Joinder of Offenses: Louisiana's New Approach in Historical Perspective

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COMMENTS

JOINDER OF OFFENSES: LOUISIANA'S NEW APPROACH IN HISTORICAL PERSPECTIVE

Criminal prosecutions are initiated by formal accusation—an indictment, information, or affidavit. The purposes of the accusation are to inform the accused of the charge or charges against him; to inform the trial judge of the nature of the prosecution so that he may rule properly on the admissibility of evidence offered at trial; and to serve as a basis for determining the extent to which jeopardy has attached.

Because the likelihood of conviction increases with the number of offenses cumulated in one trial, the rules regulating joinder of offenses within an accusation are among the most crucial in the administration of criminal justice. The determination of whether to sanction joinder of offenses within a single accusation involves the often competing interests of judicial efficiency and fairness to the accused. The former usually is

1. LA. CONST. art. 1, § 15; LA. CODE CRIM. P. arts. 382-85. See generally Slovenko, The Accusation in Louisiana Criminal Law, 32 TUL. L. REV. 70 (1957) [hereinafter cited as Slovenko].
2. LA. CODE CRIM. P. art. 464. When used in the Code of Criminal Procedure the term 'indictment' generally includes affidavits and bills of information. LA. CODE CRIM. P. art. 461. The indictment supplies only the 'essential facts' constituting the offense charged. A bill of particulars supplies the details of the alleged offense. See LA. CODE CRIM. P. arts. 484-85. See also U.S. CONST. amend. V; LA. CONST. art. 1, §§ 13, 15.
4. See generally LA. CODE CRIM. P. arts. 591-98.
5. 8 MOORE'S FEDERAL PRACTICE—CRIMINAL RULES, ¶ 8.02[1] at 8-3 [hereinafter cited as Moore].
6. In Louisiana, LA. CODE CRIM. P. art. 493, as amended by La. Acts 1975, No. 528, § 2, presently governs joinder of offenses within an accusation. LA. CODE CRIM. P. art. 706 limits consolidation of separate indictments for trial to those charging offenses which could properly have been joined in a single indictment. Compare FED. R. CRIM. P. 8(a) and 13.
7. Liberal joinder of offenses reduces demands on prosecutorial and judicial resources through elimination of duplicative prosecutions. ABA STANDARDS, Joinder and Severance, Introduction at 258 (1968) [hereinafter cited as ABA.
said to be served by liberal joinder rules, the latter by restrictive ones.

Joinder rules should effect a delicate balance between conservation of judicial resources and risk of undue prejudice to the accused.

In 1975, the Louisiana legislature modified the rules applicable to joinder of offenses in accusations, but few cases interpreting the amended provisions have reached the Louisiana Supreme Court. Nevertheless, experience under prior Louisiana joinder schemes may provide insight into how the new rules will be applied.

**History of Joinder of Offenses in Louisiana**

**Before 1928**

Before the adoption of the Code of Criminal Procedure of 1928, Louisiana courts followed the prevailing common law rule that two or more separate offenses arising out of the same criminal act or a single continuous unlawful transaction could be joined in separate counts of a

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8. An accused may be prejudiced by liberal cumulation of charges because the jury assumes that, because he is charged with several offenses, he must be guilty of something. The jury may misuse evidence of one offense to convict the accused of a separate offense tried at the same time. Further, the defendant may be confounded in the presentation of inconsistent defenses to the separate crimes.

ABA STANDARDS at 255; 8 MOORE ¶ 8.05 [2] at 8-19; SLOVENKO at 71.

9. "On occasion, however, the situation may be somewhat the reverse: the prosecution may be interested in maintaining the opportunity to proceed with multiple trials, while the defendant prefers a prompt and unified disposition of all charges." ABA STANDARDS at 285; 8 MOORE ¶ 8.05 [2] at 8-19 n.16, ¶ 8.02 [1] at 8-3 n.2; see also, Bennett, *Revision of Louisiana's Code of Criminal Procedure—A Survey of Some of the Problems*, 18 LA. L. REV. 383, 397-99 (1958).


11. An indictment joining in separate counts charges of *separate offenses* should be distinguished from one charging a *single offense* in several different ways. The latter procedure was sanctioned in Louisiana in order to provide for situations in which there was some variance between the state’s proof and its allegations. State v. Jacques, 45 La. Ann. 1451, 14 So. 213 (1893); State v. Clement, 42 La. Ann. 583 (1890); State v. Cook, 20 La. Ann. 145 (1868); State v. John, 10 La. Ann. 456 (1855). In the event a single offense was charged, but in several ways in separate counts of an accusation, the defendant could only be convicted of one crime. State v. John, 129 La. 208, 55 So. 766 (1911). See SLOVENKO at 70 n.134.
single accusation. Joinder was permissive in these circumstances; the prosecutor could charge and try the offenses separately. When a single act gave rise to multiple offenses, as when an accused unlawfully discharged a shotgun wounding two persons, the allegations could be joined in a single count charging one offense, or in separate counts in accordance with the general rule.

When felony offenses did not arise out of the same criminal act or unlawful transaction, they could not be joined properly in a single indictment or information. To join them constituted misjoinder, and subjected the accusation to challenge, though the challenge had to be raised timely or the defect was waived.

Two decisions in the early twentieth century had the effect of restricting joinder of separate offenses arising out of the same criminal act or a continuous unlawful transaction. In State v. Nejin the court formulated the requirement that offenses, to be joinable, must be subject

12. State v. Thorton, 142 La. 797, 77 So. 634 (1918); State v. Green, 37 La. Ann. 382 (1885); State v. Cook, 42 La. Ann. 85, 7 So. 64 (1890); State v. Laqué, 37 La. Ann. 853 (1885); State v. Gilkie, 35 La. Ann. 53 (1883). See also Slovenko at 76-78; Comment, Joiner of Criminal Offenses in Louisiana, 4 La. L. Rev. 127 (1941). If the court characterized the indictment as charging but one offense, only one sentence could be imposed. See note 14, infra.

13. Slovenko at 76-77.

14. This amounted to an exception to the generally applicable common law rule against duplicity, which is charging separate and distinct offenses in the same count. E.g., State v. Johns, 32 La. Ann. 812 (1880). The court held that the prosecution could not charge separate offenses in a single count; an indictment bearing this defect would be quashed. In Johns the state had joined in a single count an allegation that the defendant stabbed with a dangerous weapon with intent to kill with the separate allegation that he inflicted a wound less than mayhem. The court rationalized this exception to the general ban against duplicity by noting that when the same act causes the violations, the offenses are not truly “separate” and “distinct” within the meaning of the duplicity ban. State v. Batson, 108 La. 479, 32 So. 478 (1902); Slovenko at 77. If at trial the evidence showed that the crimes were not the result of the same act, then the defendant could compel the district attorney to elect which crime would be prosecuted. Cf. La. Code Crim. P. art. 226 (1928). See State v. Morrison, 184 La. 39, 165 So. 323 (1935). Compare State v. Green, 37 La. Ann. 382 (1885) with State v. Scott, 48 La. Ann. 293, 19 So. 141 (1896). Upon a guilty verdict, when the indictment or information charged commission of one offense in several ways in separate counts, only one sentence could be imposed. Id.; Slovenko at 70.


17. Id. See also State v. Fritz, 27 La. Ann. 360 (1875).

18. 139 La. 912, 72 So. 452 (1916).
to the same mode of appeal;\textsuperscript{19} in \textit{State v. Hataway}\textsuperscript{20} it stated the additional rule that joinable offenses must be triable by the same type of jury.\textsuperscript{21}

\textit{Joinder of Offenses under the 1928 Code of Criminal Procedure}

The legislature included in Louisiana's first Code of Criminal Procedure a provision directing joinder in separate counts of the accusation of all offenses arising out of a single criminal act or unlawful transaction.\textsuperscript{22} Article 218 provided:

\begin{quote}
When two or more crimes result from a single act, or from one continuous unlawful transaction, only one indictment will lie; but each of said distinct crimes, though some of them be felonies and others of them misdemeanors, may be separately charged in distinct counts in the same indictment.
\end{quote}

Article 217 prohibited joinder of separate offenses within a single accusation except when the Code specifically authorized joinder\textsuperscript{23}—as in Article 218. The effect of these provisions was to forbid joinder of most unrelated offenses within a single accusation, while mandating it when the crimes were related because they arose out of the same criminal act or

\begin{footnotesize}
\begin{itemize}
\item[19.] In \textit{Nejin} the defendant was charged separately with violations of a state statute and a municipal ordinance. A conviction resulting from the state charge was appealable to the supreme court, while appeal on conviction of the municipal charge would have been to the district court, although both offenses properly could be tried in the first instance in city court (139 La. at 913, 72 So. at 452). The defendant was tried and convicted on both charges in city court, but the supreme court reversed and held that offenses could not be joined in a single accusation and trial when the crimes charged were subject to different modes of appeal (139 La. at 915, 72 So. at 453).
\item[20.] 153 La. 751, 96 So. 556 (1923).
\item[21.] The defendant in \textit{Hataway} had been charged with burglary and larceny in separate counts of a single bill of information; he was tried and convicted of petty larceny by a twelve-man jury. Larceny was then properly tried by a five-man jury, while burglary was triable by a twelve-man jury (La. Const. art. 7, § 41 (1921); compare \textit{La. Const. art. 1, § 17}). The court, invalidating the conviction for improper joinder of offenses within an accusation, noted that a defendant accused of larceny had an absolute right to have that offense tried by a five-man jury. Joinder of the non-cognate offenses in separate counts of a single information denied the defendant his constitutional rights.
\item[22.] \textit{See generally SLOVENKO at 78-81; Joinder of Criminal Offenses, supra note 12, at 127.}
\item[23.] La. Code Crim. P. art. 217 (1928) provided: "Except as otherwise provided under this title, no indictment shall charge more than one crime, but the same crime may be charged in different ways in several counts." Besides article 218, other exceptions to the non-joinder rule of Article 217 included Articles 225, 246, and 249. Article 225 was carried forward into the 1966 Code of Criminal Procedure as Article 481; articles 246 and 249 were carried forward as article 482.
\end{itemize}
\end{footnotesize}
transaction. Whether the drafters of the 1928 Code intended to codify existing rules or to change them is less than clear;\textsuperscript{24} the prior rule sanctioning joinder of cognate offenses had been permissive,\textsuperscript{25} while the rule embraced in Article 218 was mandatory.

