

COMMENT

**Righting Categorical Wrongs: A Holistic Solution to Rule 8(a)'s Same-or-Similar-Character Prong**

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*More than half of federal criminal defendants are charged with multiple offenses in a single indictment. These defendants are more likely to be convicted on at least one charge than defendants who receive separate trials for each charge. Joinder has been both lauded for increasing the efficiency of the federal criminal justice system and criticized for unfairly prejudicing criminal defendants. Federal Rules of Criminal Procedure 8(a) and 14 govern the joinder of offenses in the federal system. Rule 8(a) permits offenses of the “same or similar character” to be joined against a single defendant while Rule 14 allows district courts to sever the offenses if joinder “appears to prejudice a defendant.” The circuit courts have taken divergent views of when offenses are of the “same or similar character” and thus properly joined together. Two general approaches have emerged among the circuits, with roughly half taking a categorical approach to Rule 8(a)'s same-or-similar-character prong, which requires offenses to be simply of “like class.” The remaining circuits, on the other hand, employ a holistic approach. These courts apply multifactor tests to examine the charges for similarity, including whether the offenses are connected by time or evidence and involve similar statutory elements or victims. The holistic approach's more rigorous analysis under the same-or-similar-character prong results in fewer combinations of offenses joined.*

*This Comment resolves the circuit split over the same-or-similar-character prong by examining the history, functions, and purposes of Rules 8(a) and 14. It argues that the holistic approach is superior to the categorical, as it better fulfills the intent of the rules' drafters, better accounts for the procedural and practical realities of the rules, and better meets joinder's efficiency goals while minimizing its risk of prejudice.*

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### INTRODUCTION

A criminal defendant is charged with wire fraud in violation of 18 USC § 1343. As he and his defense attorney prepare for trial, the US Attorney’s Office notifies him that there is reason to believe he has previously committed bankruptcy fraud in violation of 18 USC § 152. The prosecution joins the two charges in a single superseding indictment. The alleged crimes occurred three years apart in different cities, under different circumstances, and involved different victims; in fact, they arise from distinct statutory provisions and must be proved by different elements. Despite their striking dissimilarity, the defendant may be forced to defend against the two charges in a single criminal proceeding.

Rules 8(a) and 14 of the Federal Rules of Criminal Procedure (FRCrP) govern the joinder of offenses. One prong of Rule 8(a) authorizes the joinder of two or more charges in a single indictment if they are of the “same or similar character.”<sup>1</sup> What it means for offenses to be of the “same or similar character” has divided the US courts of appeals. If the criminal defendant is charged in a circuit that uses a strictly categorical approach, which requires that offenses only be of “like class,” then factually dissimilar offenses, as in the example above, may be charged together.<sup>2</sup> By contrast, if the criminal defendant is

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<sup>1</sup> See FRCrP 8(a).

<sup>2</sup> See, for example, *United States v Coleman*, 22 F3d 126, 133 (7th Cir 1994) (“Simply put, if offenses are of like class, although not connected temporally or evidentially, the requisites of proper joinder should be satisfied so far as Rule 8(a) is concerned.”).

charged in a circuit with a holistic approach to Rule 8(a)'s same-or-similar-character prong, the government must show that the alleged offenses are more than just of "like class." These circuits rely on additional considerations to determine whether offenses are of the "same or similar character," including any evidentiary and temporal overlap between the two offenses, or whether the offenses are proven by analogous statutory elements, share a modus operandi, occurred in similar locations, or involve similar victims.<sup>3</sup> All else equal, the holistic-approach circuits undertake a more fact-intensive analysis into whether offenses are of the "same or similar character," which results in fewer combinations of offenses joined than under the categorical approach.<sup>4</sup>

Given that joinder may substantially and unfairly prejudice defendants, the circuit split on the same-or-similar-character prong is troubling.<sup>5</sup> In a joint trial on separate offenses, the jury may struggle to separate the bodies of evidence relating to different crimes and may draw impermissible inferences about the defendant's bad character or propensity to commit crime. The defendant also may be burdened with having to present multiple—and perhaps inconsistent—defenses at once.<sup>6</sup> Furthermore, defendants facing multiple charges are significantly more likely to be convicted on at least one count at trial than defendants facing only one charge.<sup>7</sup>

The circuit split over Rule 8(a)'s same-or-similar-character prong is also concerning in light of joinder's rationale: increasing judicial and prosecutorial efficiency.<sup>8</sup> Joinder is often thought to be more efficient because a single trial on multiple offenses eliminates the need to empanel two juries, recall witnesses, and

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<sup>3</sup> See, for example, *United States v Jawara*, 462 F3d 1173, 1185 (9th Cir 2006), amended, 474 F3d 565, 578 (9th Cir 2007).

<sup>4</sup> See Part II.C.

<sup>5</sup> See, for example, *Old Chief v United States*, 519 US 172, 180 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.>").

<sup>6</sup> See Wayne R. LaFave, et al, 5 *Criminal Procedure* § 17.1(b) at 6–10 (West 4th ed 2015).

<sup>7</sup> See Andrew D. Leipold and Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 Vand L Rev 349, 367 (2006); James Farrin, Note, *Rethinking Criminal Joinder: An Analysis of the Empirical Research and Its Implications for Justice*, 52 L & Contemp Probs 325, 332 (Autumn 1989) ("The empirical data unequivocally show that the probability of a defendant being convicted significantly increases if offenses are joined rather than tried separately.>").

<sup>8</sup> See *Bruton v United States*, 391 US 123, 134 (1968).

spend time presenting the same evidence twice.<sup>9</sup> In practice, however, these benefits are often not fully realized in cases in which offenses are categorically joined under the same-or-similar-character prong. In particular, offenses joined merely because they are of “like class” may be proved with completely separate evidence and witnesses, invalidating much of joinder’s efficiency justification. And the increased threat of prejudice under these circumstances may outweigh any legitimate purpose for the joinder. Holistic-approach circuits, on the other hand, better achieve efficient joinder by requiring that offenses be more closely connected, whether by evidence, time, statutory elements, or modus operandi. And when joined offenses are more closely connected, the prejudices resulting from joinder are more likely justified by the efficiency gains in holding a single trial.

Regardless of the court’s approach to Rule 8(a), a defendant facing multiple charges may make an application under Rule 14 to sever the charges into separate criminal proceedings.<sup>10</sup> To obtain Rule 14 severance, the defendant must show that joinder would cause him prejudice.<sup>11</sup> If he meets this requirement, Rule 14 allows district courts to sever charges properly joined under Rule 8(a). As a result, the categorical-approach courts believe the availability of Rule 14 severance reinforces their more permissive interpretation of Rule 8(a).<sup>12</sup>

But this belief may not be rooted in the realities of Rule 14 severance. The procedural and practical attributes of Rule 14 make it an uncertain remedy against joinder’s prejudice. Not only do district-court judges enjoy significant discretion in deciding whether there is enough prejudice to warrant severance, but even if such prejudice exists, judges may choose alternative remedies to severance, such as instructing the jury to not use evidence of one charge to convict on the other.<sup>13</sup> The holistic-approach courts, on the other hand, acknowledge Rule 14’s

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<sup>9</sup> See *id.*

<sup>10</sup> See FRCrP 14(a) (“If the joinder of offenses . . . appears to prejudice a defendant . . . the court may order separate trials of counts.”).

<sup>11</sup> See FRCrP 14(a).

<sup>12</sup> See, for example, *Coleman*, 22 F3d at 134 (explaining that a categorical approach to the same-or-similar-character prong “makes sense” in light of Rule 14’s authority “for monitoring the continued appropriateness of a joint trial as proceedings go forward”).

<sup>13</sup> See *id.* at 134 n 11 (noting that Rule 14 authorizes courts to provide “whatever other relief justice requires”).

inherent limitations and understand that severance may not be available even in the face of joinder's prejudice.<sup>14</sup>

This Comment analyzes the current circuit split on when two or more offenses are of the "same or similar character" under Rule 8(a). Part I provides background on joinder of offenses in the federal system, its controversial nature, and its effect on criminal trials. Part I also discusses the federal rules that govern joinder and severance—their origin and their application today. Part II outlines the variety of approaches taken by the circuit courts to joinder under Rule 8(a)'s same-or-similar-character prong and examines the underlying motivations and assumptions driving the two most disparate approaches: those of the Seventh and Ninth Circuits. It also compares how these two circuits and their respective district courts have subsequently treated joinder under the same-or-similar-character prong, and it questions whether their approaches adequately address the danger of prejudice that is unjustified by any potential efficiency gains. Finally, Part III offers a solution to the circuit split, arguing that courts should abandon the categorical approach in favor of the holistic. The categorical-approach courts have failed to comply with the original understanding of the federal rules on joinder because their approach leads to additional unjustified and unfair prejudice toward defendants. The holistic approach, in contrast, more fully embodies the principles incorporated into the federal rules and adequately tempers the risks of prejudice while allowing offenses to be joined when efficiencies can be attained.

### I. JOINDER OF OFFENSES IN THE FEDERAL SYSTEM

Joinder of offenses is a contentious mechanism in the federal criminal justice system, justified primarily by the judicial and prosecutorial efficiencies it can afford. Having a single trial on multiple charges saves limited time and resources. Yet joinder may pose a substantial risk of unfair prejudice toward defendants. Courts applying the rules on joinder have struggled to ensure that joinder's efficiency benefits can be realized while minimizing its risk of unfair prejudice.

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<sup>14</sup> See, for example, *Jawara*, 474 F3d at 573 (adopting a holistic approach to the same-or-similar-character prong and cautioning that "Rule 14 should not be viewed as a backstop or substitute for the initial analysis required under Rule 8(a)").

Part I.A discusses the benefits and costs of joinder in federal prosecutions and highlights the general controversy surrounding its use. Part I.B introduces the federal rules governing joinder of offenses and explains these rules' origins before focusing on the most controversial basis for joinder: Rule 8(a)'s same-or-similar-character prong.

#### A. Joinder's Controversy

Joinder has been lauded for fostering trial efficiency and judicial and prosecutorial economy by avoiding "expensive and duplicative multiple trials."<sup>15</sup> The Supreme Court has heralded joinder's ability to "conserve [government] funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial."<sup>16</sup> Under some circumstances, the criminal defendant himself may prefer joinder to avoid the "harassment, delay, trauma, and expense of multiple prosecutions."<sup>17</sup> A single prosecution of multiple offenses also may allow for concurrent sentencing.<sup>18</sup>

Despite these advantages, joint trials present significant risks of unfair prejudice to the defendant. Rather than properly weighing the evidence for each charge, the jury may convict based on the accumulation of evidence specific to each charge or on the impermissible inference of a general criminal disposition.<sup>19</sup> Joinder may also disadvantage defendants who wish to testify regarding one charge but not the other or who need to simultaneously present multiple—and perhaps inconsistent—defenses.<sup>20</sup>

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<sup>15</sup> *United States v Coleman*, 22 F3d 126, 132 (7th Cir 1994), citing *United States v Archer*, 843 F2d 1019, 1021 (7th Cir 1988), and *United States v L'Allier*, 838 F2d 234, 240 (7th Cir 1988). See also *United States v Werner*, 620 F2d 922, 928–29 (2d Cir 1980); Robert O. Dawson, *Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices*, 77 Mich L Rev 1379, 1381–97 (1979).

