AMERICAN BAR ASSOCIATION PROJECT ON
MINIMUM STANDARDS FOR CRIMINAL JUSTICE

STANDARDS RELATING TO

Joinder and Severance

me contains the Tentative Draft of November 1967 and the Supple-
eptember 1968. The standards in the Tentative Draft, with
nts as shown in the Supplement, were approved by the ABA House
tes in August 1968, and may be cited as "Approved Draft, 1968."

E OF JUDICIAL ADMINISTRATION

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STANDARDS RELATING TO

Joinder and Severance

Amendments recommended by the

SPECIAL COMMITTEE ON MINIMUM STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE

J. Edward Lumbard, Chairman

and concurred in by the

ADVISORY COMMITTEE ON THE CRIMINAL TRIAL

Walter V. Schaefer, Chairman
Wayne R. LaFave, Reporter

September 1968

The standards proposed in the Tentative Draft of November 1967, with the amendments recommended herein, were approved by the House of Delegates on August 6, 1968. The commentary in this supplement is in the form in which it accompanied the proposed amendments submitted to the House.

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Proposed Revisions of Standards with Commentary

PART I. JOINDER OF OFFENSES AND DEFENDANTS

1.1 Joinder of offenses.

Commentary

The limitations on joinder in section 1.1 are not intended to apply in those cases in which the defendant, after conviction, is allowed to enter a plea of guilty or nolo contendere to other offenses he has committed so as to bring about a simultaneous disposition of all offenses he has committed in the state, as provided in ABA STANDARDS, PLEAS OF GUILTY § 1.2 (Approved Draft, 1968), and ABA STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES § 5.2(b) (Tent. Draft, Dec. 1967). In such cases, subject to the limitations in the two standards just cited, the defendant may enter a plea to other offenses even though these offenses, in their relationship to one another or to the offense or offenses on which a conviction has already been obtained, are neither of the same or similar character nor part of a single scheme or plan.

PART II. SEVERANCE OF OFFENSES AND DEFENDANTS

2.2 Severance of Offenses.

Commentary

In lieu of the last paragraph of the commentary of section 2.2, substitute the following:

Although the test is the same whether the motion for severance of offenses is made by the prosecution or the defense, whether there can

be a "fair determination of the defendant's guilt or innocence of each offense" will sometimes depend upon the present state of the prosecutor's case. The view has sometimes been taken that once the government has decided to proceed with prosecution for various offenses, it should be prepared to present proof as to each count of the charges, so that a severance because of a lack of evidence on one of the offenses charged would not be permitted. United States v. Cappello, 209 F. Supp. 959 (E.D. N.Y. 1962). That position has been rejected here on the ground that it is too strict; the prosecutor, although originally prepared to go to trial on several counts, may sometimes be confronted with an unanticipated change of circumstances, as where an important witness on one of the counts cannot be found. When this occurs, it is preferable to permit the prosecutor to obtain a severance, rather than to force him to seek a continuance as to all joined offenses, ABA STANDARDS, SPEEDY TRIAL § 2.3(d)(1) (Approved Draft, 1968), or to have all counts dismissed to toll the running of the time for speedy trial, *id.* at § 2.3(f).

2.3 Severance of defendants.*

(a) When a defendant moves for a severance because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court should determine whether the prosecution intends to offer the statement in evidence at the trial. If so, the court should require the prosecuting attorney to elect one of the following courses:

(i) a joint trial at which the statement is not admitted into evidence;

(ii) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been [effectively] deleted, provided that, as deleted, the confession will not prejudice the moving defendant; or

(iii) severance of the moving defendant.

*The standard is reproduced as originally proposed by the Advisory Committee. Material which it is now recommended should be deleted is placed in brackets, while the material it is proposed should be added is underlined.

(b) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (a), should grant a severance of defendants whenever:

(i) if before trial, it is deemed necessary to protect a defendant's right to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of [a] one or more defendants; or

(ii) if during trial upon consent of the [severed] defendant to be severed, it is deemed necessary to achieve a fair determination of the guilt or innocence of [a] one or more defendants.

(c) When such information would assist the court in ruling on a motion for severance of defendants, the court may order the prosecuting attorney to disclose [to the court in camera] any statements made by the defendants which he intends to introduce in evidence at the trial.

Commentary

Section 2.3(a)

Delli Paoli v. United States, 352 U.S. 232 (1957), was overruled recently in Bruton v. United States, 88 S.Ct. 1620 (1968), holding that admission of a codefendant's confession that implicated the defendant at a joint trial constituted prejudicial error even though the trial court gave a clear, concise and understandable instruction that the confession could only be used against the codefendant and must be disregarded with respect to the defendant. *Bruton* is also applicable to the states, and is to be applied retroactively. Roberts v. Russell, 88 S.Ct. 1921 (1968).

