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Mark R. McDonald

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Prejudicial Joinder Under California Penal Code Section 954: Judicial Economy at a Premium

Section 954 of the California Penal Code provides that charges of two or more offenses may be joined in one accusatory pleading against a criminal defendant if the crimes are of the same class of crimes or are connected together in their commission.¹ Section 954 further provides that a trial court may, in its discretion, order that multiple criminal charges be severed and tried individually, provided good cause is shown and fairness so necessitates.² The state realizes economic savings when separate offenses are consolidated for a single trial, but joinder may also greatly prejudice the defendant.³

Traditionally, cases dealing with section 954 interpreted the broad language of the joinder provision so as to qualify crimes as “joinable”⁴

1. CAL. PENAL CODE § 954 (West 1985). California Penal Code section 954 states: *An accusatory pleading may charge two or more offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them consolidated.* The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense in which the defendant is convicted must be stated in the verdict or the finding of the court: *provided, that a court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or be divided into two or more groups and each of the said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count.* (emphasis added) *Id.*

2. *Id.*

3. See *infra* notes 34-48 and accompanying text (economic benefits and prejudices of joinder).

4. See generally *Williams v. Superior Court*, 36 Cal. 3d 441, 683 P.2d 699, 204 Cal.

with a minimum of scrutiny.⁵ In 1984, however, the California Supreme Court for the first time assigned meaning to the severance provision of section 954 in *Williams v. Superior Court*.⁶ The supreme court held in *Williams* that upon a showing of "substantial prejudice" from joinder, a defendant has a right to severance of charges otherwise properly joined under section 954.⁷ A defendant will satisfy the substantial prejudice standard under *Williams* if prejudice to the defendant from joinder outweighs the economic benefits of joinder to the state.⁸

The California Supreme Court wrestled with the notion of substantial prejudice in subsequent decisions, unable to define a uniform policy rationale supporting joinder under section 954.⁹ The result was a widely varying application of the *Williams* balancing test.¹⁰ The development of the *Williams* standard came to a halt in 1987 when Justice Lucas replaced Justice Bird on the California Supreme Court.¹¹ Since the beginning of 1987, the Lucas Court has applied the *Williams* standard in form only, putting great emphasis on the "theoretical"¹² economic benefits of joinder, and minimizing the prejudice faced by the defendant.¹³ At present, lower courts and both prosecuting and defense attorneys ask what standards to use in ruling on severance motions.¹⁴

Rptr. 700 (1984) (crimes that meet the broad joinder requirements of the joinder provision of Penal Code section 954 are "joinable" even if they may be severed under the severance provision).

5. See *infra* notes 35-34 and accompanying text (judicial interpretation of the joinder provision of Penal Code section 954).

6. 36 Cal. 3d 441, 683 P.2d 699, 204 Cal. Rptr. 700 (1984). See also *infra* notes 52-140 and accompanying text (in depth analysis of *Williams* decision).

7. *Williams*, 36 Cal. 3d at 452, 683 P.2d at 706, 204 Cal. Rptr. at 707.

8. *Id.* (failure by a trial court to sever joined crimes that substantially prejudice the defendant constitutes an abuse of discretion).

9. See *infra* notes 144-99 and accompanying text (varying interpretations of the *Williams* standard).

10. *Id.*

11. See *infra* notes 200-64 and accompanying text (extremely narrow interpretations of the *Williams* balancing test).

12. *U.S. v. Halper*, 590 F.2d 422, 430 (D.C. Cir. 1978). See also, *People v. Smallwood*, 42 Cal. 3d 415, 426, 722 P.2d 197, 208, 228 Cal. Rptr. 913, 923 (1986) (if multiple charges share no evidence, the general economy realized from their joinder is merely "theoretical"). Cf. *People v. Balderas*, 41 Cal. 3d 144, 711 P.2d 480, 222 Cal. Rptr. 184 (1985) (economy realized due to high degree of shared witnesses between two murders). But see, *People v. Bean*, 46 Cal. 3d 919, 938-41, 760 P.2d 996, 1004-07, 251 Cal. Rptr. 467, 476-480 (1988) (blanket claim of judicial economy although joined charges shared no evidence at all).

13. See *infra* notes 200-64 and accompanying text (Lucas court's interpretation of the *Williams* balancing test).

14. See *infra* note 199 and accompanying text (conflicting District Courts of Appeals' decisions).

This comment will initially review the derivation of the *Williams* standard by charting the development of section 954 from its enactment in 1872.¹⁵ Next, the rationale behind each stage of the *Williams* Court's analysis will be examined.¹⁶ The interpretation and application of the *Williams* standard by courts in subsequent Bird Court cases will also be discussed.¹⁷ The recent corrosion of the standard by the Lucas Court and the likely standard by which trial courts in the future will grant or deny defendants' severance motions will be discussed next.¹⁸ This comment will conclude that the Lucas Court is giving only lip service to the prejudicial considerations of joinder laid out in *Williams* and is compromising defendants' rights to a fair trial.¹⁹ Finally, in accordance with the legislative purpose behind section 954, this comment will offer proposals aimed at ensuring defendants charged with multiple crimes as fair a trial as those charged with only one crime.²⁰

I. THE DEVELOPMENT OF PENAL CODE SECTION 954

Available legislative history suggests that judicial economy is a relatively recent purpose behind Penal Code section 954.²¹ From its enactment in 1872, until 1915 when the statute was amended for the third time, section 954 served to liberalize some of the common law requirements of exactness of pleading.²² Prosecutors were permitted

15. See *infra* notes 21-51 and accompanying text.

16. See *infra* notes 52-140 and accompanying text.

17. See *infra* notes 141-98 and accompanying text.

18. See *infra* notes 199-254 and accompanying text.

19. See *infra* notes 255-64 and accompanying text.

20. See *infra* notes 265-79 and accompanying text.

21. CAL. PENAL CODE § 954 (West 1985). See also *infra* notes 22-51 and accompanying text (development of Penal Code section 954).

22. Compare CAL. PENAL CODE § 954 (West 1985) with 1872 Cal. Stat. ch. 572, sec. 211 at 110 (amending the Criminal Practice Act, 1851 Cal. Stat. ch. 29, sec. 241 at 238) and 1874 Cal. Stat. ch. 614, sec. 44 at 437 (amending 1872 Cal. Stat. ch. 572, sec. 211 at 110) and 1905 Cal. Stat. ch. 574, sec. 1 at 772 (amending 1874 Cal. Stat. ch. 614, sec. 44 at 437) and 1915 Cal. Stat. ch. 452, sec. 1 at 774 (amending 1905 Cal. Stat. ch. 574, sec. 1 at 737). The Criminal Practice Act came from from New York Code of Criminal Procedure sections 278 and 279. California Penal Code section 954, as enacted in 1872, stated, "The indictment must charge but one offense, and in one form only, except that when the offense may be committed by the use of different means, the indictment may allege the means in the alternative." 1872 Cal. Stat. ch. 572, sec. 211 at 110 (amending Criminal Practice Act, 1851 Cal. Stat. ch. 29, sec. 241 at 238). See W. LAFAYE & J. ISRAEL, CRIMINAL PROCEDURE, 705 (2d ed. 1985) (*hereinafter* LAFAYE). Originally, an indictment was required to be very specific in naming the charge sought to be proved, and the means by which it was alleged to have been carried out. *Id.* at 721-24. If the indictment was incorrect, the defendant was acquitted, guilty or not. *Id.*

to charge multiple offenses on a single indictment and allege alternative means by which those offenses may have been committed.²³ However, before 1915, all charged offenses had to relate to the same act and the defendant could be convicted only of one charged offense.²⁴

The 1915 amendment expanded section 954 to permit multiple, unrelated offenses or counts belonging to the same class to be joined and tried together.²⁵ Crimes of the same class are crimes possessing

The purpose of the original section was to allow prosecutors to give alternative means by which a crime may have been committed, so that a conviction did not have to rest entirely on the correctness of a single theory. *Id.* at 715-21.

Penal Code section 954 was amended in 1874. (1874 Cal. Stat. ch. 614, sec. 44 at 437 (amending 1872 Cal. Stat. ch. 572, sec. 211 at 110). The 1873-74 amendment read, "The indictment must charge but one offense, but the same offense may be set forth in different forms under different counts, and, when the offense may be committed by the use of different means, the means may be alleged in the alternative in the same count." *Id.*

Although there is little by way of legislative intent for this amendment, its purpose was most likely to give the prosecution even greater flexibility in obtaining a conviction. See LAFAYE, *supra* at 721-30. Allowing an indictment to list the same charge under different counts eliminated the risk that a guilty defendant would be set free, because the defendant's acts fit the definition of a crime other than the one charged. *Id.* "Count" and "charge," when used relative to allegations in an indictment or information, are synonymous. BLACK'S LAW DICTIONARY at 314 (5th Ed. 1979).

Section 954 was further amended in 1905, permitting multiple offenses or counts to be joined if they all bore relation to one act or event. 1905 Cal. Stat. ch. 574, sec. 1 at 772 (amending 1874 Cal. Stat. ch. 614, sec. 44 at 437). The 1905 amendment amended the section to read:

The indictment or information may charge *different offenses*, or different statements of the same offense, under separate counts, but they must all relate to the same act, transaction, or event and charges of offenses occurring at different and distinct times and places must not be joined. The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant can be convicted of but one of the offenses charged, and the same must be stated in the verdict. (emphasis added)

Id. This 1905 amendment was the first version of section 954, which allowed separate offenses to be joined. *Id.* However, since only one offense charged could result in a conviction, the purpose of the statute was probably not judicial economy. See LAFAYE, *supra* at 704-720. Although, again, legislative history on this amendment is barren of recorded purpose, case law suggests that the addition of a provision allowing multiple offenses describing the same act to be charged and joined merely served to increase the chance of a conviction on *some* criminal theory. See, e.g., *People v. Koehn*, 207 Cal. 605, 279 P. 646 (1929). There is also evidence to suggest that joinder of separate offenses on a single indictment was for the purpose of controlling abuse of the indictment process by marshalls, who were paid per indictment, hence had incentive to draw up as many as possible. See Comment, *Joint and Single Trials*, 74 YALE L.J. 552, 560 (1965) (a legislative interest in judicial economy may have been only a by-product of joinder).

23. 1905 Cal. Stat. ch. 574, sec. 1 at 772 (amending 1874 Cal. Stat. ch. 614, sec. 44 at 437).

24. *Id.*

25. 1915 Cal. Stat. ch. 452, sec. 1 at 744 (amending 1905 Cal. Stat. ch. 574, sec. 1 at 772). The 1915 amendment essentially gave section 954 its present wording. Compare CAL PENAL CODE § 954 (West 1985) with *id.* The amendment suggests a change of purpose from all the previous amendments. There is evidence to suggest that the amendment's drafters

“common characteristics or attributes”.²⁶ Further, the 1915 amendment provided for joinder of crimes which were not of the same class if the crimes were “connected in their commission”.²⁷ Crimes are connected in their commission if they share one or more “common elements of substantial importance”.²⁸ The 1915 amendment also allowed a defendant to be convicted of any number of crimes charged.²⁹ A legislative interest in judicial economy is evidenced in these changes.³⁰ Most important, the 1915 amendment permitted a court, in its discretion, to order that all crimes be tried separately if justice so required.³¹ The 1915 amendment gave section 954 essentially its present wording, and modern interpretation of section 954 is based on case law beginning with the 1915 amendment.

recognized some measure of economy by joining offenses. *See generally* Kellett v. Superior Court, 63 Cal.2d 822, 409 P.2d 206, 48 Cal. Rptr. 366 (1966); *People v. Dorengo*, 46 Cal. App. 2d 411, 415, 115 P.2d 858, 862 (1921); *People v. West*, 34 Cal. App. 2d 55, 59, 93 P.2d 153, 158 (1920); *People v. Thorn*, 138 Cal. App. 714, 735, 33 P.2d 5 (1917) (joinder of crimes with overlapping evidence saves public money). Although judicial economy does not appear to have been an original purpose of this section, the fact that the 1915 amendment allowed multiple indictments to be consolidated for a single trial indicates this new interest. *People v. Scott*, 24 Cal. 2d 774, 779, 151 P.2d 517, 520-21 (1944). *See also*, Orfield, *Consolidation in Federal Criminal Procedure*, 40 ORE. L. REV. 318 (1961). A legislative interest in judicial economy also may be evidenced by the broadening of the definition of joinable offenses from ones in the “same transaction,” to ones of the same general “class”. *Id.* at 321-26. By allowing joinder of crimes in the same class, the drafters may have hoped to save the court time, and therefore public funds. *Id.* at 326. The rationale presumably was that since crimes of the same class share one or more essential elements, the definition of those elements would only have to be explained to one jury at one time. *Id.* at 326-30. *Cf.* *People v. Kemp*, 55 Cal. 2d 458, 476, 359 P.2d 913, 930-31, 11 Cal. Rptr. 361, 375 (1961) (crimes of the same class defined so liberally in California that their joinder bears little relation to a goal of judicial economy).

The drafters of the 1915 amendment also must have realized that the loosening of joinder requirements increased the possibility of prejudice to the defendant when they added a severance provision in the 1915 Amendment. *See*, *People v. Garcia*, 2 Cal. 2d 673, 42 P.2d 1013 (1935); *People v. Northcott*, 209 Cal. 639, 289 P. 226 (1930); *People v. Kelley*, 203 Cal. 128, 263 P. 226 (1928) (sensitivity to prejudice arising from joinder).

26. *People v. Rhoden*, 6 Cal. 3d 519, 524, 492 P.2d 1143, 1146, 99 Cal. Rptr. 751, 755 (1972).

27. 1915 Cal. Stat. ch. 452, sec 1 at 744 (amending 1905 Cal. Stat. ch. 574, sec. 1 at 772).

28. *People v. Matson*, 13 Cal. 3d 29, 33, 528 P. 2d 756, 762, 117 Cal. Rptr. 664, 668 (1974).

29. 1915 Cal. Stat. ch. 452, sec. 1 at 744 (amending 1905 Cal. Stat. ch. 574, sec. 1 at 772). The 1915 amendment stated, in pertinent part: “The prosecution is not required to elect between the different offenses set forth in the indictment, but the defendant may be convicted of any number of the offenses charged. . .” *Id.*

30. An intent to promote judicial economy is not expressly stated in committee reports, but case law has declared such an intent. *See, e.g.*, *People v. Thorn*, 138 Cal. App. 714, 735, 33 P.2d 5, 12 (1917).

31. 1915 Cal. Stat. ch. 452, sec. 1, at 744 (amending CAL. PENAL CODE § 954) *Cf.* CAL PENAL CODE § 954 (West 1985) (the wording of the severance provision changed only slightly after the 1915 amendment).

Since 1915, courts have applied the joinder provision of section 954 liberally, finding joinder proper per se when the joined crimes share common characteristics, or any common element of substantial importance.³² Crimes as distinct as a rape and a robbery are joinable under section 954 as crimes of the same "class" because they have the common characteristic of an assaultive nature.³³ Moreover, courts have primarily interpreted the legislative intent behind the joinder provision of section 954 as judicial economy.³⁴

32. See *People v. Kemp*, 55 Cal. 2d 458, 476, 359 P.2d 913, 923, 11 Cal. Rptr. 361, 371 (1961) (the California Supreme Court defined "crimes of the same class" under Penal Code section 954 as "offenses possessing common characteristics or attributes"). See, e.g., *People v. Rhoden*, 6 Cal. 3d 519, 524, 492 P.2d 1143, 1147, 99 Cal. Rptr. 751, 755 (1972) (robbery, rape and kidnapping may be joined because they are all assaultive crimes). Crimes of the same class were not originally interpreted so broadly. Cf. *People v. Frank* 130 Cal. 212, 19 P.2d 850 (1933) (prejudicial error to join charges of robbery and burglary with charge of assault with intent to commit murder which occurred four months later, since the crimes were not ones of the same class and they shared no overlapping evidence to promote judicial economy). Even where the offenses are not in the same class, they may be joined if they are "connected in their commission" containing "common elements of substantial importance in their commission." *People v. Chessman*, 52 Cal. 2d 467, 492, 341 P.2d 679, 694 (1959). The *Chessman* court said that the common element of substantial importance between seventeen joined crimes was an intent to obtain property feloniously. *Id.* The court in *Chessman* used the term "common element of substantial importance" quite differently from prior California Supreme Court cases, which used common elements of substantial importance to refer to evidence common to all joined charges, which when consolidated would save the state money. *Id.* See, e.g., *People v. Kelly*, 203 Cal. 128, 133-35, 263 P.2d 266, 270-74 (1928) (string of robberies and murders all occurring on the same day, using the same weapons and stolen vehicle shared common elements of substantial importance in that the proof of one joined charge tended to prove facts material to proof of the others; the charges were cross-admissible); *People v. Scott*, 24 Cal. 2d 774, 778-79, 151 P.2d 517, 520 (1944) (charge of altering a firearm serial number could be joined with rape charge in which the altered weapon was used by the defendant in the commission of the rape, because the weapon was a common element of substantial importance in both crimes). Joined crimes need not relate to the same transaction and can even have been committed at different times and places as long as they share a common element of substantial importance in their commission. See, e.g., *People v. Pike*, 58 Cal. 2d 70, 84, 372 P.2d 656, 669, 22 Cal. Rptr. 664, 677 (1962) (same gun used by defendant in two robberies occurring two days apart was common element of substantial importance in the commission of both crimes). Actually, the crimes in *Chessman* had numerous common elements of substantial importance in the traditional sense. *Chessman*, 52 Cal. 2d at 473-75, 341 P.2d at 682-85. *Chessman* involved robberies and rapes wherein the defendant not only had a similar modus operandi but also used the same stolen vehicle in many of the joined charges. *Id.* However, the language in *Chessman* has enabled future courts to find crimes "connected in their commission for purposes of Penal Code section 954 when the crimes do not have any overlapping evidence. See, e.g., *People v. Balderas*, 41 Cal. 3d 144, 171, 711 P.2d 480, 494, 222 Cal. Rptr. 184, 196 (1985). The California Supreme Court best described the state of joinder under section 954 in *Matson*, 13 Cal. 3d at 39, 528 P.2d at 756, 117 Cal. Rptr. at 667. In *Matson*, the Supreme Court stated that, "Where consolidation meets the test of joinder, . . . the difficulty of showing prejudice from denial of severance is so great that courts almost invariably reject the claim of abuse of discretion." *Id.*

33. *Rhoden*, 6 Cal. 3d at 524-25, 492 P.2d at 1148, 99 Cal. Rptr. at 756.

