§ 200.40 Indictment; joinder of defendants and consolidation of indictments against different defendants.

1. Two or more defendants may be jointly charged in a single indictment provided that:

(a) all such defendants are jointly charged with every offense alleged therein; or

(b) all the offenses charged are based upon a common scheme or plan; or

(c) all the offenses charged are based upon the same criminal transaction as that term is defined in subdivision two of section 40.10; or

(d) if the indictment includes a count charging enterprise corruption:

(i) all the defendants are jointly charged with every count of enterprise corruption alleged therein; and

(ii) every offense, other than a count alleging enterprise corruption, is a criminal act specifically included in the pattern of criminal activity on which the charge or charges of enterprise corruption is or are based; and

(iii) each such defendant could have been jointly charged with at least one of the other defendants, absent an enterprise corruption count, under the provisions of paragraph (a), (b) or (c) of this subdivision, in an accusatory instrument charging at least one such specifically included criminal act. For purposes of this subparagraph, joinder shall not be precluded on the ground that a specifically included criminal act which is necessary to permit joinder is not currently prosecutable, when standing alone, by reason of previous prosecution or lack of geographical jurisdiction.

Even in such case, the court, upon motion of a defendant or the people made within the period provided by section 255.20, may for good cause shown order in its discretion that any defendant be tried separately from the other or from one or more or all of the others. Good cause shall include, but not be limited to, a finding that a defendant or the people will be unduly prejudiced by a joint trial or, in the case of a prosecution involving a charge of enterprise corruption, a finding that proof of one or more criminal acts alleged to have been committed by one

defendant but not one or more of the others creates a likelihood that the jury may not be able to consider separately the proof as it relates to each defendant, or in such a case, given the scope of the pattern of criminal activity charged against all the defendants, a particular defendant's comparatively minor role in it creates a likelihood of prejudice to him. Upon such a finding of prejudice, the court may order counts to be tried separately, grant a severance of defendants or provide whatever other relief justice requires.

2. When two or more defendants are charged in separate indictments with an offense or offenses but could have been so charged in a single indictment under subdivision one above, the court may, upon application of the people, order that such indictments be consolidated and the charges be heard in a single trial. If such indictments also charge offenses not properly the subject of a single indictment under subdivision one above, those offenses shall not be consolidated, but shall remain in existence and may be separately prosecuted. Nothing herein precludes the consolidation of an indictment with a superior court information.