Chapter 18

Motions for Severance (or Consolidation) of Counts or Respondents

Part A. Motions Challenging the Joinder of Counts or Seeking Consolidation of Counts

§ 18.01 INTRODUCTION: THE PROBLEM OF JOINED COUNTS; OVERVIEW OF THE POSSIBLE REMEDIES

State statutes, rules of court, and caselaw typically permit the prosecution to include in a single charging paper all charges arising from the same event or episode (for example, housebreaking, larceny, and receiving stolen property). Most jurisdictions further authorize the prosecutor to include in the Petition charges arising out of separate events or episodes that are (depending upon variances in local rules) (a) part of the same transaction or series of transactions, (b) part of a "common plan" or "common scheme" by the respondent, or (c) legally the same or similar (for example, housebreaking on May 5 and housebreaking on June 12).

In cases in which all the charges against the respondent arise from the same event or episode (such as the ordinary set of housebreaking-larceny-receiving charges based on a single break-in), the joinder results in little prejudice to the respondent, and thus there is little reason to seek severance. In any event, most courts will compel a joint trial in this situation, whether the respondent wants one or not.

However, in cases in which the prosecution has joined charges arising from different episodes or transactions (on the basis of the factual connection between the transactions or the legal similarity of the charges), the respondent faces a significant risk that the trier of fact, whether jury or judge, will view the aggregation of charges as increasing the likelihood that the respondent is guilty of each one. Thus, in cases that are going to trial, counsel will usually wish to challenge the joinder of the counts or seek severance. *See, e.g.*, *People v. Santiago*, 190 A.D.3d 502, 502-03, 140 N.Y.S.3d 29 (N.Y. App. Div., 1st Dep't 2021) (the trial court should have granted the defendant's motion to sever charges of "leaving the scene of an incident without reporting" and "driving while ability impaired" which were based on incidents that "occurred on a different date" and "different set[s] of facts": although state law allows joinder of offenses "based on different criminal transactions if proof of one offense would be material and admissible as evidence in chief upon a trial of the other offense," the "witnesses, locations, and dates of the two crimes were completely unrelated" and "none of the proof necessary for each offense was material to the other"); *People v. Hall*, 120 A.D.3d 588, 589, 991 N.Y.S.3d 114, 116 (N.Y. App. Div., 2d Dep't 2014) ("the defendant was deprived of the effective assistance of counsel, based on defense counsel's failure to make a proper pretrial motion to sever the charges of robbery from the drug charges"). In rare cases, however, there may be countervailing benefits to having the counts joined for trial, and counsel may want to leave joinder unchallenged; or when the prosecutor has filed separate Petitions, counsel may want to seek consolidation of the Petitions for a single trial. In addition, if the respondent wishes to enter pleas of guilty to separate

Petitions or wishes to enter a plea of guilty to one Petition upon the basis of an agreement with the prosecutor that other Petitions will be dismissed (see §§ 14.06, 14.16 *supra*), consolidation may facilitate the implementation of a favorable plea agreement and may also enable the respondent to steer the case before the most favorable sentencing judge.

Section 18.02 describes the strategic variables that counsel should consider in deciding whether to challenge joinder of counts. Sections 18.03-18.05 then examine the motions that counsel can file to obtain dismissal or a severance on grounds of misjoinder and to obtain a severance on the grounds that the joinder, although technically valid, is prejudicial to the respondent. Section 18.06 discusses motions for consolidation.

Counsel must check local statutes, court rules, and caselaw to determine not only the precise terms of the joinder rules used in the jurisdiction but also the procedural requirements for raising joinder issues. In many jurisdictions, objections to misjoinder and/or motions for severance must be made at arraignment or within a specified period of time after arraignment. See § 7.05 *supra.*

§ 18.02 DECIDING WHETHER TO OPPOSE A TRIAL ON MULTIPLE CHARGES

As explained in § 18.01 *supra,* usually the only joinder of charges that the defense might want to challenge is a joinder of charges arising from different events or episodes. In deciding whether to make such a challenge, counsel should consider:

(a) *What will be the effect of the trier's knowing that the respondent is charged with several offenses, quite apart from any proof of his or her guilt of those offenses?*

Generally the more a respondent is charged with, the worse s/he looks. Jurors and even many judges tend to operate on the principle that where there's smoke, there's fire. At the outset of the trial, when they are forming critical first impressions of the case that may affect their perceptions of much of the proof that follows, they know little about the respondent except what s/he is charged with. If the charges are several, the respondent starts with several sins.

In some cases, however, there may be countervailing considerations. If the respondent is obviously overcharged – if, for example, s/he breaks a few coin boxes in public telephone booths and is charged, for each booth, with burglary, theft, and malicious destruction – the cumulative weight of the overcharging may make out a case of persecution that will sway a jury or judge in the respondent's favor.

(b) *What will be the effect on the trier of the cumulation of evidence?*

Again, generally the more evidence there is against a respondent, the worse. But this may depend on whether the evidence comes from several sources or from one. If two package store proprietors give the same trier of fact "pretty sure" identifications of the respondent as the person

who robbed them, conviction is more likely than if separate triers of fact heard the identifying witnesses. On the other hand, if a single complainant relates that the respondent committed an offense against him or her on several successive occasions, proof of an airtight alibi for one or more of those occasions may convince the trier of fact that the whole story is a fabrication, particularly if the defense can point to some motive for fabricating.

(c) *Will one defense depreciate another?*

If a respondent has a weak or unconvincing defense to one charge and a more substantial defense to another, the incredibility of the former is likely to attaint the latter. Or both defenses may be believable separately but unbelievable together, as when a respondent charged with two rapes pleads alibi to the first and consent to the second.

(d) *Is it desirable to put the respondent on the stand in one case but not in the other?*

If so, separate trials are essential. Apart from problems of cross-examination, a respondent cannot practicably take the stand and leave part of the charges against him or her unanswered.

(e) *Is there a "clinching" piece of evidence in one case that would not be admissible in the other if it were tried separately?*

If so, the item may "clinch" both cases, as when a respondent charged with two holdups left a fingerprint at the scene of one.