The *Bruton* decision does not dictate any substantial change in section 2.3(a), as that standard was based upon the conclusion that *Delli Paoli* (now overruled) should not be followed. The Supreme Court in *Bruton* did not attempt to prescribe any particular procedure to be followed so as to avoid the consequences of that case, and thus section 2.3(a) takes on even greater importance than before. The change in the language of section 2.3(a)(ii) is only intended to give greater emphasis to the fact that courts must exercise great caution in

permitting the prosecution to elect the deletion alternative. Given the decision in *Bruton*, it can be anticipated that the effectiveness of deletions will be more frequently challenged. In a great many cases the deletion alternative simply will not be available, as it will be impossible to remove all references to participation of another person in the crime without changing materially the substance of the statement. Illustrative is the confession involved in State v. Montgomery, 157 N.W.2d 196 (Neb. 1968), where defendant A confessed that he participated in a robbery with defendant B but said that he did so because he was forced to do so by defendant B; if all references to defendant B (or, indeed, to the existence of another participant which the jury would take to be defendant B) were deleted, the substance of A's confession would be changed to his disadvantage.

The standard provides that the prosecuting attorney is to elect one of three courses when the defendant moves for a severance because an out-of-court statement of a codefendant makes reference to him but is not admissible against him. This does not mean that it is for the prosecutor to decide, when he elects joint trial with a edited version of the statement, that the statement can be edited as required by section 2.3(a)(ii). This is a matter for the court to pass upon, and if the court rules that the requirements of section 2.3(a)(ii) cannot be met, then the prosecutor would have to elect one of the two remaining alternatives: joint trial at which the statement is not admitted into evidence; or severance of the implicated defendant.

Section 2.3(b)

The language in this subsection of the standard has been changed for purposes of clarity.

Section 2.3(c)

The phrase "to the court in camera" has been deleted. The statement, even though admissible against only one defendant, should be subject to discovery before trial by all joined defendants. In this way, counsel for other defendants will be in a position to move for severance before trial under section 2.3(a) (where the statement names other defendants) or under section 2.3(b) (where the statement does not

name other defendants), and to present argument to the court on the basis of the precise wording of the statement. Likewise, counsel will also be in a position to argue that a proposed editing of a statement under section 2.3(a)(ii) is not sufficient to remove the prejudice to his client.

Joinder and Severance

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Tentative Draft

AMERICAN BAR ASSOCIATION PROJECT ON
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Recommended by the

ADVISORY COMMITTEE ON THE CRIMINAL TRIAL

Walter V. Schaefer, *Chairman*
Wayne R. LaFave, *Reporter*

November 1967

The views and opinions contained in this publication, until approved by the House of Delegates or the Board of Governors of the Association, represent only the views of the Advisory Committee and do not represent the views of the American Bar Association.

Preface

THIS IS ONE of a series of tentative reports on a variety of topics being prepared by advisory committees of the American Bar Association Project on Minimum Standards for Criminal Justice. At this time it is being distributed for study and discussion. It has not been approved by the Special Committee which oversees the Project, by the Sections of the ABA which sponsor the Project, or by the House of Delegates, whose eventual approval of the Project's recommendations will make them official ABA policy. Such approval will not be sought until there has been time for an appraisal of the results of further study, discussions and comments.

A word as to the background of the Project may be helpful in placing this report in context. The formulation of minimum standards in the field of criminal justice was proposed to the ABA in 1963 by the Institute of Judicial Administration (at New York University Law School), of which the first two presidents—Arthur T. Vanderbilt and John J. Parker—had been the leaders in the ABA's promulgation of Minimum Standards of Judicial Administration 25 years earlier. During early 1964, the Institute conducted a pilot study of the problems involved, under the supervision of a committee headed by Chief Judge J. Edward Lumbard of the United States Court of Appeals for the Second Circuit and composed of ABA members nominated by the Board of Governors and the Sections of Criminal Law and Judicial Administration. On the basis of the Pilot Study Committee's report, the ABA, at its annual meeting in August 1964, authorized a three-year project with a budget of $750,000. By the end of December 1964, all of the funds had been raised through equal grants

from the ABA Endowment, the Avalon Foundation and the Vincent Astor Foundation; all of the members of the various Project committees had been appointed by President Lewis F. Powell, Jr.; a full-time director, Richard A. Green, had been selected, and a central office to administer the Project had been established in New York City at the Institute of Judicial Administration, which was appointed to serve as the secretariat.

A fifteen-member Special Committee on Minimum Standards for the Administration of Criminal Justice, with Chief Judge Lumbard as its chairman, is responsible for the overall supervision and coordination of the Project and the maintenance of liaison with the Sections of Criminal Law and Judicial Administration, the chairmen of which are ex-officio members of the Special Committee. The Special Committee will eventually recommend the standards to those Sections, and to the Board of Governors and the House of Delegates for their consideration and endorsement.

