringent one.[75]

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eliminate not only defendant's name but any reference to his existence). *Accord* Commonwealth v. French, 357 Mass. 356, 373 (1970), *sentence vacated sub nom.* Limone v. Massachusetts, 408 U.S. 936 (1972).

[72] Commonwealth v. James, 424 Mass. 770, 783 (1997) (citing Commonwealth v. Keevan, 400 Mass. 557, 570 (1987)). In *James*, codefendant's statement, claiming an alibi refuted by Commonwealth witnesses, asserted close connections with defendant before and following the crime. The trial court gave the jury "clear and forceful" instructions. *See also,* Commonwealth v. Vallejo, 455 Mass. 72, 84 (2009) (cautionary judicial instruction sufficient where codefendant did not directly implicate defendant and was not inculpatory when linked with other evidence.).

[73] *See* Commonwealth v. Bacigalupo, 455 Mass. 485, 493 (2009) (where witness testifying to codefendant's confession use of term "friend" to refer to defendant required reversal under *Bruton*, forceful instructions by judge only emphasized to jury that "friend" was indeed the defendant); Commonwealth v. LeBlanc, 364 Mass. 1, 8 (1973) (citing various cases holding that inculpatory connection to defendant may be inferred by the jury without direct reference to defendant). For a Massachusetts case where the statement was excised, *see* Commonwealth v. Best, 381 Mass. 472 (1980). For a case noting that an edited statement was insufficient to avoid the *Bruton* problem, *see* Commonwealth v. Moran, 387 Mass. 644 (1982). For other cases where the redaction was held not sufficient, *see* Commonwealth v. Johnson, 412 Mass. 318 (1992) (reversed); United States v. Danzey, 594 F.2d 905 (2d Cir.), *cert. denied*, 441 U.S. 951 (1979); United States v. Bozza, 365 F.2d 206 (2d Cir. 1966); Jones v. United States, 342 F.2d 863 (D.C. Cir. 1964).

[74] While redacting the statement may seem an appealing approach, it is not easy to do properly. The statement cannot be redacted simply to replace reference to the defendant with blank spaces, because *LeBlanc* suggests that the jury will surely know who the unnamed, second person is. *Compare* Gray v. Maryland, 523 U.S. 185 (1998) (confessions which substitute blanks or the word "deleted" for the defendant's name fall within the class of statements to which *Bruton*'s protections apply). Similarly, replacing references to joint action (replacing the plural pronoun *we* with *I)* would obviously be unfair to the codefendant and a distortion of his statement. What is required is a thorough redaction of the statement deleting all direct *and* indirect references to the defendant, while leaving unchanged the remaining, actual words of the statement.

[75] *See* Commonwealth v. Sinnott, 399 Mass. 863 (1987) (reversal for *Bruton* violation is required unless any spillover of improper evidence was without effect on the jury and did not contribute to the verdict). The *Sinnott* harmless error standard appears to require that there be overwhelming evidence against the defendant and that the codefendant's statement be merely corroboration of other evidence before the jury. *See also* Sinnott v. Duval, 139 F.3d 12 (1st Cir. 1998) (affirming denial of habeas petition on ground that *Bruton* error had no substantial and injurious effect on jury). The Supreme Court's decision in Cruz v. New York, 481 U.S. 186 (1987), where the conviction was reversed because of a *Bruton* violation, casts doubt on the *Sinnott* court's reliance on the merely corroborative aspect of the statement at issue as grounds for not reversing. *Cruz* also laid to rest the suggestion in some earlier Massachusetts cases, e.g., Commonwealth v. Horton, 376 Mass. 380 (1978); Commonwealth v. Bianco, 388 Mass. 358 (1983), that when defendant's own statement is in evidence, and it is consistent with the codefendant's statement, there is no *Bruton* problem requiring reversal. Commonwealth v. Dias,

4. Finally, there have been examples of handling *Bruton* problems by empanelling two juries and excusing one when the codefendant's statement was offered into evidence. While this practice (and similar others)[76] have been reluctantly upheld by the courts, it hardly seems advisable, since the excused jury is likely to suspect that evidence incriminating its defendant is being heard in its absence .[77]

