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MISSING THE MISJOINDER MARK: IMPROVING CRIMINAL JOINDER OF OFFENSES IN CAPITAL-SENTENCING JURISDICTIONS

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In all state and federal jurisdictions in the United States, joinder allows prosecutors to join multiple offenses against a criminal defendant. Joinder pervades the American criminal justice system, and some jurisdictions see joinder in more than half of their cases. Most states and the federal courts use a liberal joinder system where courts may join offenses regardless of their severity or punishment. These systems derive from judicial efficiency arguments, seeking to avoid unnecessary trials and striving to conserve time, money, and other resources. In a liberal joinder regime, the court may force a defendant to prepare for a trial in which she must simultaneously defend against a misdemeanor offense, like possession of marijuana, and a capital felony offense with a potential death sentence—even though the two charges may require completely different defense strategies.

Jurisdictions should no longer broadly protect the joinder of all types of offenses in the name of judicial efficiency or juridical discretion. Instead, jurisdictions should categorically protect defendants charged with capital offenses from the potentially prejudicial nature of joinder, as Louisiana has for nearly a century. Born from the state's unique judicial history, Louisiana's joinder regime restricts joinder to those offenses which are triable by the same "mode of trial," a phrase that has undergone statutory interpretation, constitutional examination, and judicial scrutiny. Louisiana offers its criminal defendants a structural, procedural protection by

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prohibiting the joinder of capital offenses with noncapital offenses. Although other scholars have published articles and studies criticizing joinder regimes, pointing out the ways in which offenses' joinder may prejudice defendants, or presenting data to show prejudice's existence in practice, none have yet suggested—as this Article does—that jurisdictions revise their joinder regimes to prohibit the joinder of capital and noncapital offenses. If jurisdictions revised their joinder schemes in this way, they could maintain liberal joinder regimes for the most common criminal cases, where joinder is most efficient, without continuing to hinder those defendants who face the most serious consequences and the highest stakes during their trials.

This Article first discusses the history and current status of joinder in most jurisdictions, followed by the history and current status of joinder in Louisiana. It then explains capital-offense joinder in Louisiana and how it differs from other jurisdictions in the United States. The Article further analyzes the arguments for liberal joinder and critiques them by presenting research in the field, practical considerations, and historical arguments. The Article concludes by urging other jurisdictions, particularly those with capital sentencing capabilities or capital offense punishments, to amend their joinder provisions to prevent the joinder of capital offenses with noncapital offenses. If jurisdictions revised their joinder schemes in this way, they could maintain liberal joinder regimes for the most common criminal cases, where joinder is most efficient, without continuing to hinder those defendants who face the most serious consequences and the highest stakes during their trials.

INTRODUCTION

In 2005, Alabama charged a criminal defendant with the murder of a two-year-old, a capital offense under Alabama law.[1] Before trial, the prosecution joined the murder charge with a charge alleging possession of a controlled substance, which carried a lesser penalty of up to ten years' imprisonment.[2] A jury ultimately convicted the defendant of both charges[3] and recommended that the defendant receive the death penalty for the murder

[1] Boyle v. State, 154 So. 3d 171 (Ala. Crim. App. 2013). *See also* ALA. CODE § 13A-5-40(a)(15) (2020). Because the victim was under fourteen years old, Alabama law classified the murder as capital. *Id.*

[2] *See Boyle*, 154 So. 3d at 183.

[3] *See id.* at 186.

charge.[4] The trial court upheld the jury's death penalty recommendation and conviction for the possession charge.[5] On appeal, the defendant argued that the joinder of the two offenses was improper, and that the two offenses should have been severed and tried in different proceedings.[6] After analyzing the relevant federal and state law, the Alabama Criminal Court of Appeals upheld the joinder because the offenses arose out of the same course of criminal conduct.[7] Joinder of the two offenses, the court found, did not prejudice the defendant,[8] despite the stark differences in the offenses' sentences.

In 2016, the Supreme Court of California decided a criminal case in which a jury convicted the defendant on four separate counts related to events that occurred over a two-month period: one count of first-degree murder; two counts of assault by a life prisoner with malice aforethought; and one count of custodial possession of a weapon.[9] At the penalty trial, the jury sentenced the defendant to death.[10] The defendant argued that the trial court "abused its discretion in denying his motion to sever" the murder count and one of the assault counts from the other two counts, contending that this violated his right to a reliable capital proceeding, among other rights-based violations.[11]

In addition, the defendant contended that without the severance, he could not take the stand at his trial.[12] He argued that he had a potential defense to the first-degree murder charge—one that was inapplicable to the others—but because the charges were joined in one trial, he was forced to refrain from taking the stand so as not to incriminate himself on the less severe counts.[13] Following a lengthy discussion, the court rejected all of the defendant's severance and rights-violation arguments and upheld the joinder.[14] In deconstructing all of the prejudicial joinder arguments, the court said: "Contrary to defendant's arguments, we do not apply a heightened standard in assessing severance issues in capital cases."[15] The court affirmed the death sentence.[16]

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[4] *See id.* at 185.
[5] *See id.* at 185–86.
[6] *See id.* at 187.
[7] *See id.* at 188–89.
[8] *See id.* at 190.
[9] People v. Landry, 385 P.3d 327, 339–41 (Cal. 2016).
[10] *See id.* at 339.
[11] *Id.* at 348.
[12] *Id.* at 351.
[13] *Id.* at 352.
[14] *See id.*
[15] *Id.* at 351.
[16] *See id.* at 339.

In 2010, the Louisiana Supreme Court heard argument in a criminal case for a defendant charged with first-degree murder—a capital offense—and "five other counts" of noncapital offenses.[17] In a terse, one-page opinion, the Louisiana Supreme Court stated, almost dismissively, that "[t]he joinder was improper at the outset."[18]

How can these jurisdictions come to such different conclusions on whether joinder is proper in relatively similar situations? Of course, each individual criminal case is unique, but the contrast between a detailed appellate analysis and a swift pronouncement of improper joinder is intriguing.

In all state and federal jurisdictions in the United States, joinder allows prosecutors to join multiple offenses against a criminal defendant in one trial. Joinder pervades the American criminal justice system, and jurisdictions may see joinder in more than half of their cases.[19] Most states and the federal courts use a liberal joinder system,[20] where courts may join offenses regardless of punishment severity. Liberal joinder is based in judicial efficiency arguments premised on avoiding unnecessary trials and striving to conserve time, money, and other resources above all else. In such jurisdictions, courts may force a defendant to prepare for a trial in which she must simultaneously defend against a misdemeanor offense, like possession of marijuana, and a capital felony offense with a potential death sentence—even though the two charges may require completely different defense strategies.

Most U.S. jurisdictions have joinder and severance schemes that are somewhat similar to one another: they permit joinder of offenses when the offenses are based on the same act or transaction, are of the same or similar character, or are part of a common scheme or plan.[21] Most jurisdictions

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[17] State v. Clarkson, 48 So. 3d 272, 273 (La. 2010).

[18] *Id.* Despite the improper joinder at the outset of the prosecution because the defendant failed to raise a timely motion to quash and because the State forewent seeking capital punishment for the first-degree murder charge, the court held that the eventual joinder was proper. *See id.*

[19] *See generally* Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 VAND. L. REV. 347, 363–65 (2006) (finding that in the federal system over a five-year period, more than half of criminal defendants were charged with multiple crimes).

[20] The use of the word "liberal" is not intended to invoke the political meaning of the term. The author uses the word "liberal" to mean that the regime is more generous with or broadly allows joinder.

[21] *See infra* Part I.B.

originally based their joinder regimes on the Federal Rules of Criminal Procedure, which went into effect in 1946.[22]

Generally, if either party feels the joinder is improper, they can use a jurisdiction's severance provision to request that the court examine the joinder. After a severance request, the judge will most commonly determine—either, depending on the jurisdiction's rules, in her discretion or by weighing the prejudice of the joinder against the public interest of judicial efficiency—whether severance is appropriate. A defendant who moves for severance of the offenses generally must meet a high burden to get the relief she seeks either at trial or on appeal.[23]

Most jurisdictions have such a process to review potentially prejudicial joinder. But some states offer parties additional structural protections. Specifically, in Louisiana, prosecutors may not join a capital charge against a criminal defendant with a noncapital charge, which carry less severe punishments.[24]

For decades, judges and scholars have argued for liberal joinder using judicial efficiency justifications. Other scholars and researchers, however, have criticized such joinder regimes by pointing out the ways in which joinder may prejudice defendants or presenting data to show empirical evidence of prejudice.[25] Studies have found that juries can prejudice defendants by confusing the evidence of one offense with that of the joined offense or inferring the defendant's criminality based on the multiple charges.[26] By far the strongest point against joinder is that a defendant's chance of conviction at trial rises merely from the state charging her with more than one offense.[27] Despite these indicia of a burdensome system, no one has yet suggested that jurisdictions revise their joinder regimes to prohibit the joinder of capital and noncapital offenses.

Jurisdictions should no longer broadly protect the joinder of all types of offenses under their regimes in the name of judicial efficiency or juridical discretion. Instead, jurisdictions should categorically protect defendants charged with capital offenses from the potential prejudice joinder can create, as Louisiana has for nearly a century. Born from the state's unique judicial

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[22] *See generally* FED. R. CRIM. P.; 327 U.S. 821 (1946). Today, as in 1946, joinder in the federal system is governed by Rule 8, and relief from joinder is governed by Rule 14. *See* FED. R. CRIM. P. 8, 14.

[23] *See infra* Part IV.F.

[24] *See* LA. CODE CRIM. PROC. ANN. art. 493 (2020) (stating that offenses may be joined provided that they are "triable by the same mode of trial"); *infra* Part III.B.

[25] *See infra* Part IV.B.

[26] *See infra* Part IV.B.

[27] *See infra* Part IV.B.

history, Louisiana's joinder regime restricted joinder to those offenses that courts can try by the same "mode of trial,"[28] a phrase that has undergone statutory interpretation, constitutional examination, and judicial scrutiny. Louisiana offers its criminal defendants a categorical procedural protection by prohibiting the joinder of capital offenses with noncapital offenses.

For jurisdictions that seek to address the growing body of scholarship on joinder's negative impacts while continuing to honor arguments promoting judicial efficiency, prohibiting the joinder of capital and noncapital offenses provides a favorable solution. Further, jurisdictions—particularly those that maintain the death penalty—should adopt a regime with a joinder restriction on capital and noncapital offenses to provide criminal defendants with an additional joinder protection not based on discretion alone.

This Article first discusses the history and current status of joinder in common law jurisdictions, followed by the history and current status of joinder in Louisiana. It then explains capital-offense joinder in Louisiana and how it differs from other U.S. jurisdictions. The Article further analyzes the arguments for liberal joinder and critiques each by presenting field research, historical arguments, and practical considerations. The Article concludes by urging other jurisdictions, particularly those with capital-sentencing capabilities or capital-offense punishments, to amend their joinder provisions to categorically prohibit the joinder of capital offenses with noncapital offenses.

If jurisdictions revise their joinder schemes in this way, they will maintain liberal joinder regimes for the most common criminal cases, where joinder is most efficient, without prejudicing those defendants who face the most serious consequences and the highest stakes during their trials.

I. JOINDER AND SEVERANCE OF OFFENSES

As a general matter in criminal procedure, joinder[29] is the method of joining defendants, charges, or both within a formal accusation—typically either a bill of information or an indictment.[30] Predictably, if joinder occurs,

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[28] *See* CRIM. PROC. art. 493.

[29] Jurisdictions' joinder rules explain in what instances joinder may be perfected, but do not define the term. The ever-helpful Black's Law Dictionary defines "joinder" as "[t]he uniting of parties or claims in a single lawsuit." *Joinder*, BLACK'S LAW DICTIONARY (11th ed. 2019). The term is believed to have been first used in the 17th century. *Id.*

[30] Both a bill of information and an indictment serve as charging documents that begin criminal proceedings against a defendant. An indictment is first presented to a grand jury, while a bill of information is not. In the federal system, an indictment must be used if a charged

whatever parties, claims, or charges the court joined it may also "sever." Severance is the method by which a party requests that the court try the previously joined parties, claims, or charges separately.[31] Jurisdictions typically allow severance when the movant can show that a high level of prejudice or a conflict exists.[32] One can term a jurisdiction's rules, provisions, statutes, and case law governing joinder and severance its "joinder and severance regime."

Many jurisdictions' joinder provisions address both joinder of offenses and joinder of defendants in the same rule or statute. Although the joinder of defendants may have negative effects, this Article will only discuss joinder of offenses[33] because this Article's proposed solution addresses only this aspect of joinder.[34]

The joinder of offenses pervades the American criminal justice system. Prosecutors consistently use joinder when initiating proceedings against a defendant. One study found that, over a five-year period in the federal criminal system, the government charged more than half of the criminal defendants with multiple crimes in the same bill of information or indictment.[35] Joinder's prevalence prompted one commentator to note: "The

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felony is punishable either by death or imprisonment for more than one year. FED. R. CRIM. P. 7(a)(1).

[31] Similar to joinder, jurisdictions' severance rules do not define the term. Black's Law Dictionary defines "severance" as "[t]he separation of criminal charges or criminal defendants for trial, as when codefendants have conflicting defenses so that prejudice might result to one or more of them." *Severance*, BLACK'S LAW DICTIONARY (11th ed. 2019). Note that this definition uses an example of "joinder of defendants." *Id.* Even though this is one prong of joinder and severance in criminal procedure, this Article will focus on joinder of offenses only.

[32] *See infra* Appendix B.

[33] Naturally flowing from an understanding of the term "joinder," "joinder of offenses" can be understood as charging a defendant with multiple crimes as separate counts in a single bill of information or indictment, resulting in the defendant being tried for the multiple crimes in the same trial. Black's Law Dictionary defines "joinder of offenses" as "[t]he charging of an accused with two or more crimes as multiple counts in a single indictment or information." *Joinder of Offenses*, BLACK'S LAW DICTIONARY (11th ed. 2019). The term is believed to have been first used in 1836. *Id.*

[34] As additional notes on the limitations of this Article, scholars find that joinder in civil cases is even more liberal than in criminal cases. *See* Krystia Reed & Bryan H. Bornstein, *Juries, Joinder, and Justice*, JURY EXPERT, Aug. 2015, at 1; Robin J. Effron, *The Shadow Rules of Joinder*, 100 GEO. L.J. 759 (2012). This Article addresses only joinder of offenses in criminal cases. Further, the preclusion of prosecution against a defendant or the institution of constitutional double jeopardy protections may be impacted by the joinder or severance of offenses if a case returns to the trial stage. This Article does not address those potential consequences.

[35] Leipold & Abbasi, *supra* note 19. Leipold and Abbasi do note, however, that this large number cannot determine "the status of defendants who actually went to trial." *Id.* at 365. Still, the high usage of joinder shows its importance in criminal justice.

way in which the prosecutor chooses to combine offenses . . . in a single indictment is perhaps second in importance only to his decision to prosecute. . . . Equally decisive may be the number of offenses which are cumulated against a single defendant, particularly if they are unconnected."[36]

Despite joinder's high usage and significance, legal scholarship in the area is sparse[37] or narrow in scope.[38] Further, law schools do not prepare

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[36] 8 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 8.02[1] (2d ed. Supp. Aug. 1996). The quote's alteration only omits portions discussing joinder of defendants. *See id.*

[37] *See, e.g.*, Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1317 n.44 (2018) (discussing the lack of attention to joinder in legal scholarship). Besides the Crespo article, which primarily addresses plea bargaining, there is one other notable piece on joinder published in the last decade. *See* Matthew Deates, Comment, *Righting Categorical Wrongs: A Holistic Solution to Rule 8(a)'s Same-or-Similar-Character Prong*, 85 U. CHI. L. REV. 827 (2018). Most joinder scholarship is more than 30 years old. *See, e.g.*, Robert O. Dawson, *Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices*, 77 MICH. L. REV. 1379 (1979); Kevin P. Hein, *Joinder and Severance*, 30 AM. CRIM. L. REV. 1139 (1993); Raymond T. Cullen Jr., *Joinder of Counts as a Violation of an Accused's Right to Remain Silent*, 41 TEMP. L.Q. 458 (1968); Kenneth S. Bordens & Irwin A. Horowitz, *Joinder of Criminal Offenses: A Review of the Legal and Psychological Literature*, 9 LAW & HUM. BEHAV. 339 (1985); Thomas C. Wales, Note, *Harmless Error and Misjoinder under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion*, 6 HOFSTRA L. REV. 533, 536–37 (1978); John F. Decker, *Joinder and Severance in Federal Criminal Cases: An Examination of Judicial Interpretation of the Federal Rules*, 53 NOTRE DAME L. REV. 147 (1977); James Farrin, Note, *Rethinking Criminal Joinder: An Analysis of the Empirical Research and Its Implications for Justice*, 52 LAW & CONTEMP. PROBS. 325 (1989); Note, *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 YALE L.J. 553 (1965). One of the first federal criminal procedure scholar's work with joinder, while significant at the time, is now aged. *See, e.g.*, Lester B. Orfield, *The Federal Rules of Criminal Procedure*, 33 CALIF. L. REV. 543 (1945); Lester B. Orfield, *Early Federal Criminal Procedure*, 7 WAYNE L. REV. 503 (1961) [hereinafter Orfield, *Early Federal Criminal Procedure*]; Lester B. Orfield, *Relief from Prejudicial Joinder in Federal Criminal Cases*, 36 NOTRE DAME L. Rev. 276 (1961); Lester B. Orfield, *Relief from Prejudicial Joinder in Federal Criminal Cases (Part II)*, 36 NOTRE DAME L. Rev. 495 (1961); Lester B. Orfield, *A Note on Joinder of Offenses*, 41 OR. L. REV. 128 (1962).

[38] There are a handful of shorter published pieces on joinder. *See, e.g.*, Paul C. Giannelli, *Joinder & Severance of Offenses*, PUBLIC DEFENDER REPORTER, Summer 1997; Reed & Bornstein, *supra* note 34, at 1. Further, some of the scholarship addresses joinder only in the context of a particular jurisdiction. *See, e.g.*, Mark R. McDonald, *Prejudicial Joinder Under California Penal Code Section 954: Judicial Economy at a Premium*, 20 PAC. L.J. 1235 (1989); Sean B. Hoar, Comment, *Joinder of Offenses: A New Rule for Oregon*, 66 OR. L. REV. 953 (1987); Ryan C. Shotter, Comment, State V. Gonzales*: Reinvigorating Criminal Joinder in New Mexico*, 44 N.M. L. REV. 467 (2014); Samuel A. Baron, Note, *A Look at the Tennessee Multiple Offender and the Joinder and Severance of Criminal Offenses for Trial*, 7 MEM. ST. U. L. REV. 457 (1977). There is a strand of Louisiana-specific scholarship as well. *See* Gilbert Dupre Litton, Comment, *Joinder of Criminal Offenses in Louisiana*, 4 LA. L. REV. 127 (1941); Dale E. Bennett, *Louisiana Criminal Procedure – A Critical Appraisal*, 14 LA. L. REV. 11 (1953); David S. Kelly, Comment, *Joinder of Offenses: Louisiana's New Approach in*

future attorneys to discuss joinder in a meaningful way, as it is often ignored or not covered in criminal procedure courses[39]: "[C]asebooks give [joinder] short shrift as well, discussing it only briefly and with near-exclusive focus on the potential trial consequences of federal joinder rules."[40]

This lack of conversation is not a recent phenomenon. From the beginning of codified joinder regimes, commentators have noted the subject's scholarly lethargy. One such commentator noted that during the thirty years following the federal joinder rules' original introduction, joinder of offenses in the context of a single defendant "has never been seriously questioned."[41]

Joinder and severance regimes—whether liberal,[42] restrictive,[43] or somewhere in between—exist in every criminal jurisdiction in the United States.[44] Some variation exists, but most jurisdictions' regimes share many similarities.[45] For joinder of multiple offenses that carry different potential sentences, most jurisdictions allow courts to permissively join all types of offenses, no matter the charged crimes' potential sentence.[46] One of the best

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Historical Perspective, 37 LA. L. REV. 203 (1976); Cheney C. Joseph Jr., *Criminal Trial Procedure and Postconviction Procedure*, 39 LA. L. REV. 933 (1978); Cheney C. Joseph Jr., *Criminal Law and Procedure*, 40 LA. L. REV. 635 (1980).

[39] *See, e.g.*, Crespo, *supra* note 37, at 1317 n.44 (discussing the lack of attention to joinder in criminal procedure courses); JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 912–19 (4th ed. 2010); YALE KAMISAR, WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, ORIN S. KERR & EVE BRENSIKE PRIMUS, ADVANCED CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 1062–89 (14th ed. 2015); RONALD JAY ALLEN, WILLIAM J. STUNTZ, JOSEPH L. HOFFMANN, DEBRA A. LIVINGSTON, ANDREW D. LEIPOLD & TRACEY L. MEARES, COMPREHENSIVE CRIMINAL PROCEDURE 1168–83 (4th ed. 2016). For instance, the criminal procedure casebook the author of this Article used, which derived from *Criminal Procedure: Principles, Policies and Perspectives*, kept a reference to "joinder of defendants and counts" in the index, but removed from the printed version the pages in which the joinder content could be found. *See* JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: INVESTIGATING CRIME, at xxv, 1594 (6th ed. 2017).

