Procedure: Criminal Trial and Postconviction Procedure

Cheney C. Joseph Jr.

Louisiana State University Law Center
CRIMINAL TRIAL AND POSTCONVICTION PROCEDURE

Cheney C. Joseph, Jr.*

OPENING STATEMENT

In State v. Green, 1 a negligent homicide case, the district attorney informed the jury in the opening statement that the state would offer evidence of a blood alcohol test to prove that the defendant was intoxicated at the time of the automobile accident in which the victim was killed. 2 However, when the district attorney attempted to introduce the evidence, the trial court sustained a defense objection based on the state's failure to comply with certain requirements of the statute governing admissibility of such tests. 3 The trial court nevertheless denied the defendant's motion for a mistrial and admonished the jury that the district attorney's opening statement was not evidence and could not be considered.

The supreme court upheld the denial of a mistrial. The court cited with approval an earlier rape case 4 in which the district attorney in the opening statement told the jury that the state would offer medical findings to prove intercourse. Although no medical evidence was introduced, the

* Associate Professor of Law, Louisiana State University.
1. 343 So. 2d 149 (La. 1977).
2. The district attorney said:
   The State is going to show you by competent evidence that at the time this accident happened that this defendant didn't even realize that there was a red light at this particular intersection, he didn't even realize it. Why didn't he realize it? The State is going to show you by competent evidence, we're going to introduce the nurse who extracted blood from his arm, the defendant's arm, at the hospital. It was taken to the crime lab in New Iberia where it was analyzed and it showed that his man had a blood alcohol content by weight of .30. Under the law of Louisiana a person with a blood alcohol content of .10 is presumed to be intoxicated. This man is three times past that presumption. The State is going to show you because of this condition this is why he didn't know there was even a red light at this particular intersection. 343 So. 2d at 151.
3. LA. R.S. 32:661(c) (Supp. 1972). The court noted that the trial court's reason for excluding the evidence was that the "consent form" signed by the defendant prior to the test failed to recite the fact that the defendant was advised of his rights prior to the test. The court assumed but did not decide that the trial court's ruling excluding the evidence was correct. 343 So. 2d at 152.
court upheld the trial court's denial of a mistrial. The court in both cases relied on the principle that the prosecutor's opening remarks are designed merely to guide the jury and that the jury is able to distinguish between what counsel says he will prove and what he actually proves. In Green, the court was impressed with the trial court's finding that the prosecutor was in good faith in alluding to the alcohol test.

Had the court determined that the district attorney was not in good faith a different result may have followed. How the court will determine the district attorney's good faith is an unresolved question. The court will undoubtedly not merely evaluate the subjective sentiments of the prosecutor toward the evidence. For example, if he should reasonably have known, based on clear and positive past decisions of the court, that such evidence was inadmissible, good faith should not be found and mistrials should be ordered. Ignorance of law should not be a defense for a prosecutor.

All things considered, the writer agrees with the court's approach. No doubt, as Justice Tate wrote, dissenting,\(^5\) the jury was aware of the fact that the state had the evidence available. The evidence was extremely damaging in view of the circumstances of the case. Whether the jury could really set aside the district attorney's reference to such evidence is doubtful. However, the fact that the state is required by law\(^6\) to make an opening statement lends support to the majority view. Some prosecutors give a detailed rendition of their expected evidence so that the jurors know exactly what to expect. Such a strategy is not beyond the spirit of a mandatory opening statement. At least one purpose of the article\(^7\) barring evidence outside the scope of the opening statement is to prevent surprise to the defendant.\(^8\)

The situation presented could have been avoided by a proper procedure for the pretrial determination of the admissibility of such evidence. The answer, the writer submits, lies in full pretrial disclosure by the district attorney with the corresponding obligation on the part of defense counsel to raise challenges in advance of trial.\(^9\) The lack of proper

---

5. Justices Tate, Dennis and Calogero dissented.
6. LA. CODE CRIM. P. art. 766.
7. Id. art. 769.
8. Id. This article further mandates exclusion of evidence not fairly within the scope of the opening statement.
9. Defense counsel possibly could have raised this issue prior to trial by moving to suppress. The court has stated that the trial court may entertain a motion, based on Code of Criminal Procedure article 3, to suppress evidence not covered by article 703. State v. Wilkerson, 261 La. 342, 259 So. 2d 871 (1972). The defendant
procedural devices to prevent such situations from arising may provide some excuse for leniency when such errors occur.

In *State v. Spot*, the supreme court upheld the trial court's failure to require the state to make an opening statement in a felony trial before the trial court sitting without a jury. The district attorney was permitted without defense objection to waive the opening statement. Although the court noted that the failure of defendant to object normally precludes review of the issue, the court nevertheless discussed its merits.

Discussing the prior cases, the court said, absent a showing of unfair surprise, the state's failure to give an opening statement in felony and misdemeanor cases tried without a jury is not error. The writer agrees. The logic of the earlier cases relates the function of the opening statement to the necessity of informing the jury rather than to providing a discovery device for the accused. These cases alluded to the fact that the steps preceding the presentation of evidence were not applicable to bench trials. This logic applies to bench trials of both felony and misdemeanor cases.

The court's position does not deny the trial court the discretion to order the state to make an opening statement in a bench trial. It merely upholds the trial court's exercise of that discretion by a refusal to require one in cases tried without juries. Presumably the court has not excluded the possibility that a complex matter being tried before the trial court would necessitate an opening statement by the state to apprise the trial judge and the defendant in outline form of the evidence the district attorney will offer.

**DEFENDANT'S RIGHT TO DISCOVER JUROR VOTING PRACTICES**

In two recent cases, defense counsel complained of the district has certain disclosure rights by statute. See *La. Code Crim. P. arts. 716-729.6; La. R.S. 32:661-669* (Supp. 1977).


11. *Id.* at 1350.


14. In felony cases, unless the defendant waives trial by jury the case is tried before a jury. *La. Const. art. I, § 17.*


attorney's unwillingness to share data collected by assistant district attorneys on prospective jurors' prior voting records.\textsuperscript{18}

In \textit{State v. Wright},\textsuperscript{19} the defendant requested a copy of the district attorney's list prior to commencement of trial. Although this request was refused by the trial court, defense counsel was permitted to ask prospective jurors on voir dire whether they had served on prior cases and, if so, what case. The trial court would not permit questioning concerning the verdict in such cases or the prospective juror's vote during his earlier service. The trial court noted that availability of clerks' records to show the prior cases tried and the verdict in those cases.\textsuperscript{20}

In affirming the conviction, the supreme court noted the granting of writs in \textit{State v. Holmes} to determine whether the state could claim a "work-product" privilege concerning the collected data. The court also noted the failure of the record in \textit{Wright} to show either that the district attorney used the information in jury selection or that the information was unavailable to defense counsel through other sources.\textsuperscript{22}

In \textit{State v. Holmes},\textsuperscript{23} the court wisely took the matter under consideration on writs prior to trial.\textsuperscript{24} In \textit{Holmes}, the trial court had ordered production of the lists and the state sought writs of review. The supreme court found no need to confront the "work-product" issue because it found no statutory or constitutional ground on which the trial court could order production of the state's data. Although defense counsel established

\textsuperscript{18} In \textit{State v. Holmes}, 347 So. 2d 221, 222 (La. 1977), the procedure was described:

The practice in the District Attorney's Office is to record the vote in some manner by the Assistant District Attorney who handled the case, usually by marking on the jury list (marked Court's Exhibit *1). The Assistant District Attorney who records the vote then sends it to the secretary of the Trial Division, where copies are made and distributed to the respective Sections of Court. The Assistant in each Section, if he so chooses, logs the vote of the particular juror on his jury venire (marked Court's Exhibit *2) which he or she receives at the beginning of the month from the Jury Commissioner.