In any event, the Louisiana Supreme Court applied Article 218 literally in \textit{State v. Roberts},\textsuperscript{26} holding that when two or more offenses were directed to be joined in "only one indictment," that is, when they arose out of the same act or transaction, they had to be joined, and when the state failed to do so, it could not press the omitted charges in subsequent prosecutions.\textsuperscript{27} The supreme court observed that the preclusion of prosecution was based not on the concept of former jeopardy, but rather on the mandatory language of Article 218.\textsuperscript{28}

Because \textit{State v. Roberts} did not involve offenses triable by different types of juries or subject to varied methods of appeal, the questions of constitutionality of joinder of offenses which had been discussed in \textit{State v. Hataway} and \textit{State v. Nejin} were neither raised nor addressed.\textsuperscript{29} However, in \textit{State v. Jacques}\textsuperscript{30} the court considered the constitutionality of Article 218.\textsuperscript{31} In \textit{Jacques} the offenses charged in the single indictment

\textsuperscript{25} See text beginning at note 11, supra.
\textsuperscript{26} 170 La. 727, 129 So. 144 (1930).
\textsuperscript{27} Id. at 732-36, 129 So. at 145-47. \textit{See also} State v. Hurst, 173 La. 459, 137 So. 852 (1931) (writ of habeas corpus properly issued to release defendant confined on charge which under article 218 should have been combined with previous prosecution).
\textsuperscript{29} See text beginning at note 18, supra.
\textsuperscript{30} 171 La. 994, 132 So. 657 (1931). \textit{See State v. O'Banion}, 171 La. 323, 131 So. 34 (1930); \textit{State v. Hill}, 171 La. 277, 130 So. 865 (1930). The constitutional invalidity of article 218 was implicit in both cases, yet the court declined expressly to repudiate article 218—even on a limited basis. These cases involved offenses triable by \textit{five-man juries} being joined with offenses triable by \textit{twelve-man juries}. The holding of \textit{State v. Hataway}, 135 La. 751, 96 So. 556 (1923), also involved joinder of offenses triable by twelve and five-man juries. That case left open the possibility that offenses triable by twelve-man juries could be joined whether capital offenses were charged, in which the verdict had to be unanimous, or whether other absolute felonies were charged, requiring the concurrence of only nine jurors for a verdict.
\textsuperscript{31} \textit{See also} State v. Cormier, 171 La. 1035, 132 So. 779 (1931). In \textit{Cormier} defendants were charged jointly in two indictments, the first charging attempted murder, the second charging manslaughter. Both charges stemmed from a continuous transaction. Defendants were convicted on the first charge and moved to quash the second when the second trial began on the ground that article 218
were murder and robbery. Both offenses were triable by twelve-man juries, but the former required a unanimous verdict, while the latter required only that nine jurors concur in the verdict. The supreme court agreed with the defendant's contention that joinder of these offenses in an indictment and trial, in accordance with the language of Article 218, violated his constitutional rights under Article 7, § 41 of the 1921 Louisiana Constitution.\textsuperscript{32} The court said that Article 218 was wholly unconstitutional and could not be used even to require joinder when the offenses were triable by the same type of tribunal.\textsuperscript{33}

The court in \textit{State v. White,}\textsuperscript{34} a case in which the accused was charged with two murders allegedly arising out of the same unlawful transaction, retreated from the position taken in \textit{Jacques}, noting that the pronouncement in that case that Article 218 was totally void was unnecessarily sweeping, and that there was no constitutional reason to strike down Article 218 insofar as the joinder mandated by that article was limited to joinder of offenses triable by the same type of tribunal.\textsuperscript{35} One writer has suggested that Article 218, as interpreted by the court in \textit{State v. White} "was a substantial codification of the old Hataway case rule."\textsuperscript{36} Had the legislature not taken further action, the post-\textit{White} rule with respect to joinder would have been that separate offenses \textit{had} to be joined in separate counts of a single indictment or information whenever the offenses arose out of the same criminal act or from a continuous unlawful transaction, \textit{provided}, the offenses to be joined were triable by the same

\textsuperscript{32} 171 La. at 999, 132 So. at 658.

\textsuperscript{33} "[A]rticle 218 . . . must be construed as a whole, . . . as the legislature clearly intended that its provisions should operate in their entirety, or not at all." \textit{Id.} The court continued, "[o]ur conclusion is . . . that Article 218 . . . is unconstitutional, null, and void." \textit{Id.} at 1000, 132 So. at 658. The court's reasoning is of doubtful validity. \textit{See} Note, 6 \textit{TUL. L. REV.} 140, 141 (1931).

\textsuperscript{34} 172 La. 1045, 136 So. 47 (1931). \textit{See} \textit{Joinder of Criminal Offenses, supra} note 12; \textit{Note, 6 TUL. L. REV.} 140 (1931).

\textsuperscript{35} 172 La. at 1049-51, 136 So. at 47-49.

\textsuperscript{36} \textit{Joinder of Criminal Offenses, supra} note 12, at 130. One important distinction should be observed. Insofar as article 218 was still constitutionally applicable under the holding in \textit{White}, joinder of separate offenses arising from the same act or unlawful transaction was mandatory. \textit{State v. Roberts}, 170 La. 727, 129 So. 144 (1930). The pre-1928 rule merely permitted joinder of cognate offenses. \textit{See} text beginning at note 11, \textit{supra}. 

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type of tribunal. The requirement of *Nejin* that the joined offenses be subject to the same method of appeal might arguably have been applicable as well because *Nejin* too was predicated on constitutional consideration.37

**Joinder of Offenses after 1932 until 1966**

The legislature responded to the *Jacques* and *White* cases by repealing Article 218.38 However, the legislature left Article 217 intact,39 making joinder of separate offenses within a single accusation generally impermissible absent an express statutory exception. The court in its early decisions following the repeal of Article 218 disregarded the remaining provisions of Article 217 and instead suggested that the repeal of the former provision left the previously prevailing common law rule in effect,41 reviving the rules of *Hataway* and *Nejin* that related offenses could be joined when they were subject to the same mode of appeal and triable by the same type of tribunal.

A parallel line of cases soon emerged reflecting a superior view of the effect of the repeal of Article 218.42 In *State v. Cannon*43 the defendant was indicted separately for killing two persons in the same unlawful transaction. He was prosecuted, convicted, and sentenced to death on one charge. The district attorney then moved to dismiss the second charge, and the defendant, who was urging an insanity defense, opposed the dismissal. The Louisiana Supreme Court directed dismissal,44 and in discussing the propriety of the separate indictments observed,

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37. The court treated the defect in *State v. Nejin*, 139 La. 912, 72 So. 452 (1916), as jurisdictional, and state court jurisdiction is constitutionally delimited. See La. Const. art. 7, §§ 10, 35 (1921); La. Const. art. 5, §§ 5, 16.


40. SLOVENKO at 79-81; *Joinder of Criminal Offenses*, supra note 12, at 131-32.

41. State v. Turner, 178 La. 925, 939, 152 So. 567, 571 (1934); State v. Mansfield, 178 La. 393, 151 So. 631 (1933). In *State v. Morrison*, 184 La. 39, 165 So. 323 (1936), the court approved defendants' convictions upon an indictment charging in a single count the murder of two individuals. (The indictment was duplicitous, but the court relied on the exception to duplicity enunciated in *State v. Batson*, 108 La. 479, 32 So. 478 (1902). See note 14, supra.) Without discussing the effect of the repeal of article 218, the court stated, "There was nothing essentially or fundamentally wrong in [the defendants'] being subjected to only one trial for the murder of two persons." Though not representing the sounder view, some more recent authority exists applying the *Turner* dicta. See State v. McDonald, 224 La. 555, 70 So. 2d 123 (1954). See generally SLOVENKO at 80; *Joinder of Criminal Offenses*, supra note 12, at 131-32; But see note 42, infra.

42. E.g., State v. Giangrosso, 263 La. 275, 268 So. 2d 224 (1972); State v. Carter, 206 La. 181, 19 So. 2d 41 (1944); State v. Cannon, 185 La. 395, 169 So. 446 (1936).

43. 185 La. 395, 169 So. 446 (1936).