[40] Crespo, *supra* note 37, at 1317 n.44.

[41] Wales, *supra* note 37, at 536–37.

[42] A liberal joinder regime is generally understood as one in which the prosecution is allowed more freedom to join offenses in the same charging document.

[43] Conversely, a restrictive joinder regime can be understood as one where the prosecution has less freedom to perform joinder. Normally, defendants would prefer restrictive joinder regimes: there is less chance of prejudice and the prosecution's job is made harder. Commentators do note, however, that there might be instances in which a defendant prefers to have her multiple charges adjudicated in one trial. *See, e.g.*, Farrin, *supra* note 37, at 327.

[44] *See infra* Part II.

[45] *See infra* Part II.

[46] *See infra* Part II.

examples of this type of regime, and the origin of most other jurisdictions' regimes, is the federal criminal system's joinder provisions.

A. HISTORY OF JOINDER IN THE FEDERAL SYSTEM

The Federal Rules of Criminal Procedure govern joinder in the federal courts today.[47] However, this was not always the case. Prior to the Rules' creation, the common law governed joinder of offenses, as well as all of the other criminal procedural elements the Federal Rules address.[48]

Judicial procedural rulemaking in other contexts came as early as 1791,[49] but criminal procedure was one of the last areas codified by the Supreme Court.[50] From the Founding, little federal legislative action took place on criminal procedure.[51] Congress did not authorize the Supreme Court to promulgate rules "as to criminal proceedings after verdict" until 1933, and the Court put the power to use quickly when they issued post-verdict rules in 1934.[52] Not until 1940 did Congress give the Court power to create rules for criminal procedure prior to and including the verdict.[53] The Court exercised this power by promulgating the 1944 Federal Rules of Criminal Procedure, effective 1946.[54]

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[47] *See* FED. R. CRIM. P. 8, 14.

[48] *See* Orfield, *Early Federal Criminal Procedure*, *supra* note 37, at 511. *See also* United States v. Dickinson, 25. F. Cas. 850, 850–51 (C.C.D. Ohio 1840) (No. 14,958); United States v. Peterson, 27 F. Cas. 515, 519 (C.C.D. Mass. 1846) (No. 16,037); United States v. O'Callahan, 27 F. Cas. 216, 216 (C.C.N.D. Ohio 1855) (No. 15,910).

[49] Orfield, *Early Federal Criminal Procedure*, *supra* note 37, at 503. Orfield writes:

> The Supreme Court from the very first could lay down rules of procedure as to proceedings before it. In 1791 it announced on motion of the attorney general that "this court consider the practice of the courts of king's bench, and of chancery, in England, as affording outlines for the practice of this court; and that they will, from time to time, make alterations therein as circumstances may render necessary."

Id. (quoting 5 U.S. (1 Cranch) xvii (1801)).

[50] *Id.* at 504.

[51] *Id.* In 1931, the Hoover Commission on Criminal Law wrote, "In Federal criminal procedure legislation has interfered but little and has left the matter largely to judicial development of the common law, with the result that many things which embarrass prosecution in the State courts have never given trouble in the Federal courts." NAT'L COMM'N ON L. OBSERVANCE AND ENF'T, REPORT ON CRIMINAL PROCEDURE 32 (1931).

[52] 47 Stat. 904 (1933), as amended in 48 Stat. 399 (1934); Orfield, *Early Federal Criminal Procedure*, *supra* note 37, at 504. *See also* Order, 292 U.S. 661, 661–66 (1934).

[53] 54 Stat. 688 (1940); Orfield, *Early Federal Criminal Procedure*, *supra* note 37, at 504.

[54] An 1853 statute provided the textual basis for what would eventually become Federal Rule 8(a)—the federal joinder rule—in 1944. *See* Orfield, *Early Federal Criminal Procedure*, *supra* note 37, at 511. The statute provided that:

During the decades following the Federal Rules' adoption, the Supreme Court and lower federal courts repeatedly acknowledged the federal joinder regime's benefits.[55] The result was a federal joinder and severance regime with jurisprudential support for its efficiency and economy.

B. FEDERAL RULES 8, 14, AND 13

Today, Federal Rule of Criminal Procedure 8(a) governs joinder of offenses in the federal system.[56] Rule 8(a) provides that "the indictment or information may charge a defendant in separate counts when [two] or more offenses charged—whether felonies or misdemeanors or both—are of the same or similar character, or are based on the same act or transaction, or are

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> Whenever there are or shall be several charges against any person or persons for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offences which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments shall be found in such cases, the court may order them consolidated.

10 Stat. 162 (1853). It was not until 1894, in *Pointer v. United States*, that the Supreme Court commented on this 1853 statute. Pointer v. United States, 151 U.S. 396, 411 (1894). The court stated that the statute "leaves the court to determine whether, in a given case, a joinder of two or more offenses in one indictment against the same person is consistent with the settled principles of criminal law." *Id.* This was the first time the Court acknowledged a judge's discretion to allow the joinder of two or more offenses: a standard that exists, at least at some level, today. *See generally id.* Although the Court, in 1827, spoke to relief from prejudicial joinder for the first time in the context of joinder of defendants, the Court did not explicitly address relief from prejudicial joinder of offenses. *See* United States v. Marchant, 25 U.S. (12 Wheat.) 480, 480 (1827) (addressing separate trials of "two or more persons jointly charged in the same indictment with a capital offense," the Court said: "The subject is not provided for by any act of Congress; and, therefore, if the right can be maintained at all, it must be as a right derived from the common law, which the Courts of the United States are bound to recognise and enforce."); Orfield, *Early Federal Criminal Procedure*, *supra* note 37, at 514.

[55] *See, e.g.*, Richardson v. Marsh, 481 U.S. 200, 209 (1987) ("Joint trials play a vital role in the criminal justice system, . . . "); *id.* at 218 ("The concern about the cost of joint trials, even if valid, does not prevail over the interests of justice."); Zafiro v. United States, 506 U.S. 534, 537 (1993) ("Joint trials 'play a vital role in the criminal justice system.' . . . [W]e repeatedly have approved of joint trials." (citing *Richardson*, 481 U.S. at 209)); Bruton v. United States, 391 U.S. 123, 135. (1968); Opper v. United States, 348 U.S. 84, 95 (1954); United States v. Bryan, 843 F.2d 1339, 1342 (11th Cir. 1988); United States v. Eufrasio, 935 F.2d 553, 568 (3d Cir. 1991) ("The public interest in judicial economy favors joint trials . . . ."); United States v. Werner, 620 F.2d 922, 928 (2d Cir. 1980); United States v. Butler, 822 F.2d 1191, 1194 (D.C. Cir. 1987); Parker v. United States, 404 F.2d 1193, 1196 (9th Cir. 1968). Although some of the federal cases involve the joinder of defendants, that has not prevented other jurisdictions from using the same efficiency arguments in the context of joinder of offenses. *See* Appendices A, B, *infra*.

[56] FED. R. CRIM. P. 8(a).

connected with or constitute parts of a common scheme or plan."[57] Under this provision, courts may join any offenses that meet one of the requirements linking the offenses together—that the offenses "are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan"—in the same indictment or bill of information.[58]

If one of the defined categories does not connect the two offenses, then joinder is improper and is classified as "misjoinder." If misjoinder occurs, the judge will rule that she may not join the offenses for one trial or, if on appeal, that the joinder of the offenses was improper at the outset. Although the judge will determine whether the offenses are sufficiently linked under Rule 8(a)'s meaning, this review is different from a discretionary review for prejudicial joinder, which is an analysis only undertaken if a court may properly join the offenses, but a party moves for severance.[59]

Rule 14 governs severance.[60] In instances where joinder is proper but joinder may prejudice a party—either the defendant or the government—that party may move for severance of the offenses under Rule 14(a), and the court can order separate trials on the individual counts.[61] Severance under this provision is "entirely in the discretion of the court."[62] The judge, in using that discretion, is meant to balance the possibility of prejudice to a party against the needs of and desire to facilitate judicial economy.[63] When the Court codified Rule 14 in 1944, they intended the Rule to restate the prevailing law

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[57] *Id.* The 1944 Notes of Advisory Committee on Rules state that the Rule is "substantially a restatement of existing law." FED. R. CRIM. P. 8 advisory committee's note to 1944 adoption. The Rule has only been amended once, in 2002, since its original enactment in 1944. FED. R. CRIM. P. 8(a). That amendment came about "as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules." FED. R. CRIM. P. 8 advisory committee's note to 2002 amendment. The changes were "intended to be stylistic only." *Id.*

[58] *Id.*

[59] *Compare id. with* FED. R. CRIM. P. 14(a).

[60] FED. R. CRIM. P. 14(a). The Rule provides that "[i]f the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." *Id.* Rule 14(a) has been amended twice since its original enactment in 1944. *Id.* A 1966 amendment provided a procedure to address possible prejudice issues on a motion for severance related to codefendants. FED. R. CRIM. P. 14(a) advisory committee's note to 1966 amendment. A 2002 amendment, similar to that of Rule 8(a), restyled Rule 14 "to make [it] more easily understood." FED. R. CRIM. P. 14(a) advisory committee's note to 2002 amendment.

[61] FED. R. CRIM. P. 14(a).

[62] *Id.*

[63] *See, e.g.*, United States v. Butler, 822 F.2d 1191, 1194 (D.C. Cir. 1987).

at the time, which allowed for this unfettered discretion of judges to decide whether joinder was prejudicial.[64]

Finally, Rule 13 governs instances where the defendant wants, for various reasons, to consolidate more than one separate charging document into one trial.[65] Here, the law provides the defendant an opportunity to combine all charges that otherwise could have been brought in one bill of information or indictment into one trial.[66] Under the federal regime, courts may join offenses so long as they meet one of Rule 8(a)'s linking requirements.[67]

Rule 8(a) states that courts may join offenses "whether felonies or misdemeanors or both."[68] As such, the level of offenses to be joined are irrelevant: courts may join a felony with a felony, a misdemeanor with a misdemeanor, a felony with a misdemeanor, and so on. In effect, although Rule 8(a) defines some causal and temporal boundaries on which offenses courts may join, the potential punishments the offenses bear do not factor at all in the consideration of misjoinder of the offenses. Courts may take such a consideration into account when assessing whether severance is applicable and whether prejudice exists under Rule 14. But as a practical matter, judges in the federal system rarely find prejudice or grant severance, and a defendant's burden of persuasion on appeal that a severance was necessary is incredibly high.[69] The result is a joinder and severance regime that values the commission of multiple offenses' interconnectivity but not the potential prejudice that a defendant may suffer at trial from a prosecutor charging her with an incredibly serious offense and a relatively minor offense.

II. JOINDER AND SEVERANCE IN MOST JURISDICTIONS

Today, all states have at least one provision or case governing joinder and severance. Whether the state's primary provision on the subject is a court rule, statute, or case, most have a joinder and severance regime that parallels the language of Federal Rules 8 and 14. States with regimes that contain the "felonies or misdemeanors or both" language naturally carry forward the

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[64] FED. R. CRIM. P. 14(a). The 1944 Notes of the Advisory Committee cite to the existing law at the time. *See* FED. R. CRIM. P. 14(a) advisory committee's note to 1944 adoption (citing 18 U.S.C. [former] 557 (Indictments and presentments; joinder of charges); Pointer v. United States, 151 U.S. 396 (1894); Pierce v. United States, 160 U.S. 355 (1896); United States v. Ball, 163 U.S. 662, 673 (1896); Stilson v. United States, 250 U.S. 583, 585–86 (1919)).

[65] FED. R. CRIM. P. 13.

[66] *Id.*

[67] *See id.*

[68] FED. R. CRIM. P. 8(a).

[69] *See infra* Part IV.F.

prosecutorial discretion to charge all offenses, no matter the level of punishment, in a single charging document. Further, the only remedy these states often provide is a judge's decision on whether the judge should sever the joined offenses. Even where a state's joinder regime language differs from the federal regime—by not including the precise "felonies or misdemeanors or both" language—almost all state jurisdictions explicitly or implicitly allow the joinder of offenses with differing levels of punishment.

There are twenty-four state jurisdictions that adopted and maintain the "felonies or misdemeanors or both" language used in the Federal Rules.[70] Even without the exact "felonies or misdemeanors or both" language, six jurisdictions' joinder regimes still significantly track the federal regime in language and effect.[71] And though one cannot say that their language shares express similarities with the Federal Rules, nineteen states' regimes have the same effect of allowing the joinder of all types of offenses, regardless of their level of punishment.[72] Some jurisdictions also, either explicitly or implicitly, adopted language from the American Bar Association's[73] or Model Penal Code's[74] recommended joinder and severance provisions, which both allow

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[70] The states that maintain the "felonies or misdemeanors or both" language are: Alabama, Alaska, Arkansas, Colorado, Florida, Idaho, Illinois, Kansas, Kentucky, Maryland, Mississippi, Montana, Nebraska, New Mexico, North Carolina, Ohio, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *See* Appendix, A.1, *infra*.

[71] Some jurisdictions' regimes, while bearing a striking resemblance to the Federal Rules, differ slightly in the terminology related to their "felonies or misdemeanors or both" language. Those states are: Maine, Missouri, Nevada, North Dakota, Pennsylvania, and Virginia. *See* Appendix, A.2, *infra*.

[72] The states that do not have the "felonies or misdemeanors or both" language or similar language, but still allow for the joinder of offenses no matter their punishment are: Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Indiana, Iowa, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oklahoma, Oregon, South Carolina, Tennessee, and Texas. *See* Appendix, A.3, *infra*.

[73] *See* ABA CRIMINAL JUSTICE STANDARDS, JOINDER & SEVERANCE, § 13-2.1 (2d ed. 1980) ("Any two or more offenses committed by the same defendant: (a) may be joined in one accusatory instrument, with each offenses stated in a separate count; or (b) may be joined for trial, upon the application of the prosecuting attorney or the defense."); *Id.* at § 13-3.1 ("The court . . . should grant a severance of related offenses: . . . whenever severance is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense.").

[74] *See* MODEL PENAL CODE § 1.07(1) (AM. L. INST. 1985) ("When the same conduct of a defendant may establish the commission of more than offense, the defendant may be prosecuted for each such offense."); *id.* § 1.07(3) ("When a defendant is charged with two or more offenses based on the same conduct or arising from the same criminal episode, the Court, on application of the prosecuting attorney or of the defendant, may order such charge to be tried separately, if it is satisfied that justice so requires.").

for the joinder of all types of offenses and grant the trial judge discretion to determine whether severance is appropriate.

Even with variations in language, each jurisdiction allows for the joinder of offenses no matter the potential level of punishment of those offenses. Whereas most states explicitly allow for the joinder of "felonies or misdemeanors or both," every other jurisdiction—save Louisiana—at a minimum implicitly allows courts to join any of those offenses. Further, the only remedy for defendants charged with different-punishment offenses in all of these jurisdictions is a judge's discretion following a motion for severance—a discretion which often rules in favor of judicial efficiency and, thus, against severance.[75]

Some jurisdictions' joinder and severance regimes carry unique conditions, histories, and characteristics. Although these regimes' idiosyncrasies are different from the traditional "felonies or misdemeanors or both" framework, Louisiana remains the only jurisdiction to categorically prohibit the joinder of capital and noncapital offenses. For instance, Arkansas had a nonjoinder regime until 2005.[76] Until then, it restricted an indictment to only one offense, although it excluded particular offenses from the restriction, and the prosecutor could allege "different modes and means in the alternative."[77] Today, Arkansas Rule of Criminal Procedure 21.1 allows for the joinder of offenses "whether felonies or misdemeanors or both."[78]

Another example is Oklahoma, where a statute provides that an indictment or information "must charge but one offense" but allows for the joinder of multiple offenses in separate counts when the same acts could constitute multiple offenses or the evidence is unclear as to which offense the defendant may be guilty.[79] But this statute, while still codified, is no longer considered binding and a joinder statute passed in 1968 superseded it.[80]

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[75] Every jurisdiction has some level of review for prejudice of joinder. Most jurisdictions make it clear that a defendant's burden of proving that a severance should have been granted in her case is incredibly high. *See* Appendix, B, *infra*.

[76] *See* ARK. CODE ANN. § 16-85-404 (1987), repealed by Arkansas Criminal Code Revision Commission's Bill, 2005 Ark. Acts 1994. The now-repealed statute provided that: "An indictment, except in cases mentioned in subsection (b) of this section, must charge but one (1) offense, but, if it may have been committed in different modes and by different means, the indictment may allege the modes and means in the alternative." *Id*.

[77] *See id.*

[78] ARK. R. CRIM. P. 21.1. *See also infra* Appendix A.

[79] OKLA. STAT. tit. 22, § 404 (2019).

[80] *See* OKLA. STAT. tit. 22, § 436 (2019); Glass v. State, 701 P.2d 765, 768 (Okla. Crim. App. 1985); Dodson v. State, 562 P.2d 916, 923 (Okla. Crim. App. 1977) (Brett, J., specially concurring). Judge Brett's concurrence analyzed § 436 and determined that the Oklahoma Legislature intended to allow the joinder of offenses, in addition to the joinder of defendants. *See Dodson*, 562 P.2d at 923 (Brett, J., specially concurring).

Indeed, prior to 1968, Oklahoma upheld a rigid nonjoinder regime.[81] Today, however, many Oklahoma Court of Criminal Appeals opinions cite *Glass v. State*, which found that "joinder of offenses [was] now permissible under Oklahoma law . . . ."[82] Thus, in effect, Oklahoma's regime now allows the joinder all offenses, no matter their level of punishment.[83]

And in Texas, defendants have a universal right of severance, but there is no outright prohibition on joinder.[84] Such a regime—where the prosecution may join any applicable offenses they wish, and the defendant can "counter" by severing all offenses they do not wish the State to try together—seems to perfectly promote judicial efficiency while protecting the defendant against potential prejudice from the joinder of offenses. The Texas Legislature, however, created several exceptions to the general rule of universal severability.[85] Further, if the defendant uses the universal severance right, she loses the guarantee that her sentences, if convicted of multiple offenses, would run concurrently.[86] As such, a defendant effectively gives up a protection when choosing to exercise her severance right. This places an additional, stressful factor on a defendant's decision process—a factor with which Louisiana defendants need not wrestle.

III. JOINDER AND SEVERANCE IN LOUISIANA

At first glance, Louisiana's joinder regime also has similar language to the Federal Rules, and the Louisiana legislature even used the Federal Rules as guidance for their provision.[87] The Louisiana legislature, however, included an additional clause allowing for joinder of offenses "provided that

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[81] *See* Kramer v. State, 257 P.2d 521, 523 (Okla. Crim. App. 1953).

[82] *Glass*, 701 P.2d at 768.

[83] *See* Appendix A, *infra*.

[84] *See* TEX. PENAL CODE ANN. § 3.04 (West 2019). The primary provision provides that: "Whenever two or more offenses have been consolidated or joined for trial under Section 3.02, the defendant shall have a right to a severance of the offenses." *Id.* § 3.04(a).

[85] *See id.* §§ 3.03(b); 3.04(c). Section 3.04(c) states that "[t]he right to severance under this section does not apply to a prosecution for offenses described by Section 3.03(b) . . . ." *Id.* § 3.04(c). Section 3.03(b) lists and references offenses like intoxication assault or manslaughter; sexual abuse crimes, particularly of minors; and trafficking of persons. *See id.* § 3.03(b).

[86] *See id.* §§ 3.03; 3.04(b).

[87] *See* LA. CODE CRIM. PROC. ANN. arts. 493, 495.1 (2019); Kelly, *supra* note 38 at 215–16; State v. McZeal, 352 So. 2d 592, 600–01 (La. 1977). Louisiana's joinder provision reads, in part, "Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, . . . " CRIM. PROC. art. 493.

the offenses joined must be triable by the same mode of trial."[88] The effect of that language led to an incredibly different joinder outcome.

Although Louisiana's joinder provision does share language similarities with other American jurisdictions, its "mode of trial" language has a profound effect. With it, Louisiana categorically prohibited the joinder of capital offenses with noncapital offenses. To properly contextualize this difference, one must examine joinder's history in Louisiana.

A. HISTORY OF JOINDER IN LOUISIANA

What one author wrote in 1941 still rings true: "The problem of joinder of criminal offenses in Louisiana has struggled through an interesting cycle."[89] Before Louisiana adopted its 1928 Code of Criminal Procedure,[90] Louisiana had a similar default joinder rule to that of other U.S. jurisdictions.[91] It allowed for the joinder of two or more offenses in one indictment, so long as they were part of the same criminal act or continuous unlawful transaction and had the same method of trial and appeal.[92]

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[88] CRIM. PROC. art. 493.

[89] Litton, *supra* note 38, at 127.

[90] New Criminal Code, 1928 La. Acts. 4; Bennett, *supra* note 38, at 11.

[91] Litton, *supra* note 38, at 127–28. *See also* Johnson v. State, 29 Ala. 62 (1856); Lascelles v. State, 16 S.E. 945 (1892); State v. Houx, 19 S.W. 35 (1891); Porath v. State, 63 N.W. 1061 (1895); Bell v. State, 48 Ala. 684, 694 (1874); Ben v. State, 58 Am. Dec. 234, 247 (1853) (reporter notes); State v. Fitzsimon, 49 Am. St. Rep. 766, 771 (1893) (reporter notes).