\textit{See also} State v. Wright, 344 So. 2d 1014, 1015 (La. 1977).

\textsuperscript{19} 344 So. 2d 1014 (La. 1977).

\textsuperscript{20} \textit{Id.} at 1016 (trial court per curiam).

\textsuperscript{21} \textit{Id.} The court noted that writs were granted to review the question concerning the existence of a state "work product" privilege to withhold the records. For the granting of writs, see \textit{State v. Holmes}, 342 So. 2d 672 (La. 1977).

\textsuperscript{22} 344 So. 2d at 1017.

\textsuperscript{23} 347 So. 2d 221 (La. 1977).

\textsuperscript{24} After conviction, the reversal involves questions of "harmless error" and the loss of much effort in the lower court. Matters of policy are best resolved in advance of trial.
the unavailability of the information from other sources, the court reversed
the trial judge's order, finding that no showing of undue hardship or
injustice had been shown because the voir dire had not yet been conduct-
ed. The court clearly said that the defendant should be entitled in voir dire
to ask:

"(1) Have you ever served on a criminal jury before?
(2) What was the charge in that case?
(3) What was the verdict in the case?, etc." 25

Presumably, by permitting defense counsel to ask the above questions, the
court evened the scales. It is only when defense counsel may not ask 26
such questions of prospective jurors on voir dire that the state's possession
of this information gives it an advantage.

Whether defense counsel may ask how the prospective juror himself
voted is an unresolved question. 27 Following the three listed questions is
an "etc." Whether the "etc." includes the right to ask prospective jurors
who have previously served how they voted could be very significant. The
writer suggests that a simple solution would be to permit the question if the
state has the information available but will not disclose it to defense
counsel. 28

The writer feels that the court's approach is fair. However, as ex-
pressed by Justice Tate in dissent, 29 the Code of Criminal Procedure 30
permits the trial court to regulate the proceedings before it. Absent a
contrary statute, constitutional provision, or judicially recognized
privilege, the trial court should have the discretion to order production of
records if this would aid in the fair administration of justice.

25. 347 So. 2d at 223. The court said it overruled State v. Roquemore, 292 So.
2d 204 (La. 1974), State v. Spencer, 257 La. 672, 243 So. 2d 793 (1971), and State v.
Martin, 250 La. 705, 198 So. 2d 897 (1967), which were in conflict with the court's
opinion that defense counsel is entitled to propose those questions to prospective
jurors on voir dire.

26. Presumably jurors will answer truthfully. If not, remedies are available. See
LA. CODE CRIM. P. arts. 775(6), 851(4).

27. In a later case, State v. McGhee, 350 So. 2d 370 (La. 1977), the court, in a
footnote (footnote 8), noted the court's failure to resolve the question. Justice
Calogero, author of McGhee, in the footnote said he would allow defense counsel
to inquire how the juror himself voted and would not restrict him to an inquiry
regarding the verdict alone.


29. 347 So. 2d at 224-25.

30. See LA. CODE CRIM. P. arts. 3, 17.
DEFENDANT’S RIGHT TO COMPULSORY PROCESS

The defendant’s right to present a defense and to compulsory process for witnesses to testify on his behalf is beyond question. The extent to which that right entitles him to a recess to procure witnesses, to the issuance of subpoenas to prisoners in federal institutions outside the state, and to the aid of a private investigator to locate a witness was discussed by the court in three recent cases.

In State v. Mizell, the defendant sought the attendance of his brother, a prisoner in the custody of the Department of Corrections. His brother would purportedly have testified that he alone, and not the defendant, stole the calf for which both he and the defendant were prosecuted. The defendant’s brother had previously pled guilty and was sentenced to serve eighteen months at hard labor.

More than two weeks prior to trial defense counsel properly requested the issuance of a subpoena to the defendant’s brother giving his address as “Angola State Prison, Angola, Louisiana.” The prisoner had apparently been transferred to the prison at DeQuincy. Rather than forward the subpoena for service, the sheriff simply returned the subpoena unserved. Apparently no effort was made to locate the witness other than to send the subpoena to the sheriff of the parish in which Angola State Prison lies.

On the morning of the trial, after trial had commenced, defense counsel realized that his witness was not available to testify. The trial court denied the defendant’s request to continue the case until he could have his witness available to testify. The supreme court reversed the conviction.

The court was willing to ignore certain procedural problems pointed out by the Chief Justice in his dissent and go straight to the heart of the matter. Compulsory process was seen as more than the right to the enforcement of only such subpoenas as are actually served. The writer

31. See U.S. CONST. amend. VI; LA. CONST. art. I, § 16.
33. 341 So. 2d 385 (La. 1976).
34. The record is discussed in 341 So. 2d at 386-87.
35. The trial had commenced so a recess, not a continuance, should have been requested. The court treated the defendant’s motion for a continuance as a request for a recess and relieved the defendant of following the procedural requisites for a continuance. 341 So. 2d at 386 n.1. The court also quickly disposed of the state’s argument that the defendant should be denied relief for failure to request a writ of habeas corpus ad testificandum. Id. at 387 n.2.
submits that under *Mizell* it is the right to have diligence exercised in having them served.

In *State v. Madison*, the defendant, an indigent, sought funds from the trial court to employ a private investigator to help him locate a witness whom he claimed to be crucial. The court affirmed the trial court's refusal to order the expenditure of funds, but recognized the possible validity of the defendant's argument, holding that in this case the defendant had failed to make a sufficient showing of need to justify expending funds for an investigator. The defense counsel had merely asserted the need for the witness. The court noted its sympathy with defense counsel's desire to avoid disclosing to the state in advance of trial the theory of his defense, but suggested that defense counsel should have sought a private hearing in which to establish for the record a "full explanation of his request." The defendant's failure to do so precluded review of the trial court's denial of his request.

Although the defense contentions and the court's treatment of them centered on equal protection and the right to effective counsel, the writer respectfully submits that this matter could be seen in light of the right to compulsory process. If a defendant is entitled to summon witnesses on his own behalf, he surely must be entitled, given a proper showing, to aid in locating them for that purpose. It is not always practical to expect law enforcement personnel to locate defense witnesses. However, appointed counsel may be unable to devote the time necessary both to locate missing witnesses and to prepare a defense. When the defendant is in custody this is a particular problem. While there is obviously no simple formula, it seems clear that under some circumstances a defendant is effectively denied the right to call a witness if he lacks the means to locate and identify him so that a subpoena can be served.

**RIGHT TO TRIAL BY JURY—JOINDER OF MISDEMEANOR OFFENSES**

In *State v. McCarroll* the defendants were charged with multiple counts of misdemeanor assault and battery. The offenses arose in a single

---

36. 345 So. 2d 485 (La. 1977).
37. *Id.* at 490.
39. *See* 345 So. 2d at 490.
40. 337 So. 2d 475 (La. 1976).
41. Several defendants’ cases were consolidated for the appeal.
incident and no issue was raised regarding the propriety of the joiner of offenses for trial. The cases were tried before the trial court without a jury and without advising the defendants of their right to have the matter tried before a jury. Two defendants were convicted following trial; one entered a plea of guilty.

The court, in a well reasoned opinion by Justice Dennis, determined that under article I, section 17 of the Louisiana Constitution the right to jury trial depends upon the maximum penalty which may be imposed in the case. The court seems clearly to understand the term "case" to mean a single indictment or information if it charges several joined offenses. When more than one offense is charged in an indictment, the aggregate of the penalties to which the defendant is exposed determines the right to trial by jury. Although the defendant's sentences did exceed six months, that does not appear to be the determining rationale. In Duncan v. Louisiana, the United States Supreme Court did not concern itself with the actual sentence, but rather only with whether the possible jail sentence exceeded six months. Subsequently, however, in Codispoti v. Pennsylvania the Court addressed itself to the actual sentence. Codispoti involved a post-trial contempt proceeding involving multiple allegations of contempt.

