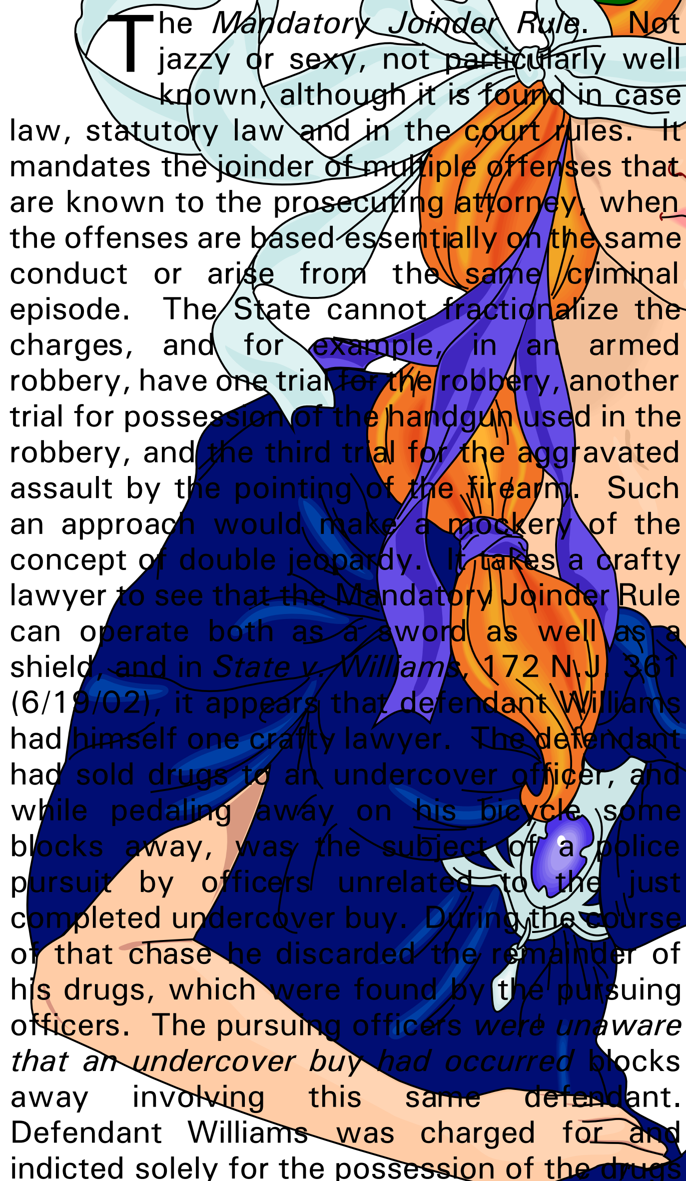
CRIMINAL LAW UPDATE

EDITED AND AUTHORED BY JOSEPH P. REM, JR.
ALL COMMENTS AND SUBMISSIONS, 201- 488-9001; FAX 487-8030; E-MAIL JREM@REMZELLER.COM

February 2003



new jersey cases

The *Mandatory Joinder Rule*. Not jazzy or sexy, not particularly well known, although it is found in case law, statutory law and in the court rules. It mandates the joinder of multiple offenses that are known to the prosecuting attorney, when the offenses are based essentially on the same conduct or arise from the same criminal episode. The State cannot fractionalize the charges, and for example, in an armed robbery, have one trial for the robbery, another trial for possession of the handgun used in the robbery, and the third trial for the aggravated assault by the pointing of the firearm. Such an approach would make a mockery of the concept of double jeopardy. It takes a crafty lawyer to see that the Mandatory Joinder Rule can operate both as a sword as well as a shield, and in *State v. Williams*, 172 N.J. 361 (6/19/02), it appears that defendant Williams had himself one crafty lawyer. The defendant had sold drugs to an undercover officer, and while pedaling away on his bicycle some blocks away, was the subject of a police pursuit by officers unrelated to the just completed undercover buy. During the course of that chase he discarded the remainder of his drugs, which were found by the pursuing officers. The pursuing officers *were unaware that an undercover buy had occurred* blocks away involving this same defendant. Defendant Williams was charged for and indicted solely for the possession of the drugs he had been seen discarding. Sizing up the situation, defense counsel withdrew the potentially viable motion to suppress and pled his client guilty to the charge of simple possession of CDS on which his client received only 180 days in the county jail. A few months thereafter, that same county indicted defendant on the distribution to the undercover officer. The defendant argued, unsuccessfully both before the Law Division and the Appellate Division that the *Mandatory Joinder Rule* required the State to have handled all these offenses at one time. Persistent, he finally prevailed in the Supreme Court, and the distribution indictment was dismissed. The Supreme Court held that the offenses were indeed based on the same conduct or arose out of the same episode (a factor required to be found for the successful application of the *Mandatory Joinder Rule* by *State v. Yoskowitz*, 116 N.J. 679, 701 (1989)). In making the determination on that factor, a *flexible* approach is utilized, and consideration is given to the nature of the offenses, the time and place of each offense, whether the evidence supporting one charge is necessary and/or sufficient to sustain a conviction under another charge, whether one offense is an integral part of the larger scheme, the intent of the accused, and the consequences of the criminal standards transgressed. Heightened significance is accorded to the time and place of the offense, and whether one offense is part of a larger scheme. Indeed, multiple offenses have been found to be part of the "same episode" even