44. The court observed that the defendant "can . . . have no other interest in forcing
since the repeal of article 218 of the Code of Criminal Procedure by Act No. 153 of 1932, it was necessary that two separate indictments be returned if the state intended to prosecute this defendant for each homicide.\(^4\)

The court apparently chose to apply the general rule expressed in Article 217 that separate offenses must be charged in separate indictments absent an express statutory exception authorizing joinder.\(^4\) This view prevailed in the subsequent jurisprudence.\(^4\)

Adoption of the 1928 Code of Criminal Procedure did not affect the general rule that a single offense could be charged in a single indictment or information listing in separate counts alternative ways in which the offense could have been committed,\(^4\) although the court could not under such an accusation impose separate cumulative penalties for each count.\(^4\)

Under the 1928 Code of Criminal Procedure misjoinder of offenses in an indictment or information was not a fatal defect; it was deemed waived if the defendant failed to object timely.\(^5\) Arguing by analogy to Article 221,\(^5\) the objection to misjoinder of offenses was to be raised by demurrer or motion to quash, but under Article 252 the court lacked authority to dismiss a defective indictment,\(^5\) and could only sever the indictment.\(^5\)

the issue of his mental status in the untried case than to relieve him of the penalty in the case already tried and disposed of. " Id. at 401-02, 169 So. at 448.
\(^45\) Id. at 400, 169 So. at 447-48 (emphasis added).
\(^47\) State v. Giangrosso, 263 La. 275, 268 So. 2d 224 (1972); State v. Carter, 206 La. 181, 19 So. 2d 41 (1944).
\(^48\) E.g., State v. Nahoum, 172 La. 83, 133 So. 370 (1931); SLOVENKO at 70.
\(^49\) This result was mandated by the double jeopardy provision. See e.g., United States v. Klein, 247 F.2d 908, 919 (2d Cir. 1957).
\(^50\) SLOVENKO at 71. The defect of duplicity—charging two or more offenses in the same count of an indictment or information—was likewise waivable. La. Code Crim. P. art. 221 (1928). See also State v. Richard, 245 La. 465, 158 So. 2d 828 (1963); State v. Blankenship, 231 La. 993, 93 So. 2d 533 (1957). But see State v. Norris, 242 La. 1070, 141 So. 2d 368 (1962).
\(^51\) La. Code Crim. P. art. 221 (1928).
\(^52\) La. Code Crim. P. art. 252 (1928) provided inter alia: "No indictment shall be quashed . . . for any one or more of the following defects: . . . That there is a misjoinder of the offenses charged in the indictment, or duplicity therein. . . . If the court be of the opinion that [either of these defects] exist in any indictment, it may sever such indictment into separate indictments, or into separate counts as shall be proper. . . ." Cf. State v. Jones, 176 La. 723, 146 So. 682 (1933).
\(^53\) When the joined offenses were distinct and arose out of different transactions, Article 226 authorized a motion to compel the district attorney to elect which offense he would prosecute. See La. Code Crim. P. art. 226 (1928). This article was not carried forward into the 1966 Code of Criminal Procedure.
Joinder of Offenses under the 1966 Code of Criminal Procedure

Several commentators expressed dissatisfaction with the general rule articulated in Article 217 that offenses, even when they arose out of the same criminal act or a continuing unlawful transaction, could not be joined in a single indictment; most called for adoption of a rule of permissive joinder similar to the common law rule in effect prior to the 1928 codification. As ultimately adopted, however, the 1966 Code of Criminal Procedure embodied substantially the same rules regarding joinder of offenses which had prevailed under the 1928 Code after the repeal of Article 218 in 1932. Article 493, the principal article governing joinder of offenses within an accusation, generally prohibited joinder, subject to express statutory exceptions. As it then read, Article 493 authorized charging the commission of a single offense in several ways, with separate theories of how the crime was committed being articulated in separate counts of one accusation. Charging a single offense in this manner was not objectionable because it amounted to neither misjoinder nor duplicity.


57. La. Code Crim. P. art. 493 (1966) provided inter alia: "[T]he same offense may be charged in different ways in several counts." Since technically the indictment charges but one offense, imposing separate cumulative penalties for each count is improper. The Louisiana Supreme Court has sustained convictions stemming from prosecutions initiated under indictments drafted in conformity with this provision. State v. Bluain, 315 So. 2d 749 (La. 1975); State v. Johnson, 278 So. 2d 84 (La. 1973); State v. Todd, 278 So. 2d 36 (La. 1973); State v. Hungerford, 278 So. 2d 33 (La. 1973); State v. Didier, 259 La. 967, 254 So. 2d 262 (1971).

58. Misjoinder of offenses under the 1966 Code scheme occurred when two or more separate offenses were joined in a single accusation. The proviso of article 493 sanctioned charging "the same offense" in several ways. La. Code Crim. P. art. 493 (1966).

Despite the general prohibition in Article 493, misjoinder of offenses within an accusation was not automatically a fatal defect, and was deemed waived if a timely and proper objection was not made.\(^{60}\) Apparently, a major reason for requiring timely objection to misjoinder was to allow the prosecutor to amend the defective accusation.\(^{61}\) If the defendant timely objected to the misjoinder of offenses, to prosecute him under the defective accusation was reversible error.\(^{62}\) When an indictment actually charged a single offense, and the trial court erroneously treated it as charging several offenses and sentenced the convicted defendant accordingly, the supreme court corrected the trial court's error notwithstanding the defendant's failure to object to "misjoinder."\(^{63}\)

The 1975 Amendments to the Joinder of Offenses Provisions

In 1975, by Act No. 528, the Louisiana legislature amended the Code of Criminal Procedure articles relative to joinder of offenses in an indictment or information.\(^{64}\) The legislation effects a radical departure from the previous general rule that joinder of offenses within an indictment was impermissible. Amended Article 493 provides:

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan;

\(^{60}\) Before its amendment by La. Acts 1975, No. 528, § 2, La. Code Crim. P. art. 495 provided: "The objections of duplicity, . . . or misjoinder of offenses may be urged only by a motion to quash the indictment." See La. Code Crim. P. arts. 532(3) (providing that a motion to quash may be based on allegations of duplicity and misjoinder—in which case the remedy is severance of the counts or indictment) and 535(C) (providing that a motion to quash based on duplicity or misjoinder may be filed of right within ten days after arraignment or before commencement of trial, whichever is earlier, and it may be filed with the court's permission more than ten days after arraignment but before trial). Compare the procedure utilized in the 1928 Code of Criminal Procedure for objection to misjoinder of offenses discussed in the text beginning at note 50, supra. See City of Baton Rouge v. Norman, 290 So. 2d 865 (La. 1974).


\(^{62}\) State v. Giangrosso, 263 La. 275, 268 So. 2d 224 (1972).

\(^{63}\) See the cases cited in note 57, supra. If multiple offenses had been charged, the defendants' failure to object would have waived the defect. City of Baton Rouge v. Norman, 290 So. 2d 865 (La. 1974).

\(^{64}\) The legislation, proposed by the Louisiana District Attorneys' Association, also included changes in the rules relating to joinder of defendants. No "legislative history" exists respecting these changes; there are no comments, as there likely would have been had the Louisiana State Law Institute proposed the changes.
provided that the offenses joined must be triable by the same mode of trial.\textsuperscript{65}

Article 493 now provides for permissive joinder of offenses\textsuperscript{66} in a manner not unrelated to that of Article 218 of the 1928 Code of Criminal Procedure,\textsuperscript{67} except that it expands the instances in which joinder is allowed. In addition to permitting joinder when offenses arise out of the same criminal act or a continuing unlawful transaction, Article 493 now allows joinder when the offenses are "of the same or similar character." The concluding proviso of Article 493 appears to be an accommodation to the earlier decisions of \textit{State v. Hataway}, \textit{State v. Nejin}, and \textit{State v. Jacques}.\textsuperscript{68}

Because the legislature phrased the amendment to Article 493 as a list of instances in which joinder of offenses is permitted, the Code of Criminal Procedure no longer contains an express general ban against joinder.\textsuperscript{69} Obviously the legislature, because it did not repeal Article 495, but only amended it to delete the reference to duplicity\textsuperscript{70}—joinder of separate offenses within a single count of an indictment—contemplated that joinder of offenses within an accusation should not be permitted except under the terms of the Code. Therefore, misjoinder should still be a valid objection. Further, the 1975 legislation repealed Articles 491 and 492—the articles relating to duplicity.\textsuperscript{71} The reason for this change is unclear, since the defect of charging multiple offenses in a \textit{single count}, which is a distinctly different defect from misjoinder of offenses,\textsuperscript{72} is just as likely to arise after the liberalizing of the joinder rules as it was under the prior scheme.

\textsuperscript{65} LA. CODE CRIM. P. art. 493, as amended by La. Acts 1975, No. 528. \textit{Compare Fed. R. Crim. P. 8(a) (text at note 78, infra); ABA Standards at § 1.1; The American Law Institute—Model Penal Code § 1.08(2) (tent. draft No. 5, 1956).}

\textsuperscript{66} By making joinder permissive rather than mandatory, as article 218 of the 1928 Code had been, the legislature avoided the problem presented in \textit{State v. Roberts}, 170 La. 727, 129 So. 144 (1930) (discussed in text beginning at note 26, \textit{supra}).

\textsuperscript{67} See La. Code Crim. P. art. 218 (1928) in text at note 22, \textit{supra}.

\textsuperscript{68} See discussion in text beginning at note 18, \textit{supra}.

\textsuperscript{69} La. Acts 1975, No. 528, § 2. The legislature could have followed the general pattern set in the 1928 Code of Criminal Procedure—enacting the new rule as a separate article authorizing joinder in the listed circumstances, and retaining the general rule that "except as otherwise provided," no indictment shall charge multiple offenses. The approach taken by the legislature leaves open the possibility, albeit the argument is extremely tenuous, that there is no longer a defect of misjoinder, since no article expressly forbids joinder of offenses not covered by the amended article 493 or articles 481 and 482.