<sup>16</sup> *Bruton v United States*, 391 US 123, 134 (1968).

<sup>17</sup> 2 ABA *Standards for Criminal Justice*, Commentary on § 13-2.1 (ABA 2d ed 1980).

<sup>18</sup> See 18 USC § 3584 ("If multiple terms of imprisonment are imposed on a defendant at the same time . . . the terms may run concurrently."). See also *United States v Matera*, 489 F3d 115, 124 (2d Cir 2007) (explaining that § 3584 grants the district-court judge "discretion to impose a concurrent, partially concurrent, or consecutive sentence").

<sup>19</sup> See *Coleman*, 22 F3d at 132, citing *Drew v United States*, 331 F2d 85, 88 (DC Cir 1964). See also *United States v Lane*, 474 US 438, 463 (1986) (Brennan concurring in part and dissenting in part) (recognizing that it is "quite easy for the jury to be prejudiced by evidence of other crimes").

<sup>20</sup> See LaFave, et al, 5 *Criminal Procedure* § 17.1(b) at 9 (cited in note 6).

Joinder is a common tactic in the federal system: a study of all federal criminal defendants from 1999 through 2003 found that slightly more than half were charged with two or more offenses in a single indictment.<sup>21</sup> Strikingly, the study found a nine-point disparity in trial conviction rates of those charged with single and joined offenses: the conviction rate for defendants charged with one offense was 76 percent, whereas the conviction rate for defendants with joined offenses was 85 percent.<sup>22</sup> Though the study did not examine the precise cause for this significant discrepancy, it is likely that jury confusion regarding the evidence on separate but similar charges and prejudice resulting from the sheer volume of evidence against the defendants played a role.<sup>23</sup> For example, the jury might “be so impressed with the evidence on counts one and two that it fails to notice that there was insufficient evidence on the very-similar count three.”<sup>24</sup>

## B. The Rules Governing Joinder of Offenses

Rules 8(a) and 14 of the FRCrP govern the joinder of offenses in the federal system. Adopted in 1944, the rules derive from the 1853 federal statute that had previously controlled joinder.<sup>25</sup> The drafters of Rules 8(a) and 14 explained that the rules are a “restatement” of the 1853 statute.<sup>26</sup> Consequently, an understanding of this statute and its application is essential to applying the current rules. Part I.B.1 explains the law that governed federal joinder prior to the adoption of Rules 8(a) and 14. Part I.B.2 discusses how joinder operates today under the rules.

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<sup>21</sup> See Leipold and Abbasi, 59 Vand L Rev at 363–64 (cited in note 7).

<sup>22</sup> Id at 383. The authors controlled for whether the factfinder was a judge or the jury, the seriousness of the crime, the type of crime, the type of lawyer, and the geography. See id at 373–83.

<sup>23</sup> See id at 355–56.

<sup>24</sup> Id at 356.

<sup>25</sup> See Act of Feb 26, 1853, 10 Stat 161, 162, codified at 18 USC § 557 (1940), repealed by Act of June 25, 1948, 62 Stat 683, 830, 832. See also Kevin P. Hein, *Joinder and Severance*, 30 Am Crim L Rev 1139, 1140 (1993).

<sup>26</sup> See FRCrP 8(a), Advisory Committee Note to the 1944 Rule (“This rule is substantially a restatement of existing law, 18 U.S.C. [former] 557.”) (alteration in original); FRCrP 14, Advisory Committee Note to the 1944 Rule (“This rule is a restatement of existing law under which severance and other similar relief is entirely in the discretion of the court.”), citing generally *Pointer v United States*, 151 US 396 (1894), *Pierce v United States*, 160 US 355 (1896), *United States v Ball*, 163 US 662 (1896), and *Stilson v United States*, 250 US 583 (1919).

### 1. Joinder law before 1944.

Before the adoption of Rules 8(a) and 14 in 1944, a federal statute permitted the joinder of offenses in federal prosecutions.<sup>27</sup> When the Supreme Court had occasion to interpret the statute, it recognized the controversial nature of joinder and its significant risks of prejudice toward criminal defendants. The Court articulated a general presumption against the joinder of offenses and established that courts should not sustain instances of joinder that are unfairly prejudicial toward the defendant. To minimize the risk of prejudice, the Court held that the former joinder statute did not permit the government to join wholly unrelated offenses sharing no significant connection. That statute, originally passed in 1853, provided in part:

Whenever there are . . . several charges against any person . . . 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.<sup>28</sup>

Though the statute seemed to broadly allow charges “of the same class of crimes or offences” joined in one indictment, the Court required a close factual and evidentiary connection between the alleged crimes. When it first examined the federal joinder statute in *Pointer v United States*,<sup>29</sup> the Court considered whether it allowed the Government to join two murder charges against a single defendant. The Government alleged the defendant had killed two people “on the same day, in the same county and district, and with the same kind of instrument.”<sup>30</sup> But because the alleged murders were entirely separate acts, the Court first concluded that the charges were neither “the result of one transaction” nor “connected together” within the meaning of the statute.<sup>31</sup>

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<sup>27</sup> Act of Feb 26, 1853, 10 Stat at 162.

<sup>28</sup> Act of Feb 26, 1853, 10 Stat at 162. Rule 8(a)'s drafters largely preserved this structure, allowing joinder when the offenses are “based on the same act or transaction,” are “connected with or constitute parts of a common scheme or plan,” or are of the “same or similar character.” FRCrP 8(a).

<sup>29</sup> 151 US 396 (1894).

<sup>30</sup> Id at 403.

<sup>31</sup> Id at 400.



The *Pointer* Court next considered whether the two charges could be joined under the statute as being of “the same class of crimes.”<sup>32</sup> It explained that, rather than mandating joinder in every case in which offenses are of “the same class,” the 1853 statute allowed courts “to determine whether, in a given case, a joinder of two or more offences . . . is consistent with the settled principles of criminal law.”<sup>33</sup> The Court looked to English and American sources for recognition of certain “settled principles” to guide courts’ joinder analyses and noted a general presumption against joinder: “[U]sually an indictment should not include more than one felony.”<sup>34</sup> That said, the Court conceded joinder “of different felonies, at least of the same class or grade, and subject to the same punishment, is not necessarily fatal to the indictment.”<sup>35</sup> Yet even when joinder is allowed, courts “must not permit the defendant to be embarrassed in his defence.”<sup>36</sup> Courts should sever charges “when it appears from the indictment, or from the evidence,” that the “substantial rights of the accused may be prejudiced” by joinder.<sup>37</sup>

Turning to the facts of the case, the Court noted that the two murders were so closely related “in respect of time, place, and occasion, that it was difficult, if not impossible, to separate the proof of one charge from the proof of the other.”<sup>38</sup> Thus, the Court decided the settled principles of criminal law allowed joinder: “the accused was not confounded in his defense” and “his substantial rights were not prejudiced” by joinder of the charges.<sup>39</sup>

Shortly after deciding *Pointer*, the Court further refined its understanding of the 1853 joinder statute in *McElroy v United States*.<sup>40</sup> The prosecution in *McElroy* charged the defendant with two counts of assault with intent to kill and two counts of arson, which derived from two separate incidents two weeks apart.<sup>41</sup> Echoing *Pointer*, the Court explained that joinder “has been considered so objectionable as tending to confound the accused in

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<sup>32</sup> Id.

<sup>33</sup> *Pointer*, 151 US at 400.

<sup>34</sup> Id at 403.

<sup>35</sup> Id.

<sup>36</sup> Id.

<sup>37</sup> *Pointer*, 151 US at 403.

<sup>38</sup> Id at 404.

<sup>39</sup> Id.

<sup>40</sup> 164 US 76 (1896).

<sup>41</sup> Id at 76–77.

his defence”<sup>42</sup> and concluded that “we do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence and in no sense resulting from the same series of acts.”<sup>43</sup>

Reaching the merits of the case, the Court found the offenses could not be joined under the statute; the offenses were “separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence.”<sup>44</sup> Although the charges were “of the same class of crimes,”<sup>45</sup> the Court required a close temporal, factual, and evidentiary connection before allowing joinder. After *McElroy*, the federal courts followed this lead.<sup>46</sup>

## 2. FRCrP 8(a) and 14.

Since 1944, FRCrP 8(a) and 14 have regulated the joinder of federal offenses. As these rules restate the previous law on joinder, the principles announced in *Pointer* and *McElroy* should continue to inform their application today. Indeed, courts relied on these decisions when applying Rules 8(a) and 14 shortly after their adoption.<sup>47</sup>

Rule 8(a) allows for the joinder of multiple offenses—“whether felonies or misdemeanors or both”—against an individual defendant if one of three conditions is satisfied: the offenses charged must be either (1) “of the same or similar character,” (2) “based on the same act or transaction,” or (3) “connected

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<sup>42</sup> Id at 80.

<sup>43</sup> Id.

<sup>44</sup> *McElroy*, 164 US at 79–80.

<sup>45</sup> Id at 80.

<sup>46</sup> See, for example, *Williams v United States*, 168 US 382, 390–91 (1897) (holding that the 1853 statute permitted the joinder of two separate extortion charges because “the offenses charged were of the same kind, were provable by the same kind of evidence, and could be tried together without embarrassing the accused in making his defense”); *Kidwell v United States*, 38 App DC 566, 570 (1912) (holding that the Government had misjoined two charges of carnal knowledge that stemmed from separate incidents more than six months apart and were not dependent on the same evidence).

<sup>47</sup> See, for example, *United States v Graci*, 504 F2d 411, 413 (3d Cir 1974) (“The Notes of the Advisory Committee on Rule[] 8 . . . indicate that [it is] substantially [a] restatement[] of existing law. Thus the construction . . . announced in *McElroy* . . . still applies.”); *United States v Schennault*, 201 F2d 1, 4 (7th Cir 1952) (“As the advisory committee on rules pointed out, rules 8 and 14 [] are mere restatements of existing law, and owe their origin to the Act of February 26, 1853. . . . Hence it is altogether proper in discussing these rules to cite cases decided under said statute.”). See also *King v United States*, 355 F2d 700, 703 (1st Cir 1966); *Drew*, 331 F2d at 88–89.

with or constitute parts of a common scheme or plan.”<sup>48</sup> These three prongs are similar to the language of the former federal joinder statute.<sup>49</sup>

Even if the offenses are properly joined under Rule 8(a), the trial judge may sever the charges and order separate trials pursuant to Rule 14, which provides: “If the joinder of offenses . . . appears to prejudice a defendant or the government, the court may order separate trials of counts . . . or provide any other relief justice requires.”<sup>50</sup>

*a) Rule 8(a).* Whether joinder is proper under Rule 8(a) is a question of law decided by the district-court judge during the case’s pretrial proceedings.<sup>51</sup> Defendants charged with multiple offenses in a single indictment may bring motions to sever pursuant to Rule 8(a), arguing that none of the rule’s three bases for joinder applies. The district-court judge must make the Rule 8(a) determination solely from information provided by the Government in the indictment.<sup>52</sup> It is therefore incumbent upon the prosecution to ensure that the indictment alleges sufficient facts for the judge to find joinder proper. If offenses are misjoined under Rule 8(a), such that none of the three prongs applies, the offenses must be severed as a matter of law. Whether offenses are properly joined under Rule 8(a) is reviewed de novo by the appellate courts.<sup>53</sup>

Of Rule 8(a)’s three bases for joinder, the same-or-similar-character prong is the most amorphous and controversial.<sup>54</sup> According to Professor Lester Orfield, the drafters of Rule 8(a) substituted “character” for the word “class” (which was used in the 1853 joinder statute) because some courts had interpreted “class” to mean “grade” rather than “nature.”<sup>55</sup> Presumably the

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<sup>48</sup> FRCrP 8(a).