34. See e.g. *Kellett v. Superior Court*, 63 Cal. 2d 822, 832, 409 P.2d 20, 25, 648 Cal. Rptr. 366, 371. (1966) (statutory amendments expanding the scope of permissible joinder demonstrate legislative purpose to prevent harassment, avoid needless repetition of evidence,

The state's interest in judicial economy may be realized in several ways when crimes are joined under section 954.³⁵ First, the joined charges may be "cross-admissible" pursuant to section 1101(b) of the California Evidence Code.³⁶ Subject to strict threshold requirements,³⁷ section 1101(b) permits the prosecution to introduce evidence of *uncharged*³⁸ crimes, for the limited purpose of resolving a disputed fact such as the identity or intent of the alleged perpetrator in the crime charged.³⁹ Section 1101(a) expressly prohibits evidence of un-

and save the state and the defendant time and money); *see also* *Matson*, 13 Cal. 3d at 41, 528 P.2d at 754, 117 Cal. Rptr. at 668 (1974) (judicial economy is the purpose of section 954 recognized by the California Supreme Court).

35. *See infra* notes 36-44 and accompanying text (economic benefits of joinder). *See also* *Pointer v. United States*, 151 U.S. 396, 403. (1916) and *Matson*, 13 Cal. 3d at 41, 528 P.2d at 757, 117 Cal. Rptr. at 668 (United States and California Supreme Court cases holding that a defendant benefits from a joint trial by avoiding the harassment of two complete trials). *But see* *Coleman v. Superior Court*, 116 Cal. App. 3d 129, 138-39, 172 Cal. Rptr. 86, 91 (1981). Avoidance of needless harassment of the defendant is not a valid benefit of joinder if it is the defendant who has moved for separate trials. *Id.*

36. CAL. EVID. CODE § 1101(b) (West 1989 Supp.). Evidence Code section 1101(b) actually refers to the admissibility of evidence of *uncharged* crimes in the trial of charged ones. The section provides:

- (a) . . . [e]vidence of a person's character or a trait of his character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is inadmissible when offered to prove his conduct on a specified occasion.
- (b) *Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident) other than his disposition to commit such acts.* (emphasis added)

CAL. EVID. CODE § 1101(b).

37. *See* *People v. Moreno*, 61 Cal. App. 3d 688, 693, 132 Cal. Rptr. 569, 571-72 (1976); JEFFERSON, CAL. EVIDENCE BENCH BOOK, 1201 (2d ed.1982) [hereinafter JEFFERSON] (to establish relevancy of the other crime(s) evidence sought to be admitted under Evidence Code section 1101(b), the prosecutor must first prove defendant's culpability in the collateral crime by a preponderance of the evidence). *But see*, *People v. Albertson*, 23 Cal. 2d 550, 578, 145 P.2d 7, 11 (1944) (requires proof of defendant's culpability in uncharged act by "the clear weight of the evidence"). The clear and convincing evidence standard is also the standard used by federal courts. *See, e.g., United States v. Beasley*, 809 F.2d 1273 (9th. Cir. 1987). Some jurisdictions require proof of defendant's culpability in the collateral crime beyond a reasonable doubt. *See, e.g., Ernster v. State*, 165 Tex. Crim. 422, 308 S.W.2d 33 (1957); *see generally*, Comment, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763 (1961) (providing an in depth discussion of restrictions on admission of other crimes evidence and standards of proof).

Further, the collateral evidence will be excluded regardless of its probative value if the trial judge determines that evidence is overly prejudicial to the defendant under Evidence Code section 352. *See* *People v. Thompson*, 27 Cal. 3d 303, 316, 611 P.2d 883, 895, 165 Cal. Rptr. 289, 301. (1980); *People v. Deeney*, 145 Cal. App. 3d 647, 652, 193 Cal. Rptr. 608, 611 (1983).

38. *See* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, 286-88 (2d ed. 1986); *People v. Shells*, 4 Cal. 3d 626, 632, 483 P.2d 1227, 1231, 94 Cal. Rptr. 275, 279 (1971) (uncharged crimes are collateral crimes for which the the defendant is not currently being tried).

39. *See* *People v. Johnson*, 43 Cal. 3d 296, 317-23, 730 P.2d 131, 147-51, 233 Cal. Rptr. 562, 578-81 (1988) (Bird, C.J. concurring) (comprehensive application of section 1101(b));

charged crimes if offered only to show a defendant's criminal disposition.⁴⁰ When multiple charged crimes are joined under section 954, if evidence of each joined crime would hypothetically be admissible in a separate trial of any other under an 1101(b) theory, the charges are cross-admissible.⁴¹ Joining cross-admissible charges under section 954 saves public resources by consolidating, for a single trial, charges which would ultimately be cross-referenced in separate trials under an 1101(b) theory.⁴² Second, joining charges that share a substantial number of facts and witnesses avoids duplication of evidence that would result from separate trials.⁴³ Finally, the state benefits economically even when charges sharing no evidence are joined, by having to impanel only one jury and staff one courtroom.⁴⁴

People v. Moreno, 188 Cal. App. 3d 1179, 233 Cal. Rptr. 863 (1987) (discussing intent in dispute); People v. Alcalá, 36 Cal. 3d 604, 685 P.2d 1126, 205 Cal. Rptr. 775 (1984) (where defendant's identity is in dispute, proof of a modus operandi common to both acts is sufficient to identify defendant). Two factors determine whether identity is sufficiently in dispute for purposes of cross-admissibility between multiple crimes: (1) the degree of distinctiveness of individual shared marks; (2) the number of minimally distinctive shared marks. Williams v. Superior Court, 36 Cal. 3d 441, 450, 683 P.2d 699, 703, 204 Cal. Rptr. 700, 705 (1984).

40. CAL. EVID. CODE § 1101(a) (West Supp. 1989) provides, in pertinent part, "... [e]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his conduct on a specified occasion." (emphasis added) *Id.*

41. See Coleman v. Superior Court, 116 Cal. App. 3d 109, 111-14, 172 Cal. Rptr. 86, 87-90 (1981) ("cross-admissible" is the term used by courts to describe crimes in a joint trial when the evidence of the crimes would be admissible in separate trials of the crimes under an Evidence Code section 1101(b) theory). See also *supra* notes 36-41 (application of section 1101(b)).

42. Williams, 36 Cal. 3d at 448, 683 P.2d at 703, 204 Cal. Rptr. at 704. See also Comment, *Joint and Single Trials*, 74 YALE L.J. 553 at 556-60 (1965) (hereinafter *Joint and Single Trials*). When crimes have been found cross-admissible, prejudice from joinder is no longer an issue because under an Evidence Code section 1101(b) theory, the probative value of the other crime(s) evidence has already been found to be greater than the prejudice to the defendant. *Id.* As a result, courts have held that cross-admissibility dispels any possibility of prejudice. Williams, 36 Cal. 3d at 448, 683 P.2d at 703, 204 Cal. Rptr. at 704. See *supra* notes 36-42 and accompanying text. (requirements for admission of evidence of uncharged crimes).

43. Matson, 13 Cal. 3d at 39, 528 P.2d at 755, 117 Cal. Rptr. at 668. But see, JOINT AND SINGLE TRIALS, *supra*, note 42 at 560. Since duplication of evidence would naturally tend to increase with the more common facts and witnesses existing between the charges, there will normally be little "economy of evidence" in joining crimes which are not either part of the same transaction or "cross-admissible". The result is a single trial which lasts much longer, tying up a courtroom, judge and counsel, to the same extent that separate trials would do so. *Id.*

44. People v. Bean, 46 Cal. 3d 919, 942, 760 P.2d 996, 1008, 251 Cal. Rptr. 467, 479 (1988). But see, Williams, 36 Cal. 3d 441, 451, 683 P.2d 699, 703, 204 Cal. Rptr. 700, 707. It is essential to distinguish between "judicial economy" and "avoidance of waste of public funds" because judicial economy is always present to some extent when charges are consolidated for a single trial. *Id.* However, economy is not justified unless separate trials would result in a waste of public funds. *Id.* A waste of public funds occurs when the joined charges share a sufficient number of facts and witnesses that separate trials would result in considerable

The severance provision added in the 1915 amendment to section 954, providing for severance of joined crimes in the interests of justice, recognizes the danger of prejudice to the defendant due to joinder.⁴⁵ When multiple charged crimes are joined against a single defendant, a jury may convict the defendant for a criminal disposition rather than the defendant's actual guilt.⁴⁶ The prohibition in Evidence Code section 1101(a) recognizes this danger with respect to evidence of uncharged crimes.⁴⁷ A defendant may be further prejudiced if one

duplication of evidence. *Id.* Determining what degree of similarity is necessary between joined charges to justify judicial economy gained from joinder, and whether, as a matter of judicial policy, judicial economy can even be balanced against a defendant's right to a fair trial, are matters over which courts have thus far been unable to agree. *See infra* notes 140-240 and accompanying text (differing views on balancing state interests against a defendant's right to a "fair" trial).

45. *See generally* *Coleman*, 116 Cal. App. 3d 129, 172 Cal. Rptr. 86; *People v. Smallwood*, 42 Cal. 3d 415, 722 P.2d 197, 228 Cal. Rptr. 913 (1986). Joinder of crimes under Penal Code section 954 results in the same form of prejudice which renders evidence of uncharged offenses inadmissible under section 1101(a) of the Evidence Code (subject to the section 1101(b) exception discussed in notes 36-42, *supra*). *See* *People v. Thompson*, 27 Cal. 3d 303, 316, 611 P.2d 883, 897, 165 Cal. Rptr. 289, 303 (1980).

The primary reason that underlies this basic rule of exclusion, [section 1101(a)], is not the unreasonable nature of the forbidden chain of reasoning. Rather, it is the insubstantial nature of the inference as compared to the grave danger of prejudice to an accused when evidence of an uncharged offense is given to the jury. We have thus reached the conclusion that the risk of convicting the innocent. . . is sufficiently imminent for us to forgo the slight marginal gain in punishing the guilty.

Id. *Cf. Williams*, 36 Cal. 3d at 455-58, 683 P.2d at 708-10, 204 Cal. Rptr. at 708-11. (Goldstein, J., dissenting) (section 1101(a) concerns are irrelevant when all crimes are charged). *See also* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO JOINDER AND SEVERANCE (Approved Draft 1978) stds. 13-2.1 & 13-3.1(a) (the ABA standards permit severance of unrelated charges on request of the accused). The federal courts share a similar view. *See, e.g., United States v. Foutz*, 540 F.2d 733 (4th. Cir. 1976):

While to the layman's mind a defendant's criminal disposition is logically relevant to his guilt or innocence of a specific crime, the law regards the inference from general to specific as so weak, and the danger of prejudice so great, that it attempts to prevent conviction on account of a defendant's bad character. . . . One inevitable consequence of a joint trial is that the jury will be aware of evidence of one crime while considering the defendant's guilt or innocence in another. If the rationale of the "other crimes" rule is correct, it would seem that some degree of prejudice is necessarily created by permitting the jury to hear evidence of both crimes.

Id. at 736 (citing *Drew v. United States* 331 F.2d 85, 89-90. (D.C. Cir. 1964)). *See generally*, Greene and Loftus, *When Crimes are Joined at Trial*, 9 LAW AND HUMAN BEHAVIOR 193 (1985); Tanford, Penrod, and Collins, *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, and Limiting Instructions*, 9 LAW AND HUMAN BEHAVIOR 319 (1985) (found through a jury simulation study that joined charges result in increased convictions and aggregation of evidence, despite limiting instructions). The above theories of prejudice apply to joint trials in which multiple defendants as well as charges are joined. However, multiple defendants are beyond the scope of this comment. *See generally, Joint and Single Trials, supra* note 42 at 556-60 (discussion of joinder of multiple defendants).

46. *Foutz*, 540 F. 2d at 736 n.13 (inference of guilt based upon defendant's bad character rather than defendant's culpability in the crime charged).

47. CAL. EVID. CODE § 1101(a) (West Supp. 1989) (makes character evidence inadmissible if offered to show a defendant's action in conformity with that character on a specific occasion).

or more joined crimes is particularly inflammatory or has weak evidentiary support in relation to the others.⁴⁸ Although the severance provision of the 1915 amendment to section 954 implied that joinder of some crimes could be prejudicial, the California Supreme Court neither authoritatively interpreted nor enforced the provision until 1984 in *Williams v. Superior Court*.⁴⁹ The supreme court in *Williams* established a two part test for determining the existence of substantial prejudice.⁵⁰ The test became the standard approach for determining the propriety of joinder under section 954.⁵¹

II. THE SEVERANCE PROVISION OF SECTION 954

A. *Williams v. Superior Court*

1. Facts

In *Williams*, the defendant, a gang member, was charged with five offenses including two counts of murder with special circumstances.⁵² The two murders occurred nine months apart and were both the result of gang violence.⁵³ The first murder occurred in June 1981

48. See *Williams*, 36 Cal. 3d at 453-54, 683 P.2d at 706-07, 204 Cal. Rptr. at 707-08. (ways in which crimes might be inflammatory and their prejudicial effect). With respect to joinder of crimes of unequal strengths, the court in *Williams* said, "[o]ur principal concern lies in the danger that the jury would aggregate all of the evidence, though presented separately in relation to each charge and convict on both charges in a joint trial; whereas, at least arguably, in separate trials, there might not be convictions on both charges, [or either]." *Id.* See also *People v. Balderas*, 41 Cal. 3d 144, 173, 711 P.2d 480, 494, 222 Cal. Rptr. 184, 197 (1985) (when evidence, in the aggregate, makes one or both charges appear stronger than they really are, courts refer to the result as the "spill-over" effect).

See also *Joint and Single Trials*, *supra*, note 42 at 556-60. A criminal defendant suffers from another form of prejudice when charges are joined. *Id.* The fifth amendment right of the accused to remain silent is infringed upon when charges are joined, because courts have held that either: (1) the defendant waives this right on all charges if he testifies to one, and (2) even if he may remain silent on one charge, the result is an accentuation of that silence due to the defendant testifying on the other charge. *Id.* The presumption is that the defendant has something to hide. *Id.* This additional form of prejudice is beyond the scope of this comment, but should be borne in mind by the reader when considering prejudice from joinder as a whole.

49. 36 Cal. 3d. 456, 683 P.2d 689, 204 Cal. Rptr. 700 (1984).

50. *Id.* at 448-54, 683 P.2d at 690-696, 204 Cal. Rptr. at 704-08. See also *infra* notes 68-125 and accompanying text (the *Williams* balancing test).

51. See *infra* notes 148-231 and accompanying text (application of *Williams* standard in subsequent cases).

52. *Williams*, 36 Cal. 3d at 442-45, 683 P.2d at 700-01, 204 Cal. Rptr. at 701-02.

53. *Id.*

when three assailants opened fire on four persons standing near a gym.⁵⁴ One of the four was killed.⁵⁵ Several witnesses testified that the defendant, Williams, was one of the assailants.⁵⁶ All parties involved were allegedly associated with gangs.⁵⁷ No evidence showed that Williams did any of the shooting.⁵⁸

The second murder occurred in March 1982.⁵⁹ On that occasion, an eyewitness allegedly observed Williams driving a van with two passengers.⁶⁰ The witness allegedly observed an arm holding a handgun extended from the driver's window.⁶¹ A few moments later, the victim was shot and killed as he stood on the sidewalk next to the van.⁶² The witness was unable positively to connect the arm holding the gun with Williams who was driving the van.⁶³

Williams moved to sever the charges on the grounds of prejudice, but the trial court denied the motion.⁶⁴ The California Supreme Court reversed, holding that although the crimes had satisfied the joinder provision of section 954—because murders are crimes of the same class—the appellant had nevertheless established “substantial prejudice” from joinder.⁶⁵ The court determined substantial prejudice by applying the “Williams Standard”⁶⁶, a balancing test that judges the propriety of joinder under section 954 by balancing the economic benefits of joinder to the state against the prejudicial effect of joinder on the defendant.⁶⁷

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* The basis of the court's denial was straight-forward. The California Supreme Court had previously considered severance motions under section 954 frivolous and without merit, if the joined charges had satisfied the broad joinder requirements. *Id.* at 446, 683 P.2d at 702, 204 Cal. Rptr. at 703. See, e.g. *People v. Matson*, 13 Cal. 3d 35, 39, 528 P.2d 756, 760, 117 Cal. Rptr. 664, 667 (1974) (“Where consolidation meets the test of joinder, . . . the difficulty of showing prejudice from denial of severance is so great that the courts almost invariably reject the claim of abuse of discretion”).

65. *Williams*, 36 Cal. 3d at 443-54, 683 P.2d at 702-07, 204 Cal. Rptr. at 704-08.

66. The “Williams standard” is the name attached by this author to the analysis undertaken by the supreme court in *Williams* when the court balanced the benefits against the prejudice of joinder under Penal Code section 954.

67. *Williams*, 36 Cal. 3d at 447-54, 683 P.2d at 703-08, 204 Cal. Rptr. at 704-08. See also *supra* notes 71-125 and accompanying text (the balancing of economic benefits of joinder against prejudice to the defendant).