42. The defendants entered a restaurant armed with shotguns and threatened the victims. One of the defendants also committed a simple battery on one of the victims. Each assault and battery exposed the defendant to a maximum sentence of imprisonment for over six months.

43. Defense counsel did not move for a jury trial; nor did the record reflect that trial court advised the defendants of their right to trial by jury. The supreme court thus found no waiver of the right from failure to object. 337 So. 2d at 480-81.

44. All of the defendants were sentenced to terms of imprisonment exceeding six months. Moore was sentenced to serve four and one-half years. Frank McCarroll was sentenced to serve four years. Earl McCarroll was sentenced to serve two years.

45. LA. CONST. art. I, § 17 provides:

   Section 17. A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict. The accused shall have a right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury.


Whether the United States Supreme Court would agree with the Louisiana Supreme Court’s analysis of the federal constitutional issue in such cases is presently academic, since reliance is clearly upon the Louisiana Constitution. The possible sentence, not the actual sentence, governs the defendant’s right to jury trial in cases of joined offenses in Louisiana.

The question of offenses not joined but tried in sequence before the same judge is not raised and no answer is suggested. Whether the term “case” used in article I, section 17 of the Louisiana Constitution only applies to indictments containing joined offenses and not to separate indictments charging offenses arising from the same episode or transaction could be critical. Suppose, for example, a defendant is arrested for second offense driving while intoxicated and during the course of the arrest strikes two of the arresting officers and threatens a third with a knife. If the state charges him in a single bill of information including all offenses, under McCarroll the case must be tried before a jury absent defendant’s waiver of that right. If, on the other hand, the state files a separate bill of information for each offense, no single conviction exposes him to imprisonment for over six months. Nevertheless, if the state tries each offense separately before the same judge, the effect is very similar to a multiple count indictment. The only difference is the fact that the evidence must be reintroduced each time. It is noteworthy that Code of Criminal Procedure article 706 permits the defendant to move to consolidate for trial in such a situation. However, consolidation is discretionary with the trial court. It may be that the burden would then shift to the defendant to move to consolidate if he wishes his case to be heard by a jury. The trial court would then exercise its discretion in allowing or denying consolidation, and the attendant jury trial right.

APPEARANCE OF THE DEFENDANT

In State v. Burnette during the progress of an armed robbery trial the defendant cursed and threw an ashtray at the trial judge. Rather than exclude the defendant, the trial judge had him handcuffed and gagged.

49. Id. 14:35 (Supp. 1968). Each officer struck is a separate battery under State v. McCarroll, 337 So. 2d 475 (La. 1976).
51. The defendant can move to consolidate if the offenses could have been joined for trial. See State v. Laurent, 290 So. 2d 809 (La. 1974).
52. 337 So. 2d 1096 (La. 1976).
Noting the wide discretion to maintain order and decorum accorded trial courts by the United States Supreme Court in *Illinois v. Allen*, the court upheld the procedure employed in this case.

The writer certainly agrees that trial judges should not be exposed to physical injury. The opinion does not state whether the defendant was warned not to engage in such conduct and given a chance to behave prior to being gagged and handcuffed. This should indeed not matter regarding the handcuffing. The accused should not be given a second chance to inflict injury on the judge once he has displayed such propensities. However, prior to gagging the defendant and thereby depriving him not only of the chance to curse the judge, but also of the ability to confer with counsel, the court should give warning. In an earlier case, *State v. Brewer*, the court reversed the conviction of one defendant and affirmed the conviction of another when both were shackled and gagged following an outburst at trial. In *Brewer*, although both defendants participated in the outburst, only one so clearly indicated his intention to disrupt the proceedings as to merit the gag and shackles. Neither defendant in *Brewer* was warned prior to being shackled and gagged. The supreme court, however, found no difficulty upholding the trial court's action where the defendant's conduct was blatant and outrageous. The conduct displayed in *Burnette* was similarly blatant and indicated the defendant's unequivocal desire to disrupt.

When a defendant misbehaves there is no constitutional bar to exclusion under appropriate circumstances. However, article 831 of the Code of Criminal Procedure mandates the presence of an accused in a felony case. Only his temporary, voluntary absence is excused by article 832. Possibly this causes some Louisiana trial judges to feel that until the legislation is amended to reflect the authority to exclude unruly defendants, they are limited to binding and gagging those whose conduct justifies such action. The legislature should consider enacting legislation similar to Rule 43(b) of the Federal Rules of Criminal Procedure to clarify the trial court's authority to exclude disruptive defendants.

---

54. The opinion reflects the fact that the ash tray actually struck the trial judge. Whether serious injury was in fact caused or not, the danger was certainly present.
56. 301 So. 2d 630 (La. 1974).
57. See FED. R. CRIM. P. 43(b):

(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant
DEFENDANT’S RIGHT TO TESTIFY

In State v. Lovett the supreme court accorded to the defendant in criminal trials the right to testify in the jury’s presence concerning the circumstances surrounding his confession without being subject to cross-examination on the “whole case.” The court further indicated, by way of preference, that the defendant should be given the opportunity to present his version as well as to offer any other evidence to diminish the weight of the confession, “contemporaneously with the state’s evidence as predicated.” The writer assumes that the practical effect would be to go through the familiar foundation outside the presence of the jury, then to repeat the entire process in the presence of the jury.

Louisiana has for many years permitted the defendant to testify in the proceedings leading to a determination of the admissibility of the confession without being subject to examination on other matters. This is seen as a rule of fairness dictated by the need to allow the accused to challenge the police testimony on the voluntariness of his confession without being compelled on cross-examination to incriminate himself. The same result could have been reached by permitting the defendant to testify and then not permitting the state to use his testimony against him in any later proceedings in the case. However, employing a “narrow rule” of cross-examination practically had the same effect.

shall be considered to have waived his right to be present whenever a defendant, initially present,

(1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or

(2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

58. 345 So. 2d 1139 (La. 1977).
59. The right would presumably also apply whenever the state intends to offer evidence of any statement requiring a showing of Miranda warnings or a showing of the free and voluntary nature of the confession.
61. 345 So. 2d at 1143.
62. Id.
63. A trial court ruling favorable to the state on the admissibility of the confession is of course needed to offer the confession to the jury.
64. See State v. Thomas, 208 La. 548, 23 So. 2d 212 (1945) for an excellent discussion of the purpose of the rule.
66. In some jurisdictions the cross-examination is limited to matters covered in
When the defendant is permitted to testify before the jury under a narrow rule of cross-examination, he has a valuable chance for the jury to see and hear him deny the voluntary nature of the confession. The district attorney is only permitted to examine him on the matter testified to on direct, i.e., the circumstances surrounding the confession. Just as this procedure was earlier seen as the only fair way to allow the defendant effectively to challenge the confession's admissibility, it was seen in Lovett as the only fair way to enable him to challenge the confession's weight.

The writer has no philosophical reservations concerning the court's authority to limit the scope of cross-examination of a particular party (i.e., the defendant) in certain types of cases (i.e., criminal cases).

Practical problems may arise if the defendant's testimony goes beyond the confession itself and, in effect, denies guilt. Should such situations arise, the state should be entitled either to have the trial court charge the jury concerning the limited nature of the defendant's testimony or to broaden his cross-examination to include all matters covered on direct. The trial court should be given broad authority to choose the proper remedy.