Some readers may be aware that, despite some similarities today, the state of Louisiana's civil system of law comes from the civilian tradition, sharing more characteristics with mainland European, Central American, and South American jurisdictions than with Anglo-American common law jurisdictions. *See, e.g.*, Harriet Spiller Daggett, Joseph Dainow, Paul M. Hébert & Henry George McMahon, *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 TUL. L. REV. 12, 12–14 (1937–38); A.N. Yiannopoulos, *Common, Public and Private Things in Louisiana: Civilian Tradition and Modern Practice*, 21 LA. L. REV. 697, 697–98 (1961); Mack E. Barham, *A Renaissance of the Civilian Tradition In Louisiana*, 33 LA. L. REV. 357, 357–58 (1972); A.N. Yiannopoulos, *Louisiana Civil Law: A Lost Cause?*, 54 TUL. L. REV. 830, 830 (1980); Kenneth M. Murchison, *The Judicial Revival of Louisiana's Civilian Tradition: A Surprising Triumph for the American Influence*, 49 LA. L. REV 1, 1 (1988). Louisiana's criminal system origins, however, are similar to other states' and the federal system's Anglo-American roots that other Americans are more familiar with. *See, e.g.*, Leon D. Hubert, Jr., *History of Louisiana Criminal Procedure*, 33 TUL. L. REV. 739, 740 (1959); John T. Hood, Jr., *A Crossroad in Louisiana History*, 22 LA. L. REV. 709, 724 (1962).

[92] *See generally* State v. Crosby, 4 La. Ann. 434, 434–35 (1849); State v. McLane, 4 La. Ann. 435, 437 (1849); State v. Laque, 37 La. Ann. 853, 856 (1885); State v. Thornton, 77 So. 634, 635 (La. 1918); State v. Moultrie, 33 La. Ann. 1146, 1148 (1881); State v. Malloy, 30 La. Ann. 61, 62 (1878); State v. Depass, 31 La. Ann. 487, 488 (1879); State v. Green, 37 La. Ann. 382, 383 (1885); State v. Cook, 7 So. 64, 65 (La. 1890); State v. Gilkie, 35 La. Ann. 53, 54 (1883); Kelly, *supra* note 38; Litton, *supra* note 38.

1. Pre-Code Jurisprudential Misjoinder

A leading pre-Code case applying the default rule was *State v. Hataway*, where the Louisiana Supreme Court reversed a conviction of a defendant charged with burglary and grand larceny—crimes that bore different types of sentences.[93] The Court stated: "[T]he rule that two or more crimes, if committed in one transaction, may be charged in one indictment, is subject to the qualification that the two or more crimes so charged 'are subject to the same mode of trial and nature of punishment.'"[94] As the Court articulated, one of its primary concerns for limiting the joinder of the offenses to those "subject to the same mode of trial and nature of punishment" stemmed from the different jury size requirements of the two offenses.

At the time of *Hataway* and even today, Louisiana required different jury sizes and concurrence requirements for different classes of offenses.[95] The Court went on to say later in the opinion:

> It cannot be that a district attorney or a grand jury, . . . can, by cumulating the case with a prosecution for another crime, deprive the accused party of his constitutional right to be tried either by a jury of five or by the judge alone, at his option, and deprive him also of the guarantee of a unanimous verdict in his case.[96]

In *Hataway*, the prosecution charged the defendant with burglary—triable by a nonunanimous twelve-person jury—and larceny, triable by a unanimous five-person jury.[97] Concerned with the prosecution's potential power to selectively choose which jury size and concurrence requirement best suited its case, the Court ruled that offenses must be subject to the same mode of trial, meaning that they required the same size and concurrence requirement of their jury, for the court to properly join them.[98]

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[93] State v. Hataway, 96 So. 556, 556, 562–63 (La. 1923).

[94] *Id.* at 557.

[95] Louisiana, until recently, did not require unanimous jury verdicts in some felony cases. *See* 2019 La. Acts 722. For a great discussion of Louisiana's unfortunate history with nonunanimous jury verdicts, which in part led to the recent constitutional amendment to require unanimous jury verdicts in trials of felonies that may be punished at hard labor, see generally THOMAS AIELLO, JIM CROW'S LAST STAND: NONUNANIMOUS CRIMINAL JURY VERDICTS IN LOUISIANA (2015). *See also* LA. CONST. art. I, § 17.

[96] *Hataway*, 96 So. at 558.

[97] *Id.* Readers will be familiar with the relatively recent constitutional amendment to Louisiana's jury concurrence requirements. However, the amendment did not address jury concurrence requirements in the context of joinder and severance. *See* text accompanying note 164–167, *infra*.

[98] *Hataway*, 96 So. at 558.

2. The 1928 Code of Criminal Procedure and Its Fallout

In 1928, Louisiana adopted its first Code of Criminal Procedure, which included joinder provisions.[99] Article 218 required joinder in separate counts of the charging document of each offense, no matter the type, that arose out of a single criminal act or continuous unlawful transaction.[100] One early commentator suggested that the article was "apparently intended" to provide a more liberal joinder rule than previously used, as it did not contain any of *Hataway*'s restrictive language.[101] However, other scholars have noted that it is not clear if that intention existed.[102]

A separate provision, Article 217, restricted joinder of offenses to only those instances where the Code elsewhere specifically listed a joinder exception—like Article 218.[103] In effect, this new regime prohibited joinder of most unrelated offenses, yet required it when the offenses arose out of the same criminal act or continuous unlawful transaction—a substantial shift from the prior rule.[104] The Louisiana Supreme Court's early jurisprudence on Article 218 was chaotic.[105] Instead of unquestioningly approving the new joinder regime, the Court found ways in which to combat the shift from the old rule.

First, the Court applied Article 218 literally, holding that prosecutors must include two charges arising out of the same criminal act or continuous unlawful transaction in the same indictment under the Article, and thus they must prosecute those charges in the same trial.[106] If the state did not prosecute the charges in the same trial, it could not press those omitted charges in later prosecutions.[107]

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[99] *See* New Criminal Code, 1928 La. Acts. 4; New Criminal Code arts. 217–18.

[100] New Criminal Code art. 218.

[101] Litton, *supra* note 38, at 129.

[102] *See* Kelly, *supra* note 38, at 207 n.24 (citing Benjamin Wall Dart, *Preface* to LA. CODE CRIM. PROC. ANN. at iii (Benjamin Wall Dart ed. 1932) as evidence of uncertainty of what laws were in effect at time of 1928 codification); Case Comment, *Constitutional Law—Criminal Law—Evidence—Coroner's Inquest—Admissibility in Homicide Cases to Prove the Cause of Death—Art. 35, Louisiana Code of Criminal Procedure of 1928*, 6 TUL. L. REV. 140, 141–42 (1931).

[103] New Criminal Code art. 217.

[104] *Id.* arts. 217–18; Kelly, *supra* note 38, at 206.

[105] For a great, more in-depth recounting of the messy historical development of Louisiana joinder, see Litton, *supra* note 38, at 127–31; Bennett, *supra* note 38, at 11–12, 18–19; Kelly, *supra* note 38, at 204–18.

[106] State v. Roberts, 129 So. 144, 146 (La. 1930). The prosecution brought two separate indictments, but the defendant successfully argued his motion to quash. *Id.* at 147.

[107] *Id.*

Second, the Court found opportunities to restate its favored *Hataway* principle. In two separate cases in which the prosecution joined two crimes, as required by Article 218, the Court took the opportunities to still require that joined offenses bear the same mode of trial.[108] Both cases involved a defendant charged with an offense triable by a five-person jury and an offense triable by a twelve-person jury, just as in *Hataway*, and the Court found the joinder impermissible in both cases.[109]

And third—further confusing Article 218's interpretation—the Court held just one year later in *State v. Jacques* that the Article was unconstitutional.[110] A disparity in treatment existed for defendants depending on the seriousness of the offenses charged, the Court reasoned, particularly because the offenses had different jury size and concurrence requirements.[111] Because Article 218 made joinder mandatory in some instances, the Article violated the State Constitution by not addressing the differences in jury requirements.[112] The Court rationalized that the legislature must have intended for courts to read and invoke Article 218 either in its entirety or not at all.[113] Although the Court did not say so, the justices seemed committed to

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[108] *See* State v. Hill, 130 So. 865, 865–66 (La. 1930); State v. O'Banion, 131 So. 34, 35 (La. 1930).

[109] *See Hill*, 130 So. at 865; *O'Banion*, 131 So. at 35. The Court stated in *Hill* that "it does not follow, as contended by the state, that defendant may be tried, at the same time, for burglary and larceny before a jury of twelve members, and convicted of larceny." *Hill*, 130 So. at 865.

[110] State v. Jacques, 132 So. 657, 658 (La. 1931). The prosecution charged the defendant in a single indictment for two crimes—murder and robbery. *Id.* at 657. Although the two crimes were, indeed, part of the same transaction, the defendant argued in his motion to quash that the Article was unconstitutional, as it violated Article VII, § 41 of the Louisiana Constitution. *Id.* At the time, Article VII, § 41 of the Louisiana Constitution of 1921 read in part that:

> All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

LA. CONST. art. VII, § 41 (1921). The Court agreed with the defendant. *Jacques*, 132 So. at 658.

[111] *Id*. In *Jacques*, the murder charge required a unanimous jury verdict, whereas the robbery, because it was classified as only "a felony necessarily punishable at hard labor," only required a 9-out-of-12 juror verdict. *See id.* With this difference in the modes of trial, the joinder could not stand and, further, the Article could not pass constitutional muster. *Id.*

[112] *Id.*

[113] *Id.*

the idea that, because of Louisiana's different jury types, the joinder of offenses across different jury-type lines was unjustified.

The Court's harsh conclusion on Article 218 in *Jacques* did not stand for long, however, and the Court quickly recanted in *State v. White*.[114] There, the prosecution charged the defendant with two murders arising out of the same transaction.[115] Withdrawing from their severe conclusion in *Jacques*, the Court realized that there were instances where there could be no constitutional objection to joinder, particularly to crimes that arose out of the same transaction and that courts could try by the same mode of trial.[116]

After *White*, Article 218 seemed to authorize the joinder of two or more offenses so long as they had the same method of trial and appeal.[117] If the offenses did not share those things, then the Article was unconstitutional as applied.[118] In effect, this ultimate rule marked a return to the *Hataway* rule, which only allowed joinder of offenses that shared the same mode of trial and appeal.[119]

3. Article 218's Repeal

In response, the Louisiana Legislature repealed Article 218 in 1932, just four years after its introduction.[120] The legislature, however, left some of the joinder provisions intact, creating a piecemeal joinder regime.[121] Despite

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[114] State v. White, 136 So. 47, 48–49 (La. 1931).

[115] *Id.* at 47.

[116] *See id.* at 48–49. Despite the defendant's appeal resting on *Jacques*'s unconstitutionality grounds, the Court, realizing the sweeping nature of its previous decision, stated: "It is clear, therefore, that no constitutional objection can be urged against the inclusion in one indictment in separate counts of two murders, or other crimes of the same nature, when such crimes result from one continuous unlawful transaction, and are triable and punishable alike." *Id*.

[117] *See id.* at 48–49 (upholding Article 218).

[118] *See Jacques*, 132 So. at 658 (rejecting Article 218).

[119] *See* State v. Hataway, 96 So. 556, 559 (La. 1923); Litton, *supra* note 38, at 130.

[120] 1932 La. Acts 508. The legislature did not provide a particular reason for repealing Article 218. One early commentator believed it was repealed because "the legislature, aware of the conflicting jurisprudence interpreting it, sought to terminate this legal turmoil." Litton, *supra* note 38, at 131. Another commentator of the time believed that the repeal was "motivated by an exaggerated fear that the test of 'one continuous unlawful transaction' was too uncertain." Bennett, *supra* note 38, at 19. Regardless of the reason behind the legislature's repeal, it left a hole in Louisiana's joinder regime that the courts needed to fill.

[121] One commentator of the time called this occurrence "[o]ne of the most serious deficiencies in our present criminal procedures." Bennett, *supra* note 38, at 14.

repealing Article 218, Article 217 remained and prohibited joinder unless another exception in a different Article in the Code permitted it.[122]

Following Article 218's repeal, the Louisiana Supreme Court used the previously controlling common law rule and the rule that it created through *Jacques* and *White*. The Court continuously found that courts could join offenses so long as they called for the same mode of trial and otherwise signaled that the *Hataway* principle prevailed.[123]

This signified a continuation, in the Court's mind, of the pre-Article 218 common law rule for joinder. Despite the reversion to the prevailing common law approach, the Court continued to find Article 217 applicable when separate offenses must have been charged in separate indictments, unless an express statutory exception permitting joinder existed.[124] The result was a disorganized approach to joinder, where the dominant article expressly denied joinder unless an exception—the primary example of which, Article 218, was no longer in the Code—applied.

Commentators began expressing dissatisfaction with the joinder regime, arguing that Louisiana should again adopt a more permissive joinder rule rather than keep the restrictive Article 217 as it stood.[125] The Louisiana Legislature adopted a new Code of Criminal Procedure in 1966, but the joinder provisions appeared substantially similar to the joinder regime following the repeal of Article 218.[126] That is, the principal article, Article 493 of the 1966 Code, appeared almost identical to Article 217 of the 1928 Code in that it prohibited joinder unless statutorily authorized elsewhere.[127] This offered no development of Louisiana's joinder regime or concessions to

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[122] *See* New Criminal Code, 1928 La. Acts. 4 art. 217. Prior to its repeal, Article 218 was the primary exception to Article 217.

[123] For instance, in a case following the repeal, *State v. Turner*, the Court opined on the non-dispositive misjoinder issue:

> Even had the complaint been properly pleaded we do not think that the indictment is amendable to the charge of duplicity. The repeal of article 218 of the Code of Criminal Procedure (Act No. 153 of 1932), relating to charging two or more offenses in distinct counts, *does not have the effect of repealing the rule at common law* as to charging such offenses.

State v. Turner, 152 So. 567, 571 (La. 1934) (emphasis added).

[124] *See, e.g.*, State v. Cannon, 169 So. 446, 448 (La. 1936); State v. Carter, 19 So. 2d 41, 44 (La. 1944) (citing and referencing *Cannon*).

[125] Ralph Slovenko, *The Accusation in Louisiana Criminal Law*, 32 TUL. L. REV. 47, 70–71 (1957); Dale E. Bennett, *Revision of Louisiana's Code of Criminal Procedure-A Survey of the Some of the Problems*, 18 LA. L. REV. 383, 397–99 (1958); Dale E. Bennett, *Blind Spots in the Louisiana Code of Criminal Procedure*, 1 LA. BAR J. 62, 66 (1954); Litton, *supra* note 38, at 132.

[126] *See* Louisiana Code of Criminal Procedure, 1966 La. Acts. 1.

[127] *Compare id.* at art. 493 *with* New Criminal Code, 1928 La. Acts. 4 art. 217.

commentators suggesting someone change the rule, as the primary article still expressly prohibited joinder.

4. 1975 Amendment and Interpretation

Not long after, in 1975, the Louisiana legislature again amended the Code of Criminal Procedure's joinder provisions.[128] The amendments drastically changed the joinder regime, departing from the rule that joinder of offenses was generally impermissible—a rule perpetuated since the repeal of Article 218 in 1932. The legislature amended Article 493 to provide for permissive joinder of offenses, whether the offenses are "of the same or similar character," are "based on the same act or transaction, or "on two or more acts or transactions connected together or constituting parts of a common scheme or plan; provided that the offenses joined must be triable by the same mode of trial."[129]

Shortly after the amendment to Article 493, the Louisiana Supreme Court heard argument in a case invoking the newly amended Article.[130] That case, *State v. McZeal*, dealt with a defendant charged with aggravated rape and armed robbery in the same indictment.[131] A twelve-person jury unanimously convicted McZeal of both crimes.[132] The defendant argued that the trial court erred in denying his motion to quash and maintained that the court misjoined the two offenses under Article 493.[133] He argued that the two offenses—aggravated rape and armed robbery—were not triable by the same "mode of trial."[134] The phrase "mode of trial" had only just entered the Article in 1975 and a court had not yet interpreted it. McZeal argued that aggravated rape, a felony with a potential capital sentence, was triable by a twelve-person jury requiring a unanimous verdict to convict, but that armed robbery, a felony necessarily punishable at hard labor, only required ten of twelve jurors to convict.[135] The different jury conviction requirements, the defendant contended, were the basis for the different "modes of trial"

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[128] 1975 La. Acts. 1107 §§ 1, 2.

[129] *Id.* at § 2. Although other articles around it have been amended since, Article 493 has not changed since its amendment in 1975. *See* LA. CODE CRIM. PROC. art. 493 (2020).

[130] State v. McZeal, 352 So. 2d 592, 593 (La. 1977).

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*; CRIM. PROC. art. 493.

[135] *See* LA. STAT. ANN. § § 14:42, 14:64 (2020) (defining aggravated rape and armed robbery, respectively); LA. CONST. art. I, § 17 (1974) (amended 1998, 2010, 2018); LA. CODE CRIM. PROC. ANN. art. 782 (1976).

contemplated by the new language of Article 493.[136] On the case's first hearing, the Louisiana Supreme Court agreed with the trial court and held that the trial court properly denied the motion to quash.[137]

The Louisiana Supreme Court, on rehearing the case, specifically readdressed the issue of joining capital and noncapital offenses.[138] The court walked through Louisiana's historical joinder developments, from the pre-Code standards to the newest joinder provision.[139] Following the historical and interpretive discussion—a discussion that the court did not entertain in its original opinion—the court held in McZeal's favor: Joinder of a capital offense with a noncapital offense constituted misjoinder under Article 493.[140]

The Louisiana Supreme Court found that when the legislature constructed the new Article 493, it intended for courts to determine the "modes of trial" by the potential punishment associated with the offense.[141] Courts could find those different punishments, the court articulated, in the Louisiana constitution.[142] The relevant constitutional provision articulated different jury size and concurrence requirements for different types of offenses and "suggest[ed] four classes of trials: trial before a judge only; trial before a jury of six persons . . . ; trial before a jury of twelve persons, ten of whom must concur . . . ; and trial before a jury of twelve persons, all of whom must concur . . . ."[143] The State argued for, and the court contemplated, other potential "modes of trial" possibly imagined by the legislature, such as "classes of trials" based on the factfinder[144] or based on the "number of triers of fact."[145] Despite these other potential interpretations, the court settled on four different "modes of trial" defined by their potential punishments.

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[136] *McZeal*, 352 So. 2d at 594.

[137] *Id.* at 599.

[138] *Id.* (Dennis, J. on rehearing).

[139] *Id.* at 599–601.

[140] *Id.* at 603.

[141] *Id.*

[142] *Id.*; LA. CONST. art. I, § 17 (1974) (amended 1998, 2010, 2018).

[143] *McZeal*, 352 So. 2d at 601 (Dennis, J. on rehearing); LA. CONST. art. I, § 17 (1974) (amended 1998, 2010, 2018).

[144] *See* McZeal, 352 So. 2d at 601 (Dennis, J. on rehearing). In this scenario, the court contemplated that one "class" would be a trial before a judge and the other "class" would be a trial before a jury. *Id.*

[145] *Id.* This is the argument the State made in defense of permitting the joinder of offenses, although the court ultimately disagreed. *Id.*

The court ultimately reasoned that the language of new Article 493 was similar to the liberal Federal Rule 8(a),[146] but by including the phrase "mode of trial," the Louisiana legislature must have intended to codify the previously dominant jurisprudential rule, nodding to the court's interpretation that could be traced all the way back to *Hataway*.[147] The court reasoned that because four different "modes of trial" existed, and aggravated rape and armed robbery were subject to different punishments—as evidenced by their different jury concurrence requirements—joining the two offenses in McZeal's case constituted misjoinder.[148] Courts categorically could not join capital offenses and noncapital offenses in the same charging document.[149]

B. LOUISIANA'S CURRENT JOINDER AND SEVERANCE REGIME

The author contends that Article 493's interpretation and the principle espoused by the Louisiana Supreme Court in *McZeal* are precedential today. The Louisiana Supreme Court, Louisiana's lower courts, and federal courts have upheld the ruling that courts may not join capital and noncapital offenses under Article 493 or, at a minimum, have cited favorably to *McZeal*.[150]

Louisiana's primary joinder provision is Article 493, and its text has not changed since *McZeal*.[151] The Article reads, in its entirety:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, are of the same or similar character or are based on the same act or transaction on two or more acts or transactions connected together or constituting parts of a common scheme or plan; provided that the offenses joined by must be triable by the same mode of trial.[152]

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[146] *See id.* Further, the court discussed that while the methods used by the federal courts in applying Federal Rule 8(a) might guide their interpretation in other contexts, the express difference in language the Louisiana Legislature used must indicate that the legislature wanted to break from the Federal Rules liberal joinder regime. *See id.*

[147] *See id.* at 600–01.

[148] *Id.* at 602–03.

[149] *Id.* at 603.