\textsuperscript{70} LA. CODE CRIM. P. art. 495, as amended by La. Acts 1975, No. 528, § 2 provides: "The objections of misjoinder of defendants or misjoinder of offenses may be urged only by a motion to quash the indictment." LA. CODE CRIM. P. arts. 532 and 535 were not altered by the legislature. Thus, though urged via a motion to quash, the remedy for misjoinder remains severance of the indictment. See discussion at note 60, \textit{supra}.

\textsuperscript{71} La. Acts 1975, No. 528, § 1.

\textsuperscript{72} "The charging of more than one distinct crime in the count of an indictment is
Despite the deletion of Articles 491 and 492, the concept of duplicity as a defect in pleading, albeit a non-fatal one, arguably is retained in the new joinder scheme, because Article 493 as amended requires that cumulated offenses be charged in "separate count[s]." Assuming the continued availability of a "duplicity" objection when the state charges a defendant with the commission of two separate crimes in one count of an accusation, the defendant will have to object to "misjoinder" of offenses under Article 495. The inevitable result will be unwarranted confusion between duplicity and misjoinder.

While increasing the availability of permissible joinder of offenses the legislature added an article allowing the defendant or the district attorney, upon a showing of undue prejudice to the accused or to the state, to compel severance of otherwise properly joined offenses. Article 495.1 was added to provide:

The court, on application of the prosecuting attorney, or on application of the defendant shall grant a severance of offenses whenever: (a) if before trial, it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense; or (b) if during the trial upon consent of the defendant, it is deemed necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. The court shall consider whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

Article 495.1 is not addressed to misjoinder; it contemplates situations in which joinder is technically permissible under Article 493, but in which the prejudice resulting from joinder is such that either party's right to a fair trial is jeopardized. Either the defendant or the state can require that the court sever the duplicity, or double pleading. The term 'duplicity' is also frequently applied to the joinder in one indictment of several counts for different offenses. However, it is considered wrong to speak of the joinder of distinct offenses in separate counts of an indictment as duplicity. The term duplicity should be limited to the joinder of two or more separate offenses in the same count of an indictment." Slovenko at 70.

The legislature failed to amend La. Code Crim. P. art. 532, which provides that duplicitive indictments properly objected to by a motion to quash may not be "quashed," but that severance of the count is proper. See discussion at note 60, supra.

The situation could arise in at least two ways. First, the offenses might be properly joinable under the criteria set forth in La. Code Crim. P. art. 493, but they may have been joined in the same count rather than in separate counts. Second, the offenses may be dissimilar and wholly unrelated so that joinder is not permitted by article 493. In the latter case, if the improperly joined offenses were cumulated in the same count, the indictments would be doubly defective, being not only defective for misjoinder but for duplicity as well. Presumably the accused would, in either situation, be required to urge the defect as 'misjoinder' under an article 495 motion to quash. However, in the former situation the defect is clearly not misjoinder.

cumulated offenses. A motion to sever need not be made before trial; in fact, the article is specifically to the contrary. Finally, Article 495.1 articulates functional criteria by which the court is to measure the likelihood of prejudice.

The net effect of the 1975 legislative amendments is to accord the state a broadened opportunity to join offenses in an accusation and trial and ideally to protect the defendant from undue prejudice by requiring that offenses joined be logically related and by allowing the accused, as well as the state, to move for severance. In this way the legislature has attempted to accommodate the competing interests of judicial and prosecutorial efficiency and fairness to the accused.  

Sources of the New Joinder Rules

Whether the legislature has succeeded in striking the desired balance between efficiency and fairness will depend ultimately on how the courts construe and apply the new rules. Important to questions of interpretation and construction are considerations of the sources from which the amendments were derived.

Sources of Article 493

Amended Article 493 tracks the language of Federal Rule of Criminal Procedure 8(a), differing in only two respects. First, the language of Federal Rule 8(a) which sanctions cumulation of "felonies or misdemeanors or both," and which clearly suggests that felonies may be cumulated with misdemeanors in a single accusation, was altered by the Louisiana legislature by the deletion of the words "or both." Thus it is possible to construe the Louisiana statute as allowing only the cumulation of felonies with felonies and misdemeanors with misdemeanors, and as barring the cumulation of felonies with misdemeanors. Second, the Louisiana legislature added a proviso to Article 493 specifying that the permissibility of joinder is contingent upon the joined offenses being subject to "the same mode of trial," perhaps to avoid the state constitutional problems implicit in joinder of offenses triable by different kinds of juries.

76. See discussion in text beginning at note 5, supra.
77. See text of LA. CODE CRIM. P. art. 493, as amended by La. Acts 1975, No. 528, § 2, in text at note 65, supra.
78. FED. R. CRIM. P. 8(a) provides: "Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." See generally 8 MOORE ¶ 8.01 et seq.
79. See text beginning at note 30, supra.
While federal juries almost always are comprised of twelve members, so that the joinder of misdemeanors and felonies does not create constitutional problems of jury sufficiency, in Louisiana an unqualified right to join felonies and misdemeanors or absolute and relative felonies unquestionably would create the problems earlier presented under Louisiana's 'common law' joinder scheme and under its experiment with mandatory joinder. The legislature's modification of the federal rule appears to have been addressed to this problem.

Joinder under the amended Article 493 is permissive, as under the federal scheme, with discretion vesting solely in the prosecutor. The defendant has no right to require joinder, even when the state possesses sufficient evidence to bring the charges together in a single trial, and even though the defendant may desire joint trial of the offenses. Further, the criteria under which Article 493 permits joinder coincide with those listed in the federal scheme. Because the legislature utilized the federal rule regulating joinder of offenses, federal jurisprudence interpreting that provision becomes relevant to Louisiana courts construing Article 493.

Source of Article 495.1

Although the Louisiana legislature adopted the basic rule of joinder of offenses expressed in Federal Rule of Criminal Procedure 8(a), it did not adopt the companion provision relative to relief from prejudicial joinder embodied in Federal Rule 14. Instead, upon recommendation of the Louisiana District Attorneys' Association, the legislature adopted a rule paralleling the American Bar Association recommendations on severance of offenses. Although it lists

(discussed in note 21, supra); State v. Nejin, 139 La. 912, 72 So. 452 (1916) (discussed in note 19, supra).
81. See FED. R. CRIM. P. 23. Even where cases are triable by jury, the right may be waived. Patton v. United States, 281 U.S. 276 (1930); 8 MOORE § 23.03 at 23-5. "An effective waiver . . . requires (1) that the waiver be in writing, (2) that it be approved by the court, and (3) that the consent of the government be obtained." Id. at 23-27. See also Singer v. United States, 380 U.S. 24 (1965). Since a defendant can waive altogether his right to jury trial, he can agree to a reduction in the usual number of jurors. 8 MOORE § 23.04 at 23-10.

82. See cases cited at note 80, supra.
83. Compare LA. CODE CRIM. P. art. 493, as amended by La. Acts 1975, No. 528, § 2, with ABA STANDARDS at §§ 1.1 & 1.3. See also FED. R. CRIM. P. 8(a).
84. FED. R. CRIM. P. 14 provides inter alia: "If it appears that a defendant or the government is prejudiced by joinder of offenses . . . in an indictment or information or by such joinder for trial together, the courts may order an election or separate trials of counts, . . . or provide whatever other relief justice requires. . . ."

85. Compare LA. CODE CRIM. P. art. 495.1 added by La. Acts 1975, No. 528, § 2 (see text at note 75, supra) with ABA STANDARDS at § 2.2(b): "The court, on application of the prosecuting attorney, or on application of the defendant . . .
the same criteria as the ABA source provision for the trial judge to consider in determining whether to sever, the new Article 495.1 is mandatory rather than permissive, and the Louisiana judge must grant a severance if the criteria are met.  

The legislature’s reason for enacting a severance provision differing from the federal scheme after having followed the federal rules respecting initial joinder is unclear, but may be due in part to the desirability of having functional guidelines for determining when to sever, such as those included in the ABA provision. The ABA scheme also makes a basic, perhaps desirable distinction between severance before trial and severance during trial. When severance is urged before trial on the ground that joinder is unduly prejudicial to the defendant because of the multiplicity of offenses or for other reasons, the court should order severance when it is appropriate; during trial, a severance will be granted only when it is necessary. A broader test applies before trial because the trial judge must base his decision on speculation about how the trial will develop, while a stricter test reasonably applies during trial since the parties and the court are in a better position to assess the actual prejudice to the defendant which may result from continuation of the joint trial. Of course, if the judge should grant a severance of offenses whenever: (i) if before trial, it is deemed appropriate to promote a fair determination of the defendant’s guilt or innocence of each offense; or (ii) if during trial upon consent of the defendant, it is deemed necessary to achieve a fair determination of the defendant’s guilt or innocence of each offense. The court should consider whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

86. Article 493 uses “shall” rather than “should.” See LA. CODE CRIM. P. art. 495.1 in text at note 75, supra; see text of ABA STANDARDS at § 2.2(b) in note 85, supra.

87. It was the express intent of the drafters of the ABA Standards that functional criteria be given to provide “a solid foundation for judicial decisions” and to “aid in the responsible exercise of . . . discretion and in . . . effective review” of joinder and severance problems. Lack of functional guidelines was viewed as a major weakness in many existing joinder-severance schemes. ABA STANDARDS at 286; Erickson, The Standards of Criminal Justice In a Nutshell, 32 LA. L. REV. 369, 386 [hereinafter cited as Erickson].

88. ABA STANDARDS at § 2.2(b) (see note 85, supra). Generally, severance under the federal scheme is available only when the defendant moves for it prior to trial. Otherwise he may be held to have waived his objection. E.g., Pummill v. United States, 297 F.2d 34 (8th Cir. 1961); 8 MOORE ¶ 14.02 [2] at 14-5. However, despite the general rule, if circumstances develop at trial which make severance necessary, the courts may permit it. Schaffyer v. United States, 362 U.S. 511 (1960). One court has said that even after trial a defendant can raise the severance issue if the prejudice was not readily apparent before trial. United States v. Wilson, 434 F.2d 494, 500 n.12 (D.C. Cir. 1970).