(f) Are *there items of evidence that the prosecution would probably be forbidden to present in a separate trial of one case because they are irrelevant or unduly prejudicial but that the prosecution would probably be permitted to present in a joint trial of the two cases?*

For example, a defendant may be charged with armed robbery and also with being a felon in possession of a firearm. If the robbery count were tried separately, the evidence of the defendant's prior felony conviction would ordinarily be inadmissible. In a joint trial of the two counts, the evidence would be admissible and would be likely to sway a jury against the defendant on the more serious robbery charge as well. Under these circumstances, "[s]ome jurisdictions routinely refuse [severance] requests . . . . Instead, they seek to address the risk of prejudice with an instruction directing the jury to consider the defendant's prior convictions only when assessing the felon-in-possession charge. . . . Other jurisdictions allow parties to stipulate to the defendant's past convictions so the particulars of those crimes don't reach the jury's ears. . . . Others take a more protective approach yet and view severance requests with favor." (*Currier v. Virginia*, 138 S. Ct. 2144, 2148 (2018)). The tactical problem here is less acute (or at least less solvable) in bench trials than in jury trials because the trial judge (whether or not s/he shares the ordinary juryperson's once-a-criminal-always-a-criminal presumption) will probably

be exposed to pretrial proceedings or court records revealing the prior conviction even in a separate trial. See § 40.5 *infra* and §§ 15.4.3, 22.5, subdivision (2) *supra* regarding the limited means available for dealing with the latter problem.

(g) *To what extent will a unitary wrap-up of all charges against the respondent expedite the task of gathering the requisite defense witnesses?*

Although, in an ideal world, defense witnesses would be willing to come to court again and again, the reality is that defense witnesses other than the respondent's family will soon lose patience and stop coming to court. Even when local practice makes it possible to put these witnesses "on call," they may be unwilling to be available for more than one trial date. If this is the case, then counsel might consider reducing the risk of losing witnesses by trying all charges in a joint trial.

(h) *To what extent will the process of successive prosecution cause the prosecutor to offer favorable plea bargains?*

Most prosecutors are so overburdened that they are hard pressed to find the time to try cases. Frequently, a prosecutor who is unwilling to make a good plea offer to resolve joint charges slated for a single trial will be far more amenable to offering whatever it takes to avoid the daunting prospect of a series of trials. If the various charges involve the same complainant or other witnesses, the prosecutor also may be eager to avoid repeated trials because the likelihood of prosecution witnesses losing patience and failing to appear increases with each successive court date.

(i) *To what extent will a unitary wrap-up affect disposition?*

As explained in §§ 14.03, 14.05 *supra,* the judge may penalize a respondent at disposition for taking a case to trial when the evidence of guilt was obviously strong. If the respondent is facing several different charges, all of which are strong prosecution cases, and the respondent is unwilling to plead guilty to any of the charges, counsel may be well advised to try all of the cases in a single trial. If the cases are separated, and the respondent insists on going through with each trial, the massive time loss is sure to redound to the respondent's detriment at disposition.

As noted in § 18.01 *supra*, consolidation of charges for purposes of a plea or pleas covering all of the charges also can be used to work out the details of a satisfactory plea bargain and to bring the case before the judge who is known to be the most favorable sentencer. See § 18.06 *infra.*

(j) *To what extent will a unitary wrap-up affect the respondent's detention status?*

If the respondent is detained on all of the offenses presently pending trial, counsel should consider the potential benefits of a unitary wrap-up as a way of shortening the respondent's

pretrial detention. If the respondent is likely to be acquitted of all charges or if s/he is likely to receive probation upon conviction, the resolution of all cases at once means that the respondent will be immediately released; to resolve them piecemeal probably means that the respondent will stay detained until all of the pending charges have been disposed of.

§ 18.03 MOTIONS TO DISMISS THE CHARGING PAPER FOR FAILURE TO ALLEGE FACTS JUSTIFYING THE JOINDER OF COUNTS

In some jurisdictions the applicable statutes, court rules, or caselaw provide a basis for a motion to dismiss a Petition (or to sever the counts joined in the Petition) if the Petition fails to allege *expressly* the facts upon which the permissibility of joinder depends. For example, when the statute authorizes joinder of charges arising out of acts that are part of a "common scheme," a multi-count Petition may be defective for failing to allege facts supporting the inference that there was indeed a common scheme incorporating all of the acts charged in the several counts.

§ 18.04 MOTIONS CHALLENGING MISJOINDER OF CHARGES

When a Petition joins charges that cannot properly be joined under the applicable joinder rules, it is subject to a motion to dismiss or, in some jurisdictions, a motion to sever counts or charges. These motions, which address the "misjoinder" of the counts or charges, are distinct from motions for a severance on the ground of prejudicial joinder. The latter motions, described in § 18.05 *infra,* assume the technical validity of the joinder and request relief from its prejudicial consequences.

In challenging the technical validity of joinder, counsel must consult the local statutes, court rules, and caselaw spelling out the requirements for joinder of offenses. In most jurisdictions there is extensive caselaw (usually in the context of adult criminal cases) elaborating the precise circumstances in which counts or charges can be joined on the ground that the offenses charged were parts of a "common scheme," or arose from the same or related transactions, or are legally the same or similar. *See, e.g.*, *United States v. Cousins*, 841 Fed. Appx. 885, 893-94 (6th Cir. 2021) ("In this case, the face of the indictment gives no indication that Mr. Cousins's charge forms part of the same 'act or transaction' or the 'same series of acts or transactions' as the other charges, as [Federal Criminal Rule 8(b) requires. Unlike many drug-conspiracy indictments, this [seven-count] indictment does not contain a statement of alleged facts before the list of counts; it merely states the counts that each defendant is charged with. It charges both Mr. Stewart and Mr. Moore with possession with intent to distribute certain drugs in each of counts 1 through 3, and it charges them both in count 4 with possession of two handguns in furtherance of drug-trafficking crimes. . . . ¶ . . . [T]he indictment contains nothing readily connecting the single count charging Mr. Cousins with any of the other six. . . . ¶ Although the government argues that joinder was appropriate because the offenses 'grew out of the same search,' the three defendants 'simultaneously stored guns' at the . . . [same] house, and '[t]he government's witnesses regarding the basis for the search, and the search itself, would be the same in separate trials,' there is no basis for any of those conclusions in the charging

instrument. The only connection apparent from the indictment is that the offenses are all alleged to have occurred '[o]n or about November 17, 2016.' Although we construe indictments 'in favor of joinder,' . . . without knowing additional facts about the search and witnesses, we cannot infer from the coincidence in date that count 7 is related to the first six counts or that the proofs will involve common evidence. We conclude that count 7 is misjoined."); *State v. Shape*, 517 N.W.2d 650 (S.D. 1994) (requiring that charges of cattle theft and of perjury committed before a grand jury roughly two years later be severed because the charged offenses were not of the same or similar character, were not based on the same act or transaction, and were not based on acts constituting a common scheme or plan.).

Counsel should particularly be alert to the issue of whether things joinable to joinable things are thereby joinable to each other: that is, whether, under a statute that allows joinder of (a) different offenses arising out of one transaction and (b) the same or similar offenses arising out of different transactions, a Petition may charge: (1) housebreaking and (2) larceny, both on May 5, *plus* (3) housebreaking and (4) arson, both on June 12.