[150] *See, e.g.*, State v. Clarkson, 48 So. 3d 272, 273 (La. 2010); State v. Washington, 846 So. 2d 723, 725–26 (La. 2003); State v. Strickland, 683 So. 2d 218, 224–25 (La. 1996); State v. Jones, 396 So. 2d 1272, 1274 (La. 1981); State v. Chapman, 367 So. 2d 808, 810–11 (La. 1979); State v. Donahue, 355 So. 2d 247, 250 (La. 1978); State v. Proctor, 354 So. 2d 488, 490 (La. 1977); State v. McElroy, 241 So. 3d 424, 428 (La. Ct. App. 2018); State v. Jones, 888 So. 2d 885, 892 (La. Ct. App. 2004); State v. Adams, 525 So. 2d 1256, 1262 (La. Ct. App. 1988); Manning v. Warden, Louisiana State Penitentiary, 786 F.2d 710, 711 (5th Cir. 1986).

[151] LA. CODE CRIM. PROC. ANN. art. 493 (2020); *McZeal*, 352 So. 2d at 593–94.

[152] CRIM. PROC. art. 493.

Although the Article shares many similarities with Federal Rule 8(a), and courts may even look to Rule 8(a)'s federal interpretation for guidance,[153] the differences between the two have sweeping consequences. The language primarily differs in two ways.

First, Article 493 does not contain the phrase "or both" in the context of joining "felonies or misdemeanors," whereas Federal Rule 8(a) contains "felonies or misdemeanors or both."[154] The *McZeal* Court noted this distinction.[155] The exclusion of "or both" indicates an intent to prevent the joinder of the different types of offenses.[156]

The second difference, as the *McZeal* Court discussed in depth, lies at the end of article 493: the phrase, "triable by the same mode of trial."[157] One commentator, writing just after the amendment and before *McZeal*, suggested that the legislature included this phrase to "avoid the state constitutional problems implicit in joinder of offenses triable by different kinds of juries,"[158] as the language is similar to that used in the historical *Hataway* context.[159]

Although Louisiana offers an additional misjoinder protection, the state also provides a method for severance of the offenses based on prejudice, just as every other jurisdiction does.[160] Article 495.1—"Severance of Offenses"—gives parties a method to request that the judge determine whether the joinder of the offenses prejudices the party.[161] A motion for severance under Article 495.1 is distinguishable from a party's misjoinder argument. If a party argues misjoinder pretrial in a motion to quash, the judge

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153 *See McZeal*, 352 So. 2d at 600–02 (Dennis, J. on rehearing).

154 *Compare* CRIM. PROC. art. 493, *with* FED. R. CRIM. P. 8(a).

155 *See McZeal*, 352 So. 2d at 602 (Dennis, J. on rehearing).

156 *See id.*; Kelly, *supra* note 38, at 215.

157 CRIM. PROC. art. 493.

158 Kelly, *supra* note 38, at 215.

159 *See id.* The Court in *McZeal* cited the commentator when discussing the legislature's intent to reconcile the Louisiana Constitution with the new Article 493. *McZeal*, 352 So. 2d at 599 (Dennis, J. on rehearing).

160 *See* Part II, *supra*.

161 CRIM. PROC. art. 495.1. The Article reads, in its entirety: "If it appears that a defendant or the state is prejudiced by a joinder of offenses in an indictment or bill of information or by such joinder for trial together, the court may order separate trials, grant a severance of offenses, or provide whatever other relief justice requires." *Id.* Article 495.1 specifically authorizes a judge's power to sever the offenses, which is different from a party objecting to the misjoinder of offenses. From a party's severance argument, the judge discretionarily determines whether prejudice exists based on the proper joinder of offenses. Under Article 495.1, the defendant can move for severance after trial has begun and need not raise the issue in a motion to quash. *See id.*

will determine whether the joinder of the offenses is proper under Article 493.[162]

Many readers will be familiar with Louisiana's relatively recent constitutional amendment requiring jury concurrence,[163] mandating unanimous jury verdicts in felony cases in which the offense is necessarily punishable at hard labor.[164] Although it is relieving to know that Louisiana finally requires unanimous jury verdicts for all of its offenses, one may ponder whether courts may now properly join capital and noncapital offenses under Article 493 because they have the same jury size and concurrence requirements for offenses committed after January 1, 2019.[165] However, the constitutional amendment only altered the provisions governing these size and concurrence requirements; it did not alter Louisiana's joinder provisions or reinterpret the "modes of trial" language.[166]

The author contends that the crux of the *McZeal* decision distinguished the "modes of trial" by their *punishments*, not by their jury size and concurrence requirements. The previous jury size and concurrence requirements only evidenced the different punishments and "modes of trial." Now, although there are fewer jury size and concurrence permutations, the four different punishments still remain. Therefore, the constitutional amendment did not affect the state's joinder and severance regime. To avoid future confusion, the Louisiana legislature should reconcile its constitutional and statutory joinder provisions with the new constitutional amendment and retain the prohibition on joinder of capital and noncapital offenses.

Although the *McZeal* court indicated that the four "modes of trial" were rigid, unmoving boundaries, the legislature later altered those boundaries slightly. Article 493.2—"Joinder of felonies; mode of trial"—allows courts to join two different types of felonies "[n]otwithstanding the provisions of

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[162] *See* CRIM. PROC. art. 495.

[163] *See generally* LA. CONST. art. I, § 17 (amended 1998, 2010, 2018); 2019 La. Acts 364–65.

[164] *See generally* LA. CONST. art. I, § 17 (amended 1998, 2010, 2018); 2019 La. Acts 364–65. Following the enactment of the constitutional amendment, all felony offenses in Louisiana require a unanimous jury of twelve to convict. Prior to 2019, juries for felony offenses necessarily punishable at hard labor only needed 10 of 12 jurors to convict, as opposed to capital offenses which require a unanimous jury of 12. *See* LA. CONST. art. I, § 17 (amended 1998, 2010, 2018); 2019 La. Acts 364–65; AIELLO, *supra* note 95, at ix (noting in its preface that, at the time the book was written, felony convictions required only 10 of 12 jurors).

[165] *See* CRIM. PROC. art. 782.

[166] *See* LA. CONST. art. I, § 17; 2019 La. Acts 364–65; CRIM. PROC. art. 782. The constitutional amendment, and concurrent Code of Criminal Procedure amendment, did not address joinder—only jury concurrence requirements. *See* LA. CONST. art. I, § 17; 2019 La. Acts 364–65; CRIM. PROC. art. 782.

Article 493."[167] Under the Article, adopted in 1997,[168] courts may join felonies in which punishment is necessarily confinement at hard labor—requiring ten out of twelve jurors for a verdict at the time—with felonies in which punishment may be confinement at hard labor—requiring six out of six jurors for a verdict at the time.[169] The Article intended to define the jury size and concurrence for joinder of these different offenses. Such cases, the Article continues, "shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict."[170]

Even with additional joinder provisions and an unfortunate criminal jury-size history, the author contends that *McZeal*'s main thrust remains: courts may not join capital and noncapital offenses. Any attempt to do so constitutes statutory misjoinder. In this particular criminal context, Louisiana's joinder provisions value the prevention of prejudice in a defendant's case over judicial efficiency—more so than other U.S. jurisdictions.[171]

Of course, one must remember that Louisiana may impose the death penalty for capital offenses.[172] Louisiana defendants facing that severe potential consequence, however, receive a structural protection in misjoinder that no other jurisdiction in the country gives. In every criminal jurisdiction

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[167] CRIM. PROC. art. 493.2.

[168] 1997 La. Acts 902.

[169] *See* CRIM. PROC. art. 493.2.

[170] *Id.* Following *Ramos v. Louisiana*, the provision is likely unconstitutional. *See Ramos v. Louisiana*, 140 S.Ct. 1390, 1397 (2020).

[171] Make no mistake, in most historical criminal contexts, Louisiana has rightfully been called out by the public and federal courts for its wrong and horrible practices. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 149 (1968); Burch v. Louisiana, 441 U.S. 130, 138–39 (1979); Selman v. Louisiana, 428 U.S. 906, 906 (1976); Williams v. Edwards, 547 F.2d 1208, 1218–19 (5th Cir. 1977); Wilbert Rideau & Billy Sinclair, *Prisoner Litigation: How it Began in Louisiana*, 45 LA. L. REV. 1060 (1985); William Quigley, *Louisiana Angola Penitentiary: Past Time to Close*, 163 LOY. J. PUB. INT. L. 203 (2018); Courtney Harper Turkington, *Louisiana's Addiction to Mass Incarceration by the Numbers*, 63 LOY. L. REV. 557 (2017); Monica L. Bergeron, Comment, *Second Place Isn't Good Enough: Achieving True Reform Through Expanded Parole Eligibility*, 80 LA. L. REV. 109 (2019); Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES, Jan. 31, 2019, https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html [https://perma.cc/FEP6-STP8]; Lea Skene, *Louisiana once again has nation's highest imprisonment rate after Oklahoma briefly rose to top*, THE ADVOCATE, Dec. 25, 2019, 2:02 PM, https://www.theadvocate.com/baton_rouge/news/article_4dcdfe1c-213a-11ea-8314-933ce786be2c.html [https://perma.cc/3Z5Y-SD45]. The state has been in the criminal law spotlight before, for all of the wrong reasons. But, in this limited joinder instance, other jurisdictions can learn from Louisiana to better protect their capital defendants.

[172] *See, e.g.*, LA. STAT. ANN. § 14:30 (2020) (indicating that the district attorney may seek a capital verdict in charge of first-degree murder).

in the United States except for Louisiana, courts may properly join capital offenses with any other offense—even an offense as small as a misdemeanor.[173] Defendants in jurisdictions that may impose the death penalty thus receive one fewer potential procedural safeguard, one that may have profound effects on their trials.

In the United States today, twenty-six jurisdictions permit a death sentence,[174] and thus, because of their liberal joinder regimes, many of them may impose a death penalty for one offense joined with and tried alongside another offense, even if the second offense bears a much lower potential punishment.[175] In three states, the legislatures codified capital punishment, but the states imposed moratoriums on such sentences.[176] Finally, there are twenty-two jurisdictions that have abolished the death penalty.[177]

Even still, in capital jurisdictions, courts can generally still join those offenses that may receive a death penalty sentence with noncapital offenses. But this possibility is one less concern for Louisiana criminal defendants facing trial for a capital offense. Louisiana's joinder provision offers defendants a shield other states do not afford their defendants. Other U.S. jurisdictions, especially those that permit the death penalty, should take heed and commit themselves to giving capital defendants a similar misjoinder procedural safeguard.

IV. IMPROVING CAPITAL-OFFENSE JOINDER AND SEVERANCE

One can see the practical difference between Louisiana's joinder regime and the rest of the United States, but there are other analytical, proactive, and historical considerations for jurisdictions to contemplate when deciding whether to amend their existing joinder regimes.

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[173] *See supra* Parts I–II.

[174] Those jurisdictions that, at a minimum, have the statutory authority to use the death penalty are: Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Wyoming, and the federal courts. *See infra* Appendix, C.1.

[175] *See supra* Parts I–II.

[176] Those three states with moratoriums are: California, Montana, and Oregon. *See infra* Appendix, C.2.

[177] The 2 jurisdictions that have abolished the death penalty are: Alaska, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, Virginia, Washington, West Virginia, and Wisconsin. *See infra* Appendix C.3.

A. ARGUMENTS FOR LIBERAL JOINDER REGIMES

The arguments for liberal joinder, which have dominated the joinder discussion for decades, often hold that joinder promotes efficiency, judicial economy, and convenience.[178] In *Bruton v. United States*, the Supreme Court found that "[j]oint trials do conserve state funds, diminish inconvenience to witness and public authorities, and avoid delays in bringing those accused of crime to trial."[179] The Ninth Circuit said that there is a "substantial public interest in [joinder]."[180] If courts can join offenses, the parties, judges, jurors, witnesses, and courts as a whole can save valuable time and money.[181] Additionally, many jurisdictions already have overloaded criminal dockets, creating more of a need for expeditious adjudication and a desire to cut down on the number of trials a court must hold.

The prosecution arguably benefits the most from joinder of offenses.[182] When the prosecution can consolidate evidence of multiple offenses into one trial, "the jury may develop a fuller picture of the defendant's criminality," and thus the presentation has a "synergistic impact" on the jury's determination of guilt.[183]

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[178] *See generally, e.g.*, Richardson v. Marsh, 481 U.S. 200, 209 (1987); Zafiro v. U*.S.*, 506 U.S. 534, 537 (1993); *Bruton v. U.S.*, 391 U.S. 123, 143 (1968); *Opper v. U.S.*, 348 U.S. 84, 95 (1954); *U.S. v. Bryan*, 843 F.2d 1339, 1342 (11th Cir. 1988); *U.S. v. Eufrasio*, 935 F.2d 553, 568 (3d Cir. 1991); *U.S. v. Werner*, 620 F.2d 922, 928 (2d Cir. 1980); *U.S. v. Butler*, 822 F.2d 1191, 1194 (D.C. Cir. 1987); *Parker v. U.S.*, 404 F.2d 1193, 1196 (9th Cir. 1968).

[179] *Bruton*, 391 U.S. at 143.

[180] *Parker*, 404 F.2d at 1196. The court, at the time, spoke directly to joinder of defendants, not necessarily joinder of offenses, although one could find that the argument would remain the same. *See id*.

[181] Hein, *supra* note 37, at 1144. Some commentators suggest that the time and money savings stem from not needing to seat more than one jury. *See* Bordens & Horowitz, *supra* note 37, at 340. Others, however, suggest that the time associated with empaneling another jury is not substantial. *See* Note, *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, *supra* note 37, at 560 (stating in comparing whether the prosecution would need to present the background at two trials, "[t]he time spent where similar offenses are joined may not be as long as two trials *but the time saved by impaneling only one jury and by setting the defendant's background only once seems minimal*.") (emphasis added).

[182] Hein, *supra* note 37, at 1144.

[183] 7 GARY KATZMANN, INSIDE THE CRIMINAL PROCESS 193 (1991). The full quote from Katzmann is:

> From the government's perspective, prosecuting multiple counts against a defendant in a single trial, as compared with separate trials, generally has strategic advantages. For one thing, when the government presents evidence relating to a number of accusations, the jury may develop a fuller picture of the defendant's criminality. Perhaps more important, counts which may be weak or 'thin' when tried singly and by themselves may assume greater authority when tried together. In one trial, each

But the defendant can benefit from joinder of offenses as well. A defendant may rather only go through the emotional toll and time of one trial, "and joinder may also enable the court system to dispose of the case more swiftly."[184] Additionally, depending on the jurisdiction's sentencing rules, joinder may allow the defendant to receive concurrent sentences rather than consecutive ones and thus spend less time in prison.[185]

There are, of course, arguments against the judicial efficiency arguments promoting liberal joinder regimes. For instance, the mere act of joinder of offenses may prejudice a defendant because the jury may assume that because the state charged her with several offenses in the same charging document, she must be guilty of at least one of the offenses.[186] Further, the jury may conflate the evidence for each offense when choosing to convict the defendant of fewer than all of the offenses.[187] In addition, joinder may force the defendant to present inconsistent defenses to the separate offenses during the same trial.[188]

B. RESEARCH RAISING CONCERNS WITH LIBERAL JOINDER REGIMES

These rational arguments against judicial efficiency only scratch the surface. Several scholars, conducting legal, psychological, and behavioral science research suggest that joinder may have unintended negative impacts on juries' considerations and defendants' convictions.

1. From the Late 20th Century

During the 1970s and 1980s, researchers and scholars published a string of studies on joinder's effects on jurors' reactions.[189] Although there was no

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> count may serve to buttress the other. Although the judge may instruct the jury to consider each count on its own merits, prosecutors and defense attorneys agree that joinder of counts has a synergistic impact.

Id.

184 Hein, *supra* note 37, at 1145; Farrin, *supra* note 37, at 327.

185 Hein, *supra* note 37, at 1145.

186 *See* Kelly, *supra* note 38, at 204 n.8; Slovenko, *supra* note 125, at 71. Commentators argued this point even before the Federal Rules were adopted. *See* Maguire, *Proposed New Federal Rules of Criminal Procedure*, 23 OR. L. REV. 56, 58–59 (1943) ("We all know that, if you can pile up a number of charges against a man, it is quite often the case that the jury will convict, where, if they were listening to the evidence on one charge only, they would find it wholly insufficient.").

187 *See* Kelly, *supra* note 38, at 204 n.8; Slovenko, *supra* note 125, at 71.

188 *See* Kelly, *supra* note 38, at 204 n.9; Slovenko, *supra* note 125, at 71.

189 *See, e.g.*, Norbert L. Kerr & Gary W. Sawyers, *Independence of Multiple Verdicts Within a Trial by Mock Jurors*, 10 REPRESENTATIVE RSCH. SOC. PSYCH. 16 (1979); Irwin A.

consensus among the studies, each revolved its discussion around similar threads.

For instance, one of the studies found evidence of jury confusion in joined offense trials: the compounded evidence confused their test jury, causing jurors to remember the evidence incorrectly.[190] The study found a causal link between the jury confusion and biased verdicts against the defendant.[191]

Although one cannot read these twentieth century studies as a whole to conclude that evidence exists for jurors' incorrect accumulation of the evidence,[192] some of those studies did find strong support for the theory that a jury would infer a defendant's criminality based merely on having joined

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Horowitz, Kenneth S. Bordens, Marc S. Feldman, *A Comparison of Verdicts Obtained in Severed and Joined Criminal Trials*, 10 J. APPLIED SOC. PSYCH. 444 (1980); Sarah Tanford & Steven Penrod, *Biases in Trials Involving Defendants Charged with Multiple Offenses*, 12 J. APPLIED SOC. PSYCH. 453 (1982) [hereinafter Tanford & Penrod, *Biases in Trials*]; Kenneth S. Bordens & Irwin A. Horowitz, *Information Processing in Joined and Severed Trials*, 13 J. APPLIED SOC. PSYCH. 351 (1983); Sarah Tanford & Steven Penrod, *Social Inference Processes in Juror Judgments of Multiple-Offense Trials*, 47 J. PERSONALITY & SOC. PSYCH. 749 (1984) [hereinafter Tanford & Penrod, *Social Inference Processes*]; Edith Greene & Elizabeth F. Loftus, *When Crimes are Joined at Trial*, 9 L. & HUM. BEHAV. 193 (1985); Sarah Tanford, Steven Penrod & Rebecca Collins, *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 L. & HUM. BEHAV. 319 (1985).

[190] Bordens & Horowitz, *supra* note 189, at 368–69.

[191] *Id.* Some of the other studies, however, did not come to such a firm conclusion. Three of the studies did find evidence of jury confusion related to the facts, but concluded that the jury confusion did not lead to biased verdicts. *See* Tanford & Penrod, *Biases in Trials*, *supra* note 189; Tanford & Penrod, *Social Inference Processes*, *supra* note 189; Tanford, Penrod & Collins, *supra* note 189. One pair of researchers, Greene & Loftus, despite not finding evidence of jury confusion, still attempted to hypothesize as to why it might exist. *See* Greene & Loftus, *supra* note 189, at 193–94. The pair hypothesized that jurors' memories may overload from the sheer number of facts, such that all of the facts are difficult to remember; jurors may mix information from different sources or relative to other offenses; or jurors may only remember discerning relevant, pejorative information, which confirms their verdict. *See id.* As one commentator notes, however, Greene and Loftus's lack of findings for significant jury confusion, "may be attributable to the relative lack of evidence" that they used in their study. Farrin, *supra* note 37, at 329. Further, the commentator notes that the conclusions reached on juror confusion not leading to biased verdicts were not supported "by research showing that memory of particular facts does not correlate strongly with general impressions," and that "future research into the exact nature of juror memory errors," would be helpful to understand the differences in results of those studies. *Id.*

[192] *See* Farrin, *supra* note 37, at 329. That is, where a jury would merge the evidence of the multiple offenses in their mind, even though evidence of the separate offenses should be kept separate.

offenses at the trial.[193] The theory flows from a juror's potential belief that because a defendant has one negative trait, she must have other negative traits. One pair of researchers even proposed a "path model" outlining the process through which the juries' inferences about the defendant made their way into sentencing.[194] Additionally, two studies found that joinder's effect on the ultimate convictions was greater when the cases against the defendant were weak.[195]

The studies reached different conclusions in some aspects and had methodological differences, yet they agreed that criminal defendants may face a greater likelihood of conviction when courts try the charged offenses jointly rather than separately.[196] One commentator, discussing the research, said that "[t]he empirical data unequivocally show that the probability of a defendant being convicted significantly increases if offenses are joined rather than tried separately."[197] In addition, this conviction effect increases when there are more offenses charged and joined together.[198] To correct these biases in real courtrooms, the solution "might well be a less frequent and more circumspect use of joinder."[199] Jurisdictions could take a more prudent, limited approach to joinder without affecting a large number of criminal cases by restricting the joinder of capital offenses with noncapital offenses.

2. Leipold and Abbasi

Andrew D. Leipold and Hossein A. Abbasi conducted the next substantial analysis of joinder in 2006, examining the frequency of joinder and convictions in federal criminal cases.[200] They sought to determine the level and effect of prejudice in cases in which joinder applies.[201] During the

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[193] *See* Bordens & Horowitz, *supra* note 189, at 368; Tanford & Penrod, *Biases in Trials*, *supra* note 189, at 477; Tanford & Penrod, *Social Inference*, *supra* note 189, at 762–63; Greene & Loftus, *supra* note 189, at 204–05; Tanford, Penrod & Collins, *supra* note 189, at 334.