<sup>49</sup> See text accompanying note 27.

<sup>50</sup> FRCrP 14(a).

<sup>51</sup> See *Coleman*, 22 F3d at 134; *United States v Jawara*, 462 F3d 1173, 1179 (9th Cir 2006), amended, 474 F3d 565, 572–73 (9th Cir 2007) (explaining that the validity of joinder under Rule 8(a) is “discern[ed] from the face of the indictment”), citing *United States v Terry*, 911 F2d 272, 276–77 (9th Cir 1990).

<sup>52</sup> See *Jawara*, 474 F3d at 572, quoting *Terry*, 911 F2d at 276; *United States v Barsoum*, 763 F3d 1321, 1337 (11th Cir 2014); *United States v Berg*, 714 F3d 490, 495 (7th Cir 2013), quoting *United States v Lanas*, 324 F3d 894, 899 (7th Cir 2003).

<sup>53</sup> See *United States v Gooch*, 665 F3d 1318, 1325 (DC Cir 2012); *Jawara*, 474 F3d at 572, citing *Terry*, 911 F2d at 276.

<sup>54</sup> See Charles A. Wright, et al, 1A *Federal Practice and Procedure* § 143 at 52–53 (West 2016); Hein, 30 Am Crim L Rev at 1140 n 8 (cited in note 25).

<sup>55</sup> See Lester B. Orfield, *Joinder in Federal Criminal Procedure*, 26 FRD 23, 27 (1961).

drafters wanted courts to focus on the factual circumstances of each offense rather than their degree or grading as either misdemeanor or felony. Despite this change, courts have struggled to determine what it means for offenses to be of the “same or similar character.” In these cases, “line drawing between permissible and improper joinder sometimes becomes imprecise and the standards applied confusing.”<sup>56</sup>

In addition to being vague, the same-or-similar-character prong may fail to advance joinder’s efficiency justifications while elevating “the risk of unnecessary unfairness infiltrating the joint trial.”<sup>57</sup> Strong evidence of one crime may cause the jury to accept weaker evidence of similar crimes, violating the spirit of the rule forbidding character or propensity evidence.<sup>58</sup> And unlike joinder under Rule 8(a)’s other two prongs, offenses of the “same or similar character” might “involve different times, separate locations, and distinct sets of witnesses and victims.”<sup>59</sup> Consequently, there might be “no comparable saving of trial time”<sup>60</sup> as “separate trials would not involve substantial duplication of evidence, repeated burdens on witnesses and victims, and increased drain upon prosecutorial and judicial resources.”<sup>61</sup>

*b) Rule 14.* Unlike Rule 8(a), Rule 14 allows courts to sever offenses at any time during criminal proceedings if joinder appears to prejudice the defendant or government.<sup>62</sup> Under Rule 14, the trial judge may even sever offenses properly joined

<sup>56</sup> *United States v Buchanan*, 930 F Supp 657, 662 (D Mass 1996).

<sup>57</sup> *Coleman*, 22 F3d at 134. See also *United States v Muniz*, 1 F3d 1018, 1023 (10th Cir 1993).

<sup>58</sup> See FRE 404(b)(1).

<sup>59</sup> LaFave, et al, 5 *Criminal Procedure* § 17.1(b) at 9 (cited in note 6).

<sup>60</sup> *Coleman*, 22 F3d at 134, quoting James W. Moore, 8 *Moore’s Federal Practice* § 8.05[4] at 8-23 to -24 (Matthew Bender 2d ed 1991).

<sup>61</sup> LaFave, et al, 5 *Criminal Procedure* § 17.1(b) at 9 (cited in note 6), quoting 2 *ABA Standards for Criminal Justice*, Commentary on § 13-2.1 (cited in note 17). See also *United States v Randazzo*, 80 F3d 623, 627 (1st Cir 1996) (“It is obvious why Congress provided for joinder of counts that grow out of related transactions . . . the reason for allowing joinder of offenses having ‘the same or similar character’ is less clear.”); *United States v Halper*, 590 F2d 422, 430 (2d Cir 1978) (“When all that can be said of two separate offenses is that they are of the ‘same or similar character,’ the customary justifications for joinder (efficiency and economy) largely disappear. . . . At the same time, the risk to the defendant in such circumstances is considerable.”); Note, *Joint and Single Trials under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 *Yale L J* 553, 560 (1965) (recommending “abolition of joinder of similar offenses under Rule 8” given the “lack of utility” and risk of prejudice to the defendant).

<sup>62</sup> See *Schaffer v United States*, 362 US 511, 516 (1960) (“[T]he trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear.”).

under Rule 8(a).<sup>63</sup> The Rule 14 severance decision is not confined to the indictment's contents; the trial judge may rely on any information, including evidence presented at trial, when deciding whether to sever charges under the rule.<sup>64</sup>

Rule 14 is important for its *potential* to resolve whatever prejudices might arise from Rule 8(a) joinder. Once Rule 8(a)'s requirements for joinder are satisfied, severance is entirely controlled by Rule 14.<sup>65</sup> Some courts have construed Rule 8(a) more leniently, knowing that any prejudice stemming from joinder can theoretically be dealt with at a later time on a Rule 14 severance motion.<sup>66</sup>

Yet there are several reasons that, compared to the Rule 8(a) analysis, Rule 14 is a weak safeguard against unfair prejudice. For starters, obtaining severance under Rule 14 is often difficult. Courts generally require defendants to show a high degree of prejudice before severing charges under the rule.<sup>67</sup> The Seventh Circuit, for example, requires defendants seeking Rule 14 severance to establish that they "could not have a fair trial without severance."<sup>68</sup> Likewise, district courts in the Fifth Circuit will grant severance only in cases of "compelling prejudice."<sup>69</sup>

Even if the defendant meets this heavy burden, Rule 14 does not mandate severance; instead, "it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion."<sup>70</sup> Rather than ordering separate trials in the face of substantial prejudice, a trial judge could choose to simply instruct the jury on the dangers of confusing the evidence relating to the separate charges. And unlike a district court's Rule 8(a) decision, which is reviewed *de novo*, appellate courts defer to a district court's Rule 14 decision and will reverse only if there is a

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<sup>63</sup> See *id.* at 515–16.

<sup>64</sup> See *id.*

<sup>65</sup> See, for example, *Lane*, 474 US at 447, citing *Schaffer*, 362 US at 515–16.

<sup>66</sup> See, for example, *Randazzo*, 80 F3d at 627 ("Rule 8(a)'s joinder provision is generously construed in favor of joinder . . . in part because [Rule] 14 provides a separate layer of protection where it is most needed."); *Coleman*, 22 F3d at 134.

<sup>67</sup> See *Zafiro v United States*, 506 US 534, 539 (1993) ("When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary.")

<sup>68</sup> *United States v Hughes*, 310 F3d 557, 563 (7th Cir 2002), quoting *United States v Mohammad*, 53 F3d 1426, 1431 (7th Cir 1995).

<sup>69</sup> *United States v Rice*, 607 F3d 133, 142 (5th Cir 2010).

<sup>70</sup> *Zafiro*, 506 US at 538–39, citing *Lane*, 474 US at 438, 449 n 12. See also *Opper v United States*, 348 US 84, 95 (1954).

clear abuse of discretion.<sup>71</sup> For example, to successfully appeal a district court's denial of Rule 14 severance in the Seventh Circuit, "the defendant bears an *extremely difficult* burden of showing . . . that the district court abused its discretion."<sup>72</sup> Similarly, the Ninth Circuit will not reverse a district court's Rule 14 decision unless the defendant shows that "a joint trial was so manifestly prejudicial as to require the trial judge to exercise his discretion in but one way, by ordering a separate trial."<sup>73</sup> The Second Circuit has put it more bluntly: "A district court's decision to deny severance is *virtually unreviewable* and will be overturned only if a defendant can demonstrate prejudice so severe that his conviction constituted a miscarriage of justice and that the denial of his motion constituted an abuse of discretion."<sup>74</sup> Consequently, a district court's severance decision under Rule 14 is far less likely to be reversed than its Rule 8(a) decision.

Besides Rule 14's exacting severance standards and deferential appellate review, certain practicalities make it difficult to obtain separate trials on joined offenses. As James Farrin notes, "there is never a good time to claim unfair joinder. Before trial, such a claim may seem speculative, during the trial, disruptive, and after the trial, harmless error."<sup>75</sup> The fallacy of sunk costs<sup>76</sup> may explain the hesitancy of district-court judges to sever offenses in the middle of trial, even if it is clear the defendant is substantially prejudiced by the joinder, having already invested time and resources into a lengthy criminal proceeding, including indictment, filing of pretrial motions, jury selection, and evidence presentment. This is unfortunate, as Rule 14 plainly allows for severance in the face of prejudice arising at any point in

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<sup>71</sup> See *Lane*, 474 US at 449 n 12 ("Rule 14's concern is to provide the trial court with some flexibility when a joint trial may appear to risk prejudice to a party; review of that decision is for an abuse of discretion.").

<sup>72</sup> *United States v Moya-Gomez*, 860 F2d 706, 754 (7th Cir 1988) (emphasis added). This is the standard that the Seventh Circuit applied before its decision in *Coleman*, which relaxed the standard. See text accompanying notes 98–99.

<sup>73</sup> *United States v Sullivan*, 522 F3d 967, 981 (9th Cir 2008) (quotation marks omitted).

<sup>74</sup> *United States v Fazio*, 770 F3d 160, 165–66 (2d Cir 2014) (emphasis added and quotation marks omitted).

<sup>75</sup> Farrin, Note, 52 L & Contemp Probs at 334 (cited in note 7). See also Dawson, 77 Mich L Rev at 1410 (cited in note 15).

<sup>76</sup> For a discussion of sunk-cost effects on decisionmaking, see generally Ross B. Steinman and Emily Jacobs, *Sunk Cost Effects on Consumer Choice*, 4 Bus Mgmt Dynamics 25 (May 2015).

the criminal proceeding—even during trial. This, together with the great burden that district courts impose on defendants seeking severance under Rule 14 and the discrepancy in appellate review, renders Rule 14 a shaky defense against joinder’s risks.

## II. CIRCUIT SPLIT: WHEN ARE TWO OR MORE OFFENSES OF THE “SAME OR SIMILAR CHARACTER” TO BE JOINED UNDER RULE 8(A)?

Given the controversial nature of joinder in general and Rule 8(a)’s same-or-similar-character prong in particular, it is especially troubling that for several decades the circuit courts have adopted disparate approaches to determine whether offenses are of the “same or similar character” and, therefore, properly joined under Rule 8(a). Two general approaches have developed: one categorical and one holistic. Part II.A examines the categorical approach while Part II.B discusses the holistic. Part II.C compares how these distinct approaches to the same-or-similar-character prong work in practice. Part II.D then considers how courts operating under the two regimes treat severance under Rule 14 and questions whether their treatment accounts for joinder’s danger of unjustified prejudice.