§ 18.05 MOTIONS FOR A SEVERANCE OF CHARGES ON THE GROUND OF PREJUDICIAL JOINDER

Unlike motions challenging misjoinder, see § 18.04 *supra,* motions for a severance by reason of prejudical joinder ask the court to order separate trials of properly joined counts on the ground that trying them together would unfairly disadvantage the respondent.

In seeking to persuade the court that the respondent would be prejudiced by a joint trial of two or more charges, counsel can point to the types of potential harm described in paragraphs (a) through (f) of § 18.02 *supra.* Often, there is local caselaw that can be cited in support of a severance to avoid the particular form of prejudice urged by counsel. *See, e.g., In the Matter of William S.,* 70 Misc. 2d 320, 333 N.Y.S.2d 466 (N.Y. Fam. Ct. 1972) (the joint trial of three separate acts of sodomy on different victims might prejudice the respondent by aggregating unrelated evidence); *United States v. Sampson*, 385 F.3d 183, 190-93 (2d Cir. 2004) (the joint trial of drug offenses occurring in 1998 with drug offenses occurring in 2000 "caused Sampson substantial prejudice with regard to the 1998 counts" because "he would have taken the stand in his defense on the 1998 counts" and he had "reasons for wanting to remain silent on the 2000 counts"); *Cross v. United States,* 335 F.2d 987 (D.C. Cir. 1964) (the joint trial of charges of robbing a church rectory and robbing a tourist home on different dates was prejudicial because Cross "wished to testify on Count II [the tourist home robbery] and remain silent on Count I [the church rectory robbery]"); *State v. Lozada*, 357 N.J. Super. 468, 471, 815 A.2d 1002, 1003-04 (2003) (applying and extending the holding of *State v. Chenique-Puey*, 145 N.J. 334, 343, 678 A.2d 694, 698 (1996), that "in order to avoid the prejudice to defendant resulting from the jury's knowledge of the restraining order when it tries the underlying crimes, . . . ' . . . trial courts should sever and try sequentially charges of contempt of a domestic-violence restraining order and of an underlying criminal offense when the charges arise from the same episode"). *See also People v. Martinez*, 165 A.D.3d 1288, 1290, 86 N.Y.S.3d 143, 146 (N.Y. App. Div., 2d Dep't

2018) (the trial court "improvidently exercised its discretion in granting the People's motion to consolidate" indictments for two separate crimes; although the crimes were "properly joinable," the consolidation "'compromise[d] . . . [the] defendant's fundamental right to a fair trial'" because "there was a substantial disparity in the evidence tying the defendant to the offenses contained in the separate indictments, which presented a strong possibility that the jury convicted the defendant of the offenses charged in Indictment No. 8114/13 by reason of the cumulative effect of the evidence").

When a severance motion based on a claim of anticipated prejudice has been denied but in the course of trial an unexpected evidentiary ruling or other development arising from the joinder of charges occurs and is damaging to the defense, the motion can be renewed and coupled with a motion for a mistrial. *See*, *e.g.*, *City of Seattle v. Lange*, 18 Wash. App. 2d 139, 491 P.3d 156 (2021).

In many localities counsel will find that the judges are obdurate in favor of joint trials to the fullest extent allowed by law and that they are reluctant to grant a severance whenever joinder is technically permissible because of the supposed saving of court time. In these localities particularly, the inquiry into "prejudice" is likely to turn into a balancing of the economies and other considerations favoring or disfavoring joint trial. *See*, *e.g.*, *State v. Freshment*, 309 Mont. 154, 164-71, 43 P.3d 968, 976-80 (2002). Accordingly, counsel is wise to point to the lack of evidentiary overlap between the counts that s/he is asking to have severed – demonstrating (to the extent that the facts allow) that the prosecution's witnesses on one count will be completely (or substantially) different from those on the other count(s), and representing (when this is true) that the defense witnesses on the different counts will be completely (or substantially) different as well. Under these circumstances a judge might well conclude that a joint trial would not save much time and, therefore, that it is not worth the judge's while to suffer the unwieldiness of numerous sets of witnesses and a lengthy proceeding, particularly in the face of the respondent's tenable (and preserved) claims of potential prejudice to his or her defense.

§ 18.06 CONSOLIDATION OF COUNTS

For reasons made apparent in §§ 18.01-18.02 *supra,* it will be the rare case in which the defense should seek consolidation for trial of charges that the prosecutor has filed in separate Petitions.

However, as § 18.01 also notes, a very different calculus applies to cases in which the respondent intends to enter a guilty plea covering charges in various Petitions. If the various Petitions are before different judges, counsel may be able to consolidate all of them, for purposes of a plea, before the judge who would be the most favorable sentencer. On the other hand, if local procedure makes it impossible to predict which judge would receive the consolidated plea, then it is usually preferable to leave the cases before the different judges and to try to schedule the disposition by the most favorable judge first, counting on the other judges to defer to the sentence entered by the first judge rather than overriding it with a more punitive sentence (as, for example,

by ordering a period of incarceration when the first judge ordered probation). In order to make the argument to the successor judges that they should go along with the disposition ordered by the first judge, however, it is important for counsel to be able to tell them that the first judge was fully advised about, and considered, all of the respondent's pending, unadjudicated charges.

When consolidation is desired, it may be ordered on stipulation, or on joint motion of the parties, or on motion of one of them, or it may be effected informally by the prosecutor's listing the cases for trial or plea together, with the acquiescence of the defense. Consolidation can be ordered in any case in which the rules governing joinder would have permitted the joinder of counts initially. If the prosecution and defense are agreed that consolidation will serve their mutual interests, the court will probably accept a stipulation consolidating even those charges that could not technically have been joined.

Part B. Motions Challenging the Misjoinder of Respondents or Seeking Severance of Respondents

§ 18.07 INTRODUCTION: THE PROBLEM OF JOINED RESPONDENTS; OVERVIEW OF THE POSSIBLE REMEDIES

Prosecutors almost always take advantage of local rules permitting the joinder for trial of co-respondents who are charged with participating in the same offense or offenses. Joinder of respondents is ordinarily in the prosecutor's interest for several reasons: (i) It saves the prosecutor from the burden of conducting successive trials, each with the same evidence. (ii) It minimizes the risk that prosecution witnesses will lose patience and stop coming to court. (iii) It enables the prosecutor to gain the impermissible benefit of aggregating the evidence against each respondent individually to mount a persuasive cumulative case against both.

The considerations that might lead defense counsel to favor or oppose a joint trial are listed in § 18.08 *infra.* As the discussion there indicates, it will usually be in the respondent's interest to seek a severance from joined co-respondents.