[194] Tanford & Penrod, *Social Inference Processes*, *supra* note 189 at 760, 763.

[195] *See* Kerr & Sawyers, *supra* note 189, at 25–26; Tanford, Penrod & Collins, *supra* note 189, at 332–33.

[196] *See* Kerr & Sawyers, *supra* note 189, at 25–26; Bordens, Horowitz & Feldman, *supra* note 189, at 453–54; Tanford & Penrod, *Biases in Trials*, *supra* note 189, at 475; Bordens & Horowitz, *supra* note 189; Tanford & Penrod, *Social Inference Processes*, *supra* note 189; Greene & Loftus, *supra* note 189, at 204–05; Tanford, Penrod & Collins, *supra* note 189, at 332–33.

[197] Farrin, *supra* note 37, at 332.

[198] *Id.* at 330–31.

[199] *Id.* at 332.

[200] Leipold & Abbasi, *supra* note 19.

[201] *Id.*

five-year period of their study, more than half of the federal defendants' charges invoked joinder.[202] Leipold and Abbasi found, just as the late-twentieth century group of research determined, that when defendants face multiple counts in a trial, the conviction rate for the more heavily-sentenced charge against the defendant increased dramatically—from 68% for defendants with a single count to 82% for defendants with a second count.[203] More drastically, if courts joined a third charge, the conviction rate for the more serious charge rose again, this time to 88%.[204]

Although the joinder research from the late-twentieth century did not conclude that juries would incorrectly accumulate evidence between the charged offense, Leipold and Abbasi did find evidence of such behavior.[205] The two further suggest that this inference is more likely to occur when the joinder is based on counts of the "same or similar character" that are not a part of a "common plan or scheme," allowing joinder of the offenses based on their nature as opposed to their temporal or factual connection.[206]

In one sense, the lack of research and agreement does not show a definitive conclusion of prejudice to defendants. Further, the focus on federal criminal defendants leaves gaps in understanding potential prejudices of criminal defendants in state courts.

Despite the lack of consensus regarding some potential prejudice to defendants, these studies show that the mere fact that courts join offenses in a defendant's case can lead to a greater chance that a jury will convict her.[207] Jurisdictions should monitor this research and acknowledge that capital defendants face the gravest consequences if convicted due to bias or prejudice—and thus courts should not subject defendants to a potentially biased conviction purely because the prosecution joined their capital offense with another offense merely for efficiency. Alternatively, jurisdictions should acknowledge that legal scholars should conduct additional research on the potential biases of criminal defendants to better determine how to revise their joinder regimes.

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[202] *Id.* at 350–51. Leipold and Abbasi do note that this large number cannot determine "the status of defendants who actually went to trial." *Id.* at 365.

[203] *Id.* at 367.

[204] *Id.*

[205] *Id.*

[206] *See id.* at 355–56, 398 n.140.

[207] *See* Kerr & Sawyers, *supra* note 189, at 25–26; Bordens, Horowitz & Feldman, *supra* note 189, at 453–54; Tanford & Penrod, *Biases in Trials*, *supra* note 189, at 475; Bordens & Horowitz, *supra* note 189; Tanford & Penrod, *Social Inference Processes*, *supra* note 189; Greene & Loftus, *supra* note 189, at 204–05; Tanford, Penrod & Collins, *supra* note 189, at 332; Leipold & Abbasi, *supra* note 19; MOORE, *supra* note 36, ¶ 8.02[1].

C. JURISDICTIONS ALREADY TREATING CAPITAL OFFENSES DIFFERENTLY

For decades, courts have repeated variations of the same adage: "[D]eath is different."[208] U.S. jurisdictions already treat capital offense procedure differently by giving more institutional protections to capital defendants in contexts other than joinder and severance. Further, preparation by capital-defendant representatives is already complex;[209] prohibiting the joinder of capital offenses with noncapital offenses would simplify already intricate cases. Jurisdictions, therefore, are well-situated to consider an additional protection for capital defendants.

For instance, many states require attorneys to meet certain qualifications if they wish to represent a defendant either during a capital trial or during post-conviction proceedings.[210] In addition, many jurisdictions have heightened standards capital defendants must meet if they wish to waive their right to counsel, waive their right to a jury trial, or plead guilty.[211] Many states have separate provisions to govern capital trials.[212] These are just some examples; most capital jurisdictions have additional provisions that apply to defendants charged with a capital crime.[213]

In Louisiana, the *McZeal* court discussed how Louisiana already treated capital defendants differently in other procedural contexts,[214] many of which

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[208] *See, e.g.*, Reid v. Covert, 354 U.S. 1, 45–46 (1957) (Frankfurter, J., concurring) ("It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights."); Gregg v. Georgia, 428 U.S. 153, 188 (1976) ("[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (noting that a death sentence is "qualitatively different from a sentence of imprisonment, however long"); State v. Neveaux, 285 So. 3d 1089, 1090 (La. 2019) (Johnson, C.J., concurring) (citation omitted).

[209] *See, e.g.*, McFarland v. Scott, 512 U.S. 849, 855 (1994); AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003).

[210] *See, e.g.*, ALA. CODE § 13A-5-54 (2019); ARK. R. CRIM. P. 37.5(c) (2019); TEX. CODE CRIM. P. art. 26.052 (2019); VA. CODE CRIM. P. § 19.2-163.7 (2019).

[211] *See, e.g.*, ALA. CODE § 13A-5-42 (2020); OR. REV. STAT. §§ 135.045, 138.504 (2019) (allowing the court to refuse a defendant's waive or counsel if the defendant is charged with a capital offense); TEX. CODE CRIM. PROC. ANN. arts. 1.13, 1.14, 11.071 (2020) (governing waiver of trial by jury).

[212] *See, e.g.*, ALA. CRIM. CODE § 13A-5-43 (2020); VA. CODE ANN. §§ 19.2-264.2–19.2-264.5 (2020).

[213] For instance, some states offer additional peremptory challenges to parties when the defendant is charged with a capital offense. *See, e.g.*, OHIO R. CRIM. P. 24(D) (giving parties six instead of four peremptory challenges); OR. REV. STAT. § 136.230 (2019) (giving parties 12 peremptory challenges instead of six or three).

[214] State v. McZeal, 352 So. 2d 592, 602 n.8 (La. 1977) (Dennis, J. on rehearing).

are similar to the additional procedures for capital punishment cases in other jurisdictions. Although the court focused on the different "classes" of trials described by the Louisiana constitution and joinder provision as the basis for why courts could not join capital offenses with noncapital offenses, the court mentioned many instances where Louisiana law treats cases involving capital offenses differently, adding to their justification that the legislature intended the more restrictive joinder regime.[215] For instance, as the *McZeal* court pointed out, Louisiana law requires that the prosecution of a capital case commence by indictment, rather than a bill of information.[216] Appointed counsel in Louisiana capital cases must be admitted to the state bar for at least five years.[217] A Louisiana court may not accept a defendant's unqualified guilty plea in a capital case.[218] In capital cases, the court must sequester the jury.[219] All of these are examples, the court reasoned, of the law giving statutory protections because of the high-stakes nature of a capital case.[220] These provisions show a structural, institutional care for a capital defendant—cares that courts do not extend to defendants in noncapital cases.

Other jurisdictions should acknowledge that they already treat capital defendants differently than noncapital defendants in other contexts and should adopt one additional procedural provision related to the prosecution of capital cases: courts may not join capital offenses with noncapital offenses in preparation for trial.

D. COMBATTING PLEA BARGAINING AND TRIAL PENALTY CONCERNS

Today's defendants, however, face a criminal justice system that "is for the most part a system of pleas, not a system of trials."[221] Data suggest that less than 3% of federal defendants, and possibly even fewer in state courts, actually go to trial.[222] Thus, many defendants facing capital offenses might seek to negotiate a plea, rather than proceed to trial.

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[215] *Id.*

[216] LA. CODE CRIM. PROC. ANN. art. 382 (2020).

[217] *Id.* art. 512.

[218] *Id.* art. 557.

[219] *Id.* art. 791.

[220] *See generally McZeal*, 352 So. 2d at 602 n.8.

[221] Lafler v. Cooper, 566 U.S. 156, 170 (2012).

[222] *See* U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2015, at 4 (2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15_Overview_Federal_Criminal_Cases.pdf [https://perma.cc/42K3-ARQM]; Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—and What Can Be Done About It*, 111 NW. U. L. REV. 1429, 1432 (2017).

When courts join multiple offenses, however, the odds of "charge piling" during a plea negotiation increase.[223] If prosecutors use "charge piling" or other coercive bargaining measures, then a criminal defendant entering a plea agreement may suffer based on the charged offenses and corresponding sentences.[224] Joining a capital offense with a noncapital offense might most exacerbate these concerns for defendants.[225] Further, if a defendant does elect to proceed to trial, and the jury convicts her of the joined noncapital offense,[226] she will most likely face a "trial penalty" for choosing to take her case to trial, leading to a larger sentence.[227]

Prohibiting the joinder of capital and noncapital offenses might alleviate some of the rising concerns regarding power imbalances in plea bargaining and trial penalties in sentencing. Jurisdictions could prevent prosecutors from using these potentially impactful prosecutorial tactics in defendants' cases where decisions about whether to proceed to trial or negotiate a plea deal may mean life or death.

E. IRRELEVANCE OF ACTUAL DEATH PENALTY USE

All jurisdictions—not just those with the death penalty—can learn from and subscribe to the idea that courts should restrict joinder of those offenses that are given the highest potential sentence with those offenses with a less severe sentence. It should not matter whether a jurisdiction uses the death penalty for its highest-level offenses for that jurisdiction to consider protecting those defendants facing the most severe punishment the jurisdiction is willing to administer.

In *McZeal*, the Louisiana Supreme Court dealt with a similar issue.[228] In between McZeal's conviction and the Court rehearing the case, the U.S. Supreme Court invalidated the use of the death penalty for Louisiana's

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[223] *See* Crespo, *supra* note 37, at 1316–23; NAT'L ASS'N OF CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 24–32 (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf [https://perma.cc/XH6B-KB3B].

[224] *See* Crespo, *supra* note 37, at 1316–23, *see also* NAT'L ASS'N OF CRIM. DEF. LAWS., *supra* note 223.

[225] For instance, see generally Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2519 (2004) (discussing how prosecutors may use initially charged high offenses to make defendants "more likely to think that they are getting good deals when they are offered lower sentences").

[226] Or, if they are convicted of the capital offense, but the sentence is a prison sentence rather than a death sentence.

[227] *See, e.g.*, NAT'L ASS'N OF CRIMINAL DEF. LAWS., *supra* note 224, at 5.

[228] *See* State v. McZeal, 352 So. 2d 592, 603–04 (La. 1977) (Dennis, J. on rehearing).

aggravated rape offense,[229] McZeal's capital offense.[230] Thus, at the time of the rehearing, the State argued that both offenses the prosecution charged McZeal with would have belonged in the same "class" of trial and could be classified as felonies necessarily punishable at hard labor because the death penalty could not be used for either.[231] The State argued that the misjoinder constituted harmless error, and that the defendant "can hardly complain of what turned out to be the routine joinder" of two offenses that—had the prosecution begun later—would have been rightfully joined under the court's interpretation of Article 493.[232]

The court disagreed with the State and held that this constituted "misjoinder," rather than a situation giving rise to discretionary review of joinder, because the offenses were not triable by the same "mode of trial."[233] Finding misjoinder was important because it meant that the joinder was "conclusively presumed to be prejudicial or harmful," and that the trial judge would have "no discretion to deny relief."[234] Although the court would not have actually instituted the death penalty in the case, the joining of the offenses constituted statutory misjoinder, such that review was forbidden. And because of the misjoinder, the prosecution was improper from the outset.[235] Thus, the court did not find that misjoinder existed solely because the defendant would have received the death penalty under the original sentence of the crime. Rather, the court guarded its interpretation of Article 493 and the structural differences in the "classes" of trials.

The "classes" of trials differ based on their punishments, but whether Louisiana used the death penalty for its most severe crimes is not relevant. Under *McZeal*, it only matters that the punishments and "classes" differed. According to this rationale, the *McZeal* court would have come to the same conclusion even if Louisiana did not institute the death penalty for its "capital offenses."[236]

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[229] *See* Selman v. Louisiana, 428 U.S. 906, 906 (1976).

[230] *See McZeal*, 352 So. 2d at 604–05.

[231] *Id.* at 601.

[232] *Id.* at 603.

[233] *Id.* at 603–04.

[234] *Id.* at 603.

[235] *Id.* at 603–04.

[236] *But see* State v. Clarkson, 48 So. 3d 272, 273 (La. 2010). In *Clarkson*, the Louisiana Supreme Court vacated a decision that non-capital offenses joined with a first-degree murder charge had prescribed. *See id.* The prosecution charged the defendant with "a capital charge of first-degree murder with five other counts charging non-capital felonies." *Id.* The defendant did not move to quash the indictment on grounds of misjoinder, and the prosecution later forewent capital punishment for the first-degree murder charge. *Id.* The court held that,

Other jurisdictions should develop a similar dedication to their joinder regimes and their classifications of criminal offenses. Even where states abolish the death penalty or place a moratorium on its use, states can protect those defendants charged with their highest classified offenses. Just because a state does not use the death penalty does not mean that it has eliminated the potential biases against a defendant when the courts join its most serious offense with its least.[237]

F. JURISPRUDENTIAL ROOTS IN JOINDER CONCERNS

Despite a recent influx of liberal joinder arguments in cases, American jurisprudence has historical roots in more restrictive joinder regimes and in complete nonjoinder. There are many instances where a federal judge favored a more restrictive joinder regime.

Prior to the enactment of the Federal Rules in 1946, the Supreme Court discussed prejudicial joinder in *Pointer v. United States*.[238] The Court said that it was impermissible for a defendant to be "embarrassed" in the defense of her trial because of the multiple charges,[239] and that an indictment should typically not contain more than one charge.[240] Not long after *Pointer*, in *McElroy v. United States*, the Court spoke to the history of joinder in England and the United States: "[I]t is the settled rule in England and in many of our states to confine the indictment to one distinct offense, or restrict the evidence to one transaction."[241]

There are other notable examples of federal judges indicating a penchant for restrictive joinder. As Learned Hand once wrote:

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because capital punishment was no longer sought, all of the offenses were now non-capital felonies and properly joined under Louisiana's joinder regime. *Id.* Further, the court held that none of the offenses had prescribed because the first-degree murder charge had begun as a capital case, which held a longer prescriptive period, and the "offense charged shall determine the applicable limitation." *Id. Clarkson*, however, does not go as far as permitting the joinder of capital offenses with non-capital offenses. The court only found the joinder permissible because the prosecution changed the punishment it sought to a less severe one and the defendant failed to move to quash. Louisiana law provided a method by which the punishment for first-degree murder could transition from the death penalty to life imprisonment depending on what punishment the prosecution sought. *See* LA. STAT. ANN § 14:30(C)(2) (2007) (amended 2009); *see also Clarkson*, 48 So. 3d at 273 (citing § 14:30(C)(2)). In *McZeal*, the prosecution sought the death penalty throughout for the aggravated rape charge, and the death penalty was only prohibited by *Selman*. *See* State v. McZeal, 352 So. 2d 592, 603 (La. 1977).

237 *See supra* Parts I–II, V.B.

238 Pointer v. United States, 151 U.S. 396, 400–04 (1894).

239 *Id.* at 403.

240 *Id.*

241 McElroy v. United States, 164 U.S. 76, 79–80 (1896).

> There is indeed always a danger when several crimes are tried together, that the jury may use the evidence cumulatively; that is, that, although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all. This possibility violates the doctrine that only direct evidence of the transaction charged will ordinarily be accepted, and that the accused is not to be convicted because of his criminal disposition. Yet in the ordinary affairs of life such a disposition is a convincing factor, and its exclusion is rather because the issue is practically unmanageable than because it is not rationally relevant.[242]

In 1964, the D.C. Circuit analyzed Judge Hand's caution and expanded upon it by stating that "the possibility of the jury's becoming hostile or inferring guilt from belief as to criminal disposition is just as substantial. For this reason great care must be exercised to protect the defendant from this possibility when joinder is tolerated under this theory."[243]

Further, some courts have discussed the arguments against liberal joinder regimes, such as those discussed by the social science research of potential juror bias previously addressed.[244] In one such case, *Gregory v. United States*, the Court reversed a conviction, noting that the lower court should have granted the defendant's motion for severance for prejudicial joinder of the offenses under Federal Rule 14.[245] The Court, in this ruling, said that "there was not only the danger of the evidence with respect to the two robberies cumulating in the jurors' minds tending to prove the defendant guilty of each, but the evidence as to one of the robberies was so weak as to lead one to question its sufficiency to go to the jury."[246] The Court believed that "[the weak evidence's] primary usefulness in this trial was to support the Government's case as to the robbery which resulted in the murder."[247] The Court invoked the same concern that Leipold and Abbasi raised fifty years later: that the jury may have improperly accumulated the evidence.[248]

Even though these limited instances where a judge contemplated the dangers of liberal joinder may be insignificant compared to the reach of

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[242] United States v. Lotsch, 102 F.2d 35, 36 (2d Cir. 1939).

[243] Drew v. United States, 331 F.2d 85, 91 (D.C. Cir. 1964). The D.C. Circuit has argued that liberal joinder is problematic on multiple occasions. *See also* Kidwell v. United States, 38 App. D.C. 566, 570 (1912); Gregory v. United States, 369 F.2d 185, 189 (D.C. Cir. 1966); United States v. Carter, 475 F.2d 349, 350–51 (D.C. Cir. 1973).

[244] *See Gregory*, 369 F.2d 185; *Carter*, 475 F.2d at 351.

[245] *Gregory*, 369 F.2d at 189.

[246] *Id.*

[247] *Id.*

[248] Leipold & Abbasi, *supra* note 19, at 355–59.

liberal joinder and severance regimes, they indicate a historical affirmation to stand upon when jurisdictions consider revising their joinder provisions.

G. COURTS SHOULD OFFER STRUCTURAL PROTECTION, NOT DISCRETIONARY REVIEW

One could argue, though, that there is no need for a statutory or otherwise institutional protection for criminal defendants because a protection already exists: the judge's discretion to sever prejudicially joined offenses. If the defendant were truly prejudiced by the joining of a capital offense with a noncapital offense, then a judge would order the offenses severed and tried separately. Such an argument stands on historical ground, as that is the way that many jurisdictions in the United States have long operated.

In the context of Federal Rules 8 and 14, in which joining capital offenses with noncapital offenses does not constitute misjoinder, a defendant's only option to contest the joinder is to argue for permissive severance under Rule 14.[249] After a defendant requests severance, a judge, depending on the jurisdiction, often exercises her discretion to balance the possibility of prejudice with the desire for judicial efficiency. Judicial economy is typically given greater weight, such that one federal court has said that the defendant may need to show that the joinder was "manifestly prejudicial."[250] Indeed, many jurisdictions have a similarly high threshold to prove the necessary prejudice for severance of the offenses.[251]

If one party seeks to sever the charges, that party bears the burden to prove the existence of prejudice.[252] Thus, most often, it is the defendant who bears the burden. An instance where prejudice under Rule 14 may arise to the requisite level is where the defendant has separate defenses for each of multiple charged offenses.[253] Proving that prejudice exists at the trial level,

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[249] *See* FED. R. CRIM. P. 14(a).

[250] United States v. Armstrong, 621 F.2d 951, 954 (9th Cir. 1980). Although the *Armstrong* court made this remark when discussing the joinder of defendants, because of the lack of jurisprudential attention to joinder of offenses, one may assume that the same, high standard would apply if a defendant asked for a severance of offenses.

[251] *See infra* Appendix B.

[252] *See, e.g.*, United States v. LiCausi, 167 F.3d 36, 48 (1st Cir. 1999).

[253] *See, e.g.*, Cross v. United States, 335 F.2d 987, 989 (D.C. Cir. 1964).

however, can be difficult.[254] Further, overturning denial of a motion to sever on appeal is even more daunting.[255]

Courts and commentators alike have noted this potential difficulty. As one court stated, "'[t]he burden of demonstrating prejudice is a difficult one, and the ruling of the trial judge will rarely be disturbed on review.' The defendant must show something more than the fact that 'a separate trial might offer him a better chance of acquittal.'"[256] One criminal procedure commentator suggested that the decisions surrounding joinder are often left "to the unguided and largely unreviewable discretion of the trial judge."[257] Another commentator advised that "relief from misjoinder is sometimes a matter of discretion, instead of a matter of right," and that, "[t]hus, a prosecutor's initial matter of framing the indictment is likely to be the way in which [a defendant] go[es] to trial."[258] Thus, because a severance grant is so difficult to acquire, the "protection" against prejudice is rarely useful.