Practical problems may also arise from an interruption of the state's case to permit the defendant to offer evidence "contemporaneously" with the state's predicate concerning the confession. The normal order of trial need not be disrupted to achieve the purposes sought by allowing the defendant to testify under a narrow rule of cross-examination. The expression of preference by the supreme court is certainly a guide to trial courts. However, if the trial court should prefer to follow the normal order of trial and to allow the state to complete its case prior to defendant's presentation of evidence, the failure to follow the supreme court's preference ought not result in reversal. As long as the defendant's evidence goes to the jury, any error due to failure to follow the preferred procedure should be deemed harmless unless the supreme court feels the need to enforce its preference by reversal of convictions.

the direct examination. See FED. R. EVID. 611(b) with comments. Louisiana adopted the broad rule of cross-examination in criminal cases. See LA. R.S. 15:280 (Supp. 1967). See also Justice Tate's discussion in State v. Lovett, 345 So. 2d at 1141.

67. Earlier cases holding that the defendant was entitled to testify in the jury's presence only by subjecting himself to cross-examination on the whole case were overruled. 345 So. 2d at 1142.

68. Id. at 1143.

69. LA. CODE CRIM. art. 921.
Mistrial—Application of the Contemporaneous Objection Rule

The supreme court recently decided two cases relating the contemporaneous objection rule to the mistrial provisions of the Code of Criminal Procedure. In *State v. Lawson*, the district attorney made a prohibited reference to an unrelated crime in a question during direct examination of a state witness. Upon defense counsel's objection to the question, the prosecutor immediately apologized and the question was never answered. No motion for a mistrial was made by defense counsel. Nevertheless, following a conference at the bench between the court and counsel, the trial court ordered a mistrial. Defense counsel did not object to the ordering of a mistrial. However, when the case was brought again for trial defense counsel argued that the retrial was barred by double jeopardy.

The court found that the trial court's action in ordering a mistrial without the consent of the defendant was erroneous. Despite the district attorney's error, the situation was not one falling within the scope of Code of Criminal Procedure article 775 which authorizes the trial court to grant a mistrial on its own motion. When inadmissible other crimes evidence is erroneously injected, the defendant's remedy is found in article 770 which does require a defendant's motion. The defendant may be satisfied to proceed to verdict with an admonition by the trial court to the jury to disregard the evidence or remark.

However, the court found that the defendant's failure to object to the mistrial precluded him from later complaining of the trial court's ordering the mistrial without a defense motion.

---

71. 338 So. 2d 627 (La. 1976).
72. See LA. CODE CRIM. P. art. 770; State v. Meshell, 332 So. 2d 767 (La. 1976).
73. The colloquy is found in 338 So. 2d at 629 n.3.
74. That, of course, would not cure the error. See State v. Meshell, 332 So. 2d 767 (La. 1976).
75. 338 So. 2d at 629 n.3.
76. The only possible ground was "a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law." LA. CODE CRIM. P. art. 775(3).
77. Id. art. 770.
78. See id. art. 841. The defendant contended that the trial court cut his objection short. This was not the high court's finding from reviewing the record. 338 So. 2d at 631. See also the colloquy at 338 So. 2d at 629 n.3.
The writer is satisfied that the result is fair. If the defendant had an objection to the mistrial he was given an opportunity to make his complaint known. To have reached a contrary result would have been a miscarriage of justice. The trial judge was obviously acting in good faith to assure a fair adjudication of the issue of guilt. To bar subsequent proceedings would have allowed the defendant to take advantage of his own failure to complain of steps taken to assure a fair trial.

In *State v. Ervin*, during his trial for burglary of a home, the defendant called a girl friend to testify as to an alibi. The witness testified that she was with the accused on the night on which the burglary occurred. On cross-examination by the state, she said she saw the defendant almost daily between 1972 and 1975. The prosecutor then, out of the presence of the jury, informed the trial court that the defendant was in the state prison at Angola from October, 1973 until September, 1974. With the jury still out of the courtroom, the witness clarified her testimony. She said she saw the accused only a few times during the year he was in prison. The prosecutor requested that the witness clarify her testimony for the jury. When the jury returned, the witness testified that from October, 1973 until September, 1974, she saw the accused only a few times. The district attorney then asked where she had seen him. Defense counsel objected to the question because it sought to allude to the fact of the accused's prior conviction. The objection was overruled and the witness answered that she saw the accused "at Angola."

On appeal, the state argued that the defendant could not complain because he failed to move for a mistrial after the witness answered the question. The supreme court properly found that no such motion was required because the trial court was already aware of the defense objection to the evidence being admitted. To assume that the trial judge would have changed his opinion regarding the propriety of the question and response is not logical. To require a subsequent motion for a mistrial to preserve the issue for review would have unjustly prevented the defendant from complaining of the trial court's erroneous ruling.

**DOUBLE JEOPARDY—RETRIAL FOLLOWING MISTRIALS**

Generally, when the defendant seeks a mistrial, a reprosecution is not barred by double jeopardy. Article 591 of the Code of Criminal Procedure...

---

79. But see defendant's argument to the contrary, 338 So. 2d at 631.
80. 340 So. 2d 1379 (La. 1976).
81. *Id.* at 1380.
82. *Id.*
incorporates that concept. However, the United States Supreme Court has recognized the possibility that bad faith conduct by the prosecutor intended to provoke a mistrial may present a different picture. To permit the state's attorney to provoke a mistrial in order to avoid an acquittal would subject the defendant to harassment by successive prosecutions. In United States v. Dinitz, the United States Supreme Court saw the double jeopardy clause as a protection against "governmental actions intended to provoke mistrial requests." In State v. Wesley, the defendant was convicted after three mistrials. Two of the mistrials were granted on defendant's motion due to comments of the district attorney during the opening or closing statement.

The supreme court recognized its authority to prevent retrials if the error causing the mistrial is so egregious as to give rise to an imputation of bad faith on the part of the district attorney. However, after evaluating the two alleged prosecutorial errors occasioning the prior mistrials, the court concluded that on neither occasion was the district attorney displaying the sort of bad faith prosecutorial overreaching which would necessitate invoking double jeopardy protections to prevent unfairness.

The writer agrees with the result and is sure that the court will not invoke such protection except in the most aggravated circumstances. It is, of course, normally sufficient protection for the accused to be able to stop the trial when prejudicial error has been committed.

In order to protect both the state and the accused in a situation involving the possibility of bad faith behavior on the part of a prosecutor, the trial court should consider denying the motion for a mistrial, thereby

83. See also La. Const. art. I, § 15.
84. 424 U.S. 600 (1976).
85. Id. at 611.
86. 347 So. 2d 217 (La. 1977).
87. One mistrial followed the inability of the jury to reach a verdict. It was conceded that this was ordinarily no bar to retrial. The defendant nevertheless argued that the protection provided by the double jeopardy clause at some point prevents the state from retrying a defendant when it cannot secure a guilty verdict. The supreme court did no more than recognize that such a point might exist; but even so, it had not been reached in this case.
88. In one trial the prosecutor mentioned the codefendant's six month jail sentence in closing argument. In another trial, the prosecutor mentioned in the opening statement an inculpatory statement by the defendant. In both cases, the trial court granted defense motions due to alleged prejudice to the accused as a result of the remarks.
allowing the accused the opportunity to be acquitted (or convicted of a lesser offense) and reserving to the defendant the opportunity to re urge his complaint in a motion for a new trial in the event of a verdict of guilty. In the context of a motion for a new trial, the issue could be evaluated in more depth and appropriate sanctions invoked.\textsuperscript{89} The guilty should not completely escape punishment because the district attorney commits reversible error.