### A. The Categorical Approach

Though not identical in form, the Second,<sup>77</sup> Seventh,<sup>78</sup> and Eleventh<sup>79</sup> Circuits take a categorical view of Rule 8(a)’s same-or-similar-character prong. These circuits permit more combinations of offenses to be joined in one indictment, even without evidentiary or temporal connections between the charges.<sup>80</sup> These courts share a broad understanding of when offenses are of the

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<sup>77</sup> See, for example, *United States v Werner*, 620 F2d 922, 926 (2d Cir 1980) (deciding that “Rule 8(a) is not limited to crimes of the ‘same’ character but also covers those of ‘similar’ character, which means ‘[n]early corresponding; resembling in many respects; somewhat alike; having a general likeness’”) (alteration in original); *United States v Rivera*, 546 F3d 245, 253 (2d Cir 2008) (expounding on *Werner* and holding that “[s]imilar” charges include those that are “somewhat alike,” or share “a general likeness”).

<sup>78</sup> See, for example, *United States v Coleman*, 22 F3d 126, 134 (7th Cir 1994).

<sup>79</sup> See, for example, *United States v Hersh*, 297 F3d 1233, 1241 (11th Cir 2002) (holding that the same-or-similar-character prong requires only that “the offenses . . . be similar in category, *not* in evidence”).

<sup>80</sup> See Part II.C.

“same or similar character” and, depending on the degree of generality, may join seemingly unrelated offenses.<sup>81</sup>

The Seventh Circuit’s landmark decision in *United States v Coleman*<sup>82</sup> most fully articulated the categorical approach to Rule 8(a)’s same-or-similar-character prong and provided numerous arguments against the holistic alternative. In that case, the Government charged the defendant with four counts of unlawful possession of a firearm under 18 USC § 922(g)(1).<sup>83</sup> Although the counts stemmed from four separate incidents occurring in separate locations over a span greater than two years,<sup>84</sup> the court found them properly joined under the same-or-similar-character prong.<sup>85</sup>

The *Coleman* court concluded: “[I]f offenses are of like class, although not connected temporally or evidentially, the requisites of proper joinder should be satisfied so far as Rule 8(a) is concerned.”<sup>86</sup> The rule’s plain language, the court reasoned, serves as a “clear directive to compare the offenses charged for categorical, not evidentiary, similarities.”<sup>87</sup> Requiring that offenses be of “like class” does not mean that they derive from the same statute, either.<sup>88</sup> Rather, their “correspondence in type is obviously central to their proper joinder.”<sup>89</sup> Similarity of character also “does not significantly depend on [the] separation in time” between two offenses: “Two armored car robberies committed

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<sup>81</sup> The Ninth Circuit has criticized the holistic approach as allowing joinder when some “general thematic commonality” among the charges can be adduced. See *United States v Jawara*, 462 F3d 1173, 1185 (9th Cir 2006), amended, 474 F3d 565, 579 (9th Cir 2007). For example, the situation of “a pharmacist who sells, over the counter, unlawful amounts of products containing pseudoephedrine and then, some years later, buys cocaine from a government informant” involves a common theme of drugs, yet that might not make the offenses of the “same or similar character” under Rule 8(a). *Id.*

<sup>82</sup> 22 F3d 126 (7th Cir 1994).

<sup>83</sup> *Id.* at 128.

<sup>84</sup> *Id.*

<sup>85</sup> See *id.* at 134.

<sup>86</sup> *Coleman*, 22 F3d at 133.

<sup>87</sup> *Id.* at 133 (refuting the Eighth Circuit’s emphasis on both evidentiary similarities and time separation).

<sup>88</sup> *Id.* at 133 n 10.

<sup>89</sup> *Id.*, citing *Werner*, 620 F2d at 926–27. The *Coleman* court did not provide much detail on its understanding of “like class” or “correspondence in type.” But it relied on Second Circuit precedent for its categorical approach, which in turn pointed to a dictionary definition of “similar” to guide an interpretation of the same-or-similar-character prong: “Nearly corresponding; resembling in many respects; somewhat alike; having a general likeness.” *Werner*, 620 F2d at 926 (alteration omitted). However, it is doubtful whether this definition provides much clarity to lower courts deciding whether two offenses are of like class.



months apart are offenses of same or similar character; possessing five kilograms of cocaine and defrauding a bank, even if they occur on the same day, are not.”<sup>90</sup>

The *Coleman* court recognized the dangers inherent in its new categorical approach. Compared to joined offenses arising from “a common scheme or plan” or “the same act or transaction,”<sup>91</sup> “[t]here is no comparable saving of trial time when offenses . . . related only by being of the same type are joined, since the offenses are usually proven by different bodies of evidence.”<sup>92</sup> Moreover, “when totally unrelated, similar offenses are joined, [the] defendant faces a ‘considerable risk’ of prejudice” that arises from “possible jury confusion [or] illegitimate cumulation of evidence.”<sup>93</sup>

Nevertheless, the *Coleman* court cited the respective roles of Rules 8(a) and 14 to justify its categorical approach. Because the district court’s joinder decision under Rule 8(a) is based solely on the face of the indictment and made at the start of the criminal proceeding, an “uncomplicated inquiry and review” is necessary.<sup>94</sup> At that early juncture, *Coleman* explained, the extent of evidentiary or temporal overlap between the alleged offenses might not be entirely clear, which supports a broad construction of the same-or-similar-character prong.<sup>95</sup> Besides, any concerns about the unfairness created by a permissive reading of Rule 8(a) could be mitigated by later opportunities for severance under Rule 14, which provides flexible authority “for monitoring the continued appropriateness of a joint trial as proceedings go forward.”<sup>96</sup> On a motion to sever under Rule 14, the district-court judge may be in a better position to examine “the nature of the evidence and ties between the acts underlying the offenses charged,” and more easily weigh the “actual risk of unfair prejudice that a joint trial would entail.”<sup>97</sup>

To compensate for its highly inclusive same-or-similar-character test, the *Coleman* court refined its standards for Rule 14 severance. Departing from the “extremely difficult burden” traditionally imposed on defendants to show substantial

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<sup>90</sup> *Coleman*, 22 F3d at 133.

<sup>91</sup> FRCrP 8(a).

<sup>92</sup> *Coleman*, 22 F3d at 133–34 & n 9.

<sup>93</sup> *Id.* at 134.

<sup>94</sup> *Id.*

<sup>95</sup> See *id.* at 134.

<sup>96</sup> *Coleman*, 22 F3d at 134.

<sup>97</sup> *Id.*

prejudice,<sup>98</sup> *Coleman* directed that district-court judges “must not shirk their duties under Rule 14”: they must “vigilantly monitor for developing unfairness” and “not hesitate to order severance at any point . . . if the risk of real prejudice grows too large to justify whatever efficiencies a joint trial does provide.”<sup>99</sup> The court recognized that, from the start, this balancing might weigh in favor of severance when offenses of the “same or similar character” are joined. To head off such cases, the court implored district courts to be “especially watchful” for the development of prejudice against the defendant, including “jury confusion, illegitimate cumulation of evidence or other sources of prejudice not worth the reduced efficiency gains of a joint trial.”<sup>100</sup> Finally, *Coleman* emphasized that trial courts have discretion to sever under Rule 14, “not to signal any general disapproval of severance,” but rather to reflect the district court’s unique vantage point at trial.<sup>101</sup> At the same time, the Seventh Circuit observed that most Rule 14 decisions that it reviews are denials to sever, suggesting that courts rarely take advantage of their Rule 14 discretion.<sup>102</sup>

## B. The Holistic Approach

The First,<sup>103</sup> Third,<sup>104</sup> Fourth,<sup>105</sup> Fifth,<sup>106</sup> Eighth,<sup>107</sup> and Ninth<sup>108</sup> Circuits employ a holistic approach to Rule 8(a)’s

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<sup>98</sup> *United States v Moya-Gomez*, 860 F2d 706, 754 (7th Cir 1988).

<sup>99</sup> *Coleman*, 22 F3d at 134. At least one other categorical circuit employs a comparable balancing test when defendants seek to sever offenses of the “same or similar character” under Rule 14. See *United States v Page*, 657 F3d 126, 129 (2d Cir 2011) (“[A] defendant seeking severance must show that the prejudice . . . from joinder is sufficiently severe to outweigh the judicial economy that would be realized by avoiding multiple lengthy trials.”), quoting *United States v Walker*, 142 F3d 103, 110 (2d Cir 1998).

<sup>100</sup> *Coleman*, 22 F3d at 134.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* See also Part I.B.2.b (discussing the weaknesses of Rule 14).

<sup>103</sup> See *United States v Edgar*, 82 F3d 499, 503 (1st Cir 1996) (considering “whether the charges are laid under the same statute, whether they involve similar victims, locations, or modes of operation, and the time frame in which the charged conduct occurred” in determining whether offenses were of the “same or similar character”) (quotation marks omitted). See also *United States v Randazzo*, 80 F3d 623, 628 (1st Cir 1996) (holding that “the extent of common evidence” between counts “plays a role in implementing Rule 8(a)”).

<sup>104</sup> See *United States v Fattah*, 858 F3d 801, 819 (3d Cir 2017); *United States v Thomas*, 610 F2d 1166, 1169 (3d Cir 1979) (concluding that thirty-one charges of misapplication of bank funds were of the “same or similar character” because the defendant “used his position as bank president to . . . misappropriate bank funds” and because “the various counts involved transactions that all occurred within an eighteen-month period of time”).

same-or-similar-character prong. These circuits refuse to permit joinder unless the offenses have some logical connection beyond a generic similarity in type or class. Although there is some diversity in the factors these courts use to determine whether charges are of the “same or similar character,” nearly all consider whether the charges joined involve common evidence and whether the offenses were allegedly committed close in time.

Holistic-approach courts have identified two primary justifications for adopting their respective rules. First, they cite the controversy surrounding the same-or-similar-character prong, recognizing that it might not advance joinder’s efficiency justifications while also amplifying the risk of unfair prejudice. Second, they believe a holistic approach better reflects the relative strengths and weaknesses of Rules 8(a) and 14 to ensure joinder is available when efficient and fair.

The Ninth Circuit has offered a uniquely developed argument for adopting a holistic rule. In *United States v Jawara*,<sup>109</sup> it recognized that Rule 8(a) is “phrased in general terms,” but cautioned it is not “infinitely elastic.”<sup>110</sup> The court criticized the Seventh Circuit’s categorical rule as offering “little guidance in close cases” as “offenses of a ‘like class’ might encompass a host of otherwise unrelated offenses.”<sup>111</sup> Instead, the Ninth Circuit provided six separate factors to determine from the indictment whether offenses joined are of the “same or similar character.”<sup>112</sup> In addition to ensuring that offenses are of “like class,” the court explained, it is “appropriate to consider factors such as the

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<sup>105</sup> See *United States v Hawkins*, 776 F3d 200, 209 (4th Cir 2009) (deciding that a carjacking charge and a felon-in-possession charge were not of the “same or similar character” because, “[w]hile the offenses all involved firearms, albeit different firearms, nothing ties them together except the defendant. There are no additional factors which indicate the offenses were ‘identical or strikingly similar’”).