§ 22.7C. ANTAGONISTIC DEFENSES

Defendants must also be severed when their defenses are sufficiently antagonistic. The leading case is *Commonwealth v. Moran,*[78] in which evidence incriminated one but not necessarily both defendants, and each defendant pursued a trial strategy of exculpating himself and inculpating the other. More generally, the *Moran* court relied on decisions from other jurisdictions holding that severance is required where "the defenses . . . conflict to the point of being irreconcilable and mutually exclusive,"[79] that is, acceptance of one such defense requires conviction of the other defendant.[80] There are various additional rationales for severance where

405 Mass. 131, 134–38 (1989) (defendants' videotaped confessions inculpating themselves and each other mandated severance of codefendants' trials). *See also* Commonwealth v. Adams, 416 Mass. 55 (1993) (reversal even though each defendant's confession, which blamed the other for major role in felony-murder, contained ample evidence to convict the maker on joint venture theory).

[76] See United States v. Lewis, 716 F.2d 16 (D.C. Cir. 1983) (upholding use of dual juries in absence of showing of prejudice to defendant); United States v. Crane, 499 F.2d 1385 (6th Cir.). *cert. denied,* 419 U.S. 1002 (1974) (divided and skeptical court upheld having jury return verdict on defendant before hearing codefendant's statement); United States v. Sidman, 470 F.2d 1158 (9th Cir. 1972), cert. *denied,* 409 U.S. 1127 (1973) (upholding but not endorsing use of two juries).

[77] Finally, on the *Bruton* issue, note that it does not arise in a judge trial. Lee v. Illinois, 476 U.S. 530 (1986).

[78] 387 Mass. 644 (1982).

[79] Commonwealth v. Moran, 387 Mass. 644, 656 (1982). This is the standard enunciated in United States v. Crawford, 581 F.2d 498, 491 (5th Cir. 1978) where, as in *Moran,* the sole defense for each defendant appeared to be to incriminate the other. *Accord,* Commonwealth v. McAfee, 430 Mass. 483, 486 (1999). *See also* Commonwealth v. Boutwell, 21 Mass. App. Ct. 201, 207–08 (1985). *Compare* Commonwealth v. Craig C., 44 Mass. App. Ct. 209, 216 (1998) (defendant's defense that he was mere bystander at shooting scene not irreconcilable with codefendant's defense that a third person present at scene was shooter).

[80] United States v. Ziperstein. 601 F.2d 281, 285 (7th Cir. 1979), *cert. denied,* 444 U.S. 1031 (1980), follows *Crawford,* and explains that "mutually antagonistic" defenses exist only "where the acceptance of one party's defense will preclude the acquittal of the other." The First Circuit test might be read as a bit more liberal: antagonistic defenses only require severance "if the tensions between the defenses are so great that the finder of fact would have to believe one defendant at the expense of the other." United States v. Rose, 104 F.3d 1408, 1415 (1st Cir. 1997) (citing United States v. Smith, 46 F.3d 1223 (1st Cir. 1995), *cert. denied,* 116 S. Ct. 176 (1995)). While the rule as stated in text is somewhat narrow, other cases relied on by *Moran* are more expansive. *See. e.g.,* People v. Hurst, 396 Mich. 1, 4 (1976) (A "defendant is entitled to a trial separate . . . from a co-defendant who it appears may testify to exculpate himself and incriminate the defendant seeking a separate trial"). *But see* Zafiro v. United States, 506 U.S. 534 (1993) (no per se right to severance under Fed. R. Crim. P. 14 when codefendants present mutually exclusive defenses; even if prejudice shown, trial court may grant less drastic relief). *See also,* Commonwealth v. Bienvenu, 63 Mass. App. Ct. 632, 637-638 (2005) (defendants did not affirmatively point at one another and jury could disbelieve both defendant's theories and