89. ABA STANDARDS at § 2.2(b) (see note 85, supra).

90. Erickson at 387.
grants a severance after trial has commenced, the entire proceeding must be aborted, and separate trials must be initiated.\textsuperscript{91}

Because Article 495.1 specifically authorizes the defendant to move for severance after trial has begun, the rights granted under this article need not be urged by a motion to quash under Article 495.\textsuperscript{92} Article 495 governs the mode of objecting to misjoinder only, that is, joinder of offenses within an accusation which is not sanctioned by Article 493.\textsuperscript{93}

**Problems of Construction of the New Joinder Rules**

**Criteria for Joinder**

Article 493 now declares that offenses may be joined in separate counts of a single accusation when they fall into one of four categories: when they arise from the same act, stem from a single unlawful transaction, result from two or more unlawful transactions connected by a common scheme or plan, or are of the same or similar character.\textsuperscript{94} Historically, at least, the first two joinder criteria listed should be familiar to Louisiana courts, since they reflect not only the prior common law rule permitting joinder of offenses in Louisiana,\textsuperscript{95} but also the criteria applicable under the mandatory joinder rule in Article 218 of the 1928 Code of Criminal Procedure.\textsuperscript{96} In both cases joinder is permitted because the factual context out of which the offenses arose is the same, and prosecution of the offenses separately would require the state to duplicate much of the same evidence.\textsuperscript{97} The same considerations apply when the offenses joined result from two or more unlawful transactions, so long as they are connected by a common scheme or plan.\textsuperscript{98} With respect to offenses falling within any of the first three categories listed, even if the rules of pleading required separate accusation and trial, the trier of fact would almost certainly learn of the uncharged offenses\textsuperscript{99} either because they comprise part of the res

\textsuperscript{91} LA. CODE CRIM. P. art. 495.1 requires that the defendant consent to severance ordered after trial has begun; his consent being necessary to keep the subsequent prosecutions from attack on double jeopardy grounds. *Compare* LA. CODE CRIM. P. art. 591.

\textsuperscript{92} See discussion in text beginning at note 70, supra; see note 70, supra, for the text of LA. CODE CRIM. P. art. 495, as amended by La. Acts 1975, No. 528, § 2.

\textsuperscript{93} *Id.* See LA. CODE CRIM. P. art. 493, as amended by La. Acts 1975, No. 528, § 2 in text at note 6, supra.


\textsuperscript{95} See discussion in text beginning at note 11, supra.

\textsuperscript{96} See discussion in text beginning at note 22, supra.

\textsuperscript{97} 8 MOORE ¶ 8.05 [2] at 8-18-19, ¶ 14.03 at 14-7-8.2.

\textsuperscript{98} *Id.*

\textsuperscript{99} "[F]ailure to join all possible charges in the same . . . indictment does not deprive the prosecution of their use for all purposes. Evidence of 'prior similar acts'
gestae\textsuperscript{100} or because they are relevant to issues of knowledge, intent, system,\textsuperscript{101} or identity\textsuperscript{102} as to the offense charged.

However, with respect to offenses merely "similar" or of the "same character," the factual connexity justifying even permissive joinder may be lacking.\textsuperscript{103} The degree of prejudice to the accused is likely to be increased, since unrelated though similar offenses will be independently admissible less often to prove knowledge, intent, system, or identity.\textsuperscript{104} In addition, the juxtaposition of multiple and unrelated counts may unduly prejudice the defendant\textsuperscript{105} by generating jury confusion over such issues as burden of proof.\textsuperscript{106}

\textit{Prejudicial Joinder}

The test for determining when joinder is so prejudicial that severance is required under Article 495.1\textsuperscript{107} is whether the defendant's guilt or inno-

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\textsuperscript{103} 8 MOORE \textsuperscript{14.03} at 14-11 (discussing federal rules of joinder and severance).

\textsuperscript{104} For example, the Louisiana Supreme Court in \textit{State v. Moore}, 278 So. 2d 781 (La. 1973), held inadmissible for purposes of proving "intent" prior acts of rape alleged to have been committed by the defendant. At a minimum the offense charged and the offenses held inadmissible were "of the same or similar character," and under the new joinder rules would properly be joinable in a separate indictment. If so joined, defendant would be forced to rely on article 495.1 for a severance based on the prejudice inherent in such joinder. L.A. CODE CRIM. P. art. 495.1. As a general proposition however, "similar offenses" may be admissible to establish knowledge, intent, system, and identity, and in such case there is no more prejudice accruing to the defendant from joining the similar crimes, than would result from joinder of more closely related offenses. \textit{Cf. Drew v. United States}, 331 F.2d 85 (D.C. Cir. 1964).

\textsuperscript{105} "The vice of joinder of [merely] similar offenses is especially clear where defendant has a good defense on one charge (and perhaps is innocent) but no defense on the other. A severance will be granted if it can be demonstrated that joinder of offenses deprives defendant 'of a choice whether or not to take the stand.' " 8 MOORE \textsuperscript{14.03} at 14-11 (discussing federal rules of joinder and severance).

\textsuperscript{106} 8 MOORE \textsuperscript{8.05} [2] at 8-19.

\textsuperscript{107} 8 MOORE \textsuperscript{14.03} at 14-7; C. WRIGHT, \textit{FEDERAL PRACTICE AND PROCEDURE} \S 143 at 316-17 (1969) [hereinafter cited as WRIGHT].
cence as to each offense charged may be fairly determined in a single trial. Implicitly, when the prejudice inherent in joinder of factually unrelated offenses, crimes merely of similar or the same character, inhibits fair determination of the accused’s guilt or innocence, severance would be proper. Article 495.1 contains functional criteria which a court must apply in measuring the prejudice likely to result from joinder of offenses, including the number and complexity of the crimes charged and the likelihood of jury confusion. These criteria should not be treated as exclusive, because other considerations may bear on the ultimate question, e.g., whether the joint trial will prejudice the accused’s right to a fair determination of guilt or innocence.

If Article 495.1 is interpreted to provide broad protection to an accused by making severance of offenses readily available when he claims that joinder is prejudicial, it should not matter that the prosecutor is given broad rights to join offenses initially. The difficulty lies in the probability that the determination of whether to sever offenses will be made by the trial court in its discretion, and that the court’s findings will be, as a practical matter, extremely difficult to review. Federal practice in this respect is similar. If offenses are joinable under Rule 8, but their joinder results in undue prejudice to the accused or to the state, the court in its discretion may grant a severance of the offenses. Perhaps the soundest approach, in the light of the steps already taken by the legislature, would be to adopt the proposal of the American Bar Association and give the defendant an absolute right to require severance of offenses whenever they are joined solely because they are of the same or similar character.

Apparently no requirement exists under the new Louisiana scheme that prejudicial joinder be raised as an objection before trial, since the article

109. See the discussion on the scope of appellate review in text beginning at note 121, infra.
110. See Wright at §§ 221 & 227.
111. See text of Fed. R. Crim. P. 8(a) at note 78, supra.
112. Joinder of offenses, though permissible under Rule 8(a), may result in prejudice to an accused in a number of recognized ways: the accused may desire to take the stand and testify as to one of the charges, but not as to the others. See Cross v. United States, 335 F.2d 987 (D.C. Cir. 1964). Evidence of one of the offenses might not be independently admissible in a trial for the other. See Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964). The risk of jury misuse of evidence might be so great that severance should be granted. See Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966). See generally, Wright § 143 at 316-17 & 222.
113. ABA Standards at § 2.2(a).
specifically allows the question to be raised during trial. Offenses can be
joinable under the terms of Article 493 and their joinder immune from
objections of "misjoinder" under Article 495 but nevertheless, the effect
of the joinder may be so inherently prejudicial, when the guidelines of
Article 495.1 are applied, that severance is necessary. The federal courts
are divided over whether the accused must object to the prejudicial joinder,
or whether the court can order severance sua sponte. Most federal appeals
courts treat the defendant's failure to object to the prejudicial joinder of
offenses properly joinable under Rule 8(a) as a waiver, though a minority
are willing to consider the question of prejudice first raised on appeal.
According to federal practice, however, if the offenses are not properly
joinable under the terms of Federal Rule of Criminal Procedure 8(a), then
the court has no discretion; it must order severance. And since the trial court
has no discretion, the standard of review is not "manifest error" or "abuse
of discretion," but is whether the court committed error. Failure to grant a
severance when the offenses are not properly joinable under Rule 8 is
reversible error.

Under the new Louisiana joinder-severance scheme, when offenses
are not properly joinable under Article 493, their joinder may be opposed
by a timely filed motion to quash. The pre-amendment cases held that
failure to object to misjoinder amounted to waiver of the objection.