\textbf{DOUBLE JEOPARDY—SAME EVIDENCE TEST}

In a series of recent cases\textsuperscript{90} involving multiple prosecution for various offenses arising from the same series of events, the supreme court evaluated the purpose for which the evidence was offered in determining the application of Louisiana's "same evidence" test.\textsuperscript{91}

In \textit{State v. Nichols}\textsuperscript{92} the defendants were charged with aggravated battery and resisting arrest.\textsuperscript{93} When the defendants were stopped by a state police trooper for driving while intoxicated, they assaulted the officer. In the course of their struggle, prior to the arrival of reinforcements to effect the defendants' arrest, the defendants attacked the officer and used his flashlight and radio microphone to batter him. Following their guilty pleas to resisting arrest, they moved to quash the aggravated battery charges.\textsuperscript{94} Although the charges arose from the same episode, the court, based on the state's answer to a bill of particulars,\textsuperscript{95} determined that defendants resisted arrest when they initially attacked the trooper. The aggravated battery occurred later when they struck him with the flashlight and microphone. Although these events were part of the same episode they were charged as distinct offenses and the court determined that the state was entitled to prosecute for both.

\textsuperscript{89} The prosecutor's conduct could conceivably violate ethical standards. He may also be in contempt of court.

\textsuperscript{90} State \textit{ex rel.} Smith v. Phelps, 345 So. 2d 446 (La. 1977); State v. Buckley, 344 So. 2d 980 (La. 1977); State v. Cotton, 341 So. 2d 362 (La. 1976); State v. Nichols, 337 So. 2d 1074 (La. 1976).

\textsuperscript{91} \textit{See} City of Baton Rouge v. Jackson, 310 So. 2d 596 (La. 1975); Wikberg v. Henderson, 292 So. 2d 505 (La. 1974).

\textsuperscript{92} 337 So. 2d 1074 (La. 1976).

\textsuperscript{93} Other charges were brought but are not critical for the double jeopardy discussion.

\textsuperscript{94} The trial court agreed and quashed the charges. The supreme court granted writs which resulted in the instant decision.

\textsuperscript{95} Because the case involved a guilty plea to the resisting arrest charge and a pretrial dismissal, the court had only the state's response to the bill of particulars to frame the facts underlying the state's allegations.
Similarly, in *State v. Buckley*, the defendant was charged in two bills of information with distribution of marijuana. The two sales to the same undercover agent occurred on the same date. The officer made one purchase, drove down the road for a distance, then returned to make the second purchase. The defendant was convicted first of one, then of the other sale. Following the first conviction, the defendant challenged the state's right to prosecute him for the second sale on double jeopardy grounds. The supreme court affirmed the second conviction on the theory that the state charged two distinct offenses.

In *State v. Cotton*, the defendant was accused of aiding in the robbery of a man named David. During the course of the criminal episode, in which the defendant and two others participated, David's companion Brister was shot and killed by one of the robbers. Following Cotton's conviction for robbery of David, he moved to quash a second degree murder indictment charging him with Brister's death. In answer to a bill of particulars the state responded that it would not contend that the killing was committed during the perpetration of the robbery of David.

The trial court quashed the murder indictment but was reversed by the supreme court. The robbery of David and killing of Brister were seen as two distinct offenses committed during the same criminal episode.

In *State ex rel. Smith v. Phelps*, Smith was convicted under municipal ordinances in the mayor's court of aggravated assault, displaying dangerous weapons and disturbing the peace. He was later convicted in the district court of simple kidnapping of his estranged common law

---

96. 344 So. 2d 980 (La. 1977).
97. There were two separate trials.
98. 341 So. 2d 362 (La. 1976).
99. The defendant was charged with armed robbery and convicted of simple robbery. See LA. R.S. 14:64-65 (Supp. 1966).
100. The state contended that all three actors were principals and hence responsible for the others' offenses. See LA. R.S. 14:24 (1950).
101. The state's answer indicated that it would rely on the fact that the killing was during the perpetration of an aggravated burglary.
102. 345 So. 2d 446 (La. 1977).
103. The assault and disturbing the peace ordinances are very similar to the title 14 offenses. The displaying dangerous weapons ordinance provided in pertinent part as follows:
   
   It shall be unlawful for any person to . . . display . . . or exhibit with intent to commit any crime or misdemeanor, or to intimidate any person, a pistol . . .
   or other dangerous weapon within the corporate limits of the Town of Winnsboro . . . .

_TOWN OF WINNSBORO, LA., ORDINANCE No. 332, quoted in State ex rel. Smith v. Phelps, 345 So. 2d 446, 448 (La. 1977)._
wife. He applied for a writ of habeas corpus on the ground that his district
court prosecution for kidnapping was barred by his prior convictions in the
mayor's courts. The court first ordered a hearing to reconstruct the facts
of the mayor's court proceedings to determine the underlying facts of
those convictions.

The mayor's court convictions arose as a result of the defendant
confronting his former common law wife in a public place with a pistol.
He forced her to accompany him and threatened to shoot if others inter-
vened. He took her to his automobile and drove away. Affirming the
kidnapping conviction, the supreme court found that the municipal ordi-
nance convictions were based on the defendant's preliminary actions and
threatening conduct with the pistol. The kidnapping conviction was found
to be based on his forcing his former companion into his car and driving
away.

Each of these decisions recognized the fact that the "same evidence"
would likely be introduced in each trial. However, the court pointed to the
fact that the purpose of the evidence would be different. It might prove the
offense in one case, and simply complete the episode in another. The
opinions continually referred to the fact that the same evidence rule does
not bar multiple prosecutions when the defendant goes on a "crime
spree" or commits several offenses in a single "criminal episode."

The writer submits that the logic of all four cases is very understand-
able and feels that the theory will be fairly easy for trial courts to apply. It
will, of course, permit the imaginative prosecutor to avoid double jeopar-
dy problems by arguing that the purpose of the evidence is different. For
example, in Nichols, he must, as he did, allege that the offense of
resisting arrest does not include hitting the trooper with the flashlight. He
may present the "same evidence" at trial as long as he clearly delineates
its different purposes.

DOUBLE JEOPARDY—STATE AND FEDERAL PROSECUTIONS

In State v. de la Beckwith and State v. Forbes, state prosecu-
tions followed federal prosecutions for essentially the same conduct. In

105. Justice Summers, author of Buckley, Cotton, and Smith, uses this term.
106. 337 So. 2d at 1078.
107. 344 So. 2d 360 (La. 1977).
108. 348 So. 2d 983 (La. 1977).
109. Federal prosecutors are generally precluded from engaging in successive
Forbes the defendant alleged that his plea of guilty to a federal indictment charging him with bank robbery precluded his state prosecution for armed robbery. The supreme court upheld the state's right to prosecute despite the prior federal conviction. The court cited article 597 of the Code of Criminal Procedure which clearly provides that a federal prosecution does not bar state prosecution on grounds of double jeopardy. The court did not extensively discuss the United States Supreme Court's decision in Bartkus v. Illinois\textsuperscript{110} other than to cite the case for the proposition that prosecution by different sovereigns is constitutionally permissible.\textsuperscript{111}

In State v. de la Beckwith,\textsuperscript{112} the prior federal prosecution resulted in an acquittal. The defendant thus contended that state prosecutors were collaterally estopped from charging him with the state offense arising from the same course of conduct.\textsuperscript{113} The court said that collateral estoppel did not apply because the matter in question was not being relitigated by the same parties, but rather between a different sovereign (the State of Louisiana) and the defendant. Thus whether an ultimate issue of fact was resolved between the defendant and the United States was not critical. Since the state was not a party to the prior prosecution, the state was not collaterally estopped.