defendants' theories of defense are antagonistic. For instance, the jury confronted with irreconcilable and conflicting defenses "will unjustifiably infer that this conflict alone demonstrates that both [defendants] are guilty";[81] a fair trial becomes impossible where each defendant has to contradict not only the government's evidence, but the evidence by his codefendant;[82] where each defendant will exculpate himself only by inculpating the codefendant, the situation "invites perjured testimony," and the "Commonwealth's use of such testimony to obtain a conviction is fundamentally unfair and does not serve the public's interest in justice";[83] where there is strong evidence that at least one of the defendants committed the crime, a jury favoring one defendant may "be inclined to find the other guilty."[84] Finally, it should be noted that severance is not required when defenses are merely inconsistent but not antagonistic,[85] nor from the mere possibility that defendants may wish to assert antagonistic defenses,[86] nor where antagonistic defenses do exist but substantial other evidence incriminates both defendants.[87]

instead credit the testimony of others); Commonwealth v. DeJesus, 71 Mass. App. Ct. 799 (2008) (defenses are antagonistic where "the only realistic escape for either defendant is to blame the other" but, if defendant merely stands a better chance of acquittal being tried alone, severance is not required).

[81] Rhone v. United States, 365 F.2d 980. 981 (D.C. Cir. 1966); Commonwealth v. Moran. 387 Mass. 644, 659 (1982).

[82] United States v. Crawford, 581 F.2d 489, 491–92 (5th Cir. 1978) ("Witnesses against each defendant were thus examined by one adversary and cross-examined by another adversary. A fair trial was impossible under these inherently prejudicial conditions").

[83] Commonwealth v. Moran, 387 Mass. 644, 659 (1982).

[84] Commonwealth v. Moran, 387 Mass. 644, 659 (1982).

[85] *See, e.g.*, Commonwealth v. Bienvenu 63 Mass. App. Ct. 632, 637 (2005) quoting Commonwealth v. Suarez, 59 Mass. App. Ct. 111, 113 (2003) ("severance is required only where the defense of a defendant and that of a codefendant are antagonistic to the point of being mutually exclusive, or where the prejudice resulting from a joint trial is so compelling that it prevents the defendant from obtaining a fair trial"); United States v. DeCologero, 530 F.3d 36 (1st Cir. 2008); Commonwealth v. Dickerson, 17 Mass. App. Ct. 960 (1983) ; Commonwealth v. Giannopoulos, 34 Mass. App. Ct. 937 (1993) (defense of duress exerted by third party not antagonistic to codefendant's defense of no knowing involvement in larcenies); Commonwealth v. Cordeiro, 401 Mass. 843, 851–53 (1988) (defense of consent was not antagonistic to codefendant's defense of mere presence); United States v. Drougas, 748 F.2d 8, 19–21 (1st Cir. 1984); Commonwealth v. Horton, 376 Mass. 380, (1978), *cert. denied sub nom.* Wideman v. Massachusetts, 440 U.S. 923 (1979).

[86] Commonwealth v. French, 357 Mass. 356 (1970), *vacated* as *to death penalty sub nom.* Limone v. Massachusetts, 408 U.S. 936 (1972). *See also* Commonwealth v. Burr, 33 Mass. App. Ct. 637, 638 (1992) (quoting Commonwealth v. Moran, 387 Mass. 644, 658, 659 (1982) (denial of motion to sever "does not require reversal unless the request is made at a time when the necessity for severance has been firmly established").

[87] This latter refinement in the law of antagonistic defenses was offered in Commonwealth v. Sinnott, 399 Mass. 863 (1987) where, because the proper severance motion had not been made, the court reviewed the issue under the miscarriage of justice standard. *Sinnott* was reaffirmed in Commonwealth v. Gordon, 422 Mass. 816, 825–26 (1996) (in case involving five codefendants and three additional eyewitnesses, no right to severance under *Moran*, which involved only two defendants and no eyewitnesses to the alleged crime; jury could have believed neither defendant and credited eyewitnesses instead); *and* Commonwealth v. Stewart, 450 Mass. 25, 31 (2007) (even if antagonistic defenses may be present, where jury is warranted in finding defendant guilty on basis of eyewitness testimony and other evidence severance not required).