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114. See text beginning at note 69, supra.
115. Many federal courts, ruling on motions to sever indictments for prejudicial
    joinder, attach weight to whether the "similar" offense charged would be indepen-
    dently admissible to establish knowledge, intent, system, and the like. E.g., United
    States v. Adams, 481 F.2d 1099 (D.C. Cir. 1973); United States v. Rodgers, 475 F.2d
    821 (7th Cir. 1973); Bradley v. United States, 433 F.2d 1113 (D.C. Cir. 1969); Drew v.
    United States, 331 F.2d 85 (D.C. Cir. 1964).
116. See WRIGHT § 221 at 432-33. Cases holding that an accused has waived his
    right to object to prejudicial joinder, when the offenses meet the Rule 8 criteria,
    represent the majority view. E.g., United States v. Flick, 516 F.2d 489 (7th Cir. 1975);
    United States v. Franklin, 452 F.2d 926 (8th Cir. 1971); Mee v. United States, 316
    F.2d 467 (8th Cir. 1963), cert. denied, 377 U.S. 997 (1964); Pummill v. United States,
    297 F.2d 34 (8th Cir. 1961); Young v. United States, 288 F.2d 398 (D.C. Cir. 1961). But
117. See cases cited in note 116, supra.
118. E.g., United States v. Gougis, 374 F.2d 758 (7th Cir. 1967); Gajewski v.
    United States, 321 F.2d 261 (9th Cir. 1963), cert. denied, 375 U.S. 968 (1964).
119. See WRIGHT at § 221 and 227.
120. E.g., McElroy v. United States, 164 U.S. 76 (1896); Ingram v. United States,
    272 F.2d 567 (4th Cir. 1959).
121. See discussion in text at note 69, supra.
123. E.g., City of Baton Rouge v. Norman, 290 So. 2d 865 (La. 1974).
however, no motion to quash is filed when improperly joined offenses are charged in an indictment, has the defendant also waived his right to assert prejudicial joinder under 495.1? Despite the retention of Article 495 as amended, it would seem anomalous to allow a defendant's failure to object before trial to misjoined offenses, offenses so unrelated that they cannot even be described as "similar," to waive also his right to object to the unduly prejudicial effects of that misjoinder, while at the same time allowing a defendant to object even during trial to properly joined offenses which unduly prejudice his right to a fair determination of guilt or innocence as to each crime charged.

Scope of Review

According to federal practice, determination that offenses are joined properly under Rule 8(a) is a question of law, reviewable as any other question of law. Questions of severance under Rule 14, not involving the validity of joinder under Rule 8, but relying instead on resulting prejudice as a ground for severance, are resolved in the trial court's discretion, and as a practical matter are unreviewable absent clear abuse. The burden of proving that a trial court abused its discretion in failing to sever offenses otherwise joinable under Rule 8 rests on the defendant, who must make an affirmative demonstration that his rights to a fair trial have been prejudiced by the joinder, and refusal to grant a severance will be affirmed even if the circumstances are such that a grant of severance would have been sustainable.

Although the burden of persuasion imposed on an accused alleging prejudicial joinder is high, some appeals courts have reversed a trial court's discretionary ruling denying severance. One commentator has con-


126. WRIGHT § 227 at 469.

127. E.g., United States v. Johnson, 478 F.2d 1129 (5th Cir. 1973); United States v. Reed, 376 F.2d 226 (7th Cir. 1969); United States v. Gougis, 374 F.2d 758 (7th Cir.
cluded, "If the appellate court is left with a definite and firm conviction that a defendant may have been prejudiced by the refusal to give him relief from joinder, it must reverse the conviction." 128

Whether the same standards of review would apply in Louisiana is unclear. Unquestionably the determination of whether joinder is permissible is essentially legal rather than factual. The federal courts so treat it, 129 and because the source provision of Article 493 is the federal rule, a Louisiana court should regard a determination as to the propriety of joinder under Article 493 as a question of law, reviewable on appeal as any other question of law, and subject to reversal unless the error is harmless. The inquiry under Article 495.1 as to whether joinder is in fact unduly prejudicial to the accused is a mixed question of law and fact, and the standard of review should be whether the trial judge committed manifest error or abused his discretion. 130

"Same Mode of Trial"

A final question regarding construction of the new Louisiana joinder and severance provisions involves interpretation of the proviso which concludes Article 493. Unlike its source provision, the amended version of Article 493 requires that offenses to be joinable "must be triable by the same mode of trial." 131 Addition of this proviso undoubtedly stems from the joinder considerations expressed in the Hataway 32 and Nejin 133 cases, and given state constitutional dimensions in State v. Jacques 134 and State v. White. 135 As noted earlier, in Hataway the court held that the jurisprudential

1969); United States v. Branker, 395 F.2d 881 (2d Cir. 1968); United States v. Bozza, 365 F.2d 206 (2d Cir. 1966); Cross v. United States, 335 F.2d 987 (D.C. Cir. 1964).

128. WRIGHT § 227 at 470.
129. See note 124, supra.
130. The federal courts review questions of severance under FED. R. CRIM. P. 14 in this manner. See note 125, supra. A question analogous to severance under Article 495.1 arises in reviewing denials of severance of jointly tried defendants under LA. CODE CRIM. P. art. 704. In the latter case, the standard of review is whether the court committed "manifest error" resulting in "clear prejudice to the accused." E.g., State v. Cook, 215 La. 163, 39 So. 2d 898 (1949); Bennett, The Work of the Louisiana Supreme Court for the 1948-1949 Term—Criminal Law and Procedure, 10 LA. L. REV. 198, 217 (1950).
131. See the textual discussion beginning at note 77, supra.
132. 153 La. 751, 96 So. 556 (1923) (discussed in note 21, supra).
133. 139 La. 912, 72 So. 452 (1916) (discussed in note 19, supra).
134. 171 La. 994, 132 So. 657 (1931) (discussed in the text beginning at note 30, supra).
135. 172 La. 1045, 136 So. 47 (1931) (discussed in the text beginning at note 34, supra).
rule sanctioning joinder of offenses within an accusation when the offenses were cognate did not permit cumulation when one offense was triable by a five-man jury and the other offense by a twelve-man jury. The court said, in effect, joinder was permissible only when the offenses charged were subject to the "same mode of trial." Similar to the court held in Nejin that joinder of offenses within an accusation, and hence for trial, was improper when the offenses were subject to varying methods of appeal. Both Jacques and White involved joinder of offenses under the mandatory joinder rule of Article 218 of the 1928 Code of Criminal Procedure, and together they held that joinder of offenses was constitutionally impermissible when the offenses were not subject to the same type of trial and the same method of appeal.

Article 1, § 17 of the 1974 Louisiana Constitution provides that criminal juries shall be comprised of either six or twelve jurors, depending on the severity of the penalty which may be imposed upon conviction. Obviously, a single jury cannot be comprised of six and twelve jurors at the same time, thus cumulation of an offense triable by a twelve-man jury with one triable by a six-man jury would violate the constitutional mandate of Article 1, § 17. The offenses clearly are not triable by the "same mode of trial." However, despite State v. Jacques, it is difficult to understand why

137. Article 493 by its terms does not proscribe joinder of offenses subject to separate modes of appeal, and as a result does not appear adequately drafted to cover the objection of the court in Nejin. Only if the accused is convicted of a felony, given a fine in excess of $500, or sentenced to imprisonment for more than six months will he be entitled to direct appeal to the supreme court. LA. CONST. art. V, § 5(D). However, an accused will be entitled to a jury trial whenever the penalty may be imprisonment for more than six months. LA. CONST. art. 1, § 17. It is therefore possible for two misdemeanor offenses to be subject to the "same mode of trial" and yet give rise to different modes of appeal.
140. 171 La. 994, 132 So. 657 (1931). The court in Jacques did not discuss why a single twelve-man jury could not serve in dual capacities, reaching a verdict as to non-capital charges with nine jurors concurring, and as to capital charges with unanimity. The court assumed that the same jury could not serve in that manner, and therefore that capital and non-capital major felonies constitutionally required separate trials. Their conclusion hardly seems compelled by the constitution, though under La. Code Crim. P. art. 337 (1928), it may have been correct. That statutory provision required that when capital and non-capital offenses were joined, the verdict had to be unanimous as to all crimes charged.
capital offenses cannot be cumulated with major but non-capital felonies\textsuperscript{141} in an indictment and for trial. In both cases the constitutionally required number of jurors is the same; the only difference is the number who must concur in the verdict. Juries could be instructed by the trial judge that to return a verdict on the capital charge, the decision must be unanimous, while to convict or acquit on the non-capital offense ten jurors concurring would be sufficient. Such a procedure should be deemed sufficient to satisfy the requirements of Article 1, § 17, since as to each charge the requirements as to total number of jurors and number of jurors concurring in the verdict are met.

\textit{Collateral Problems Relating to Joinder of Offenses}

\textit{Double Jeopardy and Multiplicity}

Amendment V of the United States Constitution,\textsuperscript{142} Article 1, § 15 of the 1974 Louisiana Constitution,\textsuperscript{143} and Article 596 of the Louisiana Code of Criminal Procedure\textsuperscript{144} guarantee that an accused may not be twice put in jeopardy of life or liberty \textit{for the same offense}.\textsuperscript{145} In 1932\textsuperscript{146} the United States Supreme Court articulated the generally accepted, although occasionally criticized,\textsuperscript{147} standard for determining whether a criminal transac-

\textsuperscript{141} When such joinder would be prejudicial, the defendant could compel severance under \textsc{La. Code Crim. P.} art. 495.1.

\textsuperscript{142} \textit{U.S. Const.} amend. V, provides \textit{inter alia}; "[N]or shall any person be subject \textit{for the same offense} to be twice put in jeopardy of life or limb.

\textsuperscript{143} \textsc{La. Const.} art. 1, § 15 provides \textit{inter alia}; "No person shall be twice placed in jeopardy \textit{for the same offense}, except on his application for a new trial, when a mistrial is declared, or when a motion in arrest of judgment is sustained \ldots" (emphasis added); see generally Hargrave, \textit{The Declaration of Rights of the Louisiana Constitution of 1974}, 35 \textsc{La. L. Rev.} 1, 51 (1974).