In effect, because courts often may not grant severance, the prosecution can routinely use joinder and force defendants to combat whatever offenses the prosecution chooses to join. A commentator notes that: "It seems strange indeed that one presumably innocent may be made to undergo something less than a fair trial, or that he may be prejudiced in his defense if the prejudice is not 'substantial,' merely to serve the convenience of the prosecution."[259]

Jurisdictions, however, have the opportunity to not solely rely on a judge's often unmet discretional standards and instead create an additional structural and procedural protection for capital defendants. Louisiana made a similar discretion-based argument for leaving the joinder decision in the

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[254] 4 WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE 593, 602 (2d ed. 1999) ("[I]t is very difficult for the trial judge to make a finding on the prejudice issue before trial, for it involves speculation about many things which may or not occur. Also, judges are understandably reluctant to make a finding of prejudice during trial, after the prosecution has put in most or all of its proof.").

[255] *See, e.g.*, United States v. Thomas, 676 F.2d 239, 243 (7th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981) (stating that a defendant must show that the refusal to sever was an abuse of discretion); United States v. Mitchell, 788 F.2d 1232, 1237 (7th Cir. 1986) (stating that a defendant must show specifically how he would be prejudiced by the joinder); United States v. Markey, 693 F.2d 594, 597 (6th Cir. 1982) (stating that "[u]nder Rule 14, Fed.R.Crim.P., the disposition of a motion for severance is entrusted to the trial judge's sound discretion."); United States v. Burton, 724 F.2d 1283, 1286–87 (7th Cir. 1984); United States v. Arbelaez, 719 F.2d 1453, 1460 (9th Cir. 1983) (stating that defendant must show that the prejudice is so compelling as to rise to the level of depriving him his right to a fair trial).

[256] State v. Henderson, Nos. 963, 964, 965, 1982 WL 5816 (Ohio Ct. App. 1982) (internal citation omitted) (citing Spencer v. Texas, 385 U.S. 554 (1967)).

[257] AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE 13-4 (1980).

[258] MOORE, *supra* note 36, ¶ 8.02[1].

[259] 1 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 141 (1969).

hands of the trial judge in the rehearing of *McZeal*.[260] The Louisiana Supreme Court disagreed.[261]

The court articulated, as discussed above,[262] an important distinction between misjoinder and severance based on prejudice.[263] Following the *McZeal* opinion, Louisiana offers *both* protections to capital defendants: the prejudice analysis under the severance rule and the categorical misjoinder rule.[264] Not only does the judge have the general authority to consider a motion to sever from a defendant and determine whether prejudice exists for otherwise properly joined offenses, but capital defendants hold an additional procedural protection in misjoinder. By law, if the state charges a defendant with a capital offense, the prosecution may not join any noncapital offense with it.[265] One could argue that the categorical bright-line rule is in itself judicially efficient because courts do not need to conduct a balancing test to determine whether prejudice exists; it is simply misjoinder to join a capital offense with a noncapital offense.

Although other jurisdictions in the country protect defendants by limiting the scenarios and instances where courts may join offenses via natural, factual, and temporal restrictions, and other jurisdictions allow defendants to request severance of the offenses,[266] as long as the prosecution can leap over the misjoinder hurdle, commentators would suggest that the defendant's chance at severance is extremely low.[267] And if the posture of a capital defendant's trial rides on a judge's prejudice determination, the risks associated with her potential sentence become even greater. By ensuring that misjoinder occurs when a capital offense is joined with a noncapital offense, Louisiana offers its capital defendants more protection.

Jurisdictions should recognize that, although they offer a limited means of protection through their offense-severance provisions, there is another way to protect capital defendants who may suffer the most drastic effects of potential biases and errors in trial and conviction. Jurisdictions should create an additional, structural misjoinder shield for capital defendants by not allowing courts to join capital offenses with noncapital offenses under their joinder regimes.

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260 *See* State v. McZeal, 352 So. 2d 592, 603–04 (La. 1977) (Dennis, J. on rehearing).

261 *See id.*

262 *See supra* Part IV.D.

263 *See McZeal*, 352 So. 2d at 603–04.

264 *See* LA. CODE CRIM. PROC. ANN. arts. 493, 495.1 (2020).

265 *See id.* art. 493.

266 *See supra* Part II.

267 *See supra* text accompanying notes 254–259.

CONCLUSION

Jurisdictions should adopt joinder regimes that restrict the joinder of offenses when one of the charges brought is a capital offense. They should characterize the joinder of a capital offense with any noncapital offense as statutory, categorical misjoinder to give capital defendants an additional structural and procedural protection in the criminal justice system.

If jurisdictions revise their joinder schemes in this way, they will preserve liberal joinder regimes for the most common criminal cases—ones in which joinder is most efficient—without harming those defendants who face the most serious consequences and the highest stakes during their trials. Such a regime achieves both underlying—and, at times, competing—ends: maximal protection against prejudice for capital defendants and judicial efficiency.

APPENDICES

A. STATES' JOINDER OF OFFENSES PROVISIONS

1. States That Maintain the "Felonies or Misdemeanors or Both" Language

For Alabama, see ALA. R. CRIM. P. 13.3; ALA. CODE § 15-8-52 (2019); Boyle v. State, 154 So. 3d 171, 188 (Ala. Crim. App. 2013) ("Rule 13.3 does not exclude the consolidation of a capital offense with another lesser offense.") (quoting Williams v. State, 710 So. 2d 1276, 1321 (Ala. Crim. App. 1996). The comments to Rule 13.3 state that the rule "is based on Rule 8(a), Fed.R.Crim.P., and ABA, Standards for Criminal Justice, *Joinder and Severance,* 13-2.1 (2d ed. 1986)." ALA. R. CRIM. P. 13.3. Although § 15-8-52 of the Alabama Code contains language that might be interpreted to mean that joined offenses must bear the same punishment—"and subject to the same punishment"—the Rule 13.3 comments explicitly overrule § 15-8-52. § 15-8-52; ALA. R. CRIM. P. 13.3 committee comments ("This rule supersedes Ala. Code 1975, § 15-8-52 . . . "). Further, the Rule 13.3 Comments specifically address joining misdemeanors and felonies, allowing such joinder and changing prior case law. *See* ALA. R. CRIM. P. 13.3 committee comments (discussing that the rule specifically allows the joinder of misdemeanors and felonies); Brandies v. State, 219 So. 2d 404, 405 (Ala. Ct. App. 1968), cert. denied, 219 So. 2d 409 (Ala. 1969).

For Alaska, see ALASKA R. CRIM. P. 8(a); Guthrie v. State, 222 P.3d 890, 894 (Alaska Ct. App. 2010) (citing to federal cases which construe Federal Criminal Procedure Rule 8(a), "which is substantially similar to Alaska Criminal Rule 8(a)" and citing to state jurisdiction cases which

construe "state joinder rules identical or substantially similar to Alaska Criminal Rule 8(a)").

For Arkansas, see ARK. CODE ANN. § 16-85-404 (1987), repealed by Arkansas Criminal Code Revision Commission's Bill, 2005 Ark. Acts 1994; ARK. R. CRIM. P. 21.1; Clay v. State, 886 S.W.2d 608, 610 (Ark. 1994) (discussing how Rule 21.1 "provides the prosecutor with broad latitude to effect joinder of offenses," and stating that "[t]his joinder rule is much broader than the prior statutes . . . .").

For Colorado, see COLO. R. CRIM. P. 8(a)(2); Bondsteel v. People, 439 P.3d 847, 853 (Colo. 2019) (naming Rule 8 the "federal analogue" to Colorado's joinder provision and positively referencing federal cases' interpretations).

For Florida, see FLA. R. CRIM. P. 3.150(a). Despite containing the "felonies or misdemeanors or both" language, Florida's joinder provision limits joinder to offenses "triable in the same court." FLA. R. CRIM. P. 3.150(a). But this language difference seems to not prevent the joinder of offenses of differing levels of punishment. *See* Rodriguez v. State, 919 So. 2d 1252, 1272 (Fla. 2005) (finding that offenses were properly joined and even if defendant would have filed motion to sever, the motion would have most likely failed).

For Idaho, see IDAHO CRIM. R. 8(a); IDAHO CODE § 19-1432 (2020); State v. Field, 165 P.3d 273, 278–79 (Idaho 2007) (citing to and favorably referencing a federal case when discussing how to interpret Idaho's rule).

For Illinois, see 725 ILL. COMP. STAT. 5/111-4 (2017); People v. Fleming, 14 N.E.3d 509, 516 (Ill. Ct. App. 2014) (discussing factors of a joinder test to determine whether offenses are joinable as "part of the same comprehensive transaction" with no mention of potential sentence of each joined offense as a factor to find misjoinder).

For Kansas, see KAN. STAT. ANN. § 22-3202 (2019); State v. Gaither, 156 P.3d 602, 612 (Kan. 2007) (outlining an analysis to determine whether joinder was proper in a given case, with no mention of potential sentence of joined offenses). Kansas's joinder provision contains a subsection specifically addressing "[w]hen a felony and misdemeanor are joined . . . ." § 22-3202(2).

For Kentucky, see KY. R. CRIM. P. 6.18; Peacher v. Commonwealth, 391 S.W.3d 821, 836–37 (Ky. 2013) (discussing the value of Kentucky's liberal joinder regime).

For Maryland, see MD. R. 4-203(a). The Maryland Rule changes the "felonies or misdemeanors or both" language to "whether felonies or misdemeanors or any combination thereof . . ." affirming the jurisdiction's

commitment to join any offenses no matter the punishment level. MD. R. 4-203(a).

For Mississippi, see MISS. R. CRIM. P. 14.2, 14.3; MISS. CODE ANN. § 99-7-2 (2019). Mississippi Rule 14.2, despite some differences in structure, still contains the "felonies or misdemeanors or both" language. *See* MISS. R. CRIM. P. 14.2.

For Montana, see MONT. CODE ANN. § 46-11-404 (2019).

For Nebraska, see NEB. REV. STAT. § 29-2002(1) (2020); State v. Knutson, 852 N.W.2d 307, 316–17 (Neb. 2014) (discussing the analysis to determine whether joinder is proper under § 29-2002(1), with no mention of potential sentences of joined offenses).

For New Mexico, see N.M. R. CRIM. P. 5-203, 6-306, 7-306; State v. Gallegos, 152 P.3d 828, 832 (N.M. 2007) (discussing New Mexico's liberal, and sometimes mandatory, joinder regime, stating that the original rule was based on the ABA Standards Relating to Joinder and Severance, and that "[t]he primary focus of such a discretionary rule [was] the promotion of judicial efficiency." (citing 1A CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 141, at 5 (3d ed. 1999)). New Mexico's joinder regime is mandatory in some instances, using the phrase, "shall be joined . . . ." *See* N.M. R. CRIM. P. 5-203, 6-306, 7-306. The New Mexico Supreme Court, in *Gallegos*, noted that the adoption of mandatory joinder had "the salutary effect of avoiding prejudice to the defendant." *Gallegos*, 152 P.3d at 832 (citing State v. Tijerina, 519 P.2d 127, 132 (N.M. 1973)).

For North Carolina, see N.C. GEN. STAT. § 15A-926 (2020); State v. Williams, 565 S.E.2d 609, 626 (N.C. 2002) (discussing the discretion given to trial judges to determine whether joinder is proper under the provision, with no mention of potential sentences of the joined offenses).

For Ohio, see OHIO R. CRIM. P. 8; OHIO REV. CODE ANN. § 2941.04 (2019); State v. LaMar, 767 N.E.2d 166, 189 (Ohio 2002) (upholding the joinder of capital offenses with noncapital offenses, stating that the "law favors joining multiple offenses in a single trial . . . ." (quoting State v. Lott, 555 N.E.2d 293, 298 (Ohio 1990)). Ohio's Rules of Criminal Procedure track the Federal Rules, but its joinder statute differs from the language of Federal Rule 8(a). *Compare* § 2941.04 *with* FED. R. CRIM. P. 8(a). Although § 2941.04 allows for the joinder of all types of offenses "connected together in their commission," the provision does contain a "same class of crimes or offenses" limitation for "different statements of the same offense, or two or more different offenses . . . ." § 2941.04. This, in effect, limits the joinder of offenses of different classes to those connected together in their commission. *See* § 2941.04. For more discussion on the Ohio and Federal joinder rules,

see Paul C. Giannelli, *Joinder & Severance of Offenses*, PUB. DEF. REP., Summer 1997, at 1.

For Rhode Island, see R.I. SUPER. CT. R. CRIM. P. 8(a); State v. Hernandez, 822 A.2d 915, 918 (R.I. 2003) (upholding the joinder of multiple offenses with no discussion of the potential sentences of the joined offenses).

For South Dakota, see S.D. CODIFIED LAWS §§ 23A-6-23, 23A-11-2 (2019); State v. Dowty, 838 N.W.2d 820, 828–29 (S.D. 2013) (upholding the joinder of multiple offenses with no discussion of the potential sentences of the joined offenses).

For Utah, see UTAH CODE ANN. § 77-8a-1 (2019); State v. Mead, 27 P.3d 1115, 1130 (Utah 2001) (upholding the joinder of multiple offenses, stating that it was "uncontested that the murder and criminal solicitation counts" were properly joined, when each offense was classified as a different type of felony offense).

For Vermont, see VT. R. CRIM. P. 8(a).

For Washington, see WASH. SUPER. CT. CRIM. R. 4.3(a); State v. Bryant, 950 P.2d 1004, 1008 (Wash. Ct. App. 1998) (explaining that the joinder provision "should be construed expansively to promote the public policy of conserving judicial and prosecution resources." (citing State v. Hentz, 32 647 P.2d 39 (Wash. Ct. App. 1982), *rev'd in part on other grounds*, 663 P.2d 476 (Wash 1983))).

For West Virginia, see W. VA. R. CRIM. P. 8(a); State v. Hatfield, 380 S.E. 2d 670, 672–75 (W. Va. 1988) (using federal joinder case law, despite ultimately finding prejudice, to interpret its own joinder provision as liberal). In addition to a permissive joinder provision like the Federal Rules, West Virginia also has a mandatory joinder provision. *See* W. VA. R. CRIM. P. 8(a)(2).

For Wisconsin, see WIS. STAT. § 971.12(1) (2019); State v. Salinas, 879 N.W. 609, 618 (Wis. 2016) (stating that its "joinder statute is to be broadly construed in favor of initial joinder"); Francis v. State, 273 N.W. 3d 310, 312 (Wis. 1979) ("A broad interpretation of the joinder provision is consistent with the purposes of joinder, namely trial convenience for the state and convenience and advantage to the defendant.")

For Wyoming, see WYO. R. CRIM. P. 8(a). The comments to Wyoming's Rule 8 say to compare the Rule to Federal Rule 8. *Compare* WYO. R. CRIM. P. 8 *with* FED. R. CRIM. P. 8(a). *See* Duke v. State, 99 P.3d 928, 945 (Wyo. 2004) ("As a general rule, joinder of offenses is proper absent compelling reasons for severance."); Bell v. State, 994 P.2d 947, 955 (Wyo. 2000) ("Joint trials serve the public interest by expediting the administration of justice, reducing docket congestion, conserving judicial time as well as that of jurors along with avoiding the recall of witnesses to duplicate their

performances."); Bishop v. State, 687 P.2d 242, 247 (Wyo. 1984); Jasch v. State, 563 P.2d 1327, 1335 (Wyo. 1977).

2. States with Similar Language to "Felonies or Misdemeanors or Both"

For Maine, see ME. R. UNIFIED CRIM. P. 8(a); State v. Lemay, 46 A.3d 1113, 1118 (Me. 2012) ("The trial court is given 'wide discretion' in determining whether to join charges for trial, ... We interpret Rule 8(a) broadly and will uphold joinder if the 'the offenses charged are connected in any reasonable manner.'" (quoting State v. Pierce, 770 A.2d 630, 634 (Me. 2001))). Maine's Rule 8 does not contain the "felonies or misdemeanors or both" language. *Compare* ME. R. UNIFIED CRIM. P. 8, *with* FED. R. CRIM. P. 8. Instead, it contains the phrase "whether of the same class or different classes," which has the same effect. *See* ME. R. UNIFIED CRIM. P. 8(a).

For Missouri, see MO. SUP. CT. R. 23.05; MO. REV. STAT. § 545.140 (2019); State v. McKinney, 314 S.W. 3d 339, 341 (Mo. 2010) ("Liberal joinder of criminal offenses is favored."); State v. Morrow, 968 S.W. 2d 100, 109 (Mo. 1998); State v. Simmons, 815 S.W. 2d 426, 428 (Mo. 1991). Missouri's Court Rule 23.05 states that "[a]ll offenses" may be joined and the 1979 Committee Note indicates that the Rule should be compared to Federal Rule 8(a). MO. SUP. CT. R. 23.05. Missouri's revised statute includes "infraction" as a type of offense that may also be joined with felonies or misdemeanors. § 545.140.

For Nevada, see NEV. REV. STAT. § 173.115 (2019); Weber v. State, 119 P.3d 107, 119–21 (Nev. 2005) (upholding the death penalty sentence in a case where the defendant was charged with seventeen joined offenses with no discussion of the potential sentences of the offenses when addressing joinder). Nevada's joinder rule, in line with its offense structure, adds the word "gross" before "misdemeanors" in its "felonies or misdemeanors or both" language. *See* § 173.115.

For North Dakota, see N.D. R. CRIM. P. 8; State v. Wamre, 599 N.W. 2d 268, 279 (N.D. 1999) ("The purpose of N.D.R.Crim.P. 8 is to provide judicial convenience and economy."); State v. Neufeld, 578 N.W. 2d 536 (N.D. 1998). North Dakota's joinder rules also allow for "infractions" to be joined with felonies, misdemeanors, or both. N.D. R. CRIM. P. 8.

For Pennsylvania, see PA. R. CRIM. P. 563. Pennsylvania's joinder rule allows for the joinder of "[t]wo or more offenses, of any grade, ..." PA. R. CRIM. P. 563.

For Virginia, see VA. SUP. CT. R. 3A:6(b); Walker v. Commonwealth, 770 S.E.2d 197, 200 (Va. 2015) (stating that the Court "perceive[s] the similarities between Rule 3A:6(b) and Federal Rule of Criminal Procedure 8(a)" and positively referencing federal interpretations). Virginia's joinder

provision reads that "[t]wo or more offenses, any of which may be a felony or misdemeanor, . . ." may be joined. VA. SUP. CT. R. 3A:6(b).

3. States with Language Different From "Felonies or Misdemeanors or Both"

For Arizona, see ARIZ. R. CRIM. P. 13.3. Arizona's joinder provision does not contain the "felonies or misdemeanors or both" language, but still reads to allow joinder of all types of offenses. *See* ARIZ. R. CRIM. P. 13.3; State v. Goudeau, 372 P.3d 945, 970 (Ariz. 2016) (upholding the joinder of seventy-four felonies, nine of which were first-degree murder charges for which the defendant was sentenced to death).

For California, see CAL. PENAL CODE § 954 (2019); People v. Landry, 385 P.3d 327, 351 (Cal. 2016) (affirming a death sentence and joinder of multiple offenses with different potential sentences). California's joinder statute differs from the language of Federal Rule 8(a). Section 954 allows for the joinder of all types of offenses "connected together in their commission," but the provision contains a "same class of crimes or offenses" limitation for "different statements of the same offense or two or more different offenses." PENAL § 954. The language difference might be attributed to the section's 1872 enactment date and 1915 substantial amendment date, which both occurred before the Federal Rules' enactment. *See generally* Mark R. McDonald, *Prejudicial Joinder under California Penal Code Section 954: Judicial Economy at a Premium*, 20 PAC. L.J. 1235 (1989) (discussing California's section 954 and concluding that California's legislature should amend the state's joinder regime to protect a defendant's right to a fair trial).

For Connecticut, see CONN. R. SUPER. CT. § 36-21; CONN. GEN. STAT. ANN. § 54-57 (2020). Despite the somewhat familiar language of CONN. R. SUPER. CT. § 36-21, Connecticut's joinder regime has been confused over recent history. *See* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1392 n.250 (2018) (discussing the confusion and complication surrounding Connecticut's joinder regime). Even with the lack of clarity, the state allows the joinder of offenses regardless of the punishment associated with the offenses. *See* State v. Payne, 34 A.3d 370, 379–81 (Conn. 2012) (revoking a previous "blanket presumption in favor of joinder," but still upholding a joinder of a felony murder offense with other, lesser offenses because an error by the trial court was harmless).

For Delaware, see DEL. SUPER. CT. R. CRIM. P. 8(a); Weddington v. State, 545 A.2d 607, 615 (Del. 1988) ("The rule of joinder 'is designed to promote judicial economy and efficiency, ...'" (quoting Mayer v. State, 320 A.2d 713, 717 (Del. 1974) *rev'd on other grounds*)). Delaware's Rule 8

does not contain the "felonies or misdemeanors or both" language but still reads to allow for the joinder of all types of offenses. DEL. SUPER. CT. R. CRIM. P. 8(a).

For Georgia, see GA. CODE ANN. § 16-1-7 (2019); Dingler v. State, 211 S.E.2d 752, 753 (Ga. 1975). Georgia's joinder provision primarily concerns itself with multiple prosecutions for the same crime. *See* § 16-1-7. When addressing joinder, although not using the "felonies or misdemeanors or both" language, the provision reads that the defendant may be prosecuted for each crime that her conduct falls within. *See* § 16-1-7. Further, in *Dingler v. State*, the Court adopted the ABA Standards joinder rule, which does contain the "felonies or misdemeanors or both" language. *Dingler*, 211 S.E.2d at 753.