2. *The Williams Standard*

The analysis of substantial prejudice under the "Williams Standard", or balancing test, calls for an initial determination of cross-admissibility under Evidence Code section 1101(b).⁶⁸ If the joined charges are not cross-admissible, possible additional economic benefits of joinder to the prosecution are then balanced against possible additional prejudicial circumstances to the defendant arising from joinder.⁶⁹ The defendant has the burden of satisfying "substantial prejudice" from joinder.⁷⁰

a. *Cross-admissibility*

As the first step in analyzing a question of substantial prejudice resulting from joinder, the *Williams* court looked to the issue of cross-admissibility under section 1101(b).⁷¹ The court began with a determination of cross-admissibility because cross-admissibility between joined charges negates a claim of substantial prejudice.⁷² The rationale is that since evidence of each joined charge would be admitted in separate trials under section 1101(b) if the charges had been severed, the prejudice to the defendant is minimal while at the same time the economic savings to the state are significant.⁷³ The state benefits economically because a consolidated trial requires only jury and courtroom.⁷⁴ In addition, since a great deal of evidence from each joined charge would have to be cross-referenced to resolve a disputed fact under section 1101(b) if the charges were tried

68. *Williams*, 36 Cal. 3d at 448-52, 683 P.2d at 705-06, 204 Cal. Rptr. at 704-06. *See also infra* notes 71-84 and accompanying text (application of cross-admissibility in balancing test).

69. *Williams*, 36 Cal. 3d at 452-53, 683 P.2d at 705-06, 204 Cal. Rptr. at 707. *See also infra* notes 85-125 and accompanying text (application of benefits versus prejudice in balancing test).

70. *Williams*, 36 Cal. 3d at 453, 683 P.2d at 706, 204 Cal. Rptr. at 707.

71. *Id.* at 448-52, 683 P.2d at 702-05, 204 Cal. Rptr. at 704-6. *See also supra* notes 36-42 and accompanying text (theory of cross-admissibility).

72. *Williams*, 36 Cal. 3d at 448, 683 P.2d at 702, 204 Cal. Rptr. at 703.

73. LAFAYE, *supra* note 22 at 659-60. *See also* *Drew v. United States*, 331 F.2d 85, 90 (D.C. Cir. 1964); *People v. Poon*, 125 Cal. App. 3d 55, 70-74, 178 Cal. Rptr. 375, 383-87 (1981) (cases reasoning that cross-admissibility between joined charges negates an argument by the defendant of prejudicial joinder).

74. LAFAYE, *supra* note 22 at 659-60.

separately, the state saves time by having to put on evidence of each charge only once.⁷⁵

The *Williams* court entertained the issue of cross-admissibility with respect to the disputed fact of the defendant's identity in the two murders.⁷⁶ The court found, however, that the joined murder charges did not share enough distinct characteristics to pass the strict standard for cross-admissibility on a theory of *modus operandi* under section 1101(b).⁷⁷ Moreover, because the crimes were not cross-admissible, a joint trial would subject the defendant to prejudicial circumstances prohibited by Evidence Code section 1101(a).⁷⁸ Section 1101(a) expressly prohibits use of other crimes' evidence which is relevant only in its tendency to show a defendant's criminal disposition.⁷⁹ Therefore, noncross-admissibility between joined charges effects a joint trial in two ways: first, the state derives less economic benefit from a consolidated trial because evidence from the joined charges could not be cross-referenced in separate trials of the same charges; second, the defendant is subject to prejudicial character inferences which section 1101(a) was designed to protect the defendant from.⁸⁰

75. *Id.*

76. *Williams*, 36 Cal. 3d at 448-51, 683 P.2d at 703-05, 204 Cal. Rptr at 704-06. The *Williams* court stated that admission of other crimes' evidence under Evidence Code section 1101(b) to prove a suspect's disputed identity requires that the crimes possess a "sufficiently high degree of common features" wherefrom an inference could be drawn that if the defendant committed one act, he committed the other(s) *Id.* See also *supra* note 39 (identity in dispute).

77. *Williams*, 36 Cal. 3d at 448-51, 683 P.2d at 703-05, 204 Cal. Rptr. at 704-06. *Cf.* *Coleman v. Superior Court*, 116 Cal. App. 3d 129, 137-38, 172 Cal. Rptr. 86, 90 (1981). Comparing *Coleman* on the issue of cross-admissibility, it becomes apparent that in both cases, the trial court misunderstood the application of Evidence Code section 1101(b). The existence of a *modus operandi* to prove the identity of the defendant requires a high degree of similarity between crimes because of the potential prejudice to the defendant. *Williams*, 36 Cal. 3d at 448-51, 683 P.2d at 702-05, 204 Cal. Rptr. at 704-05. Unfortunately, trial courts vary widely in their scrutiny of what degree of commonality between crimes satisfies sufficient similar characteristics. Compare *People v. Deeney*, 145 Cal. App. 3d 647, 654, 193 Cal. Rptr. 608, 612 (1983) (prior abuse by the defendant spouse was allowed into evidence at murder trial only for impeachment purposes, in the absence of a *modus operandi*) with *People v. Zack*, 184 Cal. App. 3d 409, 416, 229 Cal. Rptr. 317, 320 (1986) (prior incidents of abuse were admissible without showing a *modus operandi*, as long as the defendant has or had a previous relationship with the victim). A proper ruling on cross-admissibility is vital, however, since its existence makes joinder almost per se proper. *Williams*, 36 Cal. 3d at 448, 683 P.2d at 704, 204 Cal. Rptr. at 703-04. Both *Coleman* and *Williams* analysed the issue of cross-admissibility with very high scrutiny, suggesting great sensitivity to the prejudice inherent in putting evidence of more than one crime before the jury. *Id.*; *Coleman*, 116 Cal. App. 3d at 138-40, 172 Cal. Rptr. at 90-91.

78. *Williams*, 36 Cal. 3d at 448, 683 P.2d at 703, 204 Cal. Rptr. at 704.

79. *Id.* See also *supra* note 45 (rationale behind exclusion of character evidence).

80. *Williams*, 36 Cal. 3d at 448, 683 P.2d at 703, 204 Cal. Rptr. at 704. *Williams* was not the first case to view cross-admissibility as so pivotal in ruling on a severance motion. See *Coleman*, 116 Cal. App. 3d at 137-38, 172 Cal. Rptr. at 89 (1st DCA). Interestingly, it appears

The *Williams* court also indicated that because there may be additional economic benefits from joinder, the lack of cross-admissibility alone would not always be sufficient to show substantial prejudice.⁸¹ The *Williams* court adopted the reasoning of the California Supreme Court's earlier decision in *People v. Matson*⁸², wherein the court held that because there were economic benefits of a joint trial beyond those due to cross-admissibility, a defendant would also have to show additional prejudice beyond that inherent in joinder of noncross-admissible charges.⁸³ In light of the *Matson* rule, the *Williams* court undertook the second stage of the analysis, a weighing of possible "additional benefits" of joinder against possible additional prejudices against the defendant.⁸⁴

b. Additional Benefits of Joinder

The court in *Matson* held that noncross-admissibility alone was insufficient to make a denial of a defendant's severance motion an abuse of discretion.⁸⁵ The *Matson* court reasoned that a proper ruling on a severance motion requires a balancing of the probative value of joinder under section 1101(b) against the prejudicial effect on the defendant.⁸⁶ Strictly speaking, unless evidence from one joined charge is relevant in resolving a disputed fact in another joined charge under an 1101(b) theory, that evidence has no permissible probative value.⁸⁷

that the trial court in *Coleman*, although making an incorrect ruling on cross-admissibility, nevertheless predicated its decision to deny the defendant's original motion to sever on that issue alone. *Id. But see, Williams*, 36 Cal. 3d at 456-57, 683 P.2d at 706, 204 Cal. Rptr. at 709 (Goldstein, J., dissenting) (*Coleman* majority was "enticed" by "inverse logic", when it ruled that lack of cross-admissibility was a factor suggesting prejudice from joinder). The prevailing view of cross-admissibility, which apparently the appellants in *Coleman* argued should apply both ways, is that cross-admissibility between joined charges shows an absence of prejudice. *Id. Coleman* was the first case which viewed cross-admissibility as a major factor in determining substantial prejudice. *Id. Cf. People v. Smallwood*, 42 Cal. 3d 415, 433-36, 722 P.2d 197, 206-09, 228 Cal. Rptr. 913, 925-28 (1986) (Lucas, C. J., dissenting) (cross-admissibility has become a condition of proper joinder).

81. *Williams*, 36 Cal. 3d at 450-51, 683 P.2d at 605, 204 Cal. Rptr. at 706.

82. 13 Cal. 3d 35, 528 P.2d 752, 117 Cal. Rptr. 664 (1974).

83. *Id.* at 41-42, 528 P.2d at 760, 117 Cal. Rptr. at 667-68.

84. *Williams*, 36 Cal. 3d at 451-54, 683 P.2d at 705-07, 204 Cal. Rptr. at 706-08. *See also infra*, notes 85-125 and accompanying text (application of balancing test, benefits versus prejudice).

85. *Matson*, 13 Cal. 3d at 41, 528 P.2d at 757, 117 Cal. Rptr. at 667-68.

86. *Id.*

87. CAL. EVID. CODE. § 1101(a),(b) (West Supp. 1989). *See supra* notes 36-42 and accompanying text (if evidence of an uncharged crime is not relevant in resolving a disputed fact in the crime charged under Evidence Code section 1101(b), that evidence has no permissible probative value because it is inadmissible as character evidence pursuant to Evidence Code section 1101(a)).

However, the *Matson* court looked beyond the actual probative value under 1101(b) and considered some "additional benefits" of joinder that are realized when all crimes are charged.⁸⁸ These benefits must be added to the probative value side of the balance against prejudice.⁸⁹ Depending upon the particular facts, additional benefits of joinder may be realized economically through avoidance of duplicative evidence.⁹⁰ A joint trial may also benefit the defendant who might otherwise be needlessly harassed by having to endure two complete trials.⁹¹ Theoretically, therefore, a defendant must make a stronger argument for prejudice than would be necessary to keep evidence out under 1101(b) of the Evidence Code.⁹²

In acknowledgement of the *Matson* rule, the *Williams* court considered possible additional benefits of joinder, namely, avoidance of duplicative evidence and needless harassment of the defendant.⁹³ The *Williams* court did not find any of the additional benefits of joinder laid out by the *Matson* court on the facts before it.⁹⁴ Addressing the benefit allegedly to be derived from avoiding the duplication of evidence that would result in separate trials, the court concluded that on the facts before it, there could be little, if any, duplication since

88. *Matson*, 13 Cal. 3d at 41, 528 P.2d at 757, 117 Cal. Rptr at 668.

89. *Id.* The court stated:

The judge's discretion in refusing severance is broader than his discretion in admitting evidence of uncharged offenses . . . In both cases, the probative value of considering one alleged offense in light of the other must be weighed against the prejudicial effect, *but additional factors favor joinder. Joinder of related charges. . . ordinarily avoids needless harassment of the defendant and the waste of public funds which may result if the same general facts were to be tried twice in two or more separate trials.*

Id. (emphasis added).

90. *Id.* Notice that additional benefits *may* be realized when crimes are joined. *Id.* The wording by the *Matson* court implies that additional benefits do not always accrue. *Id.* In *Matson*, additional benefits did accrue because the charges there were cross-admissible, and as a result, evidence would have been duplicated in separate trials of the crimes *Id.* at 39, 528 P.2d at 756, 117 Cal. Rptr. at 666. See *Williams v. Superior Court*, 36 Cal. 3d 441, 451, 683 P.2d 699, 705, 204 Cal. Rptr. 700, 706 (1984) (additional benefits justifying joinder are entirely dependant on the facts of the case and the amount of evidence common to all joined charges).

91. *Matson*, 13 Cal. 3d at 41, 528 P.2d at 757, 117 Cal. Rptr. at 668. See *supra* note 35 (defendant only benefits if defendant is not seeking severance).

92. *Matson*, 13 Cal. 3d at 41, 528 P.2d at 757, 117 Cal. Rptr. at 668. However, the *Matson* court failed to mention that when joined charges are non-cross-admissible, not only does probative value decrease to zero, but prejudice also increases proportionately. See *People v. Smallwood*, 42 Cal. 3d 415, 425-6, 722 P.2d 197, 204-05, 228 Cal. Rptr. 913, 919 (1986) (economic benefits added to the probative value side as a state interest must first offset conceded prejudice already created by the lack of cross-admissibility). As a result, an argument can be made that without cross-admissibility, the additional benefits must be quite significant before they will actually tip a strict balance in favor of joinder.

93. *Williams*, 36 Cal. 3d at 451, 683 P.2d at 705, 204 Cal. Rptr. at 706.

94. *Id.*

the crimes were not connected together in their commission.⁹⁵ Crimes connected in their commission are almost always either cross-admissible or have all arisen from a single criminal transaction, and as a result avoid duplicative evidence when consolidated for trial.⁹⁶ However, the term has escaped a precise definition and courts have used it loosely.⁹⁷

95. *Id.*

96. See *People v. Chessman*, 52 Cal. 2d 467, 492, 341 P.2d 679, 708 (1959) (joined crimes were connected in their commission when the same car, stolen by the defendant, was used in 10 robberies, all robberies were committed using an automobile spotlight to blind the victims, and same pistol was used to rob the victims in isolated areas at night); *People v. Pike*, 58 Cal. 2d 70, 84, 372 P.2d 656, 669, 22 Cal. Rptr. 664, 677 (1962) (joinder of robbery and murder is proper because the common element of substantial importance was the same gun used in both crimes). Though the courts in the above cases did not discuss cross-admissibility, an Evidence Code section 1101(b) theory would probably have applied to both a theory of *modus operandi* in the *Chessman* case and a theory of "opportunity" in *Pike*. See, e.g., *People v. Kelly*, 203 Cal. 128, 133-36, 263 P. 226, 228-30 (1928) (case in which cross-admissibility between crimes was common element of substantial importance justifying joinder cited by courts in both *Chessman* and *Pike* as an example of crimes connected in their commission). See also *People v. Matson*, 13 Cal. 3d 35, 39, 528 P. 2d 752, 755, 117 Cal. Rptr. 664, 666 (1974) (crimes were connected together in their commission for purposes of Penal Code section 954 because the crimes shared some common elements of substantial importance in their commission). The common elements were cross-admissibility on theories of both *modus operandi* and intent. *Id.* Crimes are also connected in their commission for purposes of section 954 when they are part of a single criminal transaction, because one crime can not be fully explained without facts surrounding the other[s]. See, e.g., *People v. Scott*, 24 Cal. 2d 774, 778-79, 151 P.2d 517, 521 (1944). Cf. *People v. Bean*, 46 Cal. 3d 919, 760 P.2d 996, 251 Cal. Rptr. 467, 476 (1988); *Coleman v. Superior Court*, 116 Cal. App. 3d 129, 133-34, 172 Cal. Rptr. 86, 87-88 (1981) (cases in which crimes were not connected together in their commission because the crimes were neither cross-admissible nor part of the same transaction). See *Williams*, 36 Cal. 3d at 447, 683 P.2d at 707, 204 Cal. Rptr. at 703 (1984) (two murders occurring on different dates were not connected in their commission since neither cross-admissible nor part of the same transaction, but four separate crimes which occurred in combination with one of the two murders were *joinable* as crimes connected in their commission because they stemmed from a *single criminal transaction*). By implication, when the court in *Williams* held that the joined but unrelated murder charges would promote no judicial economy under *Matson*, because they were not connected in their commission, the court may be understood as saying that joined charges must be either cross-admissible or part of the same transaction before there will be *additional benefits* from joinder. The dissent in *Williams* actually understood the majority to hold that only cross-admissible crimes could be joined. *Williams*, 36 Cal. 3d at 455-56, 683 P.2d at 699, 204 Cal. Rptr. at 709 (Goldstein, J., dissenting). But see *Williams*, 36 Cal. 3d at 448 n.3, 683 P.2d at 701 n.3, 204 Cal. Rptr. at 703 n.3 (majority corrected the dissent's misunderstanding by pointing out its reaffirmance of *People v. Matson*, 13 Cal. 3d 35, 41, 528 P.2d 752, 757, 117 Cal. Rptr. 664, 668 (1974)). As a result, courts are left to assume that there are some situations when noncross-admissible crimes may be joined with a sufficient showing of economic benefits and a minimum of additional prejudice. *Id.* See generally *Joint and Single Trials*, *supra* note 42 at 560-61; C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE, 160 (2d ed. 1987) (federal and some other state rules governing admissibility of evidence of uncharged offenses consider all evidence of same transaction crimes cross-admissible whether all are charged or not, because the evidence is necessary for a complete understanding of the crime charged).

97. See *People v. Chessman*, 52 Cal. 2d 467, 492, 341 P.2d 679, 702 (1959) (ambiguous language allows inference that crimes may be connected in their commission when the only

The *Williams* court found the second benefit of a joint trial, avoidance of needless harassment of the defendant, to be irrelevant.⁹⁸ When it is a defendant who has requested severance of the crimes, any claim of harassment by that defendant is necessarily waived.⁹⁹ Without so stating, *Williams* put the *Matson* holding in proper perspective by changing it from a rule to an exception.¹⁰⁰ The *Williams* court concluded that although joinder will always avoid some duplication if the same defendant is involved in all joined crimes, courts could not consider this avoidance as an "additional benefit" of joinder under *Matson*.¹⁰¹ The court in *Williams* made clear that a finding of additional benefits under *Matson* requires that joined charges be cross-admissible or otherwise related by virtue of their having at least some amount of overlapping evidence.¹⁰² But, the *Williams* court failed to clarify under what circumstances, if any, *Matson* would apply—that is, in the absence of cross-admissibility, what amount of additional benefits of joinder justify denial of a

common element between them is an intent to obtain property feloniously). Cf. *People v. Balderas*, 41 Cal. 3d 144, 171, 711 P.2d 480, 507, 222 Cal. Rptr. 184, 196 (1985) (court used *Chessman* to support an argument that crimes were connected in their commission for purposes of joinder under section 954 and found unrelated robbery/murder and robbery/rape charges connected in their commission merely because they both involved use of a shotgun (not the same shotgun) and an intent to obtain property feloniously). See *infra* notes 151-77 and accompanying text (loose application of "crimes connected in their commission" by *Balderas* court "watered down" the implicit limitation set by the *Williams*' and *Coleman* courts on when "additional benefits" under *Matson* would be legitimate for purposes of a severance ruling).