A Publication of the Bergen County Bar Association

The comments contained in this publication are not necessarily those of the Bergen County Bar Association; if you disagree with them, they are not even necessarily those of the author.

when the defendant's actions occurred over several months and at different locations, when the events were connected as part of a larger scheme. (*State v. James*, 194 N.J. Super 362, 364-365 (App.Div. 1984)). Brilliance in the court room can be defined in many ways, but rarely is it applied when a defense attorney pleads his client to the top count of an indictment, and waives his client's right to a motion to suppress evidence. Here, the waiving of that motion almost certainly expedited the entry of the guilty plea, and cemented his client's double jeopardy position. Brilliance, it seems, comes in many forms, shapes and sizes.

In *State v. Ceylan* (352 N.J. Super 139 (App.Div. 2002)), a bail bondsman found himself in a difficult situation. He put up a $500,000 bond on a defendant charged with Manslaughter. While that charge was pending, the defendant was convicted of a second degree offense of Eluding, carrying with it a strong presumption of incarceration. The defendant, a native of Turkey (which does not have an extradition with the United States) now had a much greater motivation to flee, leaving this bail bondsman on the hook for big bucks--not five large, five *very* large-- if he did. The bail bondsman appeared before the court and asked to allow him to surrender the client and have the bail exonerated. The court denied the application and, of course, the defendant, awaiting sentence on the second degree charge, fled the country and is now nowhere to be found (can you say, "Do you like my fez?"). The State then turns to the bail bondsman and says "Whoa, jack, you owe us half a mill." The bail bondsman got to keep his dough, successfully arguing on appeal that the conviction on the Eluding charge markedly enhanced the risk of flight, and thus materially changed the terms of the surety. Troubling in this case is the Appellate Division comment that the defendant, facing sentencing of 5-10 years for the second degree crime of Eluding, was "now facing the *virtual certainty* of at least a presumptive seven-year sentence . . . ." Why was there the "virtual certainty" that the defendant would get the presumptive seven years, instead of perhaps five, or six, which are also encompassed by the sentencing range? Since when is the presumptive a "virtual certainty?" The case is also interesting in one other respect. The defendant actually appeared in court on a motion to adjourn his Eluding charge sentencing date for six weeks. It was at that adjournment motion that the bail bondsman appeared without prior notice and requested the exoneration of the manslaughter bail. It was at that legal argument that the bail bondsman suggested, in front of the defendant who had actually appeared in court while on bail, that defendant might flee to Turkey, informing the court, and the likely increasingly interested defendant, that Turkey had no extradition treaty. You can almost hear the wheels turning in the defendant's head: "Hmmm, no extradition treaty. Really. . . ."

a thought, perhaps trite, perhaps not

The movie *Chicago* is wonderful cinema: great music, dancing, acting, set design and costumes. However well served the public is by this piece of entertainment, criminal trial lawyers are equally disserved. In *Chicago*, the attorney for an accused murderess begins her representation by fabricating her background, her motivation, and indeed, even the facts of the case. His conduct just reinforces the public perception that attorneys instruct their clients to lie when they take the stand. Indeed, in the movie the attorney is at least on one occasion referred to as a "mouthpiece," fortifying a public misconception that attorneys blindly dance to their clients' song. The overwhelming majority of criminal attorneys, both for the state and defense, struggle mightily with each case, seeking, in an *ethical* way, in the words of the old standard, to "accentuate the positive, eliminate the negative." Defendants in a criminal trial may take the stand and tell the truth (well, at least their version of the truth), or remain silent. Perjury, condoned or induced by counsel, is *not* a third option. Movies have the power to subtly shape and covertly corrupt public perception. We hold a sacred trust, and

are a light in this darkened world. Rage, rage against the dying of the light.