For Hawaii, see HAW. R. PENAL P. 8; HAW. REV. STAT. ANN. §§ 701-109, 806-22 (2019). Hawaii's Rule 8 does not contain the "felonies or misdemeanors or both" language, but still reads to allow for the joinder of all types of offenses. HAW. R. PENAL P. 8. Hawaii's Criminal Code joinder provision does not track the language of the Federal Rules. *Compare* § 806-22, *with* FED. R. CRIM. P. 8. Hawaii case law, however, has made clear that the Federal Rules guide analysis of the two joinder provisions. *See* State v. Matias, 550 P.2d 900, 901–02 (Haw. 1976) (turning on Rule 14 but citing both HAW. R. PENAL P. 8 and HAW. R. PENAL P. 14 and stating that Hawaii's Rules are derived from the Federal Rules).

For Indiana, see IND. CODE § 35-34-1-9 (2019); Smoote v. Indiana, 708 N.E.2d 1, 2 (Ind. 1999) (upholding the joinder of a murder charge and a robbery charge). Despite not containing the "felonies or misdemeanors or both" language, Indiana's joinder provision still allows for the joinder of all types of offenses, no matter the punishment. *See* § 35-34-1-9; Hahn v. State, 67 N.E.3d 1071, 1082–84 (Ind. Ct. App. 2016) (discussing joinder of offenses in case where joined offenses have differing levels of punishment).

For Iowa, see IOWA CT. R. 2.6. Iowa's Rule 2.6 allows joinder for "[t]wo or more indictable public offenses . . . when alleged and prosecuted contemporaneously, ..." IOWA CT. R. 2.6(1). Iowa's joinder rule also contains the following: "Where a public offense carries with it certain lesser included offenses, the latter should not be charged, and it is sufficient to charge that the accused committed the major offense." IOWA CT. R. 2.6(1). This provision addresses instances where a defendant may be guilty of lesser degrees of one particular offense; prosecutors may still join two offenses with differing punishment levels in the same charging document. *See* IOWA CT. R. 2.6(1).

For Massachusetts, see MASS. R. CRIM. P. 9; Commonwealth v. Gaynor, 820 N.E.2d 233, 247–48 (Mass. 2005) (upholding the joinder of multiple aggravated rape and murder offenses). Massachusetts's regime allows for

joinder of "related offenses," which can be characterized by the common temporal and causal connections of offenses that most other jurisdictions have. *See* MASS. R. CRIM. P. 9. Despite the comments to Massachusetts's joinder rule suggesting that Federal Rule 8 served as a source, "[t]he language is drawn largely from the Uniform Rules." MASS. R. CRIM. P. 9. Even with a different source, the Massachusetts Rule allows for the joinder of offenses with different levels of punishment. *See* MASS. R. CRIM. P. 9.

For Michigan, see MICH. CT. R. 6.120. Despite having language differing from the Federal Rules, the Michigan rule still allows for prosecutors to join "any two or more offenses." MICH. CT. R. 6.120(A).

For Minnesota, see MINN. R. CRIM. P. 17.03; State v. Profit, 591 N.W.2d 451, 459 (Minn. 1999) (upholding the joinder of two counts of first-degree murder with other, less serious offenses). Despite having language differing from the Federal Rules, the Minnesota rule states, plainly and simply, that "[w]hen the defendant's conduct constitutes more than one offense, each offense may be charged in the same charging document in a separate count." MINN. R. CRIM. P. 17.03.

For New Hampshire, see N.H. R. CRIM. P. 20. New Hampshire's regime allows for joinder of "related offenses," which has been defined as "those that are based upon the same conduct, upon a single criminal episode, or upon a common plan," which resembles the limitations adopted in other jurisdictions. State v. Ramos, 818 A.2d 1228, 1230 (N.H. 2001); *see also* N.H. R. CRIM. P. 20. New Hampshire allows offenses to be joined no matter the level of potential punishment. *See* N.H. R. CRIM. P. 20. Further, New Hampshire requires joinder in some instances. *See* N.H. R. CRIM. P. 20(a)(4).

For New Jersey, see N.J. CT. R. 3:7-6; State v. Long, 575 A.2d 435 (N.J. 1990), *rev'd on other grounds* (upholding the joinder of a capital offense with a noncapital offense). New Jersey's joinder rule does not contain the "felonies or misdemeanors or both" language, but still reads to allow for the joinder of all types of offenses. N.J. CT. R. 3:7-6.

For New York, see N.Y. CRIM. PROC. LAW § 200.20 (2019). Despite the difference in language from the federal joinder regime, New York's joinder rule still allows for the joinder of all types of offenses no matter the potential punishment, even "petty offenses." CRIM. PROC. § 200.20.

For Oklahoma, see OKLA. STAT. tit. 22, §§ 404, 436 (2019); Glass v. State, 701 P.2d 765, 768 (Okla. 1985); Note, *Criminal Procedure: Joinder of Offenses in Oklahoma A Catch in Title 22*, 27 OKLA. L. REV. 499 (1974). Despite Oklahoma's unique joinder history, Oklahoma allows the joinder of all offenses no matter the potential punishment of the offenses. *See, e.g.*, Holtzclaw v. State, 448 P.3d 1134, 1144–45 (Okla. Ct. App. 2019).

For Oregon, see OR. REV. STAT. § 132.560 (2019). Oregon's joinder statute's language is different from the Federal Rules. *See* § 132.560. Further, the general rule in Oregon is that a charging instrument "must charge but one offense," but allows for the joinder of multiple offenses as an exception. § 132.560. The rule still reads to allow the joinder of all types of offenses, regardless of punishment. *See* § 132.560; State v. Taylor, 434 P.3d 331 (Or. 2019).

For South Carolina, see State v. Simmons, 573 S.E.2d 856, 860–61 (S.C. Ct. App. 2002). Despite only addressing joinder in the context of whether the defendant's conduct is temporally connected or similar in nature, nothing in South Carolina's jurisprudential joinder regime appears to structurally deny the possibility of joining offenses of differing levels of punishment, and South Carolina case law supports the proposition that the decision to join offenses is left to the discretion of the trial court. *See generally* State v. Blakely, 742 S.E. 2d 29 (S.C. Ct. App. 2013); State v. Hinson, 172 S.E. 2d 548, 551 (S.C. 1970); State v. Evans, 99 S.E. 751, 751 (S.C. 1919).

For Tennessee, see TENN. R. CRIM. P. 8; State v. Carruthers, 35 S.W. 3d 516, 573 (Tenn. 2000) (upholding the joinder of multiple offenses and death sentence for one defendant and stating, "The purpose of Rule 8 is to promote efficient administration of justice . . . ."). Despite the difference in language from the federal joinder regime, Tennessee still allows the joinder of all offenses no matter the potential punishment and even has mandatory joinder in some instances. *See* TENN. R. CRIM. P. 8.

For Texas, see TEX. PENAL CODE § 3.02 (2019); TEX. CODE CRIM. PROC. art. 21.24 (2019). Texas's joinder regime is different from that of the other jurisdictions' regimes because it generally allows the defendant a universal right of severance. *See* PENAL § 3.04. As one commentator notes, the joinder regime bears resemblance to the reform proposals of Michael L. Seigel & Christopher Slobogin. *See* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1322 n.56 (2018) (discussing Texas's provisions similarities to proposals in Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN. ST. L. REV. 1107, 1128 (2005)). Even though the defendant may receive severance in most instances sought, the defendant forfeits the guarantee of concurrent sentences of the crimes. *See* PENAL § 3.04(b). Further, Texas prosecutors still maintain the power to join any offenses at the outset, no matter the level of potential punishment. *See generally*. PENAL § 3.02, 3.04; CRIM. PROC. art. 21.24.

B. STATES' SEVERANCE PROVISIONS

For Alabama, see ALA. R. CRIM. P. 13.4; Tariq-Madqun v. State, 59 So. 3d 744, 749 (Ala. Crim. App. 2010) ("We review a trial court's ruling on a motion to sever for an abuse of discretion."); Minnis v. State, 690 So. 2d 521, 524–25 (Ala. Crim. App. 1996) ("It is only the most compelling prejudice, against which the trial court will not be able to afford protection, that will be sufficient to show the court abused its discretion in not granting a severance." (citing United States v. Perez, 489, F.2d 51, 65 (5th Cir. 1973), *cert. denied*, 417 U.S. 845 (1974)); Summerlin v. State, 594 So. 2d 235, 236 (Ala. Crim. App. 1991) ("The granting of a severance rests within the discretion of the trial court and its refusal to sever counts . . . will only be reversed for a clear abuse of discretion.").

For Alaska, see ALASKA R. CRIM. P. 14; Montes v. State, 669 P.2d 961, 966 (Alaska Ct. App. 1983) ("[D]enial of a motion for severance under Criminal Rule 14 will be reversed only when the court has abused its discretion and a showing of prejudice to the defendant has been made." (first citing Hawley v. State, 614 P.2d 1349, 1360 (Alaska 1980); and then citing Catlett v. State, 585 P.2d 553, 556 (Alaska 1978))).

For Arizona, see ARIZ. R. CRIM. P. 13.4; State v. Prince, 61 P.3d 450, 453 (Ariz. 2003) ("The trial court has broad discretion in such matters. Its decision will not be disturbed absent a clear abuse of such discretion." (citing State v. Walden, 905 P.2d 974, 984 (Ariz. 1995))); State v. Murray, 906 P.2d 542, 558 (1995) ("When a defendant challenges a denial of severance on appeal, he 'must demonstrate compelling prejudice against which the trial court was unable to protect.'" (quoting State v. Cruz, 672 P.2d 470, 473 (Ariz. 1983))).

For Arkansas, see ARK. R. CRIM. P. 22.2; Holsombach v. State, 246 S.W.3d 871, 879 (Ark. 2007) (stating, while affirming the consolidation of a capital murder offense, an attempted capital murder offense, a kidnapping offense, and an aggravated robbery offense, that "[j]oinder, consolidation, and severance of indictments for trial are procedural matters . . . . Granting or refusing a severance is a matter within the discretion of the trial court." (first citing Owen v. State, 565 S.W.2d 607, 611–12 (Ark. 1978); and then citing Passley v. State, 915 S.W.2d 248, 251–52 (Ark. 1996))). In addition, in Arkansas, a defendant has an absolute right of severance when offenses are solely joined "on the ground that they are of same or similar character." *Passley*, 915 S.W.2d at 251 (citing Clay v. State, 886 S.W.2d 608 (Ark. 1994)). *See also* ARK. R. CRIM. P. 22.2(a) ("Whenever two (2) or more offenses have been joined for trial solely on the ground that they are of the same or similar character and they are not part of a single scheme or plan, the defendant shall have a right to a severance of the offenses.").

For California, see CAL. PENAL CODE § 954 (2020); People v. Landry, 385 P.3d 327, 351 (Cal. 2016) ("Contrary to defendant's argument, we do not apply a heightened standard in assessing severance issues in capital cases.").

For Colorado, see COLO. R. CRIM. P. 14; People v. Raehal, 401 P.3d 117, 121 (Colo. App. 2017) ("We review a decision concerning the joinder of separate charges for an abuse of discretion. An abuse of discretion occurs when the joinder causes actual prejudice . . . ." (first citing People v. Curtis, 350 P.3d 949 (Colo. App. 2014); and then citing People v. Gregg, 298 P.3d 983, 985–86 (Colo. App. 2011))).

For Connecticut, see CONN. R. SUPER. CT. § 41-18; State v. Payne, 34 A.3d 370, 379 (Conn. 2012) (revoking a previous "blanket presumption in favor of joinder," but still upholding a joinder of a felony murder offense with other, lesser offenses because an error by the trial court was harmless).

For Delaware, see DEL. SUPER. CT. R. CRIM. P. 14; Lampkins v. State, 465 A.2d 785, 794 (Del. 1983) (deciding on a severance of defendant's issue, stating that "[severance] is a matter within the sound discretion of the Trial Court; and the defendant has the burden of demonstrating 'substantial injustice' and unfair prejudice." (citing Bates v. State, 386 A.2d 1139, 1142 (Del. 1978))).

For Florida, see FLA. R. CRIM. P. 3.152 (2019); Fotopoulos v. State, 608 So. 2d 784, 790 (Fla. 1992) ("A defendant also is entitled to severance of properly joined related offenses upon a showing that such is necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. However, grant a severance is largely a matter within the trial court's discretion.") (citations omitted); Rodriguez v. State, 919 So. 2d 1252 (Fla. 2005) (finding that offenses were properly joined and even if defendant would have filed motion to sever, the motion would have most likely failed).

For Georgia, see GA. CODE ANN. § 16-1-7(c) (2020); Dingler v. State, 211 S.E.2d 752, 753 (Ga. 1975) ("Necessarily, then, severance in this particular kind of circumstance lies within the sound discretion of the trial judge since the facts in each case are likely to be unique.").

For Hawaii, see HAW. R. PENAL P. 14; HAW. REV. STAT. ANN. § 806-22 (2020); State v. Balanza, 1 P.3d 281, 290–91 (Haw. 2000) ("The decision to sever is in the sound discretion of the trial court; a defendant is not entitled to a severance as a matter of right." (citing State v. Matias, 550 P.2d 900, 902 (Haw. 1976))).

For Idaho, see IDAHO CRIM. R. 14; State v. Abel, 664 P.2d 772, 774 (Idaho 1983) (positively referencing federal severance jurisprudence and stating that motions for severance "are directed to the trial court's discretion.").

For Illinois, see 725 ILL. COMP. STAT. ANN. 5/114-8 (2019); People v. Fleming, 14 N.E.3d 509, 517 (Ill. App. Ct. 2014) ("The trial court has broad discretion to sever, and, as a reviewing court, we affirm unless that decision constitutes an abuse of discretion. A trial court abuses its discretion where its decision is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the trial court's view." (first citing People v. Patterson, 615 N.E.2d 11 (Ill. App. Ct. 1993); and then citing People v. Illgen, 583 N.E.2d 515 (Ill. 1991)).

For Indiana, see IND. CODE § 35-34-1-11 (2020).

For Iowa, see IOWA CT. R. 2.6; State v. Elston, 735 N.W.2d 196, 199 (Iowa 2007) ("To prove the district court abused its discretion in refusing to sever charges, [the defendant] bears the burden of showing prejudice resulting from joinder outweighed the State's interest in judicial economy." (citing State v. Oetken, 613 N.W.2d 679, 689 (Iowa 2000))).

For Kansas, see State v. Shaffer, 624 P.2d 440, 443 (Kan. 1981) ("When joinder of offenses is proper . . . a motion for severance rests largely in the sound discretion of the trial court and severance may be ordered to prevent prejudice and manifest injustice to the defendant. The accused's election to testify on some but not all of the charges at trial does not automatically require a severance. Whether there has been prejudicial joinder involves weighing prejudice incurred by defendant because of said joinder against judicial economy resulting from a joint trial plus any other considerations which militate against severance." (first citing State v. Howell, 573 P.2d 1003 (1977); then citing United States v. Forrest, 623 F.2d 1107, 1115 (5th Cir. 1980); and then citing United States v. Cuesta, 597 F.2d 903, 919 (5th Cir. 1979), *cert. denied* 444 U.S. 964 (1979))).

For Kentucky, see KY. R. CRIM. P. 8.31; Peacher v. Commonwealth, 391 S.W.3d 821, 839 (Ky. 2013) ("Only if the defendant can show that he was thus actually prejudiced by an erroneous refusal to sever is he entitled to appellate relief." (citing Rearick v. Commonwealth, 858 S.W.2d 185, 188 (Ky. 1993); United States v. Lane, 474 U.S. 438, 438–39 (1986) (holding that misjoinder of offenses under the Federal Rules of Criminal Procedure 8(b) warrants appellate relief only upon a showing of actual prejudice))).

For Maine, see ME. R. UNIF. CRIM. P. 8 (2019); State v. Lemay, 46 A.3d 1113, 1119 (Me. 2012) ("We construe Rule 8(d) liberally in order to adequately protect the defendant from undue prejudice. Nonetheless, we review the court's decision to deny a motion for severance for an abuse of discretion and will not vacate a decision to deny a motion 'unless the case is one in which the potential for confusion or prejudice is obviously serious.'" (quoting and citing State v. Pierce, 770 A.2d 630, 634–36 (Me. 2001))); State v. Rich, 395 A.2d 1123, 1128 (Me. 1978) ("The court has wide discretion in

deciding such matters, and its decision is not grounds for new trial unless prejudice and abuse of discretion are shown.") (citation omitted).

For Maryland, see MD. R. 4-253 (2019).

For Massachusetts, see MASS. R. CRIM. P. 9; Commonwealth v. Moran, 422 N.E.2d 399, 406 (Mass. 1982) (deciding a joinder-of-defendants issue, but likening the Massachusetts severance provision to the federal severance provision) ("[Massachusetts Rule of Criminal Procedure 9] generally tracks Rule 14 of the Federal Rules of Criminal Procedure.").

For Michigan, see MICH. CT. R. 6.120; People v. Tobey, 257 N.W.2d 537 (Mich. 1977); People v. Abraham, 662 N.W.2d 836, 842 (Mich. Ct. App. 2003). While Michigan's Rule 6.120 provides for a universal right of severance, it only does so when the joined offenses are "unrelated," that is, not connected by one of the linking characteristics of joined offenses. *See* MICH. CT. R. 6.120. Properly joined, or "related," offenses may still only be severed "when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense." *Id.*

For Minnesota, see MINN. R. CRIM. P. 17.03; State v. Kendell, 723 N.W.2d 597, 608 (Minn. 2006) ("Rule 17.03 requires severance of offenses, even related offenses, if severance is 'appropriate to promote a fair determination of the defendant's guilt'—that is, if joinder would unfairly prejudice the defendant." (first citing MINN. R. CRIM. P. 17.03 3(1)(b); then citing State v. Profit, 591 N.W.2d 451, 458–59 (Minn. 1999); and then citing State v. White, 292 N.W.2d 16, 18 (Minn. 1980))).

For Mississippi, see MISS. R. CRIM. P. 14.3.

For Missouri, see MO. SUP. CT. R. 24.07; State v. Morrow, 968 S.W.2d 100, 109 (Mo. 1998) ("The decision regarding severance is left to the sound discretion of the trial court." (citing State v. McCrary, 621 S.W.2d 266, 272 (Mo. 1981) (en banc))).

For Montana, see MONT. CODE ANN. § 46-13-211 (2019); State v. Southern, 980 P.2d 3, 8 (Mont. 1999) (explaining that a criminal defendant has the burden of proving that severance "is necessary to prevent unfair prejudice"); State v. Richards, 906 P.2d 222, 226 (Mont. 1995); State v. Martin, 926 P.2d 1380, 1384–85 (Mont. 1996); State v. Slice, 753 P.2d 1309, 1310–11 (Mont. 1988).

For Nebraska, see NEB. REV. STAT. § 29-2002 (2019); State v. Knutson, 852 N.W.2d 307, 315–18 (Neb. 2014) (stating that the Federal Rule of Criminal Procedure 14(a) is "the federal equivalent" to Nebraska's severance provision and looking to federal case law for guidance on when to grant severance); State v. Foster, 839 N.W.2d 783, 795 (Neb. 2013).

For Nevada, see NEV. REV. STAT. § 174.165 (2019); Rimer v. State, 351 P.3d 697, 709–10 (Nev. 2015) ("Like it's federal counterpart [Federal Rule

14(a)], [§] 174.165(1) 'does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion.'" (citing Zafiro v. United States, 506 U.S. 534, 538–39 (1993))); Honeycutt v. State, 56 P.3d 362, 367 (Nev. 2002) ("To require severance, the defendant must demonstrate that a joint trial would be manifestly prejudicial. The simultaneous trial of the offenses must render the trial fundamentally unfair, and hence, result in a violation of due process." (internal quotations omitted)), *overruled on other grounds by* Carter v. State, 121 P.3d 592, 596 (Nev. 2005).

For New Hampshire, see N.H. R. CRIM. P. 20; State v. Ramos, 149 N.H. 118, 119, 121, 127 (N.H. 2003) (creating a new severance rule, by which criminal defendants have a right of severance of "unrelated" offenses, commenting on New Hampshire's limited discretion used in joinder and severance, and discussing other jurisdictions' joinder and severance regimes).

For New Jersey, see N.J. CT. R. 3:15-2; State v. Brown, 784 A.2d 1244, 1258–59 (N.J. 2001) (addressing a case of co-defendants, stating, "When considering a motion to sever, a court must balance the potential prejudice to a defendant against the interest in judicial economy, ... The determination whether to grant a severance was addressed to the trial court's guided discretion."); State v. Brown, 573 A.2d 886, 891 (N.J. 1990) (addressing a case of co-defendants, stating, "The danger by association [of the defendants' charged offenses] that inheres in all joint trials is not in itself sufficient to justify a severance . . . ." (citing State v. Freeman, 312 A.2d 143, 144 (N.J. 1973)).