<sup>106</sup> See *United States v Holloway*, 1 F3d 307, 310–11 (5th Cir 1993) (relying on the facts that the two joined offenses were committed almost two months apart and that different weapons were used during the commission of the two offenses to conclude the offenses were not of the “same or similar character”).

<sup>107</sup> See *United States v Rodgers*, 732 F2d 625, 629 (8th Cir 1984) (holding that “[i]n applying the ‘same or similar character’ standard, [the] court has allowed the offenses to be joined when the two counts refer to the same type of offenses occurring over a relatively short period of time, and the evidence as to each count overlaps”) (quotation marks omitted).

<sup>108</sup> See *Jawara*, 474 F3d at 574.

<sup>109</sup> 462 F3d 1173 (9th Cir 2006), amended, 474 F3d 565 (9th Cir 2007).

<sup>110</sup> *Id* at 573–74, citing *Randazzo*, 80 F3d at 627, and *United States v Cardwell*, 433 F3d 378, 385 (4th Cir 2005).

<sup>111</sup> *Jawara*, 474 F3d at 577.

<sup>112</sup> *Id* at 578.

elements of the statutory offenses, the temporal proximity of the acts, the likelihood and extent of evidentiary overlap, the physical location of the acts, the modus operandi of the crimes, and the identity of the victims.”<sup>113</sup>

Though the *Jawara* court agreed with *Coleman* that the joinder inquiry under Rule 8(a) is necessarily more limited in scope than under Rule 14, it cautioned that “Rule 14 should not be viewed as a backstop or substitute for the initial analysis required under Rule 8(a).”<sup>114</sup> The Ninth Circuit recognized that its exacting requirements for obtaining Rule 14 severance, together with the deferential standard by which it reviews district courts’ Rule 14 decisions, make the rule an inherently weak defense against any resulting prejudice.<sup>115</sup>

Ultimately, the *Jawara* court decided that the joined charges at issue were not of the “same or similar character.” The Government had charged the defendant with “document fraud related to his personal asylum application and conspiracy to commit marriage fraud to avoid the immigration laws.”<sup>116</sup> Applying its six-factor test, the court explained that the charges arose under “two different statutory violations requiring proof of different elements” and from distinct acts “separated by three-and-a-half years.”<sup>117</sup> Additionally, the indictment evinced neither an “evidentiary link” nor a “similar mode of operation” between the crimes, and the crimes did not share geographic locations or victims.<sup>118</sup>

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After *Coleman* and *Jawara*, the Seventh and Ninth Circuits are split not only over the meaning of Rule 8(a)’s same-or-similar-character prong but also over the standard for severing offenses under Rule 14. The *Coleman* court provided a categorical approach to the same-or-similar-character prong. This allows for more instances of joinder under Rule 8(a) because the government must meet fewer requirements to join offenses in a single indictment—there is no need to show the offenses are linked by time or evidence, have similar modi operandi or victims, or

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 573.

<sup>115</sup> See *Jawara*, 474 F3d at 577–78.

<sup>116</sup> *Id.* at 569.

<sup>117</sup> *Id.* at 578.

<sup>118</sup> *Id.* at 579.

even involve similar statutory elements. To compensate, *Coleman* announced a softer standard for Rule 14 that requires district courts to sever offenses when the potential for unfair prejudice outweighs any efficiency gains. In contrast, the Ninth Circuit in *Jawara* adopted a holistic approach to the same-or-similar-character prong, making it more difficult for the government to join offenses in the first place under Rule 8(a) while preserving its requirement that defendants show “manifest prejudice” before a district court may sever under Rule 14.<sup>119</sup> The two courts therefore employed different strategies toward the same goal: allowing joinder when justified by efficiencies while minimizing unfair prejudice to defendants.

### C. The Same-or-Similar-Character Prong in Practice

More than twenty years have passed since the Seventh Circuit decided *Coleman* and more than ten years since the Ninth Circuit decided *Jawara*. Having set out the rules governing joinder and severance from those decisions, this Section details how their disparate approaches to the same-or-similar-character prong have subsequently unfolded.<sup>120</sup> The differences between the holistic and categorical approaches are clearest in cases in which the charges joined are categorically similar but differ in other important ways, such as when they arise from completely separate conduct or involve no temporal or evidentiary overlap. The following case studies demonstrate that it is generally easier to find offenses of the “same or similar character” under the Seventh Circuit’s categorical “same class” test

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<sup>119</sup> See *Jawara*, 474 F3d at 579, citing *United States v Lewis*, 787 F2d 1318, 1321 (9th Cir 1986).

<sup>120</sup> I used Bloomberg Law to search the dockets of each district court within the Seventh and Ninth Circuits using the search terms “Rule 8,” “Rule 14,” and “sever,” limiting the results to criminal cases decided since September 2006, when the Ninth Circuit decided *Jawara*. I reviewed the docket of each case to determine whether either the defendant or the government filed motions contending that the offenses were or were not properly joined under Rule 8(a)’s same-or-similar-character prong, or whether the court decided the offenses had been properly or improperly joined under that prong. For each of these cases, I analyzed the court’s ruling on the defendant’s motions to sever to determine the final resolution of the issue. This research method finds only cases in which a motion was filed on this issue or the court’s ruling was memorialized in a written order. It does not find cases in which the issue of joinder was raised orally and the ruling was not memorialized in any kind of written order. For the cases located by the search method, see Appendix.

compared to the Ninth Circuit's holistic six-factor approach.<sup>121</sup> Yet although the holistic and categorical rules often lead to different outcomes, both require that courts sever categorically distinct charges.

Since September 2006, twenty-two district-court cases in the Seventh Circuit have considered whether offenses were properly joined under the same-or-similar-character prong. Of these, courts found the offenses were misjoined in seven cases. These courts relied on Rule 8(a) to sever categorically distinct charges, including drug distribution and firearms offenses,<sup>122</sup> felon in possession of a firearm and witness intimidation,<sup>123</sup> failure to register under the Sex Offender Registration and Notification Act<sup>124</sup> and attempting to coerce a minor to engage in sexual activity,<sup>125</sup> drug distribution and murder for hire,<sup>126</sup> and possession of child pornography and felon in possession of a firearm.<sup>127</sup>

In the remaining fifteen cases in which the district courts of the Seventh Circuit denied Rule 8(a) severance motions, the courts found the charges to be of "like class," and thus properly joined under the same-or-similar-character prong. These courts permitted joinder even without evidentiary or temporal overlap between the alleged offenses. In one example, a district court determined a pension plan embezzlement charge and bank fraud charges were of "similar character," even though the charges shared no overlapping evidence and arose from separate conduct

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<sup>121</sup> To compare the outcomes in the Seventh and Ninth Circuits, I chose to focus on the qualitative aspects of the individual district-court cases rather than the number of times that courts deny defendants' motions to sever under Rule 8(a). Not only are there issues with drawing statistical inferences from small sample sizes, but the circuits' established joinder rules might influence the decision to bring a Rule 8(a) motion in the first place. In particular, defendants charged within the Seventh Circuit might decide to forgo a Rule 8(a) motion because the joined charges are clearly of "like class" under *Coleman*, even if they share no temporal or evidentiary similarity. These defendants might instead focus their resources on arguing for severance under Rule 14, thus decreasing the number of denials of Rule 8(a) motions within the Seventh Circuit. See, for example, *United States v Rollins*, 301 F3d 511, 517 (7th Cir 2002).

<sup>122</sup> See Order, *United States v Broadway*, Criminal Action No 12-124, \*1 (ND Ind filed Mar 8, 2013).

<sup>123</sup> See Decision and Order Granting Defendant's Motion to Sever, *United States v Salinas*, Criminal Action No 09-185, \*1 (ED Wis filed Sept 25, 2009).

<sup>124</sup> Pub L No 109-248, 120 Stat 590 (2006), codified at 42 USC §§ 16901-17.

<sup>125</sup> See Decision and Order on Defendant's Pretrial Motion to Sever Counts, *United States v Williams*, Criminal Action No 14-109, \*1 (ED Wis filed May 5, 2015).

<sup>126</sup> See Decision and Order on Defendant's Pretrial Motion to Sever Count Eleven, *United States v Ponce De Leon*, Criminal Action No 14-197, \*1 (ED Wis filed Apr 29, 2015).

<sup>127</sup> See Decision and Order on Defendant's Motion to Sever, *United States v Schneider*, Criminal Action No 07-041, \*1 (ED Wis filed June 12, 2007).

fourteen months apart.<sup>128</sup> Another court decided that filing a false tax return and tax evasion were of the “same or similar character” despite the lack of any temporal or evidentiary relation between the offenses.<sup>129</sup>

During the same time period, thirty-two district-court cases in the Ninth Circuit employed the *Jawara* factors to determine whether offenses were properly joined under the same-or-similar-character prong. Courts granted Rule 8(a) motions to sever in twelve cases. As in the Seventh Circuit, these courts easily severed categorically distinct charges, such as conspiracy to possess with intent to distribute narcotics charges from money laundering charges<sup>130</sup> and a felon-in-possession charge from securities fraud and identity theft charges.<sup>131</sup>

These district courts also severed charges under Rule 8(a) that could arguably be considered of “like class” per *Coleman* but were not sufficiently similar under *Jawara*. For example, a district court severed two robbery charges despite similar statutory elements, victims, and *modi operandi*, because they arose from two separate incidents occurring nearly three years apart.<sup>132</sup> Another court severed chemical weapons charges from explosive device charges because they derived from incidents separated by twenty-one months, involved different explosive mechanisms, and did not share similar victims.<sup>133</sup> Likewise, a court found that various fraud charges were misjoined under Rule 8(a) as they related to two distinct schemes involving different victims and no evidentiary overlap.<sup>134</sup> And while both schemes resulted in mail and wire fraud charges, only one resulted in additional charges of money laundering and

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<sup>128</sup> See Order, *United States v Peterson*, Criminal Action No 12-087, \*2–3 (WD Wis filed Mar 5, 2014) (“*Peterson Order*”).

<sup>129</sup> See Opinion, *United States v Fogerson*, Criminal Action No 13-20047, \*6–7 (CD Ill filed May 14, 2014) (applying *Coleman* to decide the charges were “of like class,” because they were “financial crimes involving defrauding the IRS”).

<sup>130</sup> See Notice of Motion and Motion for Severance Pursuant to F.R.Crim.P.8(a); Memorandum of Points and Authorities in Support Thereof, *United States v Grudzien*, Criminal Action No 13-059, \*1, 3 (ND Cal filed Aug 28, 2014).

<sup>131</sup> See Final Report and Recommendation regarding Defendant’s Motion to Sever Counts, *United States v Freriks*, Criminal Action No 10-106, \*1–3, 8 (D Alaska filed Apr 11, 2011).

<sup>132</sup> See Order, *United States v Kincade*, Criminal Action No 15-071, \*1–2 (D Nev filed Oct 21, 2016).