The writer cannot disagree with the court's analysis based on existing statutes and precedent. However, a sense of fairness dictates that multiple prosecutions not be engaged in absent a unique set of circumstances in which justice would otherwise be subverted. For example, a state or federal prosecutor should not be able to bar the other from a good faith prosecution by securing an indictment for the sole purpose of dismissing it after jeopardy had attached, thereby barring the other prosecution. Nevertheless, in fairness to the accused, prosecutors ought to defer to one another except in the most unique situations.

DOUBLE JEOPARDY—RETRIAL OF HABITUAL OFFENDER PROCEEDINGS

In State v. Hill,\textsuperscript{114} following his conviction for possession of heroin,
the defendant was charged as a habitual offender. After hearing the state's evidence, the trial judge found that the documents presented by the state to prove the prior convictions were not properly authenticated. The trial court thus found the defendant "not guilty as a multiple offender." The district attorney filed a second bill and sought to prove by properly authenticated documents the accused's prior felony convictions. The trial court refused to permit the second proceeding and quashed the bill.

The supreme court felt that under the circumstances the state should be given a second chance to establish the defendant's prior convictions. The court found that double jeopardy did not bar the second proceeding because the habitual offender proceeding is only an enhancement proceeding and does not charge a criminal offense. The court found that principles of res judicata were applicable but were no bar to this second proceeding because there was no direct determination of a fact or matter distinctly put in issue. The original finding was based on the technical inadequacy of the state's documentation and was not a conclusive determination of a fact distinctly put in issue.

By way of further discussion, the court said that the resolution of certain matters in the defendant's favor, such as his identity as the person who suffered the prior convictions, would probably bar subsequent proceedings on res judicata grounds.

Although the court's analysis is very logical, this writer feels that the district attorney should be required to be prepared and to present his case properly the first time.

CHARGING AND ARGUING TO THE JURY ON THE PENALTY

In State v. Blackwell, a closely divided supreme court decided on rehearing that the trial court may allow or disallow argument on the penalty provision applicable to the case being tried. Similarly, it was held that the trial court could charge the jury regarding the penalty if it chose,
but was not required to do so even upon defendant's request. On original hearing, in an opinion by former Justice Barham, the court held that a charge describing the penalty had to be given if requested by the defendant. On rehearing, Justice Calogero, writing for the majority, chose to leave the matter to the sound discretion of the trial court. The theory of Blackwell is sound. The jury in Louisiana plays no role in sentencing. Except in capital cases, sentencing falls within the province of the judge, not the jury. The same logic could have applied in cases in which the legislature vests the trial court with no sentencing discretion. There it could be said the determination of sentencing is neither the function of the court nor that of the jury, but rather has been predetermined by the legislature. Although again a very close question, the majority of the court in State v. Prater\textsuperscript{123} thought otherwise, despite the language of the opinion. Charged with distribution of heroin, Prater requested that the trial court charge the jury that if convicted he faced a mandatory sentence of life imprisonment. The trial court refused the charge. In Prater, the opinion of the court, reflecting the view that the penalty is of no concern to the jury, said:

Our jurisprudence is uniform in holding that the imposition of sentence or the fixing of the punishment for conviction is solely within the province of the judge and is not a function of the jury which is concerned only with the determination of guilt or innocence of the accused . . . . Likewise, we have held that sentence regulation, such as those relating to mandatory terms, form no part of the applicable law for the judge's charge to the jury.\textsuperscript{124}

However, only three members\textsuperscript{125} subscribed to the court's opinion. Three Justices dissented and a fourth concurred.\textsuperscript{126}

In his dissenting opinion Justice Calogero, author of Blackwell on rehearing, distinguished cases such as Blackwell in which the penalty falls within certain set limits\textsuperscript{127} and those in which a mandatory penalty is fixed by statute leaving discretion neither to the trial court nor to the jury.

\textsuperscript{122} See La. Code Crim. P. arts. 871, 905-905.9.
\textsuperscript{123} 337 So. 2d 1107 (La. 1976).
\textsuperscript{124} Id. at 1108.
\textsuperscript{125} The opinion by Justice Marcus was joined by Justice Summers and Chief Justice Sanders.
\textsuperscript{126} Justices Dixon, Calogero, and Dennis dissented. Justice Tate concurred. Justice Dennis replaced Justice Barham on his retirement.
\textsuperscript{127} Blackwell was charged with armed robbery which carried a penalty from five to ninety-nine years imprisonment at hard labor. See also State v. Unzueto, 337 So. 2d 1102 (La. 1976).
Justice Tate concurred only in that the view expressed by Justice Calogero should apply to cases tried after the effective date of Prater. Justice Tate said that he regarded the bench and bar as "on notice that in the view of the majority . . . a charge and argument may be required and permitted, despite Blackwell, when the statutory offense requires a mandatory legislative penalty, with no judicial discretion as to its imposition following verdict."128

In State v. Hodges,129 a second degree murder case,130 defense counsel objected when the trial court refused to permit him to read the penalty to the jury during his closing argument. The court affirmed with a footnote131 recognizing the fact that the case was tried prior to the Prater decision. The footnote also noted a distinction between requiring the trial court to charge the jury on the penalty and permitting defense counsel to argue the penalty.

With deference to Justice Tate's concurrence in Prater, the writer sees the difference as critical. Defense counsel may indeed wish to appeal to the sympathy of the jury by pleading with them not to convict due to the stringent consequences for the defendant.

Although the writer feels that the defendant has a right to have the jury know that a mandatory life sentence will follow their verdict, this can be accomplished by requiring the judge to include such information in his charge. To allow defense counsel to argue penalty is to invite the jury to acquit because the law is too harsh.132 It is also an invitation to the district attorney to argue the availability of pardons and commutation of sentence. To permit such argument unnecessarily injects extraneous issues.

**RIGHT TO APPEAL**

In State v. McCarrol133 the defendant was brought to trial on an indictment in which several counts, all charging misdemeanor offenses, were joined. Following conviction, the defendant was sentenced to imprisonment. Although the sentence on each individual count did not exceed

---

128. 337 So. 2d at 1110. Justice Tate, writing for the court in State v. Milby, 345 So. 2d 18 (La. 1977), a second degree murder case with a mandatory life sentence, tried before the date of Prater, expressed the same view for the court.
129. 349 So. 2d 250 (La. 1977).
130. The penalty was mandatory life imprisonment.
131. 349 So. 2d at 259 n.1.
132. This was Justice Dixon's view in his dissent in State v. Harris, 258 La. 720, 247 So. 2d 847 (1971).
133. 337 So. 2d 475 (La. 1976).
six months, the defendant's total sentence did exceed six months. Citing section 5(D) of article V of the Louisiana Constitution of 1974, the court held that the defendant had the right to appeal to the Supreme Court of Louisiana. In felony cases the defendant can appeal a conviction without regard to the sentence imposed. However, under the state constitution, a convicted misdemeanant's right to appeal is conditioned upon the sentence imposed. Otherwise the defendant may only seek writs of review under the supreme court's supervisory jurisdiction over the lower courts.

In *McCarroll*, the high court held that in the case of multiple misdemeanor offenses joined in a single indictment the aggregate of the sentences actually imposed determines the right of appeal. If the total sentence actually imposed for all counts combined exceeds six months (also, presumably, if it exceeds five hundred dollars) the entire case is appealable to the supreme court. As in the court's discussion in *McCarroll* of the right to trial by jury, the court treats the term "case" used in section five of article five to apply to a single indictment including multiple counts charging separate offenses.