98. *Williams*, 36 Cal. 3d at 451, 683 P.2d at 705, 204 Cal. Rptr. at 706.

99. *Id.*

100. *Id.* See also *supra* note 96 (short of expressly limiting *Matson*, the *Williams* court implied that when crimes are not cross-admissible or at least part of the same transaction, economic benefits from joinder will not be sufficient to support a claim by the state for additional benefits under *Matson*).

101. *Williams*, 36 Cal. 3d at 451, 683 P.2d at 706, 204 Cal. Rptr. at 707.

102. *Williams*, 36 Cal. 3d at 451, 683 P.2d at 705, 204 Cal. Rptr. at 706. The court in *Williams* drew an analogy to *People v. Brock*, 66 Cal. 2d 645, 655, 426 P.2d 889, 901, 58 Cal. Rptr. 321, 330-31 (1967), when giving an example of a case where crimes were "connected in their commission" so as to satisfy additional benefits under *Matson*. *Williams*, 36 Cal. 3d at 451, 683 P.2d at 705, 204 Cal. Rptr. at 706. *Brock* involved joined burglary charges in which stolen items and tools used by the defendant in committing two burglaries were found in defendant's motel room. *Brock*, 66 Cal. 2d at 655, 426 P.2d at 901, 58 Cal. Rptr. at 330-31. The burglary charges in *Brock* were cross-admissible. *Id.* The analogy to *Brock* seems an accurate interpretation of *Matson* since the language in *Matson* stressing the additional economic benefits of joinder came from *Brock*. Compare *People v. Matson*, 13 Cal. 3d 35, 41, 528 P.2d 752, 757, 117 Cal. Rptr. 662, 668 (1974) with *Brock*, 66 Cal. 2d at 656, 426 P.2d at 902, 58 Cal. Rptr. at 332. The language in *Matson*, borrowed from *Brock* stated, "joinder of related charges . . . ordinarily avoids needless harassment of the defendant and the waste of public funds which may result if the same general facts were to be tried twice in two or more separate trials." (emphasis added) *Id.*

severance motion.¹⁰³ Despite having determined that on the facts before it that there were no significant additional benefits under *Matson*, the court looked to the other side of the balance and considered possible additional prejudice to the defendant from joinder.¹⁰⁴

c. Prejudicial Circumstances

The court in *Williams* considered three possible forms of prejudice other than noncross-admissibility to which a defendant might be subjected when crimes are joined under section 954. They are: (1) The possible inflammatory nature of one or more of the joined charges and the resultant prejudicial effect that might have on the jury, (2) the possibility that one or more of the joined has particularly weak evidentiary support in relation to the others, and (3) whether one or more of the joined charges carries the death penalty.¹⁰⁵ The *Williams* court adopted this stage of its analysis from the District Court of Appeals case of *Coleman v. Superior Court*¹⁰⁶ which had found the above three forms of prejudice evident on the facts before it when ruling on the propriety of a trial court's severance ruling.¹⁰⁷ The *Williams* court applied the same analysis to the facts surrounding the two murders, beginning with the possible inflammatory nature of the murder charges.¹⁰⁸

103. See *supra* note 96 (the term "connected in their commission" is not exact, so *Williams* holding on additional benefits remains unclear).

104. See *infra* notes 105-24 and accompanying text.

105. *Williams*, 36 Cal. 3d at 452-54, 683 P.2d at 706-07, 204 Cal. Rptr. at 707-08.

106. 116 Cal. App. 3d. 129, 130-35, 172 Cal. Rptr. 86, 86-88 (1981).

107. *Id.* In *Coleman*, the defendant was charged with sex crimes against two minors and the rape and murder of an adult woman. *Id.* The charges were consolidated under the joinder provision of section 954 as crimes of the same class. *Id.* In addition to finding that the joined charges were not cross-admissible, the court pointed out three other prejudicial circumstances. *Id.* First, joining the murder charge with the sex charges against the children was unfair, because of the inflammatory nature of the sex charges. *Id.* Second, the murder charge had very little evidentiary support compared with the other charges, thus causing evidence from the stronger charges to spill over and make the murder charge appear stronger. *Id.* Finally, a conviction for the murder could have resulted in the death penalty. *Id.* Like *Coleman*, the court in *Williams* considered prejudicial circumstances in addition to the prejudice inherent in lack of cross-admissibility. *Williams*, 36 Cal. 3d at 452-54, 683 P.2d at 705-06, 204 Cal. Rptr. at 706-07. The court undertook this analysis despite having found no "additional benefits" under the *Matson* rule. *Id.* Perhaps the court did not need to show additional prejudice to show abuse of discretion; rather, the *Williams* court discussed additional prejudice for the sake of establishing a clear methodology for its balancing test. *Id.* Cf. *People v. Smallwood*, 42 Cal. 3d 415, 426, 722 P.2d 197, 215, 228 Cal. Rptr. 913, 919 (1986) (absent additional benefits under *Matson*, lack of cross-admissibility alone may be sufficient to show substantial prejudice).

108. *Williams*, 36 Cal. 3d at 452-54, 683 P.2d at 705-06, 204 Cal. Rptr. at 706-07.

1. Inflammatory Nature

Under the facts of *Williams*, the court said that joinder of two crimes, both of which shared characteristics of gang activity, was prejudicial to the defendant for two reasons.¹⁰⁹ First, since the defendant was a gang member, a jury might automatically have assumed that the defendant must have been involved in both crimes simply because he was a gang member.¹¹⁰ Second, the court said that gang membership itself was an inflammatory phenomenon because of the negative publicity which surrounds it.¹¹¹ The court was careful to point out that crimes prejudicing a defendant because of their inflammatory nature were not limited to those involving gang membership or the facts of *Coleman*, which involved sex crimes against children.¹¹² The court next considered the relative strengths of the two charges.

2. Strong and Weak Cases

The *Williams* court agreed with the court in *Coleman* that when a charge with strong evidentiary support is joined with a weakly supported charge, a "spill-over" effect may occur, causing the weakly supported charge to appear stronger than it really is.¹¹³ The result is that the strength of the strong charge helps bring a conviction in the weaker charge where a conviction may not have been obtained in separate trials.¹¹⁴ The court in *Williams* expanded upon *Coleman*, however, by including within the category of prejudice situations in which any or all charges joined are weak.¹¹⁵ The court in *Williams* determined that the evidence supporting William's guilt was weak with respect to *both* murder charges.¹¹⁶ The court then reasoned that joinder of two weak cases is just as prejudicial as joinder of strong

109. *Williams*, 36 Cal. 3d at 452-53, 683 P.2d at 606, 204 Cal. Rptr. at 707.

110. *Id.* This reasoning has a potentially broad application. For example, an argument could be made that the "inflammatory nature" part of the *Williams* test would be satisfied if a black or an asian was the defendant and a different witness from each joined charge could testify that the perpetrator was of the same race.

111. *Id.* at 453, 683 P.2d at 605, 204 Cal. Rptr. at 706.

112. *Id.*

113. *Id.* at 453, 683 P.2d at 706, 204 Cal. Rptr. at 708.

114. *Id.*

115. *Id.*

116. *Id.*

and weak cases.¹¹⁷ The weak cases may appear stronger than they really are when all of the evidence is viewed in the aggregate.¹¹⁸

3. Capital Offenses

The *Williams* court considered as a final determinant of prejudice that one of the crimes charged was a capital offense.¹¹⁹ The court reasoned that since capital crimes result in the ultimate punishment, they require a higher degree of scrutiny in determining prejudice, especially if one of the above two forms of prejudice is also present.¹²⁰ The court stressed as particularly intolerable, joinder of two noncapital crimes that become capital merely by virtue of joinder.¹²¹ California Penal Code section 190.2 provides that multiple murders may be considered a capital offense because of the creation of *special circumstances*.¹²² However, section 190.2 requires that *both* charged murders result in convictions before special circumstances will be present.¹²³ According to the *Williams* court, joinder of two noncapital murder charges makes a multiple conviction under section 190.2 far more likely because of impermissible character inferences and a jury's tendency to aggregate and misallocate the evidence between the charges.¹²⁴

The two step analysis, or balancing test, set out by the *Williams* court as a means of ruling on or reviewing section 954 severance motions seems straight forward in theory. However, each stage of the analysis resulted in rather broad holdings by the *Williams* court, subjecting the entire analysis to a considerable breadth of plausible

117. *Id.*

118. *Id.* The court concluded that had the charges been tried separately, it is possible that neither charge would have supported a conviction. *Id.*

119. *Id.* at 454-55, 683 P.2d at 707, 204 Cal. Rptr. at 707-08.

120. *Id.* Higher scrutiny is required than when ruling on severance motions involving noncapital crimes because a capital crime carries the ultimate punishment. *Id.* Rather than providing a ground for prejudice, the presence of a capital offense signals the need for greater sensitivity to prejudice. *Id.* Cf. e.g. *Newman v. Superior Court*, 179 Cal. App. 3d 377, 384, 224 Cal. Rptr. 538, 542 (1986) (non-cross-admissibility and other prejudice more acceptable if no possibility of the death penalty).

121. *Williams*, 36 Cal. 3d at 454, 683 P.2d at 707, 204 Cal. Rptr. at 708.

122. *Id.* "The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree." CAL. PENAL CODE § 190.2(3) (West 1988). Petitioner would face multiple murder special circumstances (warranting possible death penalty) under the above subdivision only if the charges were joined for trial. *Williams*, 36 Cal. 3d at 454 n.11, 589 P.2d at 707 n.11, 204 Cal. Rptr. at 708 n.11.

123. *Williams*, 36 Cal. 3d at 454, 683 P.2d at 707, 204 Cal. Rptr. at 708.

124. *Id.*

applications.¹²⁵ A look at *Williams*' possible holdings is useful before looking at subsequent applications of the *Williams* balancing test by the supreme court.

3. *Williams*' Holding

The *Williams* decision made clear that section 954 must be considered in its totality.¹²⁶ Cross-admissibility is vital as the first determinant of prejudicial joinder because if joined charges are cross-admissible, proper joinder is presumed.¹²⁷ When charges are not cross-admissible, the defendant has the burden of showing that substantial prejudice would result from joinder.¹²⁸ In the broadest sense, *Williams* may be understood to suggest that absent cross-admissibility, substantial prejudice will be satisfied if the additional benefits of joinder laid out in *Matson* are not present.¹²⁹ The reason is that joinder of noncross-admissible charges is itself highly prejudicial.¹³⁰ Construed more narrowly, the opinion can be read as holding that, absent both cross-admissibility and any additional benefits, the defendant must still prove the existence of at least one of the three bases of prejudice laid out above.¹³¹ This holding is possible because

125. See *supra* notes 96-102 and accompanying text (*Williams* is unclear as to how pivotal cross-admissibility is as used in determining substantial prejudice because *Williams* neither defines additional benefits under the *Matson* exception nor indicates how many, if any, of the additional prejudicial circumstances enumerated in *Coleman* were necessary to offset those additional benefits).

126. *Williams*, 36 Cal. 3d at 447-49, 683 P.2d at 701-03, 204 Cal. Rptr. at 703-04.

127. *Id.*

128. *Id.*

129. See *People v. Matson*, 13 Cal. 3d 35, 41, 528 P.2d 752, 756, 117 Cal. Rptr. at 664, 668 (1974). See also *supra*, note 92 (additional benefits, added to the probative value side of the balance are required just to offset prejudice inherent in joining non-cross-admissible). Without additional benefits of joinder present to bolster probative value, the court theoretically should not have to search for additional prejudice beyond that inherent in the lack of cross-admissibility. *Matson*, 13 Cal. 3d at 41, 528 P.2d at 757, 117 Cal. Rptr. at 668.

130. See, e.g., *People v. Smallwood*, 42 Cal. 3d 415, 426, 722 P.2d 197, 208, 228 Cal. Rptr. at 913, 919 (1986) (non cross-admissibility is alone prejudicial without any additional prejudice). See also *supra* notes 45-47 and accompanying text (limitations on admitting evidence of other crimes and dangers therein); *supra* note 92 (*Matson* implied that lack of additional benefits alone is sufficient to show substantial prejudice when charges are not part of same transaction or cross-admissible).

131. *Williams*, 36 Cal. 3d 451-54, 683 P.2d at 704-07, 204 Cal. Rptr. at 706-08 (1984). Having found no additional benefits under *Matson*, the court in *Williams* proceeded to consider additional prejudice. *Id.* The purpose of this part of the opinion may have been merely to drive home the existence of substantial prejudice an attempt to provide a clear model of the balancing test for other courts to follow. However, the analysis of additional prejudice may have been recognition by the court that there is always *some* benefit to joinder which must be offset with additional prejudice. The court in *Williams* did not make this clear. *Id.*

the court, despite having concluded that no additional benefits were present under the *Matson* rule, nevertheless searched for additional prejudice to the defendant beyond that inherent in the lack of cross-admissibility.¹³²

Further, although, the *Williams* court provided for joinder of noncross-admissible crimes which does not subject a defendant to substantial prejudice, the court failed to specify what degree of factual similarity is necessary between joined charges before the state may claim "additional benefits" under *Matson*.¹³³ The *Williams* court held that unless a defendant has elected for a joint trial, or separate trials would result in a waste of public funds because of substantial duplication of evidence, joinder of noncross-admissible charges does not produce any legitimate benefits.¹³⁴ Any lesser economic benefits of joinder are apparently outweighed by greater concerns of prejudice to the defendant and do not justify joinder under section 954.¹³⁵ The court in *Williams* implied that joined charges would have to be connected in their commission before evidence would be sufficiently duplicated that the state could claim additional benefits under *Matson*.¹³⁶ However, the term "connected in their commission" is not exact, and as a result, the *Williams* court did not provide a functional definition of additional benefits under *Matson*.¹³⁷ Finally, *Williams* should not be read as purporting to limit possible "prejudicial circumstances" to those enumerated in *Coleman*, since prejudice takes many forms.¹³⁸ The lack of specificity by the *Williams* court invited these extremely broad and narrow interpretations of its balancing test in subsequent decisions, resulting in a continually divided supreme

132. *Id.*

133. *Id.* at 451-52, 683 P.2d at 705, 204 Cal. Rptr. at 707-08.

134. *Id.*

135. *Id.* When joinder does not serve to avoid duplication of evidence, lesser claims of judicial economy are overriding more fundamental issues of justice, such as defendant's right to a fair trial. *Id.*

136. *Id.*

137. *Id.* See *supra* notes 32 and 96-97 ("connected in their commission" usually means that crimes are either cross-admissible or part of the same criminal transaction but has not been limited to these situations).

138. *Williams*, 36 Cal. 3d at 452, 683 P.2d at 706, 204 Cal. Rptr. at 707. The determinants of prejudice applied by the *Williams* court were adopted directly from *Coleman v. Superior Court*, 116 Cal. App. 3d 129, 138-39, 172 Cal. Rptr. 86, 90 (1981). The *Coleman* court found those particular prejudicial circumstances to exist under a certain set of facts; different facts will no doubt give rise to different but equally severe forms of prejudice. *Id.* But see *People v. Balderas*, 41 Cal. 3d 144, 174, 711 P.2d 480, 511, 222 Cal. Rptr. 184, 198 (1985) (few crimes will be considered "inflammatory" under the *Williams* standard because of their repulsive or sensational nature).

court and inconsistent decisions.¹³⁹ In particular, the failure of the *Williams* court to define clearly the limits of the *Matson* exception, allowed that exception to swallow the *Williams* standard.¹⁴⁰

III. THE PARAMETERS OF *WILLIAMS* UNDER THE BIRD COURT

A. *People v. Balderas*

Less than a year after *Williams* was decided, the California Supreme Court opened the floodgates to the *Matson* exception in deciding *People v. Balderas*.¹⁴¹ In *Balderas*, the court sustained the trial court's denial of a defendant's severance motion, despite the lack of cross-admissibility and the presence of a capital crime.¹⁴² *Balderas*, the defendant, was found guilty of kidnapping, robbing and murdering one victim.¹⁴³ He was found guilty of kidnapping, robbing, raping and sodomizing two other victims in an unrelated attack.¹⁴⁴ The crimes occurred within a twenty-four hour period and were, according to the court, properly joinable under section 954 as crimes of the same class and as ones connected in their commission.¹⁴⁵ Two principal witnesses and two medical experts were common to

139. See *Williams*, 36 Cal. 3d at 445, 454, 683 P.2d at 700, 708, 204 Cal. Rptr. at 701, 708 (seven justices concurred in the method used by the court in reviewing the severance motion and the result). In contrast, both *Balderas*, 41 Cal. 3d at 144, 711 P.2d at 480, 222 Cal. Rptr. at 184 and *Smallwood*, 42 Cal. 3d 415, 433-436, 722 P.2d 197, 209-11, 228 Cal. Rptr. 913, 925-27 (1986), resulted in 4-3 rulings with respect to severance issues, even though both cases purported to follow *Williams*. See also *infra* notes 141-98 and accompanying text (broad applications of *Williams* in subsequent Bird court decisions).

140. See *Balderas*, 41 Cal. 3d 144, 711 P.2d 480, 222 Cal. Rptr. 184. See also *infra* notes 221-46 and accompanying text (application of additional benefits in Lucas court decisions). Under *Matson*, a judge's discretion in admitting other crimes' evidence is broader under Penal Code section 954 than Evidence Code section 1101(b) if there are "additional benefits" from joinder. *People v. Matson*, 13 Cal. 3d 35, 41, 528 P.2d 752, 756, 117 Cal. Rptr. 664, 668. (1974). Although the *Williams* court found no additional benefits present on the facts before it, the court did not indicate how closely charges must be connected before *Matson* benefits are realized. *Williams*, 36 Cal. 3d at 449-54, 589 P.2d at 703-06, 204 Cal. Rptr. at 704-08. Neither did the court indicate the extent to which the *Coleman* prejudice factors must be present to offset any *Matson* benefits. *Id.*

141. 41 Cal. 3d 144, 711 P.2d 480, 222 Cal. Rptr. 184 (1985). See *infra* notes 166-77 and accompanying text (ramifications of *Balderas*).