Challenges to the misjoinder of respondents are described in § 18.09 *infra.* Section 18.10 takes up the constitutional, statutory, and common law grounds for severance by reason of prejudicial (although technically permissible) joinder. Section 18.11 concludes by examining defense motions for consolidation of respondents.

As explained in § 18.01 *supra,* objections to joinder and motions for severance must be made at arraignment or within a specified time after arraignment. Local statutes and court rules must be consulted.

§ 18.08 DECIDING WHETHER TO OPPOSE A JOINT TRIAL OF RESPONDENTS

The considerations favoring and disfavoring joint trial of respondents are exceedingly

complex. The most significant are:

(a) *Will evidence be admitted at a joint trial that could not be admitted at the respondent's trial if s/he were tried separately?*

A principal item of concern in joint trials, and one that has generated considerable constitutional caselaw, is the admission at a joint trial of a co-respondent's confession that implicates not only the co-respondent but also the respondent. Section 18.10(a) *infra* examines the constitutional rules relating to this issue and the special modifications that some jurisdictions have adopted when applying the constitutional doctrines to bench trials in juvenile court. For the present purpose of summarizing the considerations militating for and against a joint trial, it is sufficient to observe that the existence of a confession by the co-respondent significantly impairs the respondent's chances of prevailing at a joint trial. Although the confession may not legally be considered as evidence of the respondent's guilt (see § 18.10(a)), the judge or jury will hear it and will almost surely consider it in fact, whether consciously or unconsciously, insofar as it implicates the respondent. Even co-respondents' confessions that do not explicitly implicate the respondent (or that have been redacted to remove references to the respondent, see § 18.10(a)) can be extremely damaging to the defense, particularly when they factually contradict the respondent's theory of the defense or when the facts are such that both respondents are probably guilty if either one is.

Certain nonconfessional evidence that would be inadmissible against the respondent at a severed trial may also be admissible and hurtful at a joint trial. For example, in a robbery trial, if the respondent admits to being with the co-respondent at the time the crime was committed, evidence that the co-respondent was found in possession of stolen items a short while later will probably be the undoing of the respondent as well as the co-respondent.

(b) *Conversely, will evidence be excluded at a joint trial that would be admitted against the respondent at a separate trial?*

Products of an illegal search and seizure of a co-respondent may be admissible against the respondent because the respondent lacks standing to complain of the illegality. See § 23.15 *infra.* At a joint trial, they might have to be excluded, although this point is not clear. *See McDonald v. United States,* 335 U.S. 451 (1948).

(c) *What are the relative strengths of the defensive cases of the respondent and co-respondent(s)?*

Respondents with weak defenses tend to look particularly bad in comparison to those who have stronger defenses. If the co-respondent is likely to take the stand, this may cast a bad light on the respondent's failure to take the stand. (On the other hand, in a case in which the respondent should not testify because s/he could be impeached with a damaging prior record, it may be possible to present the respondent's defense through the co-respondent's testimony.)

(d) *What is the apparent relative blameworthiness of the respondent and the co-respondent(s)?*

Joint trial invites the trier of fact, whether judge or jury, to assess degrees of culpability. In a bench trial this is particularly significant because the judge is likely to mete out sentences according to these degrees of culpability. This suggests that the least culpable respondent has the most to gain from joint trial. But counsel cannot count on his or her client appearing the least culpable unless the stories of prosecution witnesses or irrefutable physical circumstances – for example, relative size and age – make the favorable comparison strongly evident. Otherwise, the co-respondents and their attorneys will also be vying to look the best of the bunch. In this and other situations of antagonistic defenses, separate trial should be sought.

(e) *Is there something particularly attractive or unattractive about the co-respondent(s)?*

The judge's or jury's positive or negative reactions to a co-respondent may rub off on the respondent at a joint trial.

(f) *Can counsel cooperate and work well with counsel for the co-respondent(s)?*

Do their defensive theories or trial strategies conflict?

(g) *What are the local rules, and what is the local practice, regarding limitation of the procedural rights of joined respondents?*

For example, will counsel's cross-examination of prosecution witnesses be cut off as "cumulative" of that of counsel for a co-respondent? In jurisdictions that permit jury trials for juveniles, will each joined respondent be permitted the full number of peremptory challenges to which s/he would be entitled at a separate trial, or will the respondents be required to apportion peremptories?

(h) *If trial is severed, who is likely to be tried first?*

Prior trial of the co-respondents may allow defense counsel full discovery of the prosecution's case in advance of his or her own trial. On the other hand, if they are convicted, they may turn state's evidence in an attempt to win sentencing consideration.

§ 18.09 MOTIONS CHALLENGING MISJOINDER OF RESPONDENTS

Statutes, court rules, and caselaw must be reviewed to determine the local rules governing joinder of respondents and also to determine whether the remedy for misjoinder is a motion to dismiss the Petition or a motion to sever the respondent's trial from that of the co-respondent(s). In some jurisdictions counsel will also be able to frame a motion for dismissal or severance on the technical ground that the Petition does not expressly allege the facts required to support a

joinder of respondents. *See* § 18.03 *supra.*

The generally prevailing rule is that respondents may be joined in a single Petition, or their Petitions may be joined for trial, if the respondents are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. A respondent can challenge the Petition for misjoinder if, in addition to charging offenses in which both of two respondents allegedly participated, the Petition charges offenses that only the co-respondent is accused of committing. *See, e.g., Davis v. United States,* 367 A.2d 1254, 1260-64 (D.C. 1976).

§ 18.10 MOTIONS FOR A SEVERANCE OF RESPONDENTS ON THE GROUND OF PREJUDICIAL JOINDER

Motions for severance may request a separate trial for the respondent notwithstanding the technically proper joinder of co-respondents in the Petition. A severance may be granted if, for any reason, the respondent will suffer prejudice as a result of being tried jointly with the co-respondent(s). *See, e.g., Chartier v. State*, 124 Nev. 760, 191 P.3d 1182 (2008); *Rollerson v. United States*, 127 A.3d 1220 (D.C. 2015).

A cardinal problem here, as with the required showing of prejudice generally, is that at the time of the hearing on a pretrial motion for severance, most of what will occur at trial remains largely speculative. After trial has begun and if prejudice develops, a motion for mistrial and severance may be made; but by this time the judge has an interest in not having wasted the court hours already invested, and s/he will be particularly loth to grant the motion. Counsel can sometimes turn these several related problems to advantage, however. If, on a pretrial motion, counsel can convince the court that the case is one in which trial problems may arise depending on the nature of the prosecutor's proof, the court will frequently ask the prosecutor what the proof is going to be – for example, whether a co-respondent's confession will be used and whether it will incriminate the respondent. Motions for severance, therefore, have considerable discovery potential and may result in the disclosure of advance information about the prosecution evidence that counsel could not obtain by regular discovery procedures.