Additionally, the issue of antagonistic defenses between codefendants may become moot where one defendant prevails on a required finding of not guilty motion at the close of the Commonwealth's case.[87.7]

§ 22.7D. MINOR PARTICIPATION BY A CODEFENDANT

Severance may be required if the jury would otherwise be unable to individualize and compartmentalize the evidence against a defendant accused of minor participation. This is particularly true where there is a great disparity of evidence, with little evidence to be offered directly against the defendant and where, as well, one of the other factors enumerated above can also be claimed.[88]

§ 22.7E. OTHER

Although case law is not as clearly developed in these areas, reasonable arguments may be made for severance where the codefendant will take the stand to testify and may wish to comment adversely on defendant's failure to testify;[89] where codefendant's counsel may comment on defendant's failure to speak with police or to testify, [89.5]where there exists privilege issues between or among defendants that will be

[87.7] Commonwealth v. DeJesus 71 Mass. App. Ct. 799, 808-811 (2008).

[88] *See, e.g.*, Schaffer v. United States, 362 U.S. 511, 516 (1960) (if charge justifying joinder unproved by state, court should seriously consider severance); United States v. Winter, 663 F.2d 1120, 1138–39 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983); United States v. Gilbert, 504 F. Supp. 565 (S.D.N.Y. 1980); United States v. Sampol, 636 F.2d 621, 642–51 (D.C. cir. 1980); United States v. Mardian, 546, F.2d 973 (D.C. Cir. 1976); United States v. Donaway, 447 F.2d 940 (9th Cir. 1971); United States v. Brankor, 395 F.2d 881 (2nd Cir. 1968). *Compare* Commonwealth v. Weaver, 400 Mass. 612, 616–18 (1987) (severance of defendant's trial for carrying a firearm from codefendant's trial for first-degree murder not required); Commonwealth v. Flynn, 362 Mass. 455, 462–63 (1972), denial of habeas corpus *aff'd sub nom.* Velleca v. Superintendant, MCI Walpole, 523 F.2d 1040 (1st Cir. 1975); United States v. O'Bryant, 998 F.2d 21 (1st Cir. 1993) (although defendant was a "minnow" and codefendant a "kingfish," no severance where both were indicted together, most of the evidence against codefendant was independently admissible against defendant, and trial judge gave timely cautionary instructions): United States v. Saunders 553 F.3d 81 (1st Cir. 2009) (no prejudice in failure to separate charges against mother from charges against son even though mother clearly played a smaller role). United States v. DeCologero, 530 F.3d 36, 54-57 (1st Cir. 2008) (in multi-defendant RICO case where one defendant had significantly more charges against him, disparate levels of culpability of codefendants did not require severance where jury returned highly individualized verdicts).

[89] *Se*e DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962), where the majority concluded that severance was required because the codefendant had the right both to testify *and* to comment on defendant's failure to testify. Later cases have suggested that this is really a variant of the antagonistic defenses situation, so that severance will be required only if the codefendant's testimony itself is harmful to defendant. *See* United States v. Badolato, 701 F.2d 915 (11th Cir. 1983); United States v. Nakaladski, 481 F.2d 289 (5th Cir.), *cert. denied*, 414 U.S. 1064 (1973).

[89.5] Commonwealth v. Russo, 49 Mass. App. Ct. 579, 581-584 (2000) (in case of first-impression where codefendant's counsel commented on joint defendant's failure to testify defendant's fifth amendment right against self-incrimination was implicated and court reviewed comments of codefendant's counsel under same standard as they would if judge or prosecutor had made comment, namely, whether the comments "can be fairly understood as permitting the jury to draw an inference adverse to the defendant from the fact of his failure to testify"). *See also,*

jeopardized by joint trial;[90] where the evidence against the codefendant is so inflammatory that a substantial risk exists that the jury will not be able to compartmentalize that evidence and fairly consider the defendant's case;[91] or where adverse pretrial publicity concerning a codefendant[92] or the courtroom antics of a codefendant[93] may adversely affect the defendant's ability to obtain a fair trial.