<sup>133</sup> See Report and Recommendations, *United States v Fries*, Criminal Action No 11-1751, \*2 (D Ariz filed Aug 27, 2012).

<sup>134</sup> See Order, *United States v Sarad*, Criminal Action No 11-387, \*1–2 (ED Cal filed Feb 4, 2014).

transacting in criminally derived property.<sup>135</sup> That the elements of these latter charges differed from those of mail and wire fraud “weigh[ed] in favor of finding the joinder improper.”<sup>136</sup>

In the remaining twenty cases, the district courts of the Ninth Circuit decided that the joined charges were of the “same or similar character” under *Jawara*. Charges of transporting a minor to engage in prostitution, sex trafficking of children, and enticement of a minor were properly joined, for example, because the evidence of each offense overlapped, they allegedly occurred during the same time period, in the same location, and involved similar victims.<sup>137</sup> Likewise, a district court decided that bank fraud charges could be joined with charges of willful misapplication of bank funds.<sup>138</sup> Although the charges arose from separate conduct, the court nonetheless determined that they were of “similar character”: they involved the same victim, had a similar modus operandi, and shared overlapping evidence.<sup>139</sup>

These case studies demonstrate that the divergent approaches taken by the Seventh and Ninth Circuits result in real differences in the outcomes of Rule 8(a) severance motions. While the *Coleman* and *Jawara* courts attempted to honor the same balance between efficiency and fairness, courts in the Ninth Circuit generally analyze the nexus between the charged offenses more rigorously under the same-or-similar-character prong. These courts ask questions aimed at ensuring that joinder can generate real efficiencies for the system while also minimizing the risk of unjustified prejudice toward the defendant. In contrast, the district courts of the Seventh Circuit decide merely whether the charges are of “like class” under Rule 8(a), leaving any balancing of efficiency against fairness for another day on a motion to sever under Rule 14.

#### D. Rule 14 Severance in Practice

The Seventh Circuit in *Coleman* recognized that its permissive joinder rule risked greater prejudice unjustified by any extra efficiency. To avoid this danger, *Coleman* implored district

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<sup>135</sup> *Id.* at \*4.

<sup>136</sup> *Id.* at \*6.

<sup>137</sup> See Omnibus Order on Pretrial Motions, *United States v Powell*, Criminal Action No 15-244, \*15–16 (WD Wash filed Feb 10, 2016).

<sup>138</sup> See Memorandum Decision and Order, *United States v Teall*, Criminal Action No 14-119, \*15 (D Idaho filed June 29, 2015).

<sup>139</sup> See *id.*



courts to “not hesitate to order severance” under Rule 14 “if the risk of real prejudice grows too large to justify whatever efficiencies a joint trial does provide.”<sup>140</sup> The Seventh Circuit placed its trust in Rule 14 to protect defendants from unjustified prejudice. In contrast, the Ninth Circuit in *Jawara* cited Rule 14’s procedural and practical difficulties to reinforce its holistic approach to the same-or-similar-character prong.<sup>141</sup> *Jawara* relied on an exhaustive Rule 8(a) analysis to reduce joinder’s risk of unjustified prejudice and therefore kept intact its high bar for obtaining Rule 14 severance.<sup>142</sup>

Ever since, the Ninth Circuit and its district courts have continued applying an exacting standard for Rule 14 severance, requiring that defendants show “manifest prejudice.”<sup>143</sup> The Seventh Circuit and its district courts, however, have not been so consistent. In the immediate wake of *Coleman*, the Seventh Circuit continued to apply *Coleman*’s modified approach to Rule 14, recognizing that “the risk of unfairness is elevated in a trial where the joinder of two or more offenses is predicated on their ‘same or similar character.’”<sup>144</sup> Just a few years later, though, the wheels began to fall off. In *United States v Rollins*,<sup>145</sup> the defendant was charged with four robbery counts connected to four separate incidents.<sup>146</sup> Though the defendant conceded that the charges were “of same or similar character” under the Seventh Circuit’s categorical approach, he argued for Rule 14 severance.<sup>147</sup> While *Rollins* acknowledged Rule 14 tasks the district court with “balancing the cost of multiple trials against the possible prejudice inherent in a single trial,” the court failed to recognize, as *Coleman* did, that this balancing should be skewed

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<sup>140</sup> *Coleman*, 22 F3d at 134.

<sup>141</sup> See *Jawara*, 474 F3d at 573.

<sup>142</sup> See *id.* at 579.

<sup>143</sup> See, for example, Order, *United States v Tapaha*, Criminal Action No 12-8177, \*2 (D Ariz filed Jan 8, 2014) (“Rule 14 sets a high standard for showing prejudice. . . . Defendant bears the burden of showing clear, manifest, or undue prejudice of such a magnitude that, without severance, he will be denied a fair trial.”), citing *United States v Throckmorton*, 87 F3d 1069, 1072 (9th Cir 1996); Order, *United States v Damante*, Criminal Action No 11-064, \*4 (D Nev filed Sep 8, 2011) (“To prevail on a motion for severance based on prejudicial joinder, the defendant must demonstrate that without severance he is unable to receive a fair trial, and that he will suffer actual, compelling prejudice.”); *United States v Mitchell*, 502 F3d 931, 963 (9th Cir 2007).

<sup>144</sup> *United States v Turner*, 93 F3d 276, 284 (7th Cir 1996).

<sup>145</sup> 301 F3d 511 (7th Cir 2002).

<sup>146</sup> *Id.* at 513.

<sup>147</sup> See *id.* at 517.

in favor of severance when offenses of the “same or similar character” are joined.<sup>148</sup>

Set in motion by *Rollins*, the Seventh Circuit’s reversion to its exacting pre-*Coleman* Rule 14 standard continued in *United States v Berg*,<sup>149</sup> which involved the joinder of marijuana and cocaine trafficking charges under the same-or-similar-character prong.<sup>150</sup> There, the court again ignored *Coleman*’s warning that the risks of categorical joinder may not be justified by its efficiencies. Instead, *Berg* relied on a different Seventh Circuit case not involving the same-or-similar-character prong when it summarily dismissed the defendant’s unfair prejudice arguments.<sup>151</sup> “[W]hatever the source of the purported prejudice,” the *Berg* court explained, “the defendant bears a heavy burden” of establishing that “denial of severance actually prejudiced him by preventing the jury from arriving at a reliable judgment as to guilt or innocence.”<sup>152</sup> Subsequently, the Seventh Circuit has ignored *Coleman*’s modification to the Rule 14 standard in cases in which offenses are categorically joined under the same-or-similar-character prong, and has instead continued imposing a “heavy burden” on defendants to show substantial prejudice.<sup>153</sup>

Unsurprisingly, the Seventh Circuit’s confusion in this area has led to great inconsistencies at the district-court level. Since *Coleman*, there have been nine written orders by district courts of the Seventh Circuit regarding severing under Rule 14 offenses categorically joined by the same-or-similar-character prong. Four of these failed to apply *Coleman*’s balancing modification. These courts instead employed the stringent pre-*Coleman* test for severance without considering whether joinder was truly justified by efficiency.<sup>154</sup>

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<sup>148</sup> *Id.* at 518.

<sup>149</sup> 714 F3d 490 (7th Cir 2013).

<sup>150</sup> See *id.* at 493–94.

<sup>151</sup> See *id.* at 496, citing *United States v Ervin*, 540 F3d 623, 629 (7th Cir 2008). *Ervin* dealt with joinder under Rule 8(a)’s “common scheme or plan” prong, which typically involves substantial evidentiary and temporal overlap because the joined offenses must be “connected.” *Ervin*, 540 F3d at 628. See also *United States v Davis*, 724 F3d 949, 955 (7th Cir 2013). As a result, joinder in these cases more often satisfies its efficiency purpose and reduces the risk of unfair prejudice.

<sup>152</sup> *Berg*, 714 F3d at 496, quoting *Ervin*, 540 F3d at 629.

<sup>153</sup> See *United States v Peterson*, 823 F3d 1113, 1124 (7th Cir 2016) (“[T]he defendant must demonstrate actual prejudice by showing that he was unable to obtain a fair trial.”), citing *Ervin*, 540 F3d at 629.

<sup>154</sup> See Order, *United States v Lipford*, Criminal Action No 15-167, \*3 (ED Wis filed Feb 22, 2016); Order, *United States v Bradford*, Criminal Action No 15-30001, \*9–10 (SD

In *United States v Peterson*,<sup>155</sup> for example, the Government charged the defendant in the Western District of Wisconsin with twelve counts relating to a bank fraud scheme from December 2007: the defendant, the Government alleged, lied to banks to obtain money in violation of 18 USC §§ 1344 and 1014, and deposited money derived from unlawful activity in violation of 18 USC § 1957.<sup>156</sup> Count thirteen of the indictment charged the defendant with violating 18 USC § 664 by unlawfully extracting money from an employee pension fund in February 2009.<sup>157</sup> The district court first decided that, pursuant to *Coleman*, the thirteen charges were properly joined under the same-or-similar-character prong as each involved the defendant's "use [of] his business ventures to obtain money by dishonest means."<sup>158</sup> The defendant argued, however, that count thirteen should be severed under Rule 14 because the alleged crimes occurred nearly fourteen months apart and involved different evidence.<sup>159</sup> Furthermore, the jury likely would confuse the evidence and be "more apt to be swayed by the testimony of real people who have lost their retirement benefits than . . . by impersonal banks that lost funds."<sup>160</sup> The court denied the Rule 14 severance motion, explaining only that "[w]ith appropriate instructions, the jury can be trusted to decide defendant's guilt or innocence independently on each count."<sup>161</sup> The court neglected to consider any efficiencies created by joining the offenses or to weigh those against the risks of prejudice.

In contrast, the remaining five district-court cases applied *Coleman*'s refinement of Rule 14 by balancing the efficiencies gained by joinder against the prejudice posed to the defendant. In *United States v Barker*,<sup>162</sup> for example, the Government charged the defendant with two sets of two charges: armed bank robbery and brandishing a firearm during a crime of violence.<sup>163</sup>

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Ill filed June 26, 2015); *Peterson* Order at \*3 (cited in note 128); Statement, *United States v Abarca*, Criminal Action No 06-575, \*1 (ND Ill filed Mar 16, 2007).

<sup>155</sup> *Peterson* Order (cited in note 128).

<sup>156</sup> *Id* at \*1.

<sup>157</sup> *Id* at \*1–2.

<sup>158</sup> *Id* at \*1.

<sup>159</sup> *Peterson* Order at \*2–3 (cited in note 128).

<sup>160</sup> *Id* at \*3.

<sup>161</sup> *Id*.

<sup>162</sup> Order on Defendant's Motion for Severance and Separate Trials of Counts 1 and 2 from Counts 3 and 4, *United States v Barker*, Criminal Action No 09-112 (ED Wis filed July 21, 2009) ("*Barker* Order").

<sup>163</sup> See *id* at \*1.