\textsuperscript{144} \textsc{La. Code Crim. P.} art. 591.

\textsuperscript{145} The double jeopardy provision of the fifth amendment has been held applicable to the states via the fourteenth amendment. \textsc{Benton v. Maryland}, 395 U.S. 748 (1969). The guarantee provides protection against multiple punishment "for the same offense." \textsc{North Carolina v. Pearce}, 395 U.S. 711 (1969).

\textsuperscript{146} \textsc{Blockburger v. United States}, 284 U.S. 299 (1932). "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." \textit{Id.} at 304. The origins of this rule were identified in Comment, \textit{Double Jeopardy and the Identity of Offenses}, 21 \textsc{La. L. Rev.} 615, 617 (1961), as the early English case of \textit{The King v. Vandercomb and Abbott}, 2 \textsc{Leach} 708, 720, 168 Eng. Rep. 455, 461 (1796). See generally \textsc{Moore} ¶ 8.07 [2] at 8-51.

\textsuperscript{147} Justice Brennan, joined by Justices Douglas and Marshall, in a dissenting opinion to \textit{Ashe v. Swenson}, 397 U.S. 436 (1970), criticized the "same evidence test,"
tion gives rise to but one offense, or more: the "same evidence" test. 148

The double jeopardy safeguard bars not only subsequent prosecution for the same crime, but also imposition of multiple penalties for a single offense, though the offense might have been properly charged in several counts of an indictment. 149 The above situation must be distinguished from that in which several separate and distinct offenses, provable by some different element of evidence or involving some different aspect of criminal culpability or criminality, arise out of the same criminal act or transaction or a connected series of acts and transactions. 150 Consequently, the federal courts do not permit assertions of double jeopardy (or "multiplicity") to defeat joinder of several counts arising from the same criminal episode within an indictment, since whether ultimately one offense or several will be proved depends on what occurs at trial. 151

148. Louisiana courts have historically followed the "same evidence test." E.g., State v. Foster, 156 La. 891, 101 So. 255 (1924) ("whether the evidence necessary to support the second indictment would have been sufficient to have procured a legal conviction on the first"). Id. at 897, 101 So. at 258. Recently however, the Louisiana Supreme Court announced a slightly different test—the "gravamen test." State v. Didier, 262 La. 364, 263 So. 2d 322 (1972) ("Where the gravamen of the second offense is essentially included within the offense for which first tried, the second prosecution is barred because of former jeopardy"). Id. at 378, 263 So. 2d at 327. The Louisiana Supreme Court has continued to reject the "same transaction test" of double jeopardy. City of Baton Rouge v. Jackson, 310 So. 2d 596 (La. 1975), discussed in The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Criminal Trial Procedure, 36 LA. L. REV. 605, 634 (1976); State v. Richmond, 284 So. 2d 317 (La. 1973).

149. Some commentators refer to the defect of cumulative sentencing for a single offense as "multiplicity," and attempt to distinguish it from true "double jeopardy," the latter more narrowly applying only to second prosecutions for the same offense. 8 MOORE ¶ 8.07 [1] at 8-44. Courts do not necessarily make this distinction, and at any rate, it is clear that the tests used are identical—i.e., "same evidence." Id. ¶ 8.07 [2] at 8-51.

150. E.g., Gore v. United States, 357 U.S. 386 (1958) (a single narcotics sale held to constitute three separate and distinct offenses for which cumulative sentencing was proper). Louisiana courts have held that when multiple murders result from a single criminal episode double jeopardy does not prevent trying them independently; they are separate and distinct offenses though provable by much of the same evidence. State v. Richmond, 284 So. 2d 317 (La. 1973) (applying the "gravamen test" of State v. Didier, supra note 148); State v. Cannon, 185 La. 395, 169 So. 2d 446 (1953).

Louisiana always has allowed charging one offense in separate counts of an indictment or information, with each count specifying alternative ways the offense could have been committed.\textsuperscript{152} The rationale for authorizing such pleading is to prevent the "miscarriage of justice" that would result under a more restrictive pleading scheme "if the facts proved at trial happened to deviate even slightly from those alleged in the indictment."\textsuperscript{153} Louisiana courts, like federal courts, appear willing to sanction multiple charges, though imposition of multiple penalties when only one offense is proved is impermissible. Whether one offense, or more than one, is proved is governed by the "gravamen" test of \textit{State v. Didier}.\textsuperscript{154}

The double jeopardy clause and its concomitant multiplicity safeguard have been narrowly construed by application of the "same evidence" test (or in Louisiana, the "gravamen" test). But now that Louisiana has liberalized its joinder rules, the question arises whether the importance of the double jeopardy/multiplicity rules is increased. The answer is that they are not. The same test will apply in determining whether jeopardy has attached, and a single offense may still be punished by the imposition of only one sentence. Louisiana's liberalized joinder rules merely allow the prosecutor to cumulate charges of related but separate and distinct offenses, subject to the accused's right to sever them when undue prejudice is shown. Each separate and distinct offense is subject to but one penalty, whether the offenses are triable separately or together; each offense may be tried but once.

\textit{Effect of Louisiana's New Joinder Rules on the Guidelines of State v. Prieur}

In \textit{State v. Prieur}\textsuperscript{155} the Louisiana Supreme Court by a bare majority

\begin{footnotesize}
\begin{enumerate}
\item[152.] See notes 12 (before 1928), 47 and 48 (between 1928 and 1966), 57 (since 1966), \textit{supra}. The supreme court, however, has not permitted imposition of cumulative sentences when only one offense was proved. \textit{State v. Bluain}, 315 So. 2d 749 (La. 1975); \textit{State v. Johnson}, 278 So. 2d 84 (La. 1973); \textit{State v. Todd}, 278 So. 2d 36 (La. 1973); \textit{State v. Hungerford}, 278 So. 2d 33 (La. 1973); \textit{State v. Scott}, 48 La. Ann. 293, 19 So. 141 (1896).
\item[153.] SLOVENKO at 70.
\item[154.] 262 La. 364, 263 So. 2d 322 (1972) (see note 148, \textit{supra}, for an articulation of the "gravamen test").
\end{enumerate}
\end{footnotesize}
fashioned a number of procedural safeguards to the introduction of "other crimes" evidence offered to prove knowledge, intent, or system in accordance with La. R.S. 15:445-46. The court noted that Louisiana's statutory law provides for admission of "other crimes" evidence not comprising part of the res gestae or used to impeach only to prove the accused's knowledge, intent, or system. The court suggested that the limited specification of uses of "other crimes" evidence "reflect a conscious desire on the part of the draftsmen [of the 1928 Code of Criminal Procedure which first enumerated them] to adopt a limited, rather than expansive approach to the admissibility of other acts of misconduct." The court did not discuss the possible existence of other exceptions, jurisprudentially grounded, to the general rule excluding "other crimes" evidence because of its inherent tendency to prejudice the accused, though at least one—identity—appears to have been well established in the jurisprudence before Prieur. The identity exception has also been recognized by the court after Prieur. Subsequent supreme court decisions indicate that the majority remains committed to Prieur, though in State v. Banks the court held that "[t]he rules of Prieur were not meant to be used as additional, technical procedures sacramental to a valid conviction.

156. The requisites include written notice prior to trial of the prosecution's intended use of the other crimes evidence, specification of the exception under which it will be offered, and assurance that the evidence is necessary rather than merely cumulative. Furthermore, the introduction of the other crimes evidence must be accompanied by appropriate limiting instructions. 277 So. 2d at 130.

157. LA. R.S. 15:445-46 (1950) enumerate only knowledge, intent, and system as the bases under which other crimes evidence may be offered for purposes other than impeachment (LA. R.S. 15:495) or res gestae (LA. R.S. 15:447-48). However, the cases suggest that other crimes evidence is admissible to prove identity, based on a signature crime (e.g., State v. Vince, 305 So. 2d 916 (La. 1974)), or when identity is otherwise put at issue (e.g., State v. Banks, 307 So. 2d 549 (La. 1975)). The jurisprudence has not answered whether the Prieur guidelines must be followed in cases in which the "other crime" is offered to establish identity, but State v. Banks, supra, suggests the answer is yes.

158. 277 So. 2d at 128.

159. E.g., State v. Wideman, 218 La. 860, 51 So. 2d 96 (1951); State v. Fuselier, 174 La. 319, 140 So. 490 (1932); State v. Wales, 168 La. 322, 122 So. 52 (1929).


162. 307 So. 2d 594 (La. 1975). Banks involved "other offenses" used to establish the identity of the accused where he asserted an alibi defense and claimed mistaken identity on the part of the prosecution's witnesses. The parties assumed that the Prieur requisites were applicable in spite of the fact that neither knowledge, intent, nor system was involved.
Substantial compliance with this procedure designed to insure a fair trial will not be penalized.\textsuperscript{163}

The purpose of \textit{Prieur} and progeny is to protect the accused from "criminal propensity prejudice" which inheres in "other crimes" evidence despite the fact that it is deemed legally relevant. The advance notice and specification requirements of \textit{Prieur} afford defense counsel an opportunity to challenge intelligently the introduction of other crimes evidence, with the concomitant effect of promoting sounder judicial rulings on admissibility.\textsuperscript{164} The instruction requirements are designed to mitigate the prejudicial aspects insofar as possible, while not depriving the jury of evidence relevant to a material question at issue. Of course, in addition to use of "other crimes" evidence to prove knowledge, intent, and system, evidence of non-charged offenses is admissible under Louisiana law when those "other crimes" comprise part of the res gestae of the offense charged.\textsuperscript{165}

The new joinder rule embodied in Louisiana Code of Criminal Procedure Article 493 authorizes joinder of separate offenses within a single accusation when they arise from the same criminal act, or result from a single illegal transaction, or result from two or more illegal acts or transactions joined or connected by a common scheme or plan, or are of the same or similar character.\textsuperscript{166} Presumably, even absent joinder of offenses, whenever a crime falling in either of the first two categories is prosecuted, evidence of other crimes arising out of the same act or transaction would be admissible as part of the res gestae. Thus, whether joinder is permitted or not, the jury would learn of the "other offenses."\textsuperscript{167} When two or more separate acts or transactions are related by a common scheme or plan, evidence of offenses other than the one charged normally would be admissible to prove knowledge, intent, system, or identity,\textsuperscript{168} so that

\textsuperscript{163}. \textit{Id.} at 597.