142. *Id.* at 163-68, 711 P.2d at 486-89, 222 Cal. Rptr. at 190-93.

143. *Id.*

144. *Id.*

145. *Id.*

both crimes.¹⁴⁶ The court applied the *Williams* standard to the facts before it.¹⁴⁷

1. Cross-admissibility

In line with the analysis used by the supreme court in *Williams*, the *Balderas* court began with a determination of cross-admissibility.¹⁴⁸ The court held that the charges were noncross-admissible, rejecting the state's argument that the crimes shared a sufficient number of common characteristics to resolve the disputed identity of the perpetrator.¹⁴⁹ The court then undertook the next stage of the *Williams* analysis and balanced the "additional benefits" of joinder to the prosecution against possible prejudice to the defendant.¹⁵⁰

2. Benefits of Joinder

The *Balderas* court extended legal limitations on additional benefits of noncross-admissible charges implied by the court in *Williams*.¹⁵¹

146. *Balderas*, 41 Cal. 3d at 174-75, 711 P.2d at 494-95, 222 Cal. Rptr. at 198.

147. *Id.* at 170-78, 711 P.2d at 491-94, 222 Cal. Rptr. at 195-98.

148. *Id.* at 171-73, 711 P.2d at 492-94, 222 Cal. Rptr. at 196-97.

149. *Id.* The crimes shared a great deal by way of common features toward showing the modus operandi of the perpetrator, and thereby resolving his disputed identity. *Id.* The incidents occurred within twenty-four hours, both involved commandeering of vehicles, the use of a shotgun, and the partial or complete disrobing of the victims. *Id.* Though the *Balderas* court ultimately found the charges were not cross-admissible, because crimes were not similar enough to prove a modus operandi, its decision on review was based only on the facts which were known at the time of the pre-trial severance hearing. *Id.* A defendant's motion to sever charges which have been consolidated under section 954 is usually heard some time prior to trial. *Id.* In *Balderas*, the trial court had determined, on the facts known at the time of the pre-trial hearing, that the charges were cross-admissible as to identity. *Id.* However, the defendant conceded identity between the time of the pretrial severance motion and the trial. *Id.* As a result, the defendant's identity was no longer "in dispute" for purposes of cross-admissibility under Evidence Code section 1101(b). *Id.* See *supra* notes 36-42 and accompanying text (requirements of cross-admissibility). Nevertheless, the *Balderas* court held that it could only review the propriety of joinder on the facts known at the time of the pre-trial hearing. *Balderas*, 41 Cal. 3d at 171, 711 P.2d at 492, 222 Cal. Rptr. at 196. *Cf.* *People v. Duval*, 198 Cal. App. 3d 1121, 244 Cal. Rptr. 522 (1988); *People v. Polecat*, 191 Cal. App. 3d 526, 236 Cal. Rptr. 453 (1987) (on post-trial review of a trial court's severance motion, error from joinder should be predicated on events which occurred at trial rather than only on the facts known at the time of the pre-trial motion).

150. *Balderas*, 41 Cal. 3d 144, 173-76, 711 P.2d 480, 493-95, 222 Cal. Rptr. 184, 197-99.

151. See *Williams*, 36 Cal. 3d at 457, 683 P.2d at 709, 204 Cal. Rptr. at 710 (Goldstein, J., dissenting). The dissent believed that by implying the state could not claim additional benefits of joinder under *Matson* when crimes were not connected in their commission, the court in *Williams* limited the legal definition of joinable crimes under the wording of section 954 itself. *Id.* After *Williams*, crimes that are in the same "class" but not "connected in their

Regarding the economic benefit to the state in avoiding duplicative evidence by joining charges, the court first found the joined charges to be connected in their commission, even though the crimes were neither cross-admissible nor part of the same transaction.¹⁵² The *Balderas* court used the term “connected in their commission” more broadly than the court in *Williams* had implied it could be, but reasoned that because of common witnesses and medical experts testifying on both charges, the economy of a single trial was significant.¹⁵³ Although this finding extended limitations implied by the court in *Williams*, the *Williams* decision did not preclude the interpretation by the *Balderas* court.¹⁵⁴ *Balderas* provided the first real example of legitimate “additional benefits” under the *Matson* rule limited by *Williams*.¹⁵⁵ Since *Williams* had no opportunity on its facts to determine what degree of overlapping evidence between joined charges would give rise to a claim of additional benefits by the state, and also failed to provide a clear legal limitation, the *Balderas* court was a pioneer in this part of the *Williams* analysis.¹⁵⁶ As a result,

commission” arguably may not even be joined. *Id.* Although the court in *Williams* impliedly limited crimes “legally” joinable under section 954 to ones connected in their commission, the term “connected in their commission” is itself ambiguous. *See supra* note 96 and accompanying text (although *Williams* implied that crimes must be part of a single criminal transaction or cross-admissible to be connected in their commission, prior supreme court cases have used the term more loosely).

The *Balderas* court also determined that the crimes were “connected together in their commission” for purposes of satisfying the joinder provision of section 954, because they shared two “common elements of substantial importance” under the rule established in *Matson*. *Balderas*, 41 Cal. 3d at 171, 711 P.2d at 492, 222 Cal. Rptr. at 196. In *Balderas*, the common elements shared by the original charges were: (1) both involved use of a shotgun and (2) both involved an intent to obtain property feloniously. *Id.* But *see, supra* note 32 (the *Balderas* court applied the term inconsistently with *Williams* and other cases which only found crimes connected in their commission when they had some amount of overlapping evidence). Since the *Balderas* decision stretched the term “connected in their commission” beyond its traditional meaning, any implied legal limitation by the *Williams* decision on when additional benefits under *Matson* will be significant becomes rather meaningless, because most crimes can now be said to be connected in their commission. *Newman v. Superior Court*, 179 Cal. App. 3d 377, 387, 224 Cal. Rptr. 538, 543 (1986).

152. *Balderas*, 41 Cal. 3d at 171, 711 P.2d at 497, 222 Cal. Rptr. at 196.

153. *Id.* In fact, the crimes were so closely connected in time (eight hours), that the court considered one to be in the aftermath of the other. *Id.* Cf. *supra*, note 96 (crimes were very nearly “connected in their commission” as satisfying “same transaction” joinder under *Williams*).

154. *See supra* notes 96-100 and accompanying text (*Williams* neither expressly limited *Matson* nor convincingly limited crimes connected in their commission to ones that were cross-admissible or part of the same transaction).

155. *Balderas*, 41 Cal. 3d at 174, 711 P.2d at 498, 222 Cal. Rptr. at 198.

156. *Id.* Cf. *Williams*, 36 Cal. 3d at 451, 683 P.2d at 705, 204 Cal. Rptr. at 706. The California Supreme Court in *Williams* compared the facts before it with those in *People v. Brock*, 66 Cal. 2d 645, 649, 426 P.2d 889, 896, 58 Cal. Rptr. 321, 327 (1967), when dealing with the question of how much duplication of evidence was necessary to realize “additional

Balderas was the first supreme court case following *Williams* in which joined crimes, though not cross-admissible, share sufficient evidence that judicial economy from joinder must theoretically be offset by additional prejudice.¹⁵⁷

3. Prejudice from Joinder

The court next searched the facts for the existence of any of the prejudicial circumstances adopted by *Williams* from *Coleman*.¹⁵⁸ The court considered the strong versus weak factor and inflammatory nature of the charges, but summarily dismissed them as nonprejudicial on the facts before it.¹⁵⁹ The *Balderas* court found that neither of the joined charges had weak evidentiary support.¹⁶⁰ With regard to the possible inflammatory effect of a rape and a robbery/murder on the jury, the court implied that a valid claim of prejudice derived from joinder of inflammatory crimes might be limited to crimes involving strong public outcry, such as the crimes in *Williams* and *Coleman*.¹⁶¹ The *Balderas* court noted that the charges before it, in contrast, were the result of the defendant's personal motive rather than the highly publicized crimes involving gang warfare in *Williams* or child molestation in *Coleman*.¹⁶² The court concluded that crimes of an inherently inflammatory nature would be difficult to find in our present era of extraordinary violence.¹⁶³ The *Williams* court had

benefits" under *Matson*. *Id.* *Brock* involved two burglaries, occurring close together in time, and stolen property from both was found in the defendant's room. *Brock*, 66 Cal. 2d at 649, 426 P.2d at 892, 58 Cal. Rptr. at 324. Further, the crimes were connected in their commission. *Id.* *Balderas* involved approximately the same amount of duplicative testimony as *Brock*, even though the *Balderas* crimes were *not* connected in their commission. *Balderas*, 41 Cal. 3d at 163-65, 711 P.2d at 492, 222 Cal. Rptr. at 190-92. Therefore, *Williams* and *Balderas* may be called factually consistent with one another even though not legally consistent. *See also* *People v. Johnson*, 43 Cal. 3d 296, 326, 730 P.2d 131, 150, 233 Cal. Rptr. 562, 582 (1987) (Bird, C.J., concurring) ("additional benefits" based on facts of *Brock*).

157. *See* *People v. Matson*, 13 Cal. 3d 35, 41, 528 P.2d 752, 757, 117 Cal. Rptr. 664, 668 (1974) (if there are additional benefits from joinder, prejudice from non cross-admissible alone is insufficient to compel severance).

158. *Balderas*, 41 Cal. 3d at 173, 711 P.2d at 493, 222 Cal. Rptr. at 197.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* The court stated that "[b]y the sad standards of the 70's and 80's, [the crimes] were not particularly brutal, repulsive, or sensational." *Id.* This statement has been quoted consistently by the supreme court and lower courts alike in subsequent cases rejecting arguments that certain joined charges are particularly inflammatory. *See* *People v. Crosby*, 197 Cal. App. 3d 853, 858 243 Cal. Rptr. 158, 161 (1988) (rape of one adult joined with rape of one minor

expressly rejected this contention.¹⁶⁴ Finally, the *Balderas* court gave little weight to the fact that the murder charge was a capital crime and held that capital crimes which were not cross-admissible could still be joined.¹⁶⁵

4. The "Watered Down" *Williams*

The *Balderas* court interpreted *Williams* narrowly by limiting *Williams* to its facts.¹⁶⁶ By reaffirming *Matson*, the *Williams* court agreed that under some circumstances, economic benefits justify joinder of noncross-admissible crimes.¹⁶⁷ *Williams* implied that these circumstances might be limited to situations where joined charges were part of a single criminal transaction but did not say so expressly.¹⁶⁸ *Balderas* broadened this ambiguity by holding that the state has a valid claim of additional benefits under *Matson* when noncross-admissible crimes have overlapping evidence or witnesses, even though the charges are not part of the same transaction.¹⁶⁹ The *Balderas* court also limited *Williams* by downplaying the importance of higher

not "inflammatory" under *Balderas* test.); *Newman v. Superior Court*, 179 Cal. App. 3d 384, 389, 224 Cal. Rptr. 538, 541 (1986) (two rapes not especially inflammatory under the *Balderas* standard); *See also* *People v. Ruiz*, 44 Cal. 3d 589, 749 P.2d 854, 244 Cal. Rptr. 200 (1988) (joined murder charges for deaths of two former wives of defendant not considered inflammatory); *People v. Bean*, 46 Cal. 3d 919, 760 P.2d 996, 251 Cal. Rptr. 467 (1988) (hammer killing not inflammatory under *Balderas* standard). *Cf.* *People v. Johnson*, 43 Cal. 3d 296, 317, 730 P.2d 131, 155, 233 Cal. Rptr. 562, 584 (1987) (Bird, J., concurring) (rape of a white woman by a black man in a church should have been considered "inflammatory" when joined with a murder; the brutality of the rape itself was inflammatory). The effect of the broad language of this statement by the *Balderas* court is that arguably no crime is inflammatory by virtue of its gory or repulsive nature. *See Bean*, 46 Cal. 3d at 941, 760 P.2d at 1008, 251 Cal. Rptr. 479 (crimes will only be considered inflammatory if they are inflammatory in relation to each other).

164. *Williams*, 36 Cal. 3d at 452, 683 P.2d at 706, 204 Cal. Rptr. at 707. The court in *Williams* said, in finding gang membership inflammatory, "It would be folly to suggest that we should limit the consideration of prejudicial impact of a joint trial to to cases which involve sexual assaults against minors." *Id.*

165. *Balderas*, 41 Cal. 3d at 172, 711 P.2d at 505, 222 Cal. Rptr. at 196.

166. *Id.* at 171-81, 711 P.2d at 504-13, 222 Cal. Rptr. at 196-202. *Cf.* *Newman v. Superior Court*, 179 Cal. App. 3d 377, 385, 224 Cal. Rptr. 538, 543 (1986) (Poche, J., concurring). "People v. Balderas has . . . in my view, watered down *Williams v. Superior Court* to the point that no longer will trial court decisions on severance motions be subject to any genuine appellate review. Instead, such decisions will be upheld on the basis of boilerplate paragraphs." *Id.*

167. *Williams*, 36 Cal. 3d at 450, 683 P.2d at 705, 204 Cal. Rptr. at 706 (1984) (when joined charges are connected in their commission, sharing enough overlapping evidence that the state realizes legitimate economic benefit from their joinder).

168. *Id.*

169. *Balderas*, 41 Cal. 3d at 174-75, 711 P.2d at 494-95, 222 Cal. Rptr. at 198.

scrutiny when capital crimes are involved,¹⁷⁰ and by restricting the category of inflammatory crimes to those with high negative publicity.¹⁷¹

The *Balderas* opinion can nevertheless be reconciled with *Williams* since *Williams*' generality makes this possible.¹⁷² In fact, *Balderas* can be seen as completing a standard that *Williams* carelessly left incomplete. *Balderas* accomplished this by answering the open question of what degree of similarity between joined charges satisfies "additional benefits" under *Matson*.¹⁷³ *Balderas* had the opportunity to rule on this open question because of the nature of the facts before it.¹⁷⁴ Unfortunately, the primary effect of the example set by *Balderas* was to dilute *Williams* and render the balancing test ineffective.¹⁷⁵ Finally, the *Balderas* court's inattention to the need for

170. *Id.* at 177, 711 P.2d at 499, 222 Cal. Rptr. at 200.

171. *Id.* at 174, 711 P.2d at 497, 222 Cal. Rptr. at 198.

172. See *supra* note 96 and accompanying text. The court in *Williams* did not clearly define its understanding of "additional benefits" when it implied that they must be connected in their commission, and the way in which *Balderas* interpreted crimes connected in their commission is consistent with the interpretation given in the California Supreme Court case of *People v. Chessman*, 52 Cal. 2d 467, 492, 341 P.2d 679, 706 (1959). *Id.*

173. *Balderas*, 41 Cal. 3d at 174, 711 P.2d at 505, 222 Cal. Rptr. at 198. Since *Williams* failed to define when noncross-admissible charges could be joined, *Balderas* may be seen as providing this definition by virtue of being the first post *Williams* case to find additional benefits under *Matson* sufficient on the facts before it. *Id.* Moreover, *Balderas* involved charges so closely connected by time and witnesses, that substantial economy could be gained with minimal prejudice. *Id.* at 163-67, 711 P.2d at 489-91, 222 Cal. Rptr. at 191-93. If properly limited to its facts, *Balderas* can be seen as providing an example of a justifiable exception to the policy argument that noncross-admissible charges that are not part of a single transaction should never be joined. In circumstances where charges as closely connected as those in *Balderas* are neither cross-admissible nor part of the same criminal transaction, perhaps joinder is justified. This kind of situation will be an exception, however, because usually cross-admissibility or same transaction joinder will be established with crimes so closely related. See *supra* notes 39 and 96 (examples of same transaction joinder and ways in which crimes may be cross-admissible) Unfortunately, the cost to the defendant of this exception created by *Balderas* has been great. See also *infra* notes 199-264 and accompanying text (Lucas court has been able to stretch *Balderas* and *Matson* exception to make *Williams* analysis apply to fact situations where there are no similarities between joined charges). The small amount of extra time and money which would be spent if all crimes which were not either cross-admissible or part of the same transaction were per se severable at the defendant's option, seems well justified in light of the great potential for abuse by courts of the small exception in *Balderas*.

174. *Balderas*, 41 Cal. 3d at 174-75, 711 P.2d at 495-97, 222 Cal. Rptr. at 198 (the crimes joined in *Balderas* had some common witnesses that satisfied requirement of additional benefits under *Matson*).

175. See, e.g., *Newman v. Superior Court*, 179 Cal. App. 3d 377, 224 Cal. Rptr. 538 (1986). *Newman* was decided shortly after *Balderas* and involved two rape charges that were joined under section 954, but unlike *Balderas*, had no shared evidence or witnesses. *Id.* Neither were the joined charges cross-admissible. *Id.* The concurring justice in *Newman* best described the effect of *Balderas* on *Newman* when he said,

Balderas has... watered down *Williams* to the point that no longer will trial court decisions on severance motions be subject to any genuine appellate review. Instead,

heightened sensitivity when capital charges are joined, and its limitation on possible inflammatory circumstances was contrary to *Williams* and lessened the relative weight to be afforded them.¹⁷⁶ The supreme court next had an opportunity to apply the diluted *Williams* analysis to severance ruling in *People v. Smallwood*.¹⁷⁷

B. *People v. Smallwood*.

The California Supreme Court carried *Williams* to the opposite extreme of *Balderas* when it decided *People v. Smallwood* in 1986.¹⁷⁸ Defendant Smallwood was charged with two counts of first degree murder.¹⁷⁹ The two killings occurred eight months apart and shared very little common testimony at the time of the pretrial severance motion.¹⁸⁰ One murder charge had significantly more evidentiary support than the other.¹⁸¹ The defendant was found guilty of both murders, each of which carried the death penalty.¹⁸² The court ruled that the defendant had been substantially prejudiced from joinder.¹⁸³

Applying the *Williams* analysis, the court found the charges non-cross-admissible.¹⁸⁴ The *Smallwood* court then implicitly curbed the

such decisions will be upheld on the basis of boiler plate paragraphs.