The first set stemmed from an alleged bank robbery in May 2006.<sup>164</sup> The second arose from the robbery of a different bank in a different city in February 2008.<sup>165</sup> The district court decided to sever the two sets of charges under Rule 14 because it found their joinder “so prejudicial that it outweighs the interests of judicial economy and efficiency.”<sup>166</sup> Specifically, “the cumulative effect of hearing the evidence of the defendant’s alleged role in both bank robberies would be highly prejudicial to the defendant if both robberies were tried together.”<sup>167</sup> And because the evidence proffered in support of each robbery did not overlap, “the efficiency lost by trying the cases separately would be nominal when compared with the prejudice to the defendant if the cases were tried together.”<sup>168</sup>

Based on these observations, it is clear that court decisions are affected by which Rule 14 standard they employ; district courts using the *Coleman* balancing approach to Rule 14 were more likely to sever offenses than courts applying the more exacting pre-*Coleman* standard. Of the five district courts to apply *Coleman*’s refinement, two decided that the risk of unfair prejudice was not justified by the efficiencies of a joint trial and severed the charges.<sup>169</sup> In the other three cases, the courts found the defendant had failed to show that prejudice outweighed the efficiencies of a joint trial and, consequently, declined to sever under Rule 14.<sup>170</sup> In contrast, each of the four district courts applying the stringent pre-*Coleman* Rule 14 standard denied severance.

This difference in outcome may boil down to the mindset of the judge analyzing the Rule 14 issue. Merely framing the severance question as “Has the defendant shown enough prejudice to warrant severance?” rather than “Is joinder’s prejudice justified by any efficiency gains?” might cause courts to sever offenses less frequently in similar cases. And because the Seventh

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<sup>164</sup> See *id.* at \*2.

<sup>165</sup> See *id.* at \*2–3.

<sup>166</sup> *Barker* Order at \*5 (cited in note 162).

<sup>167</sup> *Id.* at \*6.

<sup>168</sup> *Id.*

<sup>169</sup> See Notification of Docket Entry, *United States v Zamiar*, Criminal Action No 13-929, \*1 (ND Ill filed Nov 26, 2014); *Barker* Order at \*5–9 (cited in note 162).

<sup>170</sup> See Opinion, *United States v Fifer*, Criminal Action No 14-30006, \*19–23 (CD Ill filed Oct 23, 2015); Statement, *United States v Simmons*, Criminal Action No 10-820, \*2–3 (ND Ill filed June 28, 2012); Memorandum Opinion and Order, *United States v Kashmiri*, Criminal Action No 09-830, \*2–4 (ND Ill filed June 7, 2012).

Circuit and its district courts invariably apply the permissive categorical approach to the same-or-similar-character prong, they violate not only the careful balance struck by *Coleman* but also the principles of *Pointer* and *McElroy* that rulemakers explicitly baked into Rules 8(a) and 14.

### III. A HOLISTIC SOLUTION TO THE SAME-OR-SIMILAR-CHARACTER PRONG

Rules 8(a) and 14, according to their drafters, substantially restate the law on joinder in place before their adoption in 1944.<sup>171</sup> At that time, 18 USC § 557 governed the joinder of offenses. As the Supreme Court established in *Pointer* and *McElroy*, that statute incorporated “settled principles of criminal law,” including a general presumption against joinder in federal prosecutions.<sup>172</sup> *Pointer* recognized joinder’s great risk of prejudice toward defendants and advised that even when joinder is appropriate, courts “must not permit the defendant to be embarrassed in his defence.”<sup>173</sup> Later, in *McElroy*, the Court acknowledged that joinder “has been considered so objectionable as tending to confound the accused in his defence, or to prejudice him as . . . being held out to be habitually criminal, in the distraction . . . of the jury.”<sup>174</sup> To mitigate these risks, *McElroy* explained that courts should not allow joint trials on offenses “separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence.”<sup>175</sup>

Because Rules 8(a) and 14 have not changed since 1944, the principles of *Pointer* and *McElroy* should continue directing courts’ joinder and severance inquiries today.<sup>176</sup> Courts applying the rules must be mindful that joining offenses of the “same or similar character” might prove unfairly prejudicial to defendants, especially when the offenses derive from entirely distinct conduct with little evidentiary and temporal overlap. Courts should understand, too, that in these cases the efficiency justifications for joinder are often weaker and might not be sufficiently

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<sup>171</sup> FRCrP 8(a), Advisory Committee Note to the 1944 Rule.

<sup>172</sup> *Pointer*, 151 US at 400. See also *McElroy*, 164 US at 80, quoting *Pointer*, 151 US at 400.

<sup>173</sup> *Pointer*, 151 US at 403.

<sup>174</sup> *McElroy*, 164 US at 80.

<sup>175</sup> *Id.* at 79–80.

<sup>176</sup> See note 47 and accompanying text.

compelling to justify the heightened risk of prejudice. To this end, courts should apply Rules 8(a) and 14 by balancing joinder's advantages and disadvantages while keeping in mind the relative strengths and limitations of the two rules in protecting against unjustified prejudice.

The reverberations of *Pointer's* and *McElroy's* admonitions were heard in both *Coleman* and *Jawara*. The Seventh and Ninth Circuits recognized the dangers of joining offenses under the same-or-similar-character prong and established two divergent systems to account for its inherent problems. By adjusting their respective standards under Rules 8(a) and 14, the two courts sought to ensure charges are joined only when doing so is efficient and fair.

The Seventh Circuit adopted a categorical approach to the same-or-similar-character prong but recognized that this might prejudice defendants without a concomitant increase in efficiency. Thus, *Coleman* announced a more lenient standard for severance under Rule 14, requiring lower courts to sever offenses when joinder's costs outweigh its benefits. It attempted to strike a careful balance between efficiency and fairness by making Rule 14 severance more accessible in response to its permissive joinder standard for Rule 8(a).

Conversely, the Ninth Circuit in *Jawara* announced a holistic approach to the same-or-similar-character prong and required lower courts to apply six separate factors before allowing joinder. Satisfied with this approach's fairness, which restricts the government's ability to join offenses from the start, the Ninth Circuit left in place its exacting requirement that defendants seeking Rule 14 severance show "manifest prejudice" from the joinder.<sup>177</sup>

As the case studies in Parts II.C and II.D show, *Coleman's* attempt to create an efficient and fair system of joinder has failed. The Seventh Circuit's categorical approach allows more combinations of offenses joined under the same-or-similar-character prong compared to the holistic approach.<sup>178</sup> This difference is most apparent when the government joins similar statutory charges in a single indictment but the underlying crimes share few other similarities, whether in evidence, time, location, modus operandi, or victim. In fact, under the

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<sup>177</sup> See *Jawara*, 474 F3d at 579, citing *United States v Lewis*, 787 F2d 1318, 1321 (9th Cir 1986).

<sup>178</sup> See Part II.C.

categorical approach, even violations of entirely different statutes can be joined depending on the level of abstraction taken by the court in judging the similarities between the offenses.<sup>179</sup>

Critically, the Seventh Circuit's approach does not always advance joinder's traditional justifications of judicial and prosecutorial economy. When categorically joined charges are proven with different bodies of evidence and separate witnesses, the time and resources saved by a joint trial are less obvious. At the same time, categorical joinder comes with far greater risks of unfair prejudice toward the defendant. In these cases, jurors see and hear evidence relating to the multiple charges. If strong evidence supports an inference of guilt on one charge, the jury might be inclined to look past weaker evidence on the other charges, inferring that if the defendant is guilty of one crime, he is also guilty of the others. The defendant might be prejudiced, too, simply by having multiple charges against him. The jury could conclude the defendant has a criminal character or propensity to commit crime, an inference against which the Federal Rules of Evidence protect.<sup>180</sup>

The Seventh Circuit's trust in Rule 14 has also proven misguided. *Coleman* pointed to the availability of Rule 14 severance to justify its permissive understanding of the same-or-similar-character prong. The court believed that Rule 14 could function as a safety valve, authorizing severance in the face of unjustified prejudice. Yet *Coleman*'s ideal of trial judges severing offenses whenever the risk of prejudice outweighs joinder's efficiency benefits has not materialized, which is perhaps inevitable given Rule 14's inherent weaknesses.<sup>181</sup> Not only have district courts inconsistently applied *Coleman*'s lower standard for severance, the Seventh Circuit itself has reverted to imposing a greater burden on defendants petitioning under Rule 14.<sup>182</sup> In turn, this leads courts to sever fewer offenses, even when the defendant can point to concrete examples of joinder's prejudice.<sup>183</sup> Thus, by

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<sup>179</sup> See, for example, *Peterson* Order at \*1 (cited in note 128) (deciding that charged violations of 18 USC §§ 664, 1014, 1344, and 1957 were of "similar character," as each involved the defendant's "use [of] his business ventures to obtain money by dishonest means").

<sup>180</sup> See FRE 404(b)(1) ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.").

<sup>181</sup> See Part II.D. See also Part I.B.2.b.

<sup>182</sup> See Part II.D.

<sup>183</sup> See Part II.D.

permissively joining charges under the same-or-similar-character prong while raising higher barriers to Rule 14 severance, approaches like the Seventh Circuit's virtually ensure that there will be instances in which joinder creates substantial prejudice with little or no efficiency gains.

To remedy these problems and avoid the Seventh Circuit's failures, categorical-approach courts should instead employ a holistic approach to the same-or-similar-character prong by requiring that joined offenses be connected by at least evidence and time. This solution conforms to the drafters' characterization of Rules 8(a) and 14 as "substantially a restatement of existing law,"<sup>184</sup> as well as the Supreme Court's prohibition on the joinder of offenses "committed at different times, and not provable by the same evidence."<sup>185</sup> Furthermore, Rule 8(a)'s drafters purposely replaced the "same class of crimes"<sup>186</sup> language from the former joinder statute with the phrase "same or similar character" so that courts focus on the nature of the offenses joined rather than their degree or grading as either misdemeanor or felony.<sup>187</sup> If the Court in *Pointer* and *McElroy* believed that the 1853 statute's "same class of crimes" language required offenses be connected by time and evidence, then surely the same-or-similar-character prong demands at least as much.

The holistic approach comports with this understanding by permitting joinder only when the offenses are at least related in time and by evidence.<sup>188</sup> This better reflects the general presumption against joinder embodied in Rules 8(a) and 14 and fulfills the principles of *Pointer* and *McElroy* by reducing the risk that defendants will suffer unfair and unjustified prejudice in criminal trials. The holistic approach also ensures that offenses are joined when the efficiency justifications are strongest, such as when evidence of the crimes overlaps, and guards against unfair prejudice by requiring offenses to be more closely related.

In addition, the holistic approach's focus on a series of factors to determine the "same or similar character" better guides lower courts' application of Rule 8(a) and leads to more consistent results.<sup>189</sup> *Jawara's* six factors constitute concrete

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<sup>184</sup> FRCrP 8(a), Advisory Committee Note to 1944 Rule.

<sup>185</sup> *McElroy*, 164 US at 79–80.

<sup>186</sup> Act of Feb 26, 1853, 10 Stat at 162.

<sup>187</sup> See Orfield, 26 FRD at 26–27 (cited in note 55).

<sup>188</sup> See Part II.B.

<sup>189</sup> See Wright, et al, 1A *Federal Practice & Procedure* § 143 at 43 (cited in note 54).



requirements for joinder compared to *Coleman's* ill-defined concept of "like class."<sup>190</sup> Consequently, it is easier for district courts to decide whether the offenses are connected by time or evidence without having to be concerned about the proper level of generality to find any thematic connection between the joined charges.