The most common bases for seeking severance are the following:

§ 18.10(a) Severance on the Basis of a Co-Respondent's Confession Implicating the Respondent

In *Bruton v. United States,* 391 U.S. 123 (1968), the Court held that the admission at a joint trial of a co-defendant's confession which incriminated the defendant violated the defendant's Sixth Amendment right of confrontation despite clear instructions to the jury limiting the use of the confession to its maker. Even in the situation known as "interlocking confessions," in which the defendant and co-defendant both confessed and their incriminating statements support each other, the *Bruton* rule prohibits the introduction at a joint trial of a co-defendant's

statement that incriminates the defendant. *Cruz v. New York,* 481 U.S. 186 (1987) (rejecting the plurality opinion in *Parker v. Randolph,* 442 U.S. 62 (1979) and adopting the approach espoused by Justice Blackmun's concurring opinion in *Parker*). *See*, *e.g.*, *Brown v. Brown*, 847 F.3d 502 (7th Cir. 2017).

The *Bruton* rule is limited to co-defendants' statements incriminating the defendant, and therefore a co-defendant's confession can be introduced at a joint trial "with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to her existence." *Richardson v. Marsh,* 481 U.S. 200, 211 (1987). *See also Gray v. Maryland*, 523 U.S. 185, 192-93 (1998) (addressing "a question that *Richardson* left open" and holding that "*Bruton*'s protective rule" fully applies when the ostensible "redaction [of the co-defendant's confession] . . . replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word 'deleted,' or a similar symbol," with the result that "the jury will often realize that the confession refers specifically to the defendant"); *Washington v. Secretary, Pennsylvania Dep't of Corrections*, 801 F.3d 160, 162, 163, 167 (3d Cir. 2015) ("admission into evidence of a confession by a non-testifying codefendant that redacted James Washington's name and replaced it with . . . generic terms describing Washington and his role in the charged crimes" violated the Confrontation Clause because "there were two obvious alterations that notified the jury that Washington's name was deleted"); *Colon v. Rozum,* 649 Fed. Appx. 259, 263-64 (3d Cir. 2016) ("Although the reference to 'another person' in this case is less specific than the more direct reference to 'the driver' in *Washington*, this distinction is not very meaningful in this case. This is so because the jury knew that: there were only three people in the car at the time of the crime; the statement was coming from Gonzales; Gonzales referred to the second person in the car (Betancourt) by name; and, finally, the jury knew from the prosecutor that Colon was the third person in the car. By a process of elimination, it was easy for the jury to infer that Colon was the person referenced when Gonzales was asked if the 'other person' heard Betancourt say that 'he was gonna rob somebody's purse and stuff like that.'"); *United States v. Taylor*, 745 F.3d 15, 29-30 (2d Cir. 2014) (redaction of the co-defendants' names from Taylor's statement failed to overcome the Confrontation Clause problem because the resulting "stilted circumlocutions" and the retention of the name of the co-perpetrator who testified for the prosecution would have made it "obvious [to the jury] that names have been pruned from the text" and "the choice of implied identity is narrow" since "[t]he unnamed persons correspond by number (two) and by role to the pair of co-defendants" on trial with Taylor); *Eley v. Erickson*, 712 F.3d 837, 854-62 (3d Cir. 2013) (the trial court violated the Confrontation Clause by denying severance and allowing the admission of a jailhouse informant's account that a non-testifying co-defendant confessed to committing the charged crime with "'other two'" individuals, which the jury doubtless would have understood to refer to Eley and another co-defendant); *Brown v. Superintendent Greene SCI*, 834 F.3d 506 (3d Cir. 2016) (the co-defendant's statement was redacted to eliminate the defendant's name by using terms such as "the other guy," "one of the guys," or "the guy with the gun" to replace it, but the prosecutor in closing argument referred to the defendant by name in a way that revealed he was "the other guy"; this constituted a *Bruton* violation whether the prosecutor's action was deliberate or an inadvertent slip, and although "[t]here are some circumstances when the prosecution can commit what otherwise would be a constitutional

violation but nonetheless escape a mistrial through limiting instructions[,] . . . in cases falling within the ambit of *Bruton* and its progeny, limiting instructions cannot cure the error." (*id*. at 519)); *accord, Johnson v. Superintendent Fayette SCI*, 949 F.3d 791 (3d Cir. 2020); *People v. Cedeno*, 27 N.Y.3d 110, 120-21, 50 N.E.3d 901, 907-08, 31 N.Y.S.3d 434, 440-41 (2016) (the admission of the co-defendant's statement violated *Bruton* even though the "statement, as read out loud at trial, did not appear to have been obviously redacted" to remove any reference to the defendant (and "simply referred to a generic 'Latin King,' of which there were many involved in the fight"), because the "manner in which the physical, written statement itself – which was provided to the jury – was redacted [with a replacement of an "identifying description of defendant . . . with a large blank space"] made it obvious that Villanueva expressly implicated a specific Latin King" and, "[g]iven that defendant was one of three codefendants sitting at the table with . . . [the co-defendant who made the statement], the statement powerfully implicated" the defendant); *Orlando v. Nassau County District Attorney's Office*, 915 F.3d 113 (2d Cir. 2019) (an investigating detective testified that while interrogating the defendant he confronted the defendant with the fact that an accomplice, during simultaneous interrogation, had made a statement incriminating the defendant and that the detective believed that the accomplice's statement was what really happened; although the contents of the accomplice's statement were not further disclosed and although the judge instructed the jury that the statement could not be used as evidence of guilt but was admitted only to show the context within which the defendant himself made certain changes in his version of relevant events, the Second Circuit finds a clear *Bruton* violation); *United States v. De Leon-De La Rosa*, 17 F.4th 175 (1st Cir. 2021) ("The government's sole contention as to why there is no *Bruton* violation . . . hinges on the fact that . . . [appellant's codefendant] did not at any point in his statements expressly assert that he had tied a controlled substance to the engine that was jettisoned. Rather, the government stresses, . . . [the codefendant] referred in those statements only to "*eso*." ¶ According to the government, that feature of . . . [the codefendant's] statements in and of itself ensures that there is no problem here under *Bruton*, because it ensures that those statements are not themselves "facially incriminating" of . . . [appellant]. According to the government, the statements became so only when linked to the other testimony at trial that explained that "*eso*" . . . [is a] common slang terms for cocaine." *Id*. at 193-94. Rejecting this argument and finding a reversible *Bruton* error, the First Circuit writes: "[W]e are confident that '[a] juror who does not know the law,' . . . would easily intuit that had the meaning of "*eso*" been ambiguous, [the interrogating] Agent . . . would have asked . . . [the codefendant] a follow up question – namely, 'What is *eso*?' Given that . . . [the agent] did not acknowledge asking such a question, a juror would immediately infer here that the meaning of '*eso*' was unambiguous to . . . [the codefendant's] interlocutor. And, in coming to that conclusion, a juror would also immediately infer that '*eso*' must obviously mean cocaine – for if it did not mean as much, then . . . [the agent] would have continued to question . . . [the codefendant] about what was on the boat to determine if he would admit to possessing, destroying, and conspiring to destroy forfeitable property." *Id*. at 195.). The *Bruton* rule also is limited to cases in which the co-defendant does not testify at trial in a manner that exposes him or her to cross-examination on the confession by the defendant's attorney. *Nelson v. O'Neil,* 402 U.S. 622 (1971).