That is not to say that I believe that due process will not be served by trying these *unrelated*, and *not cross-admissible*, rape charges together, or that *judicial economy* is served by a consolidated trial: the evidence simply is not overlapping. (emphasis added)

Id. at 385, 224 Cal. Rptr. at 543 (Poche, J., concurring). See also *infra* notes 200-36 and accompanying text (the decision in *Balderas* has allowed the *Williams* analysis to be adapted to almost any factual situation).

176. *Balderas*, 41 Cal. 3d at 171, 174, 711 P.2d at 502, 505, 222 Cal. Rptr. at 196, 198 (1985). See, e.g., *People v. Bean*, 46 Cal. 3d 919, 931, 760 P.2d 996, 1009, 251 Cal. Rptr. 467, 479 (1988) (inflammatory crimes must be inflammatory in relation to each other to be prejudicial); *People v. Ruiz*, 44 Cal. 3d 589, 606-08, 749 P. 2d 854, 860-61, 244 Cal. Rptr. 207-08 (1987) (joined crimes not inflammatory because neither gang warfare nor child molestation present; the capital nature of the charges is not important unless charges become capital by virtue of joinder).

177. 42 Cal. 3d 415, 722 P.2d 197, 228 Cal. Rptr. 913 (1986).

178. *Id.* See *infra* notes 185-98 and accompanying text (contrasting *Balderas* and *Smallwood*).

179. *Smallwood*, 42 Cal. 3d at 418-24, 722 P.2d at 198-202, 228 Cal. Rptr. at 914-18.

180. *Id.*

181. *Id.* at 430, 722 P.2d at 206, 228 Cal. Rptr. at 922. The court ruled that the evidence that defendant Smallwood was the killer in the second of the two murders was very weak. *Id.* An alleged eyewitness proved to be uncredible. *Id.*

182. *Id.* at 417, 722 P.2d at 198, 228 Cal. Rptr. at 914 (The murders qualified as "felony murders"—ones committed *during* a felony. *Id.* Such killings carry a death penalty pursuant to California Penal Code section 190.2 *Id.*

183. *Id.* at 429, 722 P.2d at 205, 228 Cal. Rptr. at 921.

184. *Id.* at 428-30, 722 P.2d at 203-07, 228 Cal. Rptr. at 919-23.

decision in *Balderas* by spending three pages of the opinion offering strong policy arguments against joinder of noncross-admissible charges.¹⁸⁵ The court indicated that if the charges were not cross-admissible, joinder under section 954 would seldom produce legitimate additional benefits.¹⁸⁶ The court then held that although non cross-admissible charges could still be joined, the prosecution would have to prove real, not merely theoretical economic benefits from joinder if it sought to override prejudice to the defendant.¹⁸⁷ The *Smallwood* court held that there are no presumed benefits from joinder; rather, additional benefits will vary with each case, and are entirely dependant upon the amount of overlapping evidence between joined charges.¹⁸⁸ Finally, contrary to *Balderas*, the court stressed the need for extreme scrutiny in any death penalty case.¹⁸⁹

The court in *Smallwood* based its finding of substantial prejudice primarily on a lack of any additional benefits from joinder, coupled with prejudice to the defendant inherent in the noncross-admissibility of the crimes.¹⁹⁰ The presense of additional prejudicial circumstances, namely, the fact that the death penalty was involved and that one charge was particularly weak, solidified the appellant's argument for substantial prejudice but does not appear to have been decisive.¹⁹¹

185. *Id.* at 426-33, 722 P.2d at 207-11, 228 Cal. Rptr. at 923-27 (joinder of noncross-admissible charges is highly prejudicial and ensures that otherwise inadmissible evidence (barred by Evidence Code section 1101(a)) comes before the jury).

186. *Id.* at 430, 722 P.2d at 207, 228 Cal. Rptr. at 923. The court stated: "[a]s the two offenses were not cross-admissible, there simply was no significant judicial economy to be gained from joinder." *Id.*

187. *Id.* at 425, 722 P. 2d at 203, 228 Cal. Rptr. at 919.

188. *Id.*

189. *Id.* at 431, 722 P.2d at 207, 228 Cal. Rptr. at 923.

190. *Id.* at 430, 722 P.2d at 206, 228 Cal. Rptr. at 922-23. The *Smallwood* court did not indicate when noncross-admissible crimes could be joined, because the court had no occasion to judge the potential judicial economy in its own case. *Id.* The prosecutor never argued that judicial economy would be promoted by joinder. *Id.* The court in *Smallwood* warned, however, "no longer may a court merely recite public policy favoring joinder or presume judicial economy to justify denial of severance." *Id.* at 425, 722 P.2d at 203, 228 Cal. Rptr. at 919. See also, *People v. Balderas*, 41 Cal. 3d 144, 182, 711 P.2d 480, 498, 222 Cal. Rptr. 184, 202 (1985) (Bird, C.J., dissenting) (denial of severance improper even with the great deal of evidence shared between the *Balderas* crimes).

191. *Smallwood* at 429-31, 722 P.2d at 206-07, 228 Cal. Rptr. at 922-23. With regard to the issue of a capital charge, the court stated: "[e]ven if such an ill-considered ruling were justifiable in a less serious case, it was impossible where questions of life and death were at stake." (emphasis added) *Id.* Further, although one of the murder charges was weak, the charge had strengthened by the time of trial due to a new witness. *Id.* In line with *Balderas*, though, the court based its review only on the facts available at the time of the severance motion. *Id.* The *Smallwood* court, however, took note of events during the trial, stating that the strengthening of the prosecution's case between the time of the pre-trial severance hearing and the time of trial would not have changed the finding of substantial prejudice, because the

The *Smallwood* decision was the first interpretation of *Williams* which actually seemed to condition defensible joinder of noncross-admissible crimes on the state's ability to prove substantial economic benefit.¹⁹² The court in *Smallwood* implied that the burden was still on the defendant to show substantial prejudice from joinder.¹⁹³ But, the court seemed to imply that when joined crimes are not cross-admissible, substantial prejudice would be shown more by the state's failure to substantiate joinder with economic benefits than by the defendant's ability to prove the additional forms of prejudice set out in *Coleman*.¹⁹⁴

The court in *Smallwood* interpreted *Williams* to the opposite extreme from the court in *Balderas*.¹⁹⁵ The *Smallwood* court may have hoped to curb the widening of the *Matson* exception created

new witness was less than credible. *Id.* From the majority opinion, it is difficult to infer whether the court would have ruled differently, had the charges been sufficiently strong by the time of trial to negate the "weakness factor" of one of the murder charges. *Id. But see, id.* at 434-35, 722 P. 2d at 210, 228 Cal. Rptr. at 926 (Lucas, J., dissenting) (although an erroneous ruling on a pretrial severance motion may signify an abuse of discretion by the trial court, that erroneous ruling does not justify reversal of a conviction unless a post trial review shows that the error resulted in substantial prejudice at trial). Particularly noteworthy is the statement by the court that noncross-admissibility between joined charges is itself prejudicial to the defendant and must be offset by additional benefits. *Id.* at 426, 722 P. 2d at 203, 228 Cal. Rptr. at 919. This statement lends support to an argument that absent cross-admissibility or proven additional benefits between joined charges, joinder may be substantially prejudicial even without the presence any of the additional forms of prejudice set out in *Coleman*. *Cf. Id.* at 433-36, 722 P.2d at 209-11, 228 Cal. Rptr. at 925-27 (Lucas, J., dissenting) (Lucas attacks the majority, saying the majority misread *Williams* in placing so much importance on cross-admissibility in determining substantial prejudice). Interestingly, though, Broussard, who wrote the majority opinion in *Williams*, concurred entirely in the majority opinion in *Smallwood*. *Id.* at 433, 722 P.2d at 209, 228 Cal. Rptr. at 925.

192. *Id.* at 426-32, 711 P.2d at 204-07, 228 Cal. Rptr. at 920-23 (entire emphasis on prosecution failure to support joinder with proof of real economic benefits to the state in the face of prejudice to the defendant due to noncross-admissibility).

193. *Id.*

194. *Id.*

195. At one extreme, *Williams* can be seen as supporting a rule that noncross-admissible crimes should always be severed when they are not part of a single transaction, even if there are no additional prejudicial circumstances such as inflammatory or capital charges. *Williams v. Superior Court*, 36 Cal. 3d 441, 451, 683 P.2d 699, 706, 204 Cal. Rptr. 700, 707 (1984). This appears to be where *Smallwood* stands. *See supra* notes 129 and accompanying text (broadest possible reading of *Williams*). At another extreme, *Williams* can support a rule that noncross-admissible charges may be joined if they share only similar characteristics, such as an intent to obtain property feloniously, and need not be severed unless the defendant proves all four of the additional prejudicial circumstances set out in *Coleman*. *See People v. Balderas*, 41 Cal. 3d 144, 171, 711 P.2d 480, 492, 222 Cal. Rptr. 184, 196 (1985) (*Balderas* used the term "connected in their commission" more loosely than had the court in *Williams*) and *Williams*, 36 Cal. 3d at 453-54, 683 P.2d at 706-07, 204 Cal. Rptr. at 707-08 (*Williams* did not indicate how many of the additional forms of prejudice adopted from *Coleman* must be present to show substantial prejudice from joinder, but found all of them present on the facts before it).

by the decision in *Balderas*.¹⁹⁶ However, the *Smallwood* court had no opportunity to do so, because the prosecution in *Smallwood* never claimed any additional benefits with which to justify its denial of the defendant's severance motion.¹⁹⁷ Purportedly sustaining the decisions in both *Balderas* and *Smallwood*, the *Williams* standard became so malleable that trial courts had no standard at all by which to determine the propriety of joinder under section 954.¹⁹⁸

IV. THE PARAMETERS OF *Williams* Under The Lucas Court

While District Courts of Appeal battled with the proper application of *Williams* following the inconsistent decisions in *Balderas* and *Smallwood*, the new Lucas court embarked on further variations of the shapeless *Williams* standard.¹⁹⁹ Two 1988 Lucas court decisions may fairly well indicate the shape of *Williams* to come.

A. *People v. Ruiz*

In *People v. Ruiz*,²⁰⁰ the defendant was charged with murdering three former wives, and sentenced to death.²⁰¹ There were no witnesses

196. Justice Bird, who dissented on the severance issues in *Balderas*, 41 Cal. 3d at 144, 711 P.2d at 480, 222 Cal. Rptr. at 184 (Bird C.J., dissenting), wrote the majority opinion in *Smallwood*, 42 Cal. 3d at 415, 722 P.2d at 197, 228 Cal. Rptr. at 913.

197. *Smallwood*, 41 Cal. 3d at 431, 722 P.2d at 207, 228 Cal. Rptr. at 923 (the prosecutor arguing for denial of severance in *Smallwood* did not even make an attempt to show additional benefits).

198. See *Williams*, 36 Cal. 3d at 457, 683 P.2d at 708, 204 Cal. Rptr. at 710 (Goldstein, J., dissenting). "The result is that the trial courts are left without a usable standard as to when a reviewing court will find an otherwise statutorily proper joinder to be intolerably prejudicial." *Id.* Cf. *Smallwood*, 42 Cal. 3d at 434, 722 P.2d at 209, 228 Cal. Rptr. at 925 (Lucas, J., dissenting). "The majority magically transmutes an element guaranteeing proper joinder into a prerequisite to proper joinder." *Id.* But see *People v. Crosby*, 197 Cal. App. 3d 853, 860, 243 Cal. Rptr. 158, 163 (1988) (*Smallwood* is consistent with *Balderas* and *Williams*).

199. Compare *Crosby*, 197 Cal. App. 3d at 853, 243 Cal. Rptr. at 158 (court denied severance where charges were noncross-admissible and shared no evidence to promote judicial economy but two totally unrelated rapes were "inflammatory") with *People v. Duval*, 198 Cal. App. 3d 1121, 1126-32, 244 Cal. Rptr. 522, 524-27 (1988) (trial court properly severed two rapes upheld where defendant teacher assaulted two students under same circumstances, based on lack of cross-admissibility). The supreme court is no clearer on severance rulings. See, e.g., *People v. Johnson*, 43 Cal. 3d 296, 319-35, 730 P.2d 131, 144-155, 233 Cal. Rptr. 562, 575-86 (1987). Justices Lucas and Bird wrote separate opinions ruling on propriety of trial court's denial of severance motion, even though the issue had been declared moot by the majority. *Id.* Both opinions can be reasonably supported by a combination of *Williams*, *Smallwood* and *Balderas*.

200. 44 Cal. 3d 589, 749 P.2d 854, 244 Cal. Rptr. 200 (1988).

201. *Id.* at 599-602, 749 P.2d at 862-64, 244 Cal. Rptr. at 203-05.

to any of the alleged murders, and one of the bodies was never found.²⁰² The only real evidence supporting the defendant's involvement in the murders was his alleged lack of concern over the victims' disappearance and resultant deaths.²⁰³ In *Ruiz*, the court sustained what it conceded was a highly questionable finding of cross-admissibility by the trial court.²⁰⁴ The theory of a *modus operandi* upon which the trial court based its finding was simply unsupported by the evidence.²⁰⁵

In an attempt to resolve doubts, the court considered possible additional prejudice under the *Williams* balancing test.²⁰⁶ The court departed from the notion in *Williams* that capital crimes in general require a higher degree of scrutiny than non-capital crimes.²⁰⁷ Instead, the *Ruiz* court interpreted the *Williams* standard as saying that extra scrutiny is required only when two noncapital crimes would become capital by virtue of joinder.²⁰⁸ This limited reading of *Williams* has been applied in subsequent decisions of the Lucas court.²⁰⁹ With respect to the joined crimes' possible inflammatory nature, the court limited that category to the facts of *Williams* and *Coleman*.²¹⁰ Finally, although claiming to employ the *Williams* analysis, the court in *Ruiz*

202. *Id.* at 602, 749 P.2d at 863, 244 Cal. Rptr. at 204.

203. *Id.*

204. *Id.* at 606, 749 P.2d at 861, 244 Cal. Rptr. at 207. *See id.* at 625-30, 749 P.2d at 874-79, 244 Cal. Rptr. at 220-25 (Broussard, J., dissenting) (crimes were not even close to being cross-admissible).

205. *Id.* at 627, 749 P.2d at 875, 244 Cal. Rptr. at 221 (Broussard, J., dissenting).

206. *Id.* at 605-08, 749 P.2d at 859-62, 244 Cal. Rptr. at 205-08.

207. *Id.*

208. *Id.* This was the first case in which the California Supreme Court limited *Williams* to its specific facts regarding capital punishment. *Id.* It is in direct conflict with *People v. Smallwood*, 42 Cal. 3d 415, 430-31, 722 P.2d 197, 207, 228 Cal. Rptr. 913, 923. (1986) (requiring heightened scrutiny in *all* capital cases, not only when crimes become capital by virtue of joinder).

209. *People v. Ruiz*, 44 Cal.3d 589, 606-07, 749 P.2d 854, 861-63, 244 Cal. Rptr. 200, 207-09 (1988). *See also* *People v. Poggi*, 45 Cal. 3d 306, 313, 753 P.2d 1082, 1090, 246 Cal. Rptr. 886, 896 (1988); *People v. Odle*, 45 Cal. 3d 386, 393, 754 P.2d 184, 191, 247 Cal. Rptr. 137, 146 (1988) (limited readings of *Williams*' requirement of higher scrutiny in capital cases).

210. *Ruiz*, 44 Cal. 3d at 606-07, 749 P.2d at 861-63, 244 Cal. Rptr. at 207-09. If the murders were indeed noncross-admissible (a possibility the court concedes), the fact that all of the victims were former wives of the defendant and all disappeared under similar circumstances, is a source of prejudice directly analogous to the type of highly inflammatory situation talked about in *Williams* a common trait of gang membership between all joined charges coupled with the fact that the defendant was a gang member. *Id.* *See Williams*, 36 Cal. 3d at 453, 683 P.2d at 706, 204 Cal. Rptr. at 707 (warning that inflammatory crimes should not be limited to gang membership or sex crimes against children). *See also* *People v. Johnson*, 43 Cal. 3d 296, 311-15, 730 P.2d 131, 138-40, 233 Cal. Rptr. 562, 569-71 (1987) (rape of white woman by black man in church is inflammatory). *But see* *People v. Balderas*, 41 Cal. 3d 144, 174, 711 P.2d 480, 494, 222 Cal. Rptr. 184, 198 (1986) (*Williams* may be limited to its facts).

never mentioned any benefits of joinder.²¹¹ The court may have considered them presumed.²¹²

B. People v. Bean

In its 1988 decision in *People v. Bean*,²¹³ the Lucas court rendered its first clear indication of future applications of the *Williams* standard.²¹⁴ *Bean* involved two brutal murders, both beating deaths.²¹⁵ In one murder, a hammer was used and in the other, the weapon could not be determined.²¹⁶ The murders occurred three days apart, and shared no common evidence or witness testimony.²¹⁷ The defendant was sentenced to death for each murder.²¹⁸

The court purportedly applied the *Williams* analysis, beginning with the issue of cross-admissibility.²¹⁹ The court found cross-admissibility absent, but denied that severance was necessary, and proceeded to weigh the additional benefits of joinder against the prejudicial circumstances enumerated in *Williams*.²²⁰ The *Bean* court gave great weight to the economic benefits of joinder.²²¹ However, unlike *Balderas*, the crimes in *Bean* shared no evidence that would support an argument for judicial economy under the *Matson* excep-

211. *Ruiz*, 44 Cal. 3d at 608, 749 P.2d at 862, 244 Cal. Rptr. at 208. The facts of the case suggest that there was no shared testimony or physical evidence between the three murders which would have justified a joint trial in the absence of cross-admissibility. *Id. Cf. Smallwood*, 42 Cal. 3d at 425, 722 P.2d at 203, 228 Cal. Rptr. at 919 (judicial economy from joinder may no longer be presumed). The silence by the *Ruiz* court as to the issue of benefits of joinder may have been because the court found the charges cross-admissible as to identity. *Ruiz*, 44 Cal. 3d at 606, 749 P.2d at 861, 244 Cal. Rptr. at 207. However, cross-admissibility was questionable, the court admitted. *Id.* In light of *Smallwood*, 42 Cal. 3d at 426, 722 P.2d at 203, 244 Cal. Rptr. at 919 (requiring proof of real economic benefits), this conclusion should have led the court to substantiate its determination of proper joinder by showing that there were additional benefits under *Matson*. *Ruiz*, 44 Cal. 3d at 606, 749 P.2d at 860, 244 Cal. Rptr. at 207.