§ 22.8 JOINDER OF DEFENDANTS WHO DISAGREE ON JURY WAIVER

A different issue is raised when properly joined defendants disagree on whether to claim or waive a jury trial. In superior court, and in district court cases originating after January 1, 1994,[94] a defendant cannot waive the jury unless all codefendants do as well.[95] Therefore, a defendant who wants a bench trial when his codefendants do not should argue for a severance.[96] However, in district court cases prosecuted under the former de novo system, the defendants' individual preferences must be observed; a

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Commonwealth v. Vallejo, 455 Mass. 72 (2009) (where codefendant's counsel commented on defendant's failure to speak with police before trial, court reviewed under same standard as they would if prosecutor, judge, or codefendant's counsel made comment on defendant's failure to testify).

[90] *E.g.*, United States v. Thoresen, 281 F. Supp. 598 (N.D. Cal. 1967) (where spouses charged with crime, severance required because of marital privilege).

[91] *E.g.*, United States v. Clayton, 52 F.R.D. 360 (S.D.N.Y. 1971); United States v. DeCologero 530 F.3d 36 (1st Cir. 2008).

[92] *See* In re Gottesman, 332 F.2d 975 (2d Cir. 1964) (not ordering severance).

[93] *E.g.*, United States v. DeCologero 530 F.3d 36, 54 (1st Cir. 2008) (codefendant's unresponsive and tangential testimony which elicited rebukes from the bench and prosecution did not require severance in the absence of demonstration of specific prejudice; "if the rule were otherwise codefendants could provoke mistrials at will"); United States v. Celestin, 612 F.3d 14 (1st Cir. 2010) (severance not required where codefendant represented himself pro se and made representations to the Court, but not in front of jury, refusing to take the oath in order to avoid making "contract" with the court and denying the existence of the United States). Jones v. Commonwealth, 379 Mass. 607 (1980) (where clashes at trial between cocounsel and the court led to mistrial, severance should have been ordered); Commonwealth v. Flowers, 5 Mass. App. Ct. 557, 569 (1977) (Brown, J., concurring); United States v. Pierro, 32 F.3d 611, 616 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 919 (1995) (severance not ordered; curative instructions, rather than severance, will usually suffice); Aratari v. Cardwell, 357 F. Supp. 681 (S.D. Ohio 1973); United States v. Bentuena, 319 F.2d 916 (2d Cir.) *cert. denied*, 375 U.S. 940 (1963) (severance not ordered); Braswell v. United States, 200 F.2d 597 (5th Cir. 1952).

[94] *See* G.L. c. 263, § 6 (1992 ed.). For discussion of changes in the de novo system for district court cases originating after January 1, 1994, *see supra* ch. 3.

[95] G.L. c. 263, § 6; MASS. R. CRIM. P. 19(a). All the defendants must be tried by a jury, or all by the judge, or else severance must be granted. *But see* Commonwealth v. Collado, 426 Mass. 675, 678 (1998) (judge conducted bench trial of jury-waiving defendant simultaneously with jury trial of codefendant but, where judge unintentionally violates rule and statute, no reversal unless defendant shows substantial risk of miscarriage of justice).

[96] *See* Commonwealth v. Collado, 426 Mass. 675, 677 (1998) (all the defendants must be tried by a jury, or all by the judge, or else severance must be granted).

defendant seeking a first-tier bench trial must be severed for that purpose,[97] and he is supposed to be tried first.[98]

While the categories above, both concerning severance of offenses and severance of defendants, are meant to suggest plausible approaches for counsel, they are, of course, not exhaustive. The issue before counsel must always be whether the facts of the case are such that a joint trial will be an unfair trial and whether, even if the requisite showing cannot be made under any particular category to require severance, a combination of various factors are present such that a court determined to do justice will order severance.

[97] Commonwealth v. Greene, 400 Mass. 144 (1987).

[98] Dist. Ct. Bulletin No. 4-79, Item 18 (12/79).