In jury trials in adult criminal cases, the *Bruton* rule provides a powerful argument in support of a defense motion for a severance in virtually every case in which the prosecution intends to introduce a co-defendant's statement that incriminates the defendant. The same is true in jury trials in juvenile court in those jurisdictions that recognize a right to a jury trial in delinquency proceedings (see § 21.01 *infra*). Alternatively, or if severance is denied, counsel can move for exclusion of the codefendant's statement. *See*, *e.g.*, *United States v. Bhimani*, 492 F. Supp. 3d 376, 390-93 (M.D. Pa. 2020). Some jurisdictions apply the *Bruton* rule to bench trials (*see, e.g.*, *State v. M.M.*, 133 Wash. App. 1031, 2006 WL 1731316 (2006) (per curiam)), but in other States there are decisions saying that *Bruton* is inapplicable to bench trials in juvenile court because a judge is better able than a jury to perform the mental gymnastics necessary to avoid considering a co-respondent's confession in determining a respondent's guilt. *See, e.g., In re L.J.W.,* 370 A.2d 1333, 1336–37 (D.C. 1977); *State in the Interest of R.B.,* 200 N.J. Super. 573, 577, 491 A.2d 1311, 1313 (1985); *see also United States v. Cardenas*, 9 F.3d 1139, 1154-56 (5th Cir. 1993) (holding *Bruton* inapplicable to bench trials in adult criminal cases). This ground for denying *Bruton*'s protections to respondents in delinquency bench trials is arguably at odds with the reasoning of *Lee v. Illinois*, 476 U.S. 530 (1986), an adult criminal bench-trial case. In *Lee*, which involved a bench trial, the Court held that the judge's consideration of a non-testifying co-defendant's confession incriminating the defendant violated the defendant's Sixth Amendment right of confrontation. *See id*. at 539-46. *See also Crawford v. Washington*, 541 U.S. 36, 58 (2004) (replacing the analytic rubric used in *Lee* and other pre-*Crawford* cases to assess Confrontation Clause claims but explaining that *Lee*'s result was "faithful to the Framers' understanding" of the requirements of the Confrontation Clause). The *Lee* case is distinguishable from the usual *Bruton* situation because the judge in *Lee* not only admitted the co-defendant's confession into evidence but considered it as substantive evidence against the defendant (see § 30.06 *infra*), whereas typically a judge in a bench trial would profess to compartmentalize his or her mind and not consider a co-respondent's statement against the respondent. The *Lee* decision is instructive, however, because the majority's opinion contains an extended discussion of the presumptive unreliability and harmfulness of co-defendants' confessions even in the context of a bench trial. *See Lee*, 476 U.S. at 541-46 (the "truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination," *id*. at 541). *See also Crawford v. Washington*, 541 U.S. at 64-65 (explaining, in the context of a jury trial, that cross-examination is essential to test the reliability of a "potential suspect['s]" statement that inculpates the accused); *Lilly v. Virginia*, 527 U.S. 116, 131 (1999) (plurality opinion) ("we have over the years 'spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants'" (quoting *Lee v. Illinois*, 476 U.S. at 541)); *Williamson v. United States*, 512 U.S. 594, 601 (1994). The *Lee* Court's reasoning provides support for the conclusion that judicial self-control is not an adequate substitute for the *Bruton* rule in bench trials; and *Crawford* adds (albeit in connection with a different aspect of judicial self-control) a strong admonition that it would violate the Constitution's "intended constraint on judicial discretion" (*Crawford v. Washington*, 541 U.S. at 76) to rely upon individual judges' subjective willingness and ability to protect accused persons as a substitute for "the constitutionally prescribed method of assessing reliability" (*id*. at 62) through confrontation and cross-

examination. *See id*. ("The Framers . . . knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands.") Caselaw supporting the general proposition that judges should avoid engaging in mental gymnastics in lieu of objective procedural precautions is discussed in § 20.05 *infra*. In any event, in the present state of the law – with no authoritative ruling or even hint by the Supreme Court of the United States that the *Bruton* rule does *not* apply to bench trials – counsel can and should argue that a joint trial in which a co-respondent's confession may be offered into evidence presents a significant risk of running into reversible constitutional error, and that that risk alone is a sufficient reason for granting a severance of respondents.

§ 18.10(b) Severance on the Basis of the Respondent's Need To Call the Co-Respondent as a Witness

In some jurisdictions, state law provides a basis for severance in those cases in which the defense can show that a co-respondent's testimony would be favorable to the respondent. *See, e.g.*, *United States v. Cobb*, 185 F.3d 1193, 1195 (11th Cir. 1999) ("the district court should have granted Stephen Cobb's motion to sever the trial so his brother and co-defendant, Jerry Cobb, could provide exculpatory testimony"); *Rollerson v. United States*, 127 A.3d 1220, 1226-30 (D.C. 2015). The theory underlying this doctrine is that in a joint trial, the co-respondent could elect to invoke his or her Fifth Amendment Privilege not to take the witness stand, and therefore the joint trial would prejudice the respondent by depriving him or her of a witness with exculpatory testimony. If the cases are severed and the co-respondent's case is tried before the respondent's, then the co-respondent is free to testify at the respondent's trial. (If the co-respondent is acquitted at his or her own trial, s/he can also be subpoenaed and compelled to testify; if s/he is convicted, his or her Fifth Amendment Privilege certainly continues until s/he is sentenced and probably also continues throughout the pendency of his or her appeal, but s/he may elect to waive it in order to testify on the respondent's behalf.) Severance is similarly required when a co-respondent has made an out-of-court statement which critically supports the respondent's theory of the case and which would be admissible within a hearsay exception if the respondent were tried alone but excludable upon the co-respondent's objection at a joint trial. *United States v. Slatten*, 865 F.3d 767 (D.C. Cir. 2017).