212. *Ruiz*, 44 Cal. 3d at 606, 749 P.2d at 861, 244 Cal. Rptr. at 207 (because the charges were cross-admissible).

213. 46 Cal. 3d 919, 760 P.2d 996, 251 Cal. Rptr. 467 (1988).

214. *Id.*

215. *Id.* at 927-30, 760 P.2d at 1000-03, 251 Cal. Rptr. at 471-74.

216. *Id.*

217. *Id.* at 933, 760 P.2d at 1007, 251 Cal. Rptr. at 478. In fact, the *Bean* court went so far as to suggest that the dissimilarity of the evidence from the two murders tended to negate the trial court's finding that they were committed by the same person. *Id.* Finally, one of the murders was of questionable strength, due to a improper fingerprint test. *Id.* at 935, 760 P.2d 1008, 251 Cal. Rptr. at 479.

218. *Id.* at 919, 760 P.2d at 996, 251 Cal. Rptr. at 467.

219. *Id.* at 926-27, 760 P.2d at 1005-06, 251 Cal. Rptr. at 476-77.

220. *Id.*

221. *Id.* at 929-30, 760 P.2d at 1008, 251 Cal. Rptr. at 479.

tion.²²² The economic benefits referred to by the *Bean* court were savings realized merely by virtue of a consolidated trial, benefits considered illegitimate by the Bird court in *Smallwood* and other decisions.²²³ Therefore, the *Bean* court's uniform application of additional benefits in the balance cannot be reconciled with the rationale behind *Smallwood*—that additional benefits justifying joinder are entirely dependant on the amount of evidence shared by joined charges.²²⁴

Having decided that the presumed benefits of joinder were substantial, the court entertained the possibility of some additional prejudice, although seemingly only for the sake of form.²²⁵ First, the fact that capital punishment was involved played no part in the weighing process.²²⁶ Faced with the last two *Williams* factors, inflammatory and strong versus weak cases, the court quickly dispensed with the issues as clearly cut against the defendant.²²⁷ The court decided that the crimes were not inflammatory with respect to each other, presumably because neither involved gang membership or sex crimes against children.²²⁸ Contrary to *Williams*, and even limiting

222. *Id.* at 922-26, 760 P.2d at 1003-07, 251 Cal. Rptr. at 474-78. The facts indicate that no reliable evidence and no witness testimony whatsoever was common to both crimes. *Id.*

223. *Id.* Cf. *Williams v. Superior Court*, 36 Cal. 3d 441, 451, 683 P.2d 699, 705, 204 Cal. Rptr. 700, 706 (1984); *People v. Smallwood*, 42 Cal. 3d 415, 431, 722 P.2d 197, 207, 228 Cal. Rptr. 913, 923 (1986) (economic benefits are not presumed; their strength depends entirely on the facts of each case). Even the court in *People v. Balderas*, 41 Cal. 3d 144, 711 P.2d 480, 222 Cal. Rptr. 184 (1985) based its finding of judicial economy on the substantial amount of duplicative evidence between the joined charges. *Balderas*, 41 Cal. 3d at 173-74, 711 P.2d at 494, 222 Cal. Rptr. at 198. In comparison, the *Bean* court simply recited the generalized benefits of a joint trial, benefits which *Williams* and *Smallwood* would not consider significant in light of the need for a fair trial. *Bean*, 46 Cal. 3d at 919-923, 760 P.2d at 996, 999, 251 Cal. Rptr. at 467-70.

224. *Smallwood*, 42 Cal. 3d at 426, 722 P.2d at 203, 228 Cal. Rptr. at 919 (no presumed judicial economy from joinder).

225. *Bean*, 46 Cal. 3d at 931-36, 760 P.2d at 1006-10, 251 Cal. Rptr. at 476-80 (the court deferred entirely to the findings of the trial court).

226. *Id.* But see *id.* at 947-53, 760 P.2d at 1021-24, 251 Cal. Rptr. at 492-95 (Broussard, J., dissenting). Both charges carried possible death penalties, hence arguably no need for higher scrutiny, but the jury may well not have chosen to sentence defendant to death if both murder charges had not resulted in convictions. *Id.* Moreover, the chance of a double conviction was greatly increased because one of the charges was particularly weak. *Id.*

227. *Bean*, 46 Cal. 3d at 934, 760 P.2d at 1008, 251 Cal. Rptr. at 479.

228. *Id.* See *People v. Ruiz*, 44 Cal. 3d 589, 607, 749 P.2d 854, 862, 244 Cal. Rptr. 200, 208 (1988) (other Lucas court decision which dealt with inflammatory crimes impliedly limited this form of prejudice to gang warfare, sex crimes against children and crimes which might qualify as "particularly brutal or repulsive" under *Balderas*). Arguably, however, beating someone to death with a hammer is repulsive by any standard. *People v. Johnson*, 43 Cal. 3d 296, 308, 730 P.2d 131, 139, 233 Cal. Rptr. 562, 570 (1987). Further, the fact that the precise weapon was not determined in the other murder could lead a jury to infer that it too was a hammer killing. At least the argument can be made that particularly unusual methods

Ruiz, the court implied that a charge may not be considered inherently inflammatory, but only in relation to another joined charge.²²⁹ The court did not seem to care that the evidence supporting the second murder appeared weak.²³⁰ Rather, the court was unwilling to second guess the trial court's findings that both charges were adequately supported by the evidence.²³¹

The breadth to the *Williams* standard created by the supreme court decisions in *Smallwood* and *Bean* has caused inconsistency amongst lower courts.²³² The *Bean* and *Ruiz* decisions provide lower courts with some indication about how to apply *Williams* to severance motions.²³³ However, lost in the confusion of previous inconsistent decisions is any definite policy rationale with which to approach the issue of joinder under section 954.²³⁴ The *Williams* balancing test becomes nothing but a shell void of substance when the supreme court can not agree on what combination of judicial economy and prejudice equals a fair trial.²³⁵ Therefore, lower courts are compelled to keep abreast of the latest *definition* of *Williams*. For the time being, trial courts, prosecutors and defense attorneys should not rely

of killing combined with unknown ones are of an "inflammatory nature". See *People v. Williams*, 36 Cal. 3d 441, 452, 683 P.2d 699, 705, 204 Cal. Rptr. 700, 707 (1984) (inflammatory crimes are not limited to sex crimes against children or gang membership). See also *Bean*, 46 Cal. 3d at 940-42, 760 P.2d at 1023, 251 Cal. Rptr. at 494. (Broussard, J., dissenting) (the murders were very inflammatory).

229. *Bean*, 46 Cal. 3d at 933, 760 P.2d at 1008, 251 Cal. Rptr. at 479.

230. *Id.* at 933, 760 P.2d at 1008, 251 Cal. Rptr. at 479.

231. *Id.* Although admittedly, trial courts' factual determinations are not often upset by a less well informed review court, (absent a clear abuse of discretion) there would appear to be a great danger in this general rule when the standard itself is in such confusion. See *Newman v. Superior Court*, 179 Cal. App. 3d 377, 385, 224 Cal. Rptr. 538, 543 (1986). The defendant is entirely at the mercy of the particular understanding of *Williams* balancing test. *Id.* The degree of deference given the trial court's findings by the *Bean* court, and its apparent rote application of the *Williams* criteria without particular scrutiny, confirms the worst fears of one justice. See *Id.* at 385, 224 Cal. Rptr. at 543 (1986) (Poche, J., concurring). "[N]o longer will trial court decisions on severance be subject to any serious appellate review . . . Such decisions will be upheld on the basis of boilerplate paragraphs. . . What is foreseeable is that the defendant will be convicted on both crimes so long as the evidence on one is convincing". (emphasis added) *Id.*

232. See *supra* note 199 (conflicting opinions amongst District Courts of Appeals).

233. See *infra* notes 237-56 and accompanying text (discussion of "*Bean* standard").

234. See *Joint and Single Trials*, *supra* note 42 at 553 (1965) (advocates limiting joinder under federal joinder statutes to crimes that are cross-admissible). See also *supra* notes 148-231 and accompanying text (courts since *Williams* seem to have come no closer to defining whose interest, the defendant's or the state's, is being sought to be protected or furthered with the *Williams* balancing test; one must inquire as to whether economic benefits can be balanced against prejudice at all).

235. See generally *People v. Bean*, 46 Cal. 3d 919, 760 P.2d 996, 251 Cal. Rptr. 467 (1988); *People v. Smallwood*, 42 Cal. 3d 415, 722 P.2d 197, 228 Cal. Rptr. 913 (1986) (both cases allegedly fit within the framework of *Williams* balancing test, yet incorporate entirely different judicial philosophies).

on *Williams*, but the *Bean* standard in addressing severance issues.²³⁶

V. THE *Bean* STANDARD

A. Cross-admissibility

Lower courts must first consider cross-admissibility.²³⁷ Under *Williams*, if the charges are cross-admissible, joinder under section 954 will be proper *per se*.²³⁸ However, a finding of noncross-admissibility has carried little weight in determining prejudice in the Lucas court decisions handed down so far.²³⁹ The court rationalizes that any prejudice in joining noncross-admissible crimes is offset by some presumed benefits of joinder, absent other strong prejudicial circumstances.²⁴⁰ Following a finding of noncross-admissibility, lower courts should consider the additional benefits and prejudices laid out by *Williams*.²⁴¹

B. Benefits of Joinder

Based on Lucas court decisions to date, lower courts may give great weight to the judicial economy realized merely by virtue of consolidating two trials.²⁴² Unlike the economy in avoiding duplicative evidence, that varies drastically with each case, the benefit recognized

236. See *infra* notes 237-54 and accompanying text. The "*Bean* standard" is the name given by the author to the Lucas court's interpretation of the *Williams* standard thus far.

237. See *Williams v. Superior Court*, 36 Cal. 3d 441, 451, 683 P.2d 699, 705, 204 Cal. Rptr. 700, 706. (1984) (determine cross-admissibility first because it is decisive).

238. *Id.*

239. See, e.g., *People v. Bean*, 46 Cal. 3d 919, 760 P.2d 996, 251 Cal. Rptr. 467 (1988); *People v. Ruiz*, 44 Cal. 3d 489, 749 P.2d 854, 244 Cal. Rptr. 200 (1988); *People v. Odle*, 45 Cal. 3d 386, 754 P.2d 184, 247 Cal. Rptr. 137 (1988); *People v. Poggi*, 45 Cal. 3d 306, 753 P.2d 1082, 246 Cal. Rptr. 886 (1988) (in all of these decisions, the court has minimized the importance of cross-admissibility as a vital factor in prejudicial joinder). Cf. *People v. Johnson*, 43 Cal. 3d 296, 313-18 730 P.2d 131, 145-55, 233 Cal. Rptr. 562, 576-86 (1987) (Bird, C.J., concurring); *People v. Smallwood*, 42 Cal. 3d 415, 424-33, 722 P.2d at 197, 202-09, 228 Cal. Rptr. 913, 918-25 (1986) (cases in which the pivotal nature of cross-admissibility is stressed).

240. See, e.g., *Bean*, 46 Cal. 3d at 933, 760 P.2d at 1008, 251 Cal. Rptr. at 479.

241. See *Williams*, 36 Cal. 3d at 447-54, 683 P.2d at 701-07, 204 Cal. Rptr. at 702-08 (*Williams* balancing test).

242. See *Bean*, 46 Cal. 3d at 933, 760 P.2d at 1008, 251 Cal. Rptr. at 479 (benefit derived by virtue of a single jury and courtroom). This economic benefit is not very significant. See *Joint and Single Trials*, *supra*, note 42 at 560 (savings minimal because trial lasts much longer when unrelated charges are joined).

by the present supreme court is a constant.²⁴³ Therefore, lower courts may consider this presumed benefit of joinder a legitimate benefit that must always be offset by additional prejudice.²⁴⁴ Under Bird court interpretations of *Williams*,²⁴⁵ only a state interest in avoiding substantial duplication of evidence was considered a legitimate benefit of joinder.²⁴⁵ As yet, the Lucas court has reviewed no noncross-admissible case under section 954 in which the facts showed any duplicative evidence. However, if that situation arises, joinder will probably be unassailable.²⁴⁶

C. Capital Crimes

In *Bean*, the court was silent as to the capital nature of the charges before it and the resulting need for higher scrutiny.²⁴⁷ After *Ruiz*, however, lower courts can refrain from giving capital crimes weight in determining prejudice unless two non-capital cases would become capital by virtue of joinder.²⁴⁸ Should that situation arise, the lower courts may find joinder substantially prejudicial under section 954, but probably only if other prejudicial circumstances are present.²⁴⁹

D. Other Prejudicial Circumstances

Lower courts may direct limited attention to the final two determinants of prejudice in the *Williams* balancing test, cases which are of an inflammatory nature and trials combining multiple weak cases or strong with weak cases.²⁵⁰ So far, the court has limited the term

243. *Joint and Single Trials*, *supra*, note 42 at 560-62.

244. *Id.*

245. *See, e.g.*, *People v. Smallwood*, 42 Cal. 3d 415, 425-27, 722 P.2d 197, 203-4, 228 Cal. Rptr. 913, 919-20 (1986) (benefits of joinder will not accrue in every case and may not be presumed).

246. *See Bean*, 46 Cal. 3d at 933-37, 760 P.2d 1006-09, 251 Cal. Rptr. at 477-80 (even when the joined crimes had no overlapping evidence that would promote judicial economy from joinder, the supreme court upheld the trial court's denial of severance, and in the face of additional prejudice under *Coleman*).

247. *Id.* at 133-34, 760 P.2d at 1008, 251 Cal. Rptr. at 479 (1988).

248. *See People v. Ruiz*, 44 Cal. 3d 589, 606, 749 P.2d 854, 862, 244 Cal. Rptr. 200, 208 (heightened scrutiny required when capital crimes are involved only if joinder *converts* otherwise non-capital crimes into a capital one because of special circumstances).

249. *See Smallwood*, 42 Cal. 3d at 435, 722 P.2d at 209, 228 Cal. Rptr. at 925 (Lucas, J., dissenting) (section 954 does not differentiate between capital and non-capital offenses, so neither should the court).

250. *See, e.g., Bean*, 46 Cal. 3d at 929-32, 760 P.2d at 1005-09, 251 Cal. Rptr. at 476-80.

inflammatory to the specific facts of *Williams* and *Coleman*, situations in which gang warfare is a common characteristic of joined crimes or in which one of several joined crimes involves sex crimes against children.²⁵¹ Further, the *Bean* court considered joined charges inflammatory only in relation to each other, not inherently so.²⁵² However, since both *Williams* and *Coleman* involved situations creating strong public outcry, circumstances with a similar impact on juries might also qualify as inflammatory.²⁵³ With respect to joinder of strong and weak cases, the court has indicated a willingness to stand by the trial court's decision as to joined charges' respective evidentiary support.²⁵⁴

E. Prognosis

The *Bean* standard gives great weight to presumed benefits of joinder and approaches the issue of prejudice under section 954 in the pre *Williams* fashion of virtual disregard.²⁵⁵ This attitude, coupled with the fact that the Lucas court has so far exhibited a great unwillingness to meddle with trial court severance decisions, suggests that trial courts applying the *Bean* court's interpretation of *Williams* can feel quite safe in denying most severance motions.²⁵⁶ Conversely, trial courts that are more sympathetic to the *Williams* analysis applied in *People v. Smallwood* may feel equally safe in granting severance motions.²⁵⁷

The *Bean* standard rests on a weak foundation, both in logic and fairness.²⁵⁸ Joinder of noncross-admissible charges is contrary to

251. See e.g., *Ruiz*, 44 Cal. 3d at 607, 749 P.2d at 862, 244 Cal. Rptr. at 208. The court in *Ruiz* also implied that particularly brutal or repulsive crimes under the standard set forth in *Balderas* also might be considered inflammatory. *Id.* See also *Coleman v. Superior Court*, 116 Cal. App. 3d 129, 138, 172 Cal. Rptr. 86, 91 (1981) (sex crimes against children). *Williams v. Superior Court*, 36 Cal. 3d 441, 452-53, 683 P.2d 699, 706, 204 Cal. Rptr. 700, 707 (1984) (gang membership).

252. See *Bean*, 46 Cal. 3d at 933-34, 760 P.2d at 1008, 251 Cal. Rptr. at 479.

253. See, e.g., *People v. Johnson*, 43 Cal. 3d 296, 305-07, 730 P.2d 131, 138-39, 233 Cal. Rptr. 562, 569-70 (1987) (court thought rape of white woman by black man in a church might be sufficiently inflammatory).