**TOTAL LACK OF EVIDENCE—REMANDS FOR NEW TRIAL**

In *State v. Elzie* and *State v. Jackson* the state's highest court applied the "total lack of evidence" standard to reverse convictions. Both cases were tried before juries after the legislature abolished the directed verdict in jury trials. The defendant challenged his conviction by moving for a new trial in which it was contended that there existed a total lack of evidence of an essential element of the offense.

---

134. Felony cases are those in which the defendant may be imprisoned at hard labor. *See* LA. CODE CRIM. P. art. 933.
135. LA. CONST. art. V, § 5.
136. Id. art. V, § 5(D) provides:
   (D) Appellate Jurisdiction. In addition to other appeals provided by this constitution, a case shall be appealable to the supreme court if (1) a law or ordinance has been declared unconstitutional; (2) the defendant has been convicted of a felony or a fine exceeding five hundred dollars or imprisonment exceeding six months actually has been imposed.
137. Id. art. V, § 5(A).
138. See text at notes 40-51, supra.
139. 343 So. 2d 712 (La. 1977).
140. 344 So. 2d 961 (La. 1977).
141. In *Jackson*, the defendant actually moved for a judgment N.O.V. following the verdict. This was treated as a motion for a new trial alleging a total lack of evidence.
In *Elzie* the accused was convicted of possession of cocaine with intent to distribute. Proof that the defendant possessed .07 of an ounce of a substance containing .01 per cent cocaine was evident. The state offered evidence which further showed that such amount was sufficient for twenty individual cocaine uses. Based on this evidence, the jury convicted. The state argued that the jury had some evidence from which it could infer a specific intent to distribute the drug.

The supreme court found a "total lack of evidence" from which the jury could infer that the defendant possessed the requisite intent and reversed. The court decision noted the reasonable hypothesis of innocence standard as to circumstantial evidence and said that whether "every reasonable hypothesis of innocence has been excluded presents a question of law."  

Similarly, in *State v. Jackson*, the court reversed the defendant's conviction as an accessory after the fact, finding that the facts presented showed no evidence of that offense. In *Jackson*, the accused discovered that three others had burglarized various business places. In return for not reporting the culprits, the accused was given money and other valuables.

Although the court suggested that the accused may have been guilty of receiving stolen property or compounding a felony, his mere failure to report the offenses, formerly punished as misprision, was not sufficient to render him an accessory after the fact.

---

142. LA. R.S. 15:438 (1950) provides:

§438. Circumstantial evidence.

The rule as to circumstantial evidence is: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence.

143. "For purposes of appellate review, the issue before us then is whether there is some evidence from which the jury could reasonably conclude that beyond a reasonable doubt the accused in the present instance possessed the cocaine with intent to distribute it. Stated another way, did the evidence before the jury, reasonably accepted by it, exclude as a matter of law every other reasonable hypothesis, such as that the accused possessed the cocaine for personal consumption rather than for distribution to others?" 343 So. 2d at 715.

144. 343 So. 2d at 714.

145. 344 So. 2d 961 (La. 1977).


147. Id. 14:131 (1950).

148. The court noted that section 856 of the Revised Statutes of 1870 did make criminal the mere failure to report crime. 344 So. 2d at 963. The offense was repealed in 1942 when the present criminal code was enacted.

149. 344 So. 2d at 963.
The writer concurs in the direction the court has taken in reviewing under the total lack of evidence standard. The court indicates in Elzie a willingness to build into the test the circumstantial evidence rule. Where the evidence is so weak that the supreme court (or the trial court) finds that no reasonable juror could find proof beyond a reasonable doubt (or that the proof excludes every reasonable hypothesis of innocence, whatever the applicable test), the conviction should not stand. 150

The writer further feels that reference to a total lack of evidence standard for review purposes should be abandoned. In effect, the supreme court is reviewing the sufficiency of the evidence presented in the trial court. If the evidence is insufficient to support the burden of proof required by law, a question of law is presented. Conceptually it would be more satisfactory if the court would rearticulate the standard for reviewing the sufficiency of the evidence presented on the question of guilt or innocence.

Another problem not disposed of in either Elzie or Jackson relates to the lack of a directed verdict in jury cases. In both Elzie and Jackson a new trial was granted, thereby presumably allowing the state an opportunity to supply proof of the missing element. In Elzie, Justice Tate noted the unresolved issue regarding the application of double jeopardy principles should the state reprosecute the accused for possession of cocaine with intent to distribute.

In cases in which absence of the missing element does not affect the defendant's guilt of a lesser included offense, the court should consider simply affirming the conviction of the lesser offense, and remedying for resentencing.152 In cases like Jackson, where such a result would not be possible, the court, as Justice Tate correctly suggests, must wrestle with the double jeopardy question in the event of retrial for the same offense.

MULTIPLE OFFENDER DWI PROSECUTIONS

In State v. Neal153 the defendant was apprehended on January 4, 1976 while allegedly operating a vehicle under the influence of alcohol. On May 11, 1976 he was again accused of operating his vehicle under the influence. At the time he had not yet been convicted of the January DWI. Following the May arrest, he pled guilty to the January DWI. The district

150. See State v. Finley, 341 So. 2d 381 (La. 1976).
151. See LA. CONST. art. V, § 5.
153. 347 So. 2d 1139 (La. 1977).
attorney then charged that on May 11, 1976 he was guilty of second offense DWI.

The supreme court held that he could not be charged as a second offender, because the first conviction did not precede the second transgression. The court reasoned that because the first conviction must be alleged and proved, the conviction itself (not merely the underlying conduct) must have occurred prior to the conduct which subjects the offender to the enhanced penalty\textsuperscript{154} for second offense DWI. Writing for the court, Justice Tate said:

Traditional American principles of criminal responsibility of an individual for his conduct do not permit the state to convert a formal charge against him for a less serious offense, into a charge for a more serious offense, on the legal basis of a change of status or other incident which occurs after the initial offense charged. Criminal conduct ordinarily subjects an individual to the imposition of criminal penalties applicable to the act at the time it is committed.\textsuperscript{155}

As in \textit{State v. Cox},\textsuperscript{156} \textit{State v. Taylor},\textsuperscript{157} and \textit{State v. Sanders},\textsuperscript{158} the court has correctly resolved a question of legislative intent in favor of the

\textsuperscript{154} \textit{LA. R.S. 14:98 (Supp. 1975) provides:}

A. Operating a vehicle while intoxicated is the operating of any motor vehicle, aircraft, vessel or other means of conveyance while under the influence of alcoholic beverages, narcotic drugs, central nervous system stimulants, hallucinogenic drugs or barbiturates.

B. Whoever operates a vehicle while intoxicated is guilty of a crime and upon conviction shall be fined not less than one hundred twenty-five dollars and not more than four hundred dollars or imprisoned in the parish jail for not less than thirty days nor more than six months or both.

C. On a second conviction, the offender shall be fined not less than one hundred twenty-five dollars nor more than five hundred dollars and shall be imprisoned for not less than one hundred twenty-five days nor more than six months.

D. On a third conviction, the offender shall be imprisoned with or without hard labor for not less than one year nor more than five years, and may be fined not more than one thousand dollars.

E. On a fourth conviction, the offender shall be sentenced to imprisonment at hard labor for not less than ten nor more than thirty years.

F. Provided that any offense under the statute committed more than five years prior to the commission of the crime for which the defendant is being tried shall not be considered in the assessment of penalties hereunder.

\textsuperscript{155} 347 So. 2d at 1141.

\textsuperscript{156} 344 So. 2d 1024 (La. 1977).

\textsuperscript{157} 347 So. 2d 172 (La. 1977).

\textsuperscript{158} 337 So. 2d 1131 (La. 1976).
accused. This is clearly a question which the legislature can resolve with an amendment should they disagree with the court's approach. The statute could be drafted so that the second instance of such conduct subjects the defendant to the greater penalty although he has not yet been convicted for the first instance of the conduct.