Typically, state law requires that the defense show both that the co-respondent has exculpatory testimony to offer on the respondent's behalf and that s/he is willing to testify for the respondent if the cases are severed. This showing is ordinarily made through an affidavit by counsel or the defense investigator affirming that s/he has spoken with the co-respondent, recounting the substance of the co-respondent's exculpatory testimony (in as little detail as possible, to avoid giving discovery to the prosecution), and relating the co-respondent's willingness to testify if the cases are severed and his or her trial is held first.

Although decisions recognizing this ground for severance are usually based on a statute, rule of court, or state court's supervisory powers, counsel can argue that the right to call the co-

respondent as a witness – and whatever procedures such as severance are necessary to bring that about – are grounded in the Sixth Amendment rights to compulsory process and to present defensive evidence (see § 9.09(b)(4) *supra;* § 33.04 *infra*; *Washington v. Texas,* 388 U.S. 14 (1967)), the Fourteenth Amendment Due Process right to a fair trial (*see Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); see also § 13.05(b) *supra*), and cognate state constitutional guarantees. And because, in most jurisdictions, the prosecution could secure the testimony of the co-respondent *against* the respondent, if it were incriminating, by granting the co-respondent immunity from prosecution, the principle of *Wardius v. Oregon,* 412 U.S. 470 (1973), discussed in § 9.09(b)(7) *supra,* strongly suggests that a severance sought by the respondent in order to obtain the same co-respondent's exculpatory testimony is constitutionally required in order to maintain "the balance of forces between the accused and his accuser" (412 U.S. at 474).

§ 18.10(c) Severance on the Basis of the Respondents' Conflicting and Irreconcilable Defenses

State law frequently affords a basis for severance on the ground that the defense that the co-respondent intends to offer irreconcilably conflicts with the defense that the respondent intends to offer. The theory underlying this ground for severance is that the benefits of judicial economy which justify a joint trial do not outweigh the concrete prejudice that the respondent suffers when a co-respondent essentially proves the case for the prosecution by rebutting the respondent's witnesses with a conflicting version of the events. *See People v. Gutierrez*, 2021 COA 110, 499 P.3d 367, 368 (Colo. App. 2021) ("After a two-week trial, a jury found defendant, Andrew George Gutierrez, and his codefendant, John Orlando Sanchez, guilty of first degree murder and conspiracy to commit murder. The defendants were tried jointly, despite numerous pretrial motions to sever. At trial, the prosecution introduced evidence that the victim, Eric Schnaare, was fatally shot four times with bullets from one gun. Both defendants and the prosecution regarded this evidence, considered with the other evidence in the case, as conclusively proving that there was one shooter. Gutierrez denied shooting Schnaare and accused Sanchez of being the sole shooter, and Sanchez similarly denied being the shooter and accused Gutierrez. ¶ In this case, we conclude that Gutierrez's defense was antagonistic to Sanchez's because the two defenses specifically contradicted each other and to believe one defense meant that a jury would have to disbelieve the other. We further conclude that the joint proceedings in this case resulted in reversible prejudice because the trial saw the introduction of voluminous evidence that would likely not have been admissible in a separate trial – and also required numerous limiting instructions – and a great deal of damaging evidence introduced not by the prosecution but by the codefendant. The trial court erred by denying Gutierrez's motions for severance, so we reverse his convictions and remand for a new, separate trial.").

Typically, state caselaw imposes a stringent standard that a respondent must meet in order to obtain severance on this ground. The cases may require, for example, that counsel show that the defenses of the respondent and the co-respondent are directly conflicting (and not merely inconsistent) or that the conflicts are such that a trier-of-fact could conclude, solely on the basis of the conflicts, that the respondent is guilty. *Compare United States v. Mayfield*, 189 F.3d 895,

897, 900 (9th Cir. 1999) ("Mayfield argues that the district court abused its discretion by refusing to sever the trials despite Gilbert's mutually exclusive defense and prejudicial evidence that was improperly elicited by Gilbert's counsel. Although the district court's initial denial of Mayfield's severance motion was understandable, based on pretrial representations made by the government about the evidence that would be admitted, the district court abused its discretion when at trial it gave Gilbert's counsel free rein to introduce evidence against Mayfield and act as a second prosecutor. Gilbert's counsel's trial tactics necessitated severance or some alternative means of mitigating the substantial risk of prejudice."; "Gilbert's counsel used every opportunity to introduce impermissible evidence against Mayfield, and her closing argument barely even addressed the government's evidence against her client and instead focused on convincing the jury that Mayfield was the guilty party, not her client. . . . It is beyond dispute that, if the jury accepted Gilbert's defense, which was that Mayfield was the drug ringleader who had control over the drugs, it necessarily had to convict Mayfield."), *and People v. Colon*, 177 A.D.3d 1086, 1088-89, 113 N.Y.S.3d 389, 393 (N.Y. App. Div., 3d Dep't 2019) (the trial court erred in denying the defendant's motion to sever his trial from his co-defendant's based on conflicting defenses: The co-defendant "denied knowledge of the cocaine's existence in his car and . . . testified that defendant had brought the . . . bag into the car, that he did not know the contents of that bag, [and] that he would not have allowed the bag in his car if he did," while the defendant "argued – through counsel and without testifying – that he lacked knowledge of the cocaine's presence in the car and that the cocaine must have belonged to [the co-defendant], given that it was found in [the co-defendant's] car and that he had a criminal history involving drug possession and distribution"), *and People v. McGuire*, 148 A.D.3d 1578, 1579, 51 N.Y.S.3d 726, 727-28 (N.Y. App. Div., 4th Dep't 2017) (the trial court should have severed the defendant's trial from that of his co-defendants based on irreconcilable trial strategies because "both codefendants denied possessing the gun and testified it was in defendant's possession," and "the codefendants' respective attorneys 'took an aggressive adversarial stance against [defendant at trial], in effect becoming a second [and a third] prosecutor'"), *and People v. Lessane*, 142 A.D.3d 562, 564, 36 N.Y.S.3d 231, 233 (N.Y. App. Div., 2d Dep't 2016) (the trial court should have granted the defendant's motion to sever his trial from his co-defendant's based on antagonistic defenses; the defendant asserted that his written and videotaped confessions were false and extracted by the interrogating officers' promises of leniency, while "[c]odefendant Steele's defense . . . was almost entirely based on accepting as true the defendant's statements, in which the defendant named three other individuals as perpetrators and omitted any mention of Steele"), *and People v. Feliciano*, 189 A.D.3d 416, 417, 419, 136 N.Y.S.3d 268, 270-71, 272 (N.Y. App. Div., 1st Dep't 2020) ("the court should have severed Feliciano's trial from that of his codefendant, Roberts, rather than conducting a joint trial before separate juries. In order to establish that both defendants participated in the crimes, the People were necessarily required to establish that both defendants were present. However, Roberts' cross examinations, mostly presented to both juries, undermined Feliciano's defense, that he was merely present with Roberts and did not share Roberts' intent to commit robbery or murder, which was antagonistic to, and irreconcilable with, Roberts' defense that he was not there at all."; "Roberts' counsel's pursuit of his client's defense, contemporaneously undermined Feliciano's. Accordingly, he effectively became a 'second prosecutor' and was able to impeach . . . witnesses to Feliciano's detriment in a manner that the