The scope of the Project's concern has been the entire spectrum of the administration of criminal justice, including the functions performed by law enforcement officers, by prosecutors and by defense counsel, and the procedures to be followed in the pretrial, trial, sentencing and review stages. In order to cover this broad area, the administration of criminal justice was initially divided into five sub-areas, and a separate Advisory Committee was appointed to make the necessary studies and to draft the standards for the topics of major concern within each of those areas. The titles of those Committees indicate their scope: Police Function, Pretrial Proceedings, Prosecution and Defense Functions, Criminal Trial, and Sentencing and Review. A sixth Advisory Committee was created specifically to deal with the subject of Fair Trial and Free Press.

Each of these Committees is composed of ten or eleven ABA members with experience and expertise in the administration of criminal justice, including appellate and trial judges, both state and federal; prosecuting attorneys, public defenders and other public officials; criminal law professors, and practicing lawyers, including defense attorneys. The Committees are being aided by reporters and consul-

tants drawn from law faculties across the nation and by the resources of interested specialized organizations.

Each of these Committees, except the Fair Trial and Free Press Committee, has been preparing standards on more than one topic and is reporting on each topic separately. Accordingly, it is expected that there will be approximately 16 reports by the Project in this series. Each such report is being distributed in the form of a tentative draft for study and discussion.

The subject of this report—joinder and severance of both offenses and defendants in criminal cases—reflects the concern of the Project about an area of considerable difficulty and of diverse approaches by the various jurisdictions. The difficulty stems from a collision between the ideal that a defendant be tried (and convicted) only upon evidence relevant to the specific charge against him and the costs to the system of trying to achieve that ideal, not only because of the burden on the prosecutors and the courts but also because of the demands it may impose on witnesses. Bearing the strain of this conflict is a proposition which has been treated with increasing skepticism in recent years—that jurors have the ability to perform the mental gymnastics required to keep the law and the evidence in the appropriate compartments. The Advisory Committee has given these matters considerable thought and study over the past two years.

Serving as members of the Advisory Committee on the Criminal Trial have been the following:

HON. WALTER V. SCHAEFER, *Chairman*
Chicago, Illinois

Associate Justice, Supreme Court of Illinois;
Professor of Law, Northwestern University School of Law, 1940-51.

HON. LEO BREWSTER
Fort Worth, Texas

United States District Judge for the Northern District of Texas;
President, State Bar of Texas, 1958-59;
First Assistant District Attorney, Tarrant County, Texas, 1934-39.

PROF. LIVINGSTON HALL
Cambridge, Massachusetts
Professor of Law, Harvard Law School;
President, Massachusetts Bar Association, 1963-64;
Assistant U.S. Attorney for the Southern District of New York, 1931-33.

HON. WALTER E. HOFFMAN
Norfolk, Virginia
Chief Judge of the United States District Court for the Eastern District of Virginia; Member, Advisory Committee on Criminal Rules, Judicial Conference of the U.S.

HON. FRANK R. KENISON
Concord, New Hampshire
Chief Justice, Supreme Court of New Hampshire;
Attorney General of New Hampshire, 1940-42, 1945-46

CHARLES B. MURRAY
Washington, D.C.
Practicing lawyer; Director, Legal Aid Agency for the District of Columbia, 1960-65.

JOHN M. PRICE
Sacramento, California
District Attorney, Sacramento County, California

FRANK G. RAICHLE
Buffalo, New York
Practicing lawyer; President,
American College of Trial Lawyers, 1966-67.

EARL T. THOMAS
Jackson, Mississippi
Practicing lawyer; Circuit Judge, Seventh Circuit, State of Mississippi, 1949; President, Mississippi Bar Association, 1964-65.

WILLIAM F. TOMPKINS
Newark, New Jersey
Practicing lawyer; Assistant Attorney General of the United States, 1954-58; United States Attorney for New Jersey, 1953-54.

The initial proposal of standards to the Committee, the drafting of the commentary and the research behind them were the responsibility of the reporter, Prof. Wayne R. LaFave of the University of Illinois Law School. Since 1959, he has been a member of the project staff of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States. He is the author of *Arrest* (Little, Brown 1965), the first of the series of volumes being produced by that project. He is also the author of numerous articles on various facets of the criminal justice process. Prof. LaFave also served as reporter for the Committee's earlier reports, on PLEAS OF GUILTY and SPEEDY TRIAL.

Approximately 8,000 copies of this report are being distributed within the American Bar Association: to members of the House of Delegates, the Sections of Criminal Law and Judicial Administration and interested committees. Additional copies are being furnished to other individuals and groups who have exhibited interest in the subject. By such distribution of a tentative draft for study and discussion, the Special Committee and the Advisory Committee on the Criminal Trial are soliciting wide and careful consideration of these proposals and welcome comments in writing. Through this procedure, it is hoped to achieve the formulation of standards which can be recommended for application throughout the United States. It is also hoped that by involving in the formulation process many of the persons who would be responsible for the application of such standards, the Project can stimulate their interest in improving the effectiveness, efficiency and fairness of the administration of criminal justice.

In order to receive appropriate attention, all communications should be addressed to:

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