For New Mexico, see N.M. STAT. ANN. § 5-203 (2019); State v. Garcia, 246 P.3d 1057, 1064 (N.M. 2011) ("The decision to grant a severance motion lies within the trial judge's discretion and will not be overturned on appeal unless the joinder of offenses results in *actual* prejudice against the moving party.") (emphasis in original); State v. Dominguez, 171 P.3d 750, 752–53 (N.M. 2007); State v. Gallegos, 152 P.3d 828, 834 (N.M. 2007); State v. Ramming, 738 P.2d 914, 918–19 (N.M. Ct. App. 1987); State v. Duffy, 967 P.2d 807, 819 (N.M. 1998).

For New York, see N.Y. CRIM. PROC. LAW § 200.20 (2019); People v. Lane, 436 N.E.2d 456, 451 (N.Y. 1982) ("[S]everance will be granted only if he can persuade the court that the severance should be granted 'in the interest of justice and for good cause shown.'") (quoting CRIM. PROC. § 200.20(3)).

For North Carolina, see N.C. GEN. STAT. § 15A-927 (2019); State v. Nelson, 260 S.E.2d 629, 640 (N.C. 1979) (discussing joinder of defendants, stating, "Unless the accused suffered some apparent and palpable injustice in

the trial below, this court will not interfere with the decision of the court on the motion for a severance." (quoting State v. Finley, 24 S.E. 495, 496 (N.C. 1896))).

For North Dakota, see N.D. R. CRIM. P. 14; State v. Purdy, 491 N.W.2d 402, 405–06 (N.D. 1992) ("The defendant bears the burden of demonstrating prejudicial joinder. Bare allegations that a defendant would stand a better chance of acquittal in a separate trial or that there may be some 'spillover effect' from evidence against a codefendant is insufficient to compel severance. We will not set aside a trial court's refusal to grant a separate trial unless the defendant establishes a clear abuse of discretion.") (citations omitted); State v. Dymowski, 459 N.W.2d 777, 779 (N.D. 1990).

For Ohio, see OHIO CRIM. R. 14; State v. Brinkley, 824 N.E.2d 959, 971 (Ohio 2005) ("The defendant, however, bears the burden of proving prejudice and of proving that the trial court abused its discretion in denying severance."); State v. Lott, 555 N.E.2d 293, 298 (Ohio 1990); State v. Torres, 421 N.E.2d 1288, 1290 (Ohio 1981).

For Oklahoma, see OKLA. STAT. tit. 22, § 439 (2019); Neill v. State, 827 P.2d 884, 886 (Okla. Crim. App. 1992) (discussing severance of joined defendants but stating, "The decision to grant or deny severance is left to the sound discretion of the trial court. This Court has recognized that it is in the interest of both justice and economy to jointly charge and try those who have allegedly participated in the same criminal act, and we have urged trial courts to do so whenever possible. Absent an abuse of discretion resulting in prejudice to the appellant, the decision of the trial court will not be disturbed on appeal." (citing Cook v. State, 699 P.2d 653, 658 (Okla. Crim. App. 1985); Menefee v. State, 640 P.2d 1381, 1383 (Okla. Crim. App. 1982); Faubion v. State, 569 P.2d 1022, 1025 (Okla. Crim. App. 1977))).

For Oregon, see OR. REV. STAT. § 132.560 (2019); State v. Meyer, 820 P.2d 861, 863 (Or. Ct. App. 1991) ("In determining whether joinder is allowable, the court must keep in mind that 'the availability of severance under rule 14 [§ 132.560(3)] as a remedy for prejudice that may develop during the trial permits rule 8 [§ 132.560(2)] to be broadly construed in favor of initial joinder." (internal brackets omitted) (citing United States v. Rodgers, 732 F.2d 625, 629 (8th Cir. 1984))).

For Pennsylvania, see PA. R. CRIM. P. 583; Commonwealth v. Melendez-Rodriguez, 856 A.2d 1278, 1282 (Pa. Super. Ct. 2004) (en banc) ("'[A] motion for severance is addressed to the sound discretion of the trial court, and . . . its decision will not be disturbed absent a manifest abuse of discretion.' The critical consideration is whether [the] appellant was prejudiced by the trial court's decision not to sever. [The a]ppellant bears the burden of establishing such prejudice." (citations omitted) (quoting

Commonwealth v. Jones, 610 A.2d 931, 936 (Pa. 1992)) (first citing Commonwealth v. Lopez, 739 A.2d 485, 501 (Pa. 1999); and then citing Commonwealth v. Carroll, 418 A.2d 702, 704 (Pa. Super. Ct. 1980))); Commonwealth v. Dozzo, 991 A.2d, 898, 901–02 (Pa. Super. Ct. 2010).

For Rhode Island, see R.I. SUPER. CT. R. CRIM. P. 14; State v. Pereira, 973 A.2d 19, 27–28 (R.I. 2009) ("Rule 14, like Rule 8, protects defendants from prosecutorial harassment and unfair advantage, while at the same time balancing the public's interest in avoiding the cost of repetitive trials. However, severance is not a matter of right, and the determination of whether to sever charges under Rule 14 lies within the sound discretion of the trial justice. Therefore, this court will not disturb a trial justice's decision under Rule 14 absent a clear abuse of discretion . . . . The defendant must show that he did, in fact, suffer real and substantial prejudice.") (internal citations omitted); State v. King, 693 A.2d 658, 663 (R.I. 1997) ("To prevail in demonstrating that a trial justice has abused this discretion, a defendant must show that the trial justice's denial of the motion to sever prejudiced the defendant to such a degree that he or she was denied a fair trial." (quoting State v. Eddy, 519 A.2d 1137, 1140 (R.I. 1987))).

For South Carolina, see State v. Simmons, 573 S.E.2d 856, 860–61 (S.C. Ct. App. 2002). South Carolina case law supports the proposition that the decision to join offenses is left to the discretion of the trial court. *See generally* State v. Blakely, 742 S.E.2d 29, 36 (S.C. Ct. App. 2013); State v. Hinson, 172 S.E.2d 548, 551 (S.C. 1970); State v. Evans, 99 S.E. 751, 751 (S.C. 1919).

For South Dakota, see S.D. CODIFIED LAWS § 23A-11-2 (2019); State v. Dixon, 419 N.W.2d 699, 702–03 (S.D. 1988) (discussing joinder and severance tests in other jurisdictions and stating, "We have interpreted the statutes to mean that the decision not to sever is firmly within the discretion of the trial court and absent a clear showing of prejudice to substantial rights of the defendant, there is no abuse of discretion.").

For Tennessee, see TENN. R. CRIM. P. 14; State v. Shirley, 6 S.W.3d 243, 245 (Tenn. 1999) (clarifying the state's severance jurisprudence and stating that "[f]or the reasons set forth below, we hold that a denial of a severance will only be reversed for an abuse of discretion.").

For Texas, see TEX. PENAL CODE § 3.04 (West 2019). Texas's joinder regime is different from that of the other jurisdictions' regimes because it generally allows the defendant a universal right of severance. *See* PENAL § 3.04. Even though the defendant may receive severance in most instances sought, the defendant forfeits the guarantee of concurrent sentences of the convictions. *See* PENAL § 3.04(b). Further, Texas prosecutors still maintain the power to join any offenses at the outset, no matter the level of potential

punishment, which this Article seeks to address. *See generally* PENAL §§ 3.02, 3.04; TEX. CODE CRIM. PROC. ANN. art. 21.24 (West 2019).

For Utah, see UTAH CODE ANN. § 77-8a-1 (West 2019); State v. Lopez, 789 P.2d 39, 42 (Utah Ct. App. 1990) ("[T]he grant or denial of severance is a matter within the discretion of the trial judge, so we reverse [a denial] only if the trial judge's refusal to sever charges 'is a clear abuse of discretion in that it sacrifices the defendant's right to a fundamentally fair trial.'" (quoting State v. Pierre, 572 P.2d 1338, 1350 (Utah 1997))).

For Vermont, see VT. R. CRIM. P. 14; State v. Venman, 564 A.2d 574, 578 (Vt. 1989) ("In order to obtain a severance, the defendant had to show that the severance was appropriate (before trial) or necessary (during trial) for 'a fair determination of of [sic] the defendant's guilt or innocence of each offense.' V.R.Cr.P. 14(b)(1)(B). The trial court has discretion in making this determination." (citing State v. Chenette, 560 A.2d 365, 370 (Vt. 1989))).

For Virginia, see VA. SUP. CT. R. 3A:10; Goodson v. Commonwealth, 467 S.E.2d 848, 853 (Va. Ct. App. 1996) ("In determining whether a joint trial would prejudice a defendant, the trial court should 'require [t]he party moving for severance [to] establish that actual prejudice would result from a joint trial.'" (quoting United States v. Reavis, 48 F.3d 763, 767 (4th Cir. 1995) *cert. denied* 115 S.Ct. 2597 (1995))).

For Washington, see WASH. SUPER. CT. CRIM. R. 4.4; State v. Bythrow, 790 P.2d 154, 156 (Wash. 1990) ("The failure of the trial court to sever counts is reversible only upon a showing that the court's decision was a manifest abuse of discretion. Defendants seeking severance have the burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy." (citing State v. Philips, 741 P.2d 24, 33 (Wash. 1987) (a case concerning joinder of defendants))); State v. Thompson, 564 P.2d 315, 318 (Wash. 1977); State v. Smith, 446 P.2d 571, 578 (Wash. 1968), *vacated in part*, 408 U.S. 934 (1972), *overruled on other grounds by* State v. Gosby, 539 P.2d 680, 686 (Wash. 1975).

For West Virginia, see W. VA. R. CRIM. P. 14; State v. Milburn, 511 S.E.2d 828, 833 (W. Va. 1998); State v. Penwell, 483 S.E.2d 240, 247 (W. Va. 1996) (reviewing federal authority to decide severance issue); State v. Hatfield, 380 S.E.2d 670, 674 (W. Va. 1988) ("The decision to grant a motion for severance pursuant to [W. VA. R. CRIM. P.] 14(a) is a matter within the sound discretion of the trial court."); State v. Ludwick, 475 S.E.2d 70, 73 (W. Va. 1996) ("Rule 14 of the West Virginia Rules of Criminal Procedure is [modeled] on Rule 14 of the Federal Rules of Criminal Procedure, ...").

For Wisconsin, see WIS. STAT. § 971.12 (2019); State v. Locke, 502 N.W.2d 891, 894 (Wis. 1993) ("A motion for severance is addressed to the

trial court's discretion . . . . An erroneous exercise of discretion, in the balancing of these competing interests, will not be found unless the defendant can establish that failure to sever the counts caused "substantial prejudice." (quoting and citing State v. Hoffman, 316 N.W.2d 143, 157 (Wis. Ct. App. 1982))).

For Wyoming, see WYO. R. CRIM. P. 14; Duke v. State, 99 P.3d 928, 945 (Wyo. 2004) ("Any prejudice caused by the joinder is weighed against the judicial economies created by joinder."); Bell v. State, 994 P.2d 947, 955 (Wyo. 2000); Dorador v. State, 768 P.2d 1049, 1052 (Wyo. 1989); Lee v. State, 653 P.2d 1388, 1390 (Wyo. 1982).

C. JURISDICTIONS' DEATH PENALTY PROVISIONS

1. Jurisdictions with Statutory Authority to Use Death Penalty

For Alabama, see, e.g., ALA. CRIM. CODE §§ 13A-5-2, 13A-5-39 (defining "capital offense" as "[a]n offense for which a defendant shall be punished by a sentence of death or life imprisonment without parole, . . . "), 13A-5-40 (listing nineteen murder crimes that can be capitally charged) (2019).

For Arizona, see, e.g., AZ. REV. STAT. §§ 13-1105 (defining first degree murder); 13-751 (2019) (listing aggravating circumstances that must be proven for death penalty to be imposed).

For Arkansas, see, e.g., ARK. CRIM. CODE §§ 5-10-101 (defining "capital murder"); 5-4-602 (listing procedures governing "a trial of a person charged with capital murder") (2019).

For Delaware, see, e.g., DEL. CODE tit. 11, § 4209 (2019). *But see* Rauf v. State, 145 A.3d 430, 477–79 (Del. 2016) (finding Delaware's existing death penalty provision unconstitutional).

For Florida, see, e.g., FLA. STAT. §§ 775.082(1)(a) ("[A] person who has been convicted of a capital felony shall be punished by death . . . ."); 782.04 (defining murder in the first degree as a capital felony); 921.141 ("Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.") (2019).

For Georgia, see, e.g., GA. CODE § 17-10-30 (2019) (defining those offenses for which the death penalty may be imposed).

For Idaho, see, e.g., IDAHO CODE § 19-2515 (2019) (stating that "a person convicted of murder in the first degree shall be liable for the imposition the penalty of death . . . ").

For Indiana, see, e.g., IND. CODE § 35-50-2-3(b)(1)(A) (2019) (indicating murder may be punished by death).

For Kansas, see, e.g., KAN. STAT. ANN. §§ 21-5401 (defining capital murder); 21-6622 (2019) (discussing sentencing for capital murder).

For Kentucky, see, e.g., KY. REV. STAT. ANN. § 507.020(2) (West 2019) (defining murder as a capital offense).

For Louisiana, see, e.g., LA. REV. STAT. § 14:30(C)(1) (2019) (indicating that district attorney may seek a capital verdict in charge of first-degree murder).

For Mississippi, see, e.g., MISS. CODE § 97-3-19 (2019) (defining crimes that constitute capital offenses).

For Missouri, see, e.g., MO. REV. STAT. § 565.020 (2019) (establishing death penalty as a potential sentence for first-degree murder).

For Nebraska, see, e.g., NEB. REV. STAT. §§ 28-105(1) (defining the sentence for Class I felonies as death); 29-2523(1) (listing aggravating circumstances).

For Nevada, see, e.g., NEV. REV. STAT. §§ 176.025 (discussing death penalty); 200.030(4)(a) (establishing when a person convicted of murder will be punished by death); 200.033 (listing aggravating circumstances).

For North Carolina, see, e.g., N.C. GEN. STAT. § 14-17(1) (2019) (indicating murder in the first degree can be punished by the death penalty).

For Ohio, see, e.g., OHIO REV. CODE § 2929.04 (2019) (defining those aggravating factors which allow for the imposition of the death penalty for aggravated murder).

For Oklahoma, see, e.g., OKLA. STAT. tit. 21, § 701.9(A) (2019) (indicating murder in the first degree may be punished by death).

For Pennsylvania, see, e.g., 18 PA. CONS. STAT. § 1102(a) (2019) (indicating first degree murder may be punished by death).

For South Carolina, see, e.g., S.C. CODE ANN. § 16-3-20(A) (2019) (indicating potential death penalty sentence for murder).

For South Dakota, see, e.g., S.D. CODIFIED LAWS § 23A-27A-4 (2019); *see also* S.D. CODIFIED LAWS ch. 23A-27A (2019).

For Tennessee, see, e.g., TENN. CODE ANN. § 39-13-202(c)(1) (2019) (indicating that the crime of first-degree murder is punishable by death).

For Texas, see, e.g., TEX. PENAL CODE ANN. § 12.31(a) (West 2019) (indicating that "[a]n individual adjudged guilty of a capital felony in a case in which the state seeks the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for life without parole or by death").

For Utah, see, e.g., UTAH CODE ANN. § 76-3-206(2)(a)(i) (West 2019) (defining sentences for capital felonies, one of which is death).

For Wyoming, see, e.g., WYO. STAT. ANN. § 6-2-101(b) (2019) (indicating first-degree murder can be punished by death).

For the federal criminal system, see, e.g., 18 U.S.C. § 3591 (2019) (defining those offenses which may receive a death sentence).

2. States with Moratoriums on the Death Penalty

For California, see, e.g., CAL. PENAL CODE §§ 37 (indicating treason may have a death penalty sentence); 187 (defining first degree murder); 190 (indicating first-degree murder may have a death penalty sentence) (West 2019); Cal. Executive Order N-09-19 (2019) (instituting a moratorium on usage of the death penalty).

For Montana, see, e.g., MONT. CODE ANN. § 45-5-102(2) (2019) (indicating Deliberate homicide shall be punished by death); Tribune Capitol Bureau, *Judge Knocks Down Death Penalty Drug*, GREAT FALLS TRIB. (Oct. 6, 2015, 4:28 PM), https://www.greatfallstribune.com/story/news/2015/10/06/judge-knocks-down-death-penalty-drug/73481198 [https://perma.cc/2Y5K-UA3N].

For Oregon, see, e.g., OR. REV. STAT. § 163.105(1)(a) (2019) (indicating aggravated murder can be punished by death); Tony Hernandez, *Brown to Maintain Death Penalty Moratorium*, OR. LIVE (Jan. 9, 2019), https://www.oregonlive.com/pacific-northwest-news/2016/10/brown_to_maintain_death_penalt.html [https://perma.cc/3NWQ-SCD5].

3. States That Have Abolished the Death Penalty

For Alaska, see, e.g., ALASKA STAT. § 12.55.015 (2019).

For Colorado, see, e.g., 2020 Colo. Sess. Laws 204; Jesse Paul & John Ingold, *Governor Signs Bill Abolishing Colorado's Death Penalty, Commutes Sentences of State's 3 Death Row Inmates*, COLO. SUN (Mar. 23, 2020, 3:53 PM), https://coloradosun.com/2020/03/23/colorado-death-penalty-repeal [https://perma.cc/T27W-J9KV].

For Connecticut, see, e.g., Daniela Altimari, *Without Fanfare, Malloy Signs Bill Abolishing Death Penalty*, HARTFORD COURANT (Apr. 25, 2012), https://www.courant.com/news/connecticut/hc-xpm-2012-04-25-hc-death-penalty-signing-0426-20120425-story.html [https://perma.cc/N95V-ZMGU].

For Hawaii, see, e.g., Haw. Rev. Stat. § 706-656(1) (2019) (indicating that the sentence for "[p]ersons . . . convicted of first degree murder or first degree attempted murder shall be sentenced to life imprisonment without possibility of parole," excluding the death penalty as a punishment)

For Illinois, see, e.g., NPR Staff and Wires, *Illinois Abolishes The Death Penalty*, NPR (Mar. 9, 2011, 1:35 PM), https://www.npr.org/2011/03/09/134394946/illinois-abolishes-death-penalty [https://perma.cc/2ZJ5-3YPT].

For Iowa, see, e.g., IOWA CODE § 902.9 (2019) (describing maximum sentence for felons as ninety-nine years confinement).

For Maine, see, e.g., ME. STAT. tit. 17-A, § 1502 (2019).

For Maryland, see, e.g., Michael Dresser & The Baltimore Sun, *O'Malley Signs Death Penalty Repeal*, BALT. SUN (May 2, 2013, 6:46 PM), https://www.baltimoresun.com/politics/bs-md-death-penalty-bill-sign-20130502-story.html [https://perma.cc/Z5R6-XWWH].

For Massachusetts, see, e.g., Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (1984).

For Michigan, see, e.g., MICH. CONST. art. 4, § 46; MICH. COMP. LAWS § 750.316 (2019).

For Minnesota, see, e.g., Minn. Stat. §§ 609.10, 609.185 (2019); 1911 Minn. Laws ch. 387.

For New Hampshire, see, e.g., Kate Taylor & Richard A. Oppel Jr., *New Hampshire, With a Death Row of 1, Ends Capital Punishment*, N.Y. TIMES (May 30, 2019) https://www.nytimes.com/2019/04/11/us/death-penalty-new-hampshire.html [https://perma.cc/4YGE-57NH].

For New Jersey, see, e.g., Jeremy W. Peters, *Death Penalty Repealed in New Jersey*, N.Y. TIMES (Dec. 17, 2007), https://www.nytimes.com/2007/12/17/nyregion/17cnd-jersey.html [https://perma.cc/M5KE-X7NR].

For New Mexico, see, e.g., N.M. STAT. ANN. § 31-14-1 (2019).

For New York, see, e.g., People v. LaValle, 817 N.E.2d 341, 367 (N.Y. 2004).

For North Dakota, see, e.g., N.D. CENT. CODE § 12-50, *repealed by* N.D. Laws 1973, ch. 116, § 41.

For Rhode Island, see, e.g., 11 R.I. GEN. LAWS § 11-23-2 (2019).

For Vermont, see, e.g., VT. STAT. ANN. tit. 13, § 7101 (2019). Following Furman v. Georgia, 408 U.S. 238, 239–40 (1972), the Vermont statute has never been amended to conform to constitutional requirements.

For Virginia, see, e.g., Hailey Fuchs, *Virginia Becomes First Southern State to Abolish the Death Penalty*, N.Y. TIMES (Mar. 24, 2021), https://www.nytimes.com/2021/03/24/us/politics/virginia-death-penalty.html [https://perma.cc/S4GK-US3A].

For Washington, see, e.g., Seattle Times Editorial Board, *Legislature, Abolish Washington's Death Penalty*, SEATTLE TIMES (Apr. 11, 2019, 2:12

PM), https://www.seattletimes.com/opinion/editorials/legislature-abolish-washingtons-death-penalty [https://perma.cc/P86M-24LE].

For West Virginia, see, e.g., W. VA. CODE § 61-11-2 (2019).

For Wisconsin, see, e.g., WIS. STAT. §§ 939.50(3)(a), 940.01 (2019).