JOINDER AND SEVERANCE – Definition of joinder of offenses "based on the same conduct" or "otherwise connected together in their commission" under Rule 13.3(a)(2) – Revised 11/2009

Rule 13.3(a)(2), Ariz. R. Crim. P., allows offenses to be joined for trial if they are "based on the same conduct." For example, in *State v. Mauro*, 149 Ariz. 24, 716 P.2d 393 (1986), the defendant abused his son, and eventually killed him, by forcing cloth down the child's throat. The defendant was charged with child abuse and homicide and argued that he was entitled to severance. The Arizona Supreme Court held that severance was not proper: "since both charges were based on the 'same conduct,' the severance request was properly denied." *Id*. at 28, 716 P.2d at 397. And in *Anderson v. State,* 155 Ariz. 289, 290, 746 P.2d 30, 31 (App. 1987), the Court of Appeals rejected the defendant's claim that he was entitled to severance of his charges of driving while intoxicated and driving with a blood alcohol content of 0.10% or more, noting, "Joinder cannot be resisted simply on the ground that proof of guilt on one charge will make the trier more likely to find guilt on the other charge."

Offenses are considered "otherwise connected together in their commission" when "the offenses arose out of a series of connected acts, and the evidence as to each count, of necessity, overlaps;" "where most of the evidence admissible in proof of one offense [is] also admissible in proof of the other;" or "where there [are] common elements of proof in the joined offenses." *State v. Garland,*191 Ariz. 213, 217, 953 P.2d 1266, 1270 (App. 1998)*, quoting State v. Martinez-Villareal*, 145 Ariz. 441, 446, 702 P.2d 670, 675 (1985). In *Martinez-Villareal*, the court found that a burglary in which the defendant stole guns used to commit the subsequent homicides was sufficiently connected to join the homicide and burglary charges to be joined for trial. "Offenses

may be joined as otherwise connected in their commission where, among other things, most of the evidence admissible in proof of one offense is also admissible in proof of the other." *State v. Williams,* 183 Ariz. 368, 375, 904 P.2d 437, 444 (1995).

However, offenses may not be joined for trial as "otherwise connected together in their commission" if their sole connection is that they were committed on the same day. *State v. Comer,* 165 Ariz. 413, 418, 799 P.2d 333, 338 (1990), *citing State v. Stago*, 82 Ariz. 285, 287, 312 P.2d 160, 162 (1957) and *State v. Curiel*, 130 Ariz. 176, 184, 634 P.2d 988, 996 (App.1981). There must be more than temporal proximity between separate offenses to justify joinder of those offenses as "otherwise connected." Also, the particular crimes to be joined for trial must be similar; it is not sufficient to show merely that the perpetrators of the particular crimes were similar. For example, in *State v. Garland,* 191 Ariz. 213, 217, 953 P.2d 1266, 1270 (App. 1998)*,* a black man in a Colorado Rockies baseball cap, who gave his name as "Mike," pulled a gun on two people; they fled, abandoning property that the defendant then took. About 90 minutes later, a motorist pulled into a parking lot in the same area. A man with the same description approached the motorist, pulled a gun, and demanded a ride. During the ride, he gave his name as "Mike," then attempted to steal the motorist's property; during the struggle, the motorist was shot. The man fled, leaving a Colorado Rockies baseball cap. The offenses were joined for trial. However, on appeal the Court of Appeals reversed the conviction and remanded the case for separate retrials. The Court stated that the offenses could not be joined as "otherwise connected together in their commission," noting:

> The crimes and the common elements of proof of each were independent of the other. The evidence of each count does not overlap the evidence of

> the other. Nor . . . is the evidence of each crime admissible as proof of the other.
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> Here the similarities--two incidents on the same night in the same general area, a baseball cap, a gun tucked into the front of the assailant's pants and then pulled out, and a black man named "Mike"--do not show how the crimes are distinctly similar. Instead, they only show that the man or men who perpetrated the crimes were similar. The offenses were different.

*State v. Garland,*191 Ariz. 213, ¶¶ 15, 23 at 217-18, 953 P.2d 1266, ¶¶ 15, 23 at 1270-71 (App. 1998). The temporal proximity of the crimes and the similarity of the perpetrator were insufficient to justify joinder of the two dissimilar crimes.