What's more, the holistic approach more closely reflects the relative strengths and weaknesses of Rules 8(a) and 14 to effectively counter joinder's prejudice. Because the holistic-approach courts employ a more rigorous application of the same-or-similar-character prong that results in fewer combinations of charges joined, they need not be as concerned that Rule 8(a) joinder will cause unfairness. As a result, the holistic-approach courts are able to maintain a high standard for defendants seeking to sever under Rule 14. This avoids Rule 14's inherent weaknesses in protecting against unjustified prejudice, including the broad discretion enjoyed by district-court judges applying the rule. As the experience in the Seventh Circuit demonstrates, even when defendants can show that joinder causes substantial prejudice, district courts may order alternative remedies to severance, such as imploring the jury not to draw impermissible inferences about the defendant's criminal character.<sup>191</sup> Likewise, the holistic approach's relatively greater reliance on Rule 8(a) reduces the likelihood that the sunk-cost fallacy will affect the district-court judge's decision to sever, because the Rule 8(a) joinder determination is made at the beginning of the case and based solely on the indictment's contents.<sup>192</sup>

Compared to the categorical approach, the holistic approach better incorporates the principles of *Pointer* and *McElroy* embodied in Rules 8(a) and 14, is more likely to allow joinder only when justified by real efficiency gains, and better reflects the comparative strengths and weaknesses of the rules in preventing unjustified prejudice against criminal defendants. The holistic approach is therefore superior to the categorical alternative and authorizes joinder only when efficient and fair.

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<sup>190</sup> The *Jawara* court predicted that, depending on the level of abstraction, absurdities can result in finding obviously dissimilar offenses are of "like class." See *Jawara*, 474 F3d at 579.

<sup>191</sup> See Part II.D.

<sup>192</sup> See note 76 and accompanying text.

## CONCLUSION

Joinder of offenses against a single defendant is a controversial mechanism in the federal system. Especially contentious is joinder under Rule 8(a)'s same-or-similar-character prong, as it may create a greater risk of unfair prejudice toward the defendant without accompanying efficiency gains. It is therefore troubling that the federal courts are deeply split over how to determine whether offenses can be joined under this prong.

Courts taking a categorical approach to the same-or-similar-character prong should instead employ a holistic approach. By permissively joining offenses under the same-or-similar-character prong while making it difficult to later sever under Rule 14, the categorical-approach courts violate the Supreme Court precedent embodied in the federal rules. *Pointer* and *McElroy* instructed that joinder should be sustained only when offenses are connected in some tangible evidentiary way, such as involving the same evidence and temporal overlap, and when defendants will not be unfairly prejudiced as a result. The solution offered here conforms to the drafters' intent to preserve in the rules the principles established by *Pointer* and *McElroy*, properly accounts for the procedural and practical realities of the rules, and allows joinder only when justified by the efficiencies it affords. This solution ensures that the joinder of similar offenses is available when it serves its legitimate purpose but will not needlessly expose criminal defendants to excessive prejudice.

## APPENDIX

I used Bloomberg Law to search the dockets of each district court within the Seventh and Ninth Circuits using the search terms “Rule 8,” “Rule 14,” and “sever,” limiting the results to criminal cases decided since September 2006, when the Ninth Circuit decided *Jawara*. I reviewed the docket of each case to determine whether either the defendant or the government filed motions contending that the offenses were or were not properly joined under Rule 8(a)’s same-or-similar-character prong, or whether the court decided the offenses had been properly or improperly joined under that prong. For each of these cases, I analyzed the court’s ruling on the defendant’s motions to sever to determine the final resolution of the issue. Tables 1 and 2 consolidate the results for the Seventh and Ninth Circuits respectively. This research method finds only cases in which a motion was filed on this issue or the court’s ruling was memorialized in a written order. It does not find cases in which the issue of joinder was raised orally and the ruling was not memorialized in any kind of written order.

TABLE 1. SEVENTH CIRCUIT CASES

Case	Misjoinder under Same- or-Similar- Character Prong?	Severance under Rule 14?
<i>United States v Lipford</i> , Criminal Action No 15-167 (ED Wis filed Feb 22, 2016)	Denied	Denied
<i>United States v Fifer</i> , Criminal Action No 14-30006 (CD Ill filed Oct 23, 2015)	Not raised	Denied
<i>United States v Carpenter</i> , Criminal Action No 13-930 (ND Ill filed July 30, 2015)	Denied	Not raised
<i>United States v Williams</i> , Criminal Action No 14-109 (ED Wis filed May 5, 2015)	Granted	N/A
<i>United States v Ponce De Leon</i> , Criminal Action No 14-197 (ED Wis filed Apr 29, 2015)	Granted	N/A
<i>United States v Bradford</i> , Criminal Action No 15-30001 (SD Ill filed June 26, 2015)	Denied	Denied
<i>United States v Anderson</i> , Criminal Action No 14-186 (ED Wis filed Apr 29, 2015)	Denied	Not raised
<i>United States v DiCosola</i> , Criminal Action No 12-446 (ND Ill filed Aug 14, 2014)	Denied	Granted
<i>United States v Fogerson</i> , Criminal Action No 13-20047 (CD Ill filed May 14, 2014)	Denied	Denied

Case	Misjoinder under Same- or-Similar- Character Prong?	Severance under Rule 14?
<i>United States v Zamiar</i> , Criminal Action No 13-929 (ND Ill filed Dec 3, 2013)	Denied	Granted
<i>United States v Broadway</i> , Criminal Action No 12-124 (ND Ind filed Mar 8, 2013)	Granted	Granted
<i>United States v Jenkins</i> , Criminal Action No 12-34 (ED Wis filed Aug 15, 2012)	Granted	N/A
<i>United States v Simmons</i> , Criminal Action No 10-820 (ND Ill filed June 28, 2012)	Denied	Denied
<i>United States v Tolbert</i> , Criminal Action No 11-186 (ED Wis filed Feb 7, 2012)	Denied	Not raised
<i>United States v Kashmiri</i> , Criminal Action No 09-830 (ND Ill filed Jan 25, 2011)	Denied	Denied
<i>United States v Salinas</i> , Criminal Action No 09-185 (ED Wis filed Sept 25, 2009)	Granted	N/A
<i>United States v Barker</i> , Criminal Action No 09-112 (ED Wis filed July 21, 2009)	Denied	Granted
<i>United States v Rogers</i> , Criminal Action No 06-540 (ND Ill filed Feb 29, 2008)	Not raised	Denied
<i>United States v Schneider</i> , Criminal Action No 07-041 (ED Wis filed June 12, 2007)	Granted	N/A
<i>United States v Guillen</i> , Criminal Action No 06-360 (ND Ill filed May 23, 2007)	Not raised	Denied
<i>United States v Abarca</i> , Criminal Action No 06-575 (ND Ill filed Mar 16, 2007)	Denied	Denied

TABLE 2. NINTH CIRCUIT CASES

Case	Misjoinder under Same- or-Similar- Character Prong?	Severance under Rule 14?
<i>United States v Kincade</i> , Criminal Action No 15-71 (D Nev filed Oct 21, 2016)	Granted	N/A
<i>United States v King</i> , Criminal Action No 14-3537 (SD Cal filed Mar 14, 2016)	Denied	Denied
<i>United States v Powell</i> , Criminal Action No 15-244 (WD Wash filed Feb 10, 2016)	Denied	Denied
<i>United States v Kimmell</i> , Criminal Action No 14-54 (D Nev filed Nov 9, 2015)	Denied	Denied
<i>United States v Drago</i> , Criminal Action No 13-334 (D Nev filed Oct 26, 2015)	Denied	Denied
<i>United States v Handl</i> , Criminal Action No 15-126 (ND Cal filed Aug 25, 2015)	Granted	N/A
<i>United States v Teall</i> , Criminal Action No 14-119 (D Idaho filed June 29, 2015)	Denied	Denied
<i>United States v Tillisy</i> , Criminal Action No 13-310 (WD Wash filed Nov 14, 2014)	Denied	Denied
<i>United States v Grudzien</i> , Criminal Action No 13-59 (ND Cal filed Aug 28, 2014)	Granted	N/A
<i>United States v Hill</i> , Criminal Action No 13-765 (ND Cal filed July 24, 2014)	Granted	N/A
<i>United States v Rachell</i> , Criminal Action No 14-25 (D Mont filed June 19, 2014)	Denied	Denied
<i>United States v Halgat</i> , Criminal Action No 13-239 (D Nev filed June 13, 2014)	Granted	N/A
<i>United States v Alcaraz</i> , Criminal Action No 13-189 (D Nev filed May 20, 2014)	Denied	Denied
<i>United States v Taplin</i> , Criminal Action No 13-266 (D Or filed Feb 10, 2014)	Granted	N/A
<i>United States v Sarad</i> , Criminal Action No 11-387 (ED Cal filed Feb 4, 2014)	Granted	N/A
<i>United States v Tapaha</i> , Criminal Action No 12-8177 (D Ariz filed Jan 8, 2014)	Denied	Denied
<i>United States v LaFarga</i> , Criminal Action No 13-85 (D Nev filed Dec 30, 2013)	Granted	Denied (incorrectly applied the law)

Case	Misjoinder under Same- or-Similar- Character Prong?	Severance under Rule 14?
<i>United States v Walton</i> , Criminal Action No 12-311 (D Nev filed Dec 6, 2013)	Not raised	Granted
<i>United States v Musso</i> , Criminal Action No 12-273 (D Nev filed Oct 1, 2013)	Denied	Not raised
<i>United States v Ruby</i> , Criminal Action No 12-1073 (SD Cal filed Feb 12, 2013)	Denied	Not raised
<i>United States v Vales</i> , Criminal Action No 11-434 (D Nev filed Jan 4, 2013)	Not raised	Granted
<i>United States v Fries</i> , Criminal Action No 11-1751 (D Ariz filed Aug 27, 2012)	Granted	N/A
<i>United States v Salyer</i> , Criminal Action No 10-61 (ED Cal filed Dec 12, 2011)	Granted	N/A
<i>United States v Quesada</i> , Criminal Action No 11-8088 (D Ariz filed Dec 1, 2011)	Not raised	Granted
<i>United States v Damante</i> , Criminal Action No 11-64 (D Nev filed Sept 8, 2011)	Denied	Denied
<i>United States v Freriks</i> , Criminal Action No 10-106 (D Alaska filed Apr 11, 2011)	Granted	N/A
<i>United States v Walizer</i> , Criminal Action No 10-124 (D Nev filed Dec 30, 2010)	Not raised	Denied
<i>United States v Schmit</i> , Criminal Action No 07-1714 (D Ariz filed Dec 14, 2010)	Denied	Denied
<i>United States v Brown</i> , Criminal Action No 09-8067 (D Ariz filed July 13, 2010)	Not raised	Denied
<i>United States v Nejbauer</i> , Criminal Action No 09-670 (D Ariz filed Nov 2, 2009)	Not raised	Denied
<i>United States v Cerna</i> , Criminal Action No 08-730 (ND Cal filed Sept 16, 2009)	Granted	N/A
<i>United States v Feliciano</i> , Criminal Action No 08-932 (D Ariz filed Aug 5, 2009)	Not raised	Denied