People were unable to."), *with Zafiro v. United States*, 506 U.S. 534, 538-41 (1993) ("the District Court did not abuse its discretion in denying petitioners' motion to sever" under FED. RULE CRIM. PRO. 14 based on a claim of "mutually antagonistic defenses"; "Rule 14 leaves the determination of risk of prejudice and any remedy that may be necessary to the sound discretion of the district courts" and "petitioners have not shown that their joint trial subjected them to any legally cognizable prejudice"). *See also United States v. Blunt*, 930 F.3d 119 (3d Cir. 2019) (in a prosecution of a married couple for identity theft and mail fraud, it was an abuse of discretion for the trial court to deny the motions made by both defendants for a severance based on the wife's intention to testify in her defense that the husband coerced her to take part in the criminal scheme; the husband was prejudiced by the admission of emotion-rousing evidence that would not have been admitted against him in a single trial; the wife was prejudiced by being required to choose between asserting spousal privilege and taking the stand in her own defense); *People v. Davydov*, 144 A.D.3d 1170, 1172, 43 N.Y.S.3d 74, 78 (N.Y. App. Div., 2d Dep't 2016) (the defendant was denied effective assistance of counsel due to his lawyer's errors, which included "fail[ing] to request a severance of the defendant's trial from that of the codefendant . . . as soon as it became clear that their defenses were antagonistic").

§ 18.10(d) Severance on the Basis of the Disparity or Dissimilarity of the Evidence Against the Respondents

State law may also provide a basis for severance when the evidence against the co-respondent is much stronger than the evidence against the respondent, and the spectre is thereby raised that the respondent will be found guilty by association. "It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together." *Krulewitch v. United States,* 336 U.S. 440, 454 (1949) (concurring opinion of Justice Jackson). Usually, state law requires that the disparity of the evidence be substantial.

Although this doctrine affords a basis for severance in jury trials, it would probably be rejected as a ground for severance in a bench trial. Most judges would deny the notion that they are susceptible to being swayed by guilt-by-association. However, even in a bench trial, counsel may be able to secure severance when the evidence is not only disparate but includes items inadmissible against the respondent, admissible against the co-respondent, and incriminating as to the respondent. Although the *Bruton* rule described in § 18.10(a) *supra* deals exclusively with co-respondents' confessions that incriminate the respondent, the logic underlying that rule calls for severance also in this situation. *See, e.g.*, *Zafiro v. United States*, 506 U.S. 534, 539 (1993) (dictum) (explaining that one of the types of prejudice that can justify severance under FED. RULE CRIM. PRO. 8(b) is when there is "[e]vidence that is probative of a defendant's guilt but technically admissible only against a codefendant," and citing *Bruton* as support). And § 18.10(a) makes the argument for the applicability of the *Bruton* principle to bench trials.

Prejudice sufficient to require severance of co-respondents may also be found when substantial evidence of wrongdoing by one of them would be admissible only against that one

and would be inadmissible in a separate trial of the other. *See*, *e.g.*, *United States v. López Martinez*, 994 F.3d 1, 14-15 (1st Cir. 2021) (reversing convictions for accepting bribes and for conspiracy because the trial judge denied defendant López Martinez's motion for severance from her co-defendant Rivera: "The jury before which López was tried was exposed to days of detailed evidence regarding Hernández's role in corrupting the contract bidding process at the Puerto Rico House of Representatives [by giving bribes] . . . . ¶ But, López was not herself employed by the Puerto Rico House of Representatives, let alone charged with any offense pertaining to the corruption of that bidding process. We thus cannot see how evidence of such depth and quality about the nature of the allegedly corrupt scheme at the Puerto Rico House of Representatives in which [co-defendant] Rivera was charged with having a role could have been admitted at a trial against López alone on the counts that she faced. . . . ¶ . . . López's primary defense to the charges against her was that Hernández acted corruptly and intended to influence her but that she merely accepted gifts from him without any sort of quid pro quo. For that reason, the evidence about how Hernández corruptly schemed with others in connection with the Puerto Rico House of Representatives that could not have been introduced at a trial against her alone but to which her jury nonetheless was exposed did create a grave risk of spillover prejudice. Specifically, that evidence risked leading the jury in considering her charges to impute the states of mind of the employees of the Puerto Rico House of Representatives – based on the direct evidence of their intent that was introduced – to López and thereby 'prevent[ing] the jury from making a reliable judgment about [her] guilt or innocence.'"); *United States v. Islam*, 2021 WL 308272 (E.D. Pa. January 29, 2021). Judges considering a motion to sever trials of defendants on the ground that evidence admissible against some of them would be inadmissible and prejudicial at a separate trial of others are likely to balance that consideration against the economies and efficiencies of joint trial. For this reason, the advice given in the third paragraph of § 18.05 *supra* is applicable to these motions as well: Counsel should emphasize not only the probable prejudicial impact of evidence inadmissible against his or her client but also the fact – when it is the case – that there is relatively little prosecution evidence which is admissible against both his/her client and others, so that "[a] separate trial for . . . [counsel's client] will be the most efficient use of judicial resources" (*United States v. Burke*, 789 F. Supp. 2d 395, 400 (E.D.N.Y. 2011)).

§ 18.11 DEFENSE MOTIONS FOR CONSOLIDATION OF RESPONDENTS

Although rare, there are some cases in which the respondent would benefit by being tried with co-respondents. See § 18.08 *supra.* The procedures for consolidation of respondents are the same as those for consolidation of offenses, described in § 18.06 *supra.* Usually, if the prosecutor has decided for strategic reasons to try the co-respondents separately, s/he will resist the respondent's motion for consolidation. In arguing the motion to the court, defense counsel should both point to whatever specific prejudice the respondent is suffering as a result of being tried separately and also advert to any economies that would be effected by a joint trial (compare § 18.05 *supra*), noting previous cases in which the prosecutor has elected to conduct a single trial of multiple respondents in similar circumstances, apparently in recognition of the force of those economies. *United States v. Burdett*, 127 A.F.T.R.2d 2021-1270, 2021 WL 1063067 (E.D. La. March 19, 2021).