\textsuperscript{164}. Evidence of "other crimes" may be excluded as a matter of legal relevancy since its prejudicial effect is likely to outweigh its probative value. State v. Foss, 310 So. 2d 573 (La. 1975).

\textsuperscript{165}. \textsc{La. R.S.} 15:447-48 (1950); \textit{see} Comment, \textit{Excited Utterances and Present Sense Impressions as Exceptions to the Hearsay Rule in Louisiana}, 29 \textsc{La. L. Rev.} 661 (1969).

\textsuperscript{166}. \textsc{La. Code Crim. P.} art. 493. \textit{See} art. 493 in the text at note 65, \textit{supra}.

\textsuperscript{167}. \textit{E.g.}, State v. Richmond, 284 So. 2d 317 (La. 1973) (Defendant, in a single criminal episode, killed two persons. He was convicted in separate trials for each murder; in each trial evidence of the other murder was admitted as part of the res gestae. The Louisiana Supreme Court affirmed the second conviction over defendant's double jeopardy objection, which had been based on his prior conviction.).

\textsuperscript{168}. \textit{Prieur} requisites would have to be met in Louisiana. But because both offenses are charged in the same indictment the defendant certainly receives advance
allowing joinder does not increase prejudice to the accused.\textsuperscript{169} Under the last criterion listed, however, the scope of permissible joinder may go beyond the limits of admissibility of other crimes evidence, though some offenses of the same or similar character would be admissible to prove knowledge, intent, system or identity.\textsuperscript{170} In those situations in which crimes of the same or similar character would be inadmissible under "other crimes" exceptions, the effect of their cumulation under Article 493 would be to undercut the vitality of the rule announced in \textit{Prieur}. The jury will be aware of alleged misconduct on the part of the defendant which heretofore would have been excluded. In effect, the narrow exceptions of knowledge, intent, system, and identity have been repealed when the offenses joined can be characterized as merely of the same or similar character.

The federal courts' experience using the provision from which Article 493 was taken has been less than satisfactory.\textsuperscript{171} As a possible solution, one commentator has suggested that joinder under Rule 8 be restricted to offenses reciprocally and independently admissible as "other crimes" evidence.\textsuperscript{172} This proposal is not without initial appeal, since whether joinder involves increased prejudice may often depend on whether the non-charged crime could have been independently presented to the jury. However, the language of Federal Rule 8, and of Article 493 of the Louisiana Code of Criminal Procedure, is clear, and such a narrow construction does violence to its express terms.\textsuperscript{173}

\textsuperscript{169} United States v. Adams, 434 F.2d 756 (2d Cir. 1970) (drug sale and drug possession charges joined although the crimes occurred nine months apart; the court upheld joinder on the theory that they comprised a common scheme or plan); Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968), \textit{cert. denied}, 400 U.S. 965 (1970) (court approved joinder of tax count and theft count on the theory that they were "connected together" and formed part of a "common plan or scheme"). Thus, a danger exists that Article 493 can be expansively read.

\textsuperscript{170} Drew v. United States, 331 F.2d 85, 90 (D.C. Cir. 1964).

\textsuperscript{171} \textit{E.g.}, United States v. Leca, 499 F.2d 922 (5th Cir. 1974) (drug charges cumulated with gun violation charges); United States v. Biurassa, 411 F.2d 69 (10th Cir. 1969) (court approved cumulation of counterfeiting and bail jumping charges); Williams v. United States, 317 F.2d 545 (D.C. Cir. 1963) (cumulation of one count of rape and one count of rape and robbery was not an abuse of discretion despite the lack of connexity, since the offenses were "similar"); Chambers v. United States, 301 F.2d 564 (D.C. Cir. 1962) (cumulation of three unrelated housebreaking charges "not prejudicial").
Absent statutory modification of the new joinder scheme, the provisions of Article 495.1 offer the greatest likelihood of protection to an accused. They provide that in the event an accused is deprived of a fair determination of guilt or innocence as to each crime charged by joinder of offenses the court must grant a severance. A broad construction of that article, one in which the listed criteria for evaluation of prejudice—number and complexity of the offenses cumulated and the likelihood that the jury will be confused over the law or evidence—are not deemed exclusive, could provide the vehicle whereby the accused is protected from undue prejudice. However, the application of Article 495.1 is a matter of trial court discretion, and that exercise of discretion is virtually non-reviewable.

Abolition of the Article 493 criteria authorizing joinder of offenses of the same or similar character, however, is not desirable, since it would work against the valued considerations of judicial and prosecutorial efficiency. In some situations joinder of the same type, or similar offenses, though unrelated, might not prejudice an accused. No reason exists to bar joinder of offenses when no prejudice accrues against an accused.

Perhaps the best way to deal with the question of undue prejudice, in view of the possible disutility of Article 495.1 for this purpose, is to enact the American Bar Association proposal giving the accused an absolute right to severance when the offenses are joined because they are of the same or similar character. In this way, the goals of efficiency could be maintained insofar as possible without depriving the accused of protection in those cases in which joinder has unduly prejudicial effects.

**Consolidation of Separately Indicted Offenses for Trial**

A question related to joinder of offenses in an accusation is when separately indicted offenses may be consolidated for trial. Louisiana Code of Criminal Procedure Article 706 provides that separately indicted offenses may be joined for trial only upon motion of the accused, and only when the offenses could have been charged in the same indictment or information. Because of the latter requirement, the liberalization of joinder under Article 493 has the effect of liberalizing the applicability of the consolidation article.

Because Louisiana Code of Criminal Procedure Article 706 is tied to

174. See L.A. CODE CRIM. P. art. 495.1 in text at note 75, supra.
175. See text beginning at note 129, supra.
176. See text beginning at note 146, supra.
177. ABA STANDARDS at § 2.2(a).
178. L.A. CODE CRIM. P. art. 706.
the rules governing joinder of offenses, and because, as earlier noted, misjoinder is a non-fatal defect which is deemed waived if not timely asserted, \(^1\) it is not surprising that the Louisiana Supreme Court has treated improper consolidation as a waivable defect. Defendants have had little success raising an objection to improper consolidation of offenses for the first time on appeal, \(^2\) the court being inclined to find either a waiver of the objection or harmless error.

The 1975 amendments to the joinder rules have effected a change in determining the initial and ultimate permissibility of joinder of offenses, requiring not only that initial joinder comply with the criteria listed in Code of Criminal Procedure Article 493, but also requiring that the court must sever the offenses under Article 495.1 when undue prejudice to the accused is shown. Arguably, in determining for purposes of Article 706 whether consolidation is proper, the functional criteria of Article 495.1 are applicable and should be utilized by the court in its exercise of discretion. \(^3\)

Conclusions

The new joinder rules adopted by the Louisiana legislature represent an attempt to strike a realistic balance between the need for judicial and prosecutorial efficiency and the responsibility to afford to an accused a fair trial. The provisions theoretically appear to have effected that balance. However, ultimate responsibility for insuring that the rules are not used to

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\(^1\) See text at note 64, supra.

\(^2\) In a non-jury trial where no contemporaneous objection was made to consolidation, the court has declared that the error was “harmless.” State v. Robertson, 310 So. 2d 619 (La. 1975) (the offenses consolidated arose out of the same transaction and would now be joinable under article 493 as amended); State v. Laurent, 290 So. 2d 809 (La. 1974) (consolidated offenses arose out of a single continuous transaction; the court observed that evidence of the consolidated offense would have been admissible as part of the res gestae). Cf. State v. Peters, 298 So. 2d 276 (La. 1974) (Separate indictments for armed robbery and simple kidnapping were consolidated for trial. Defendant appealed conviction on armed robbery after his conviction on kidnapping was set aside because of an improper jury [defendant was entitled to a five-man jury on the kidnapping charge]. The Louisiana Supreme Court on rehearing denied relief on the basis that the defendant’s failure to object before trial operated as a waiver. Justice Tate concurred finding “harmless error”). When the offenses consolidated involved unrelated criminal episodes, the supreme court has in dicta suggested consolidation is improper. State v. Raby, 259 La. 909, 253 So. 2d 370 (1971).

\(^3\) By way of contrast, LA. CODE CRIM. P. arts. 493 and 495.1 do not afford the trial court discretion. If the terms of article 493 are met, initial joinder is proper, and the accusation cannot be severed unless under article 495.1 the court makes a finding of undue prejudice, then severance becomes mandatory.
prejudice the accused unduly falls upon the courts. They must resolve, on a case by case basis, whether joinder is permissible under Article 493, and whether it is unduly prejudicial under Article 495.1. If the supreme court insists on a liberal application of Article 495.1, the joinder rules will represent a desired change in Louisiana's system of criminal justice. Ideally, a court which voluntarily imposes protective safeguards in the area of other crimes evidence will take an equally protective view of an accused's rights under the new Louisiana joinder scheme.

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