254. See, e.g., *Bean*, 46 Cal. 3d at 931-33, 760 P.2d at 1006, 251 Cal. Rptr. at 477 (1988).

255. See *supra* notes 237-54 and accompanying text (*Bean* standard) *Cf.* *People v. Matson*, 13 Cal. 3d 35, 41, 528 P.2d 752, 755, 117 Cal. Rptr. 664, 667 (1974) ("[w]here consolidation meets the test of joinder, the difficulty of showing prejudice from denial of severance is so great that courts invariably reject the claim of abuse of discretion").

256. *Bean*, 46 Cal. 3d at 930, 760 P.2d at 1006, 251 Cal. Rptr. at 477.

257. *Id.*

258. *Id.* Without demonstrating real economic benefits from joinder, which would avoid

notions of fairness adhered to by Evidence Code section 1101(b).²⁵⁹ Under the Bird court, the practice was justified only when the balance tipped in favor of substantial and real economic benefits to the state.²⁶⁰ Joinder of charges sharing no evidence produces a savings of public resources, but failure to join them does not amount to a waste of public funds.²⁶¹ Public funds are wasted only when charges involving the same general facts and no great prejudice to the defendant are nevertheless tried separately.²⁶² If our society considered all single trials a waste of public funds when compared with a joint trial, society would merely save money by joining unrelated charges

duplicative evidence, the *Williams* court's basic theory behind *Matson* has not been applied. *Matson*, 13 Cal. 3d at 41, 528 P.2d at 759, 117 Cal. Rptr. at 668. Thus, there is no legitimate state interest in prejudicing the defendant by joining noncross-admissible charges. See *People v. Smallwood*, 42 Cal. 3d 415, 431, 722 P.2d 197, 207, 228 Cal. Rptr. 913, 923. (1986) ("The only real convenience served by permitting a joint trial of unrelated charges is the convenience of the prosecution in securing a conviction."). The Lucas court view is also in the minority nationally. See *LAFAVE*, *supra*, note 22 at 659 (only one third of the states have joinder provisions which, like section 954, allow joinder of crimes that are not part of a single criminal transaction or cross-admissible). The majority of other states' joinder statutes, as well as the Federal Rules of Criminal Procedure are applied with much greater sensitivity to prejudice from joinder than is section 954 under the Lucas court analysis. *Id.* See also, *Chambers v. U.S.* 301 F.2d 564 (D.C. Cir. 1962) (joinder of noncross-admissible charges violates Rule 14 of Federal Rules of Criminal Procedure); *Cross v. United States*, 335 F.2d 987 (D.C. Cir. 1964) (defendant substantially prejudiced by possibility of spillover of evidence from one charge to the other); *Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964) (joinder depends mainly on cross-admissibility between joined charges).

On the subject of logic, the reader should also note that, as a rule, the California Supreme Court has been quite strict in its application of Evidence Code section 1101(b), despite its changing view on the importance of cross-admissibility in proper joinder under section 954. From *Williams* to date, the California Supreme Court has reversed the trial court's decision on cross-admissibility in virtually all section 954 death penalty cases. See, e.g., *Williams v. Superior Court*, 36 Cal. 3d 441, 683 P.2d 699, 204 Cal. Rptr. 700 (1984); *People v. Smallwood*, 42 Cal. 3d 415, 722 P.2d 197, 228 Cal. Rptr. 913 (1986); *People v. Bean*, 46 Cal. 3d 919, 760 P.2d 996, 251 Cal. Rptr. 467 (1988); *People v. Balderas*, 41 Cal. 3d 144, 711 P.2d 480, 222 Cal. Rptr. 184 (1985); *People v. Johnson*, 43 Cal. 3d 296, 730 P.2d 131, 233 Cal. Rptr. 562 (1987). There are a few exceptions. See, e.g., *People v. Ruiz*, 44 Cal. 3d 589, 749 P.2d 854, 244 Cal. Rptr. 200 (1988); *People v. Ghent, Jr.*, 43 Cal. 3d 739, 739 P.2d 1250, 239 Cal. Rptr. 82. (1987). Paradoxically, during the same period, the supreme court has allowed the same prejudice to occur by upholding joinder under section 954 of those noncross-admissible charges. See, e.g., *Bean*, 46 Cal. 3d 919, 760 P.2d 996, 251 Cal. Rptr. 467.

259. See *supra* notes 45-48 and accompanying text (joinder of noncross-admissible crimes permits jury to hear evidence of one crime in the trial of another when that same evidence would be barred by restrictions in the Evidence Code).

260. See, e.g., *Smallwood*, 42 Cal. 3d at 425, 722 P.2d at 203, 228 Cal. Rptr. at 919 (state may not presume benefits from joinder).

261. Compare *Williams v. Superior Court*, 36 Cal. 3d 441, 451, 683 P.2d 699, 706, 204 Cal. Rptr. 700, 707 (1984) (there is always economy in a joint trial, but unless there is substantial duplication of evidence between charges, defendant is being denied right to a fair trial) with *People v. Matson*, 12 Cal. 3d 35, 41, 528 P.2d 752, 756, 117 Cal. Rptr. 664, 668 (1974) (waste of public funds occurs only when the same general facts are tried twice).

262. See, e.g., *People v. Brock*, 66 Cal. 2d 645, 655, 426 P.2d 889, 895, 58 Cal. Rptr. 321, 327 (1967) (crimes which are cross-admissible or part of the same transaction).

and defendants to a point of diminishing economic returns and have all charges decided by one jury. Fortunately, our society considers avoiding the danger of improper character inferences and confusion of evidence that accompanies joint trials worth the extra money spent trying unrelated charges separately.²⁶³ The exception to this general rule supplied by section 954 should be applied fairly and consistently. For this to be possible, legislative reform of section 954 is essential.²⁶⁴

VI. A PROPOSAL FOR LEGISLATIVE REFORM OF PENAL CODE SECTION 954

A. Section 954 (amended)

Williams imposed a judicial limitation on the definition of charges that may be joined under section 954.²⁶⁵ However, the *Williams* standard has not effectively dealt with the court's original concern over prejudice to the defendant.²⁶⁶ Penal Code section 954 should be amended to deal with prejudicial joinder more effectively. Section 954 should conform to the safeguards against prejudice under section 1101 of the Evidence Code while recognizing a legislative intent in judicial economy.²⁶⁷

263. See generally Comment, *Joint and Single Trials*, *supra* note 42 at 553; Payne, *Limiting Instructions in Joint Criminal Trials*, 22 WASH. & LEE L. REV. 285 (1965).

264. See *infra* notes 265-80 and accompanying text (proposed legislative reform of California Penal Code section 954).

265. *Williams*, 36 Cal. 3d at 457, 683 P.2d at 709, 204 Cal. Rptr. at 710 (Goldstein, J., dissenting). See *supra* notes 71-140 and accompanying text (in depth analysis of *Williams*). Before *Williams*, the supreme court predicated improper joinder on the "types" of crimes joined and whether or not they were in the same class. See e.g. *People v. Renier*, 148 Cal. 2d 516, 306 P.2d 917 (1957) (all crimes assaultive in nature could be joined). Further, courts took the view that satisfaction of the joinder provision of section 954 rendered any claim of prejudice moot. *People v. Matson*, 13 Cal. 3d 35, 528 P.2d 752, 117 Cal. Rptr. 664 (1974); *Walker v. Superior Court*, 37 Cal. 3d 938, 112 Cal. Rptr. 767 (1974). *Williams*, on the other hand, revolutionized how section 954 was interpreted. *Williams*, 36 Cal. 3d 441, 451, 683 P.2d 699, 706, 204 Cal. Rptr. 700, 707. Economic benefits were not, as the supreme court had previously held, present whenever crimes met the broad joinder criteria of section 954. *Id.* Instead, the benefits and prejudice from joinder under section 954 vary with each case and its particular facts. *Id.* Cf. *Kidwell v. U.S.*, 38 App. D.C. 566, 570 (D.C. Cir. 1912) (early federal decision recognizing that crimes joined as "of the same class" may actually produce no economic benefits, while subjecting the defendant to great prejudice).

266. See *Newman v. Superior Court*, 179 Cal. App. 3d 377, 385, 224 Cal. Rptr. 538, 543. (Poche, J., concurring) (*Williams* is not a usable standard).

267. See B. WITKIN, CALIFORNIA PROCEDURE, 288 (2d ed 1985) (the requirements of similarity that apply to the admission of evidence of *uncharged* offenses are not applicable

Cross-admissibility between joined charges should create a presumption of proper joinder under section 954.²⁶⁸ Moreover, if joined charges are cross-admissible, the burden should be on the defendant to show substantial prejudice under Evidence Code section 352 in order to sever.²⁶⁹ Noncross-admissibility between joined charges should create a presumption of *substantial prejudice* to the defendant, which the prosecution can rebut by satisfying two conditions: (1) the crimes are all part of a single criminal transaction; and (2) no particularly prejudicial circumstances exist such as those originally classified in *Coleman*.²⁷⁰ As a result, section 954 should read as follows:

(1) The court, in its discretion, may order or allow one or more charges to be joined for a single trial in the interests of judicial economy provided that:

(a) if the charges were to be tried separately, evidence of each charge would be admissible in the trial of the other[s] under Evidence Code sections 1101(b) and 352, or

(b) all charges joined are part of the same criminal transaction, and the economic benefit from their joinder substantially outweighs the danger of prejudice to the defendant. Prejudice from joinder includes but is not limited to: crimes reasonably likely to inflame a jury, crimes of different strengths, and any crime involving the

when all offenses are charged). But judicial economy should be contingent on the degree to which joined charges have overlapping evidence and even then, the defendant's right to a fair trial should never be compromised. *People v. Smallwood*, 42 Cal. 3d 415, 426, 722 P.2d 197, 203, 228 Cal. Rptr. 913, 919 (1986); *Williams v. Superior Court*, 36 Cal. 3d 441, 451, 683 P.2d 699, 706, 204 Cal. Rptr. 700, 707 (1984).

268. *Williams*, 36 Cal. 3d at 448, 683 P.2d at 703, 204 Cal. Rptr. at 704 (evidence which is already admissible to prove a disputed fact under Evidence Code section 1101(b) has already been held more probative than prejudicial under the restrictions imposed by the code). The evidence, when joined, also promotes maximum judicial economy because in separate trials of the crimes, if severed, evidence of each crime would nevertheless have to be introduced in a separate trial of the other[s]. *LAFAVE*, *supra* note 22 at 658-61.

269. *See JEFFERSON*, *supra* note 37 at 1201-05. The trial judge determines whether other crimes' evidence will be admitted under Evidence Code section 1101(b) *Id.* If evidence of other crimes is admissible under an 1101(b) theory and therefore cross-admissible for purposes of Penal Code section 954, the defendant moving for severance under section 954 should have the same burden that a defendant has under Evidence Code section 1101(b) if the defendant wishes to have evidence excluded on the ground of prejudice. *Id.* To exclude evidence that is otherwise admissible under section 1101(b), a defendant must satisfy trial court that danger of prejudice *substantially* outweighs the probative value of the evidence. *Id.*

270. *Id.* Violations of notions of fairness embodied in Evidence Code sections 1101(a) and (b), should only be allowed upon a showing of a compelling state interest in promoting judicial economy. *People v. Smallwood*, 42 Cal. 3d at 415, 426, 722 P.2d 197, 203, 228 Cal. Rptr. 913, 919 (noncross-admissibility automatically subjects a defendant to additional prejudice upon joinder). On the other hand, when joined charges are part of a single transaction, even if not cross-admissible, economic benefits are usually great because of contemporaneity of charges in geography and time, while prejudice is minimal due to small likelihood of error with respect to defendant's identity. *Joint & Single Trials*, *supra* note 42 at 556-60.

possibility of a death sentence.

(2) A defendant charged with multiple offenses shall be entitled to a joint trial of the offenses to the extent reasonable.

B. Interpretive Comments

With the above wording, the amended statute recognizes the economic benefits of a joint trial in which all crimes are charged, by permitting joinder of noncross-admissible charges which are part of the same transaction.²⁷¹ At the same time, multiple offenses that are not cross-admissible at the time of trial are presumed non-joinable because of the great danger of prejudice to the defendant.²⁷² Whenever a jury hears evidence of two or more crimes at the same time, it will draw some extra-evidentiary inference of guilt.²⁷³ Moreover, Evidence Code section 1101(b) considers evidence of uncharged crimes relevant only if the prosecution proves by at least a preponderance of the evidence the defendant's commission of the uncharged crime.²⁷⁴ Beyond this level of proof, the uncharged crime's evidence will still be excluded if it creates a danger of undue prejudice under Evidence

271. See *People v. Shells*, 4 Cal. 3d 626, 632, 483 P.2d 1227, 1231, 94 Cal. Rptr. 275, 279 (1971); *People v. Haston*, 69 Cal. 2d 233, 244-50, 444 P.2d 91, 99-102, 70 Cal. Rptr. 419, 427-30 (1968) (same benefits do not exist when the state merely seeks to introduce evidence of uncharged crimes for purposes of resolving a fact in dispute as are present when all crimes are charged). However, noncross-admissible joinder should be limited to crimes that are part of single transaction, because most crimes having any significant amount of overlapping evidence so as to produce legitimate economic benefit from joinder are either cross-admissible or are part of the same transaction. See *supra* note 96 and accompanying text (crimes connected in their commission); *Joint and Single Trials*, *supra* note 42 at 556-560. Even if the crimes have overlapping evidence, they should be excluded as a matter of law if they are not either cross-admissible or part of the same transaction because of the potential for abuse of what would otherwise be a discretionary rule. See, e.g., *Newman v. Superior Court*, 179 Cal. App. 3d 377, 224 Cal. Rptr. 538 (1988) (stretched *Balderas* to fit a fact situation where joined charges shared absolutely no evidence that would the state's compelling interest in judicial economy); *People v. Bean*, 46 Cal. 3d 919, 760 P.2d 996, 251 Cal. Rptr. 467 (1988) (claims to be applying *Williams* but crimes shared no overlapping evidence necessary under *Williams* to satisfy *Matson* exception).

272. See *Williams* 36 Cal. 3d at 448-49, 683 P.2d at 703, 204 Cal. Rptr. at 704 (judicial economy must never override defendant's right to a fair trial); *People v. Schader*, 71 Cal. 2d 761, 772, 457 P.2d, 841, 852, 80 Cal. Rptr. 1, 12 (1969) ("[t]he risk of convicting the innocent is sufficiently imminent for us to forego the slight marginal gain in punishing the guilty.").

273. JEFFERSON, *supra* note 37 at 262 (admission of evidence of other crimes produces an overstrong tendency to believe the defendant guilty of the charge merely because he is the likely person to do such acts). Also, the jury might not be able to identify with a defendant of offensive character, hence would tend to disbelieve the evidence in his favor. Note, *Procedural Protections of the Criminal Defendant—a Reevaluation of the Privilege Against Self-incrimination and the Rule Excluding Evidence of the Propensity to Commit Other Crimes*, 78 HARV. L. REV. 426, 436 (1964).

274. JEFFERSON, *supra* note 37 at 1201.

Code section 352.²⁷⁵ In contrast, joinder of noncross-admissible charges allows a jury to be influenced in its decision concerning one charge by evidence of other charges which is quite possibly wholly irrelevant.²⁷⁶ Finally, when crimes are not cross-admissible or part of the same transaction they should not be joined at all, because judicial economy is at a minimum; the evidence from one crime would not be admissible in a separate trial of the other[s], and there will most often be little duplication of evidence.²⁷⁷

The proposed statute would subject joinder of noncross-admissible charges to a high level of scrutiny. The burden of proving high economic value and low prejudice rests with the prosecution. Because of the discretionary nature of weighing economic value against prejudice, the process is susceptible to grave abuse by trial court judges.²⁷⁸ Therefore, putting the burden on the state and allowing errors to fall in favor of the defendant would be fairer.²⁷⁹ Proper joinder should be conditioned on fairness. Moreover, fairness should be defined by the statute. If fairness can be achieved at all through a formula that justifies a certain amount of prejudice in exchange for economic savings to the state, the formula should be clearly defined and strictly adhered to.

VII. CONCLUSION

At present, section 954 serves the purpose of allowing joinder of multiple criminal charges for the sake of judicial economy, but at the expense of a fair trial. The purpose of section 954 is not to make convictions easier for the prosecution, although that has been the result.²⁸⁰ In considering severance motions, courts have struggled with

275. *Id.*

276. *Id.*

277. *See supra* notes 94-101 and accompanying text (close connection necessary between crimes before real benefits of joinder will be realized).

278. *See* *People v. Bean*, 46 Cal. 3d 919, 937, 760 P.2d 996, 1022, 251 Cal. Rptr. 467, 493 (1988) (Broussard, J., dissenting) (vigorous disagreement with majority decision to affirm trial court's finding on issues of relative strengths of joined charges, and inflammatory nature of crimes). The tendency of review courts to uphold all findings of fact by trial courts would seem to compound the problem when the balancing of economic benefits against prejudice is discretionary, based entirely upon facts. *See Newman v. Superior Court*, 179 Cal. App. 3d 377, 386, 224 Cal. Rptr. 538, 543 (1986) (Poche, J., concurring) (denials of severance motions will be upheld on the basis of boilerplate paragraphs).

279. *Williams v. Superior Court*, 36 Cal. 3d 441, 448, 683 P.2d 699, 703, 204 Cal. Rptr. 700, 704. (1984).

280. *See People v. Smallwood*, 42 Cal. 3d 415, 430, 722 P.2d 197, 207, 228 Cal. Rptr. 913, 923 (1986) (only beneficiary of joint trial of unrelated charges is the prosecutor who enjoys the convenience of easier convictions).

finding an appropriate standard by which to balance the benefits of joinder against the possibility of prejudice. Interpretations of section 954 have varied to the point that the statute is not a creation of the legislature, but of the courts. The latest interpretation given the statute by the Lucas court endangers defendants' rights and disregards one of the statute's objectives—fairness. The legislature should limit the court's freedom to adopt its own view of fairness under section 954 by amending the statute to ensure that judicial economy and surer convictions are not gained at the expense of defendants' rights to a fair trial.

Mark R. McDonald