HABITUAL OFFENDER PROCEEDINGS—LEGISLATIVE INTENT

A series of cases\textsuperscript{159} dealt with the application of enhancement of penalty proceedings to convictions for offenses which include as an essential element a prior felony conviction.\textsuperscript{160} In \textit{State v. Sanders}, following the defendant's conviction for being a convicted felon in possession of a firearm,\textsuperscript{161} the state filed a multiple offender bill of information. Similarly, the state filed a multiple offender bill of information in \textit{State v. Cox}, following the defendant's conviction for simple escape from the Department of Corrections.\textsuperscript{162} In both cases, the court quashed the enhancement proceedings on the theory that the legislature must have intended that procedure to apply to such convictions. The decisions noted that in both situations conduct which would not be felonious, perhaps not even criminal, was in effect deemed by the legislature to constitute a felony because the person had suffered a prior felony conviction. The court felt that the legislature must not have intended that the habitual offender provisions should apply because to do so would be doubly to enhance the penalty for the conduct. The conduct is deemed felonious in the first place because of the prior conviction. To permit the penalty prescribed for that conduct to be further enhanced because of the same prior conviction was deemed impermissible absent a clear showing that the legislature intended such a result. The effect is to hold that the legislature must not have intended that the prior convictions could serve both as an element of the offense and to enhance the sentence.

\textsuperscript{159} State v. Taylor, 347 So. 2d 172 (La. 1977); State v. Cox, 344 So. 2d 1024 (La. 1977); State v. Sanders, 337 So. 2d 1131 (La. 1976).


\textsuperscript{161} The statute, LA. R.S. 14:95.1 (Supp. 1975), prohibits those convicted of certain felonies from passing firearms or carrying concealed weapons. Sanders had previously been convicted of attempted simple burglary and armed robbery.

\textsuperscript{162} Cox was convicted of escaping (\textit{See} LA. R.S. 110(A) (Supp. 1972)) from Jackson Barracks Work Release Program, when he was serving a sentence following his conviction for simple burglary. A felony conviction only may result in a sentence to the custody of the Department of Corrections. \textit{See} LA. CODE CRIM. P. art. 933; LA. R.S. 15:824 (Supp. 1976).
In *State v. Taylor*, without a lengthy discussion, the court refused to allow the state to use a prior felony escape conviction to enhance a single kidnapping conviction, relying on its rationale in *Cox* and *Sanders*. With deference, the writer sees a significant difference. In *Taylor*, the felony conviction (simple kidnapping) enhanced by the escape conviction was not one which requires as one of its elements a prior conviction. This was not, of course, the situation in *Cox* or *Sanders*. However, the court may regard offenses which themselves have as elements a prior felony conviction as status offenses; on this basis it may be logical to hold that such offenses can neither be enhanced nor be used to enhance.

The writer agrees with Justice Dennis, author of *Cox*, in his approach to the problem. Criminal statutes are strictly construed and, in instances where there is an “absence of express legislative intent,” doubts should be resolved in favor of the defendant’s interest.  

**HABITUAL OFFENDER PROCEEDINGS—THE EFFECT OF THE “AUTOMATIC PARDON”**

In *State v. Selmon*, it was held that the pardon provided for first offenders in article I, section 20 of the Constitution of Louisiana does not prevent the “pardoned” conviction from being used to enhance punishment. The court distinguished the pardon provided in Louisiana Constitution article I, section 20, from a full gubernatorial pardon in that the former only restores rights of citizenship whereas the latter restores the “status of innocence.” Thus the earlier cases holding that a governor’s pardon precludes the use of the pardoned conviction for enhancement purposes were distinguished.

**HABITUAL OFFENDER PROCEEDINGS—THE FIVE YEAR RULE**

*State v. Anderson* held that the five year “cleansing period”  

---

163. 347 So. 2d 172 (La. 1977).
164. 344 So. 2d at 1026.
165. Justice Dennis also discusses the “principle of lenity” in *State v. McCarroll*, 337 So. 2d 475 (La. 1976).
166. 343 So. 2d 720 (La. 1977).
167. *Id.* at 722.
168. *Id.* at 721.
170. 349 So. 2d 311 (La. 1977).
following which a conviction\textsuperscript{172} cannot be used to enhance the penalty for subsequent convictions\textsuperscript{173} begins to run when the defendant is actually discharged from his sentence. Anderson was released from prison with good time credits\textsuperscript{174} on June 19, 1970. His sentence without such credit would not have expired until September 4, 1972. On August 2, 1975, over five years after his release from prison, Anderson committed an armed robbery. The earlier conviction was used to enhance the sentence. Because the supreme court held that the date of his actual discharge with good time credit was “the expiration of the maximum sentence,”\textsuperscript{175} the five years had expired. Under the terms of the statute, therefore, the earlier conviction could not be used to enhance the sentence. If it had been determined that the “maximum sentence” had expired on September 4, 1972, the date on which he would have been released \textit{absent} credit for good behavior, then the five year period would not have run.

The determination that the phrase “expiration of the maximum sentence” means the actual date of final discharge from state custody seems to be logical and in keeping with the “five year rule.” As the court noted in dictum, the inmate released on parole is not finally discharged. He is still subject to state supervision, and his release is only conditional. Thus his maximum sentence has not been served until the termination of his parole. The five year period does not begin to run, under Anderson, until the defendant’s debt to society is paid.

Again the court has resolved an issue of statutory construction in favor of the defendant\textsuperscript{176} because the legislative purpose either is not clear or seems to favor the defendant’s contention. The result is a fair one. If the

\textsuperscript{172.} Anderson was convicted of a felony and sentenced to 5 years and 6 months at hard labor on March 3, 1967. 349 So. 2d at 313.

\textsuperscript{173.} La. R.S. 15:529.1(C) (Supp. 1956) provides that its provisions permitting enhanced sentence upon a subsequent conviction, because of prior offenses, “shall not be applicable in cases where more than five years have elapsed since the expiration of the maximum sentence, or sentences, of the previous conviction, or convictions, and the time of the commission of the last felony for which he has been convicted. In computing the period of time as provided herein, any period of servitude by a person in a penal institution, within or without the state, shall not be included in the computation of any of said five year periods.” See 349 So. 2d at 312 n.4.

\textsuperscript{174.} At the time of Anderson’s conviction prisoners were entitled to diminution of sentence for good behavior. La. R.S. 15:571.3 (Supp. 1975).

\textsuperscript{175.} La. R.S. 15:529.1(C) (Supp. 1956).

\textsuperscript{176.} See State v. Neal, 347 So. 2d 1139 (La. 1977); State v. Cox, 344 So. 2d 1024 (La. 1977); State v. Sanders, 337 So. 2d 1131 (La. 1976).
legislature determines that a longer period should be involved or that a
different method of computing the five years should be devised, it is free
to amend the applicable statutes.

In State v. Schamburge, the defendant was sentenced for several
felonies on the same date. Under an earlier case, the convictions only
counted as one for the purpose of enhancing the penalty for subsequent
convictions. However, in determining the date on which the five year
"cleansing period" began to run, the court computed the total imprison-
ment to be served. Since the three convictions are considered as one,
the supreme court considered the total for all three to determine "the
actual number of years which the [trial] court sentenced defendant to serve
for his wrongdoing."  

The result seems logical. The three sentences were consecutive so
they were added. Should a future case arise in which the sentences were
concurrent, the writer assumes that the court would again look to the
"actual number of years" to be served in determining when the five year
"cleansing period" would begin to run.

HABITUAL OFFENDER PROCEEDINGS—"THE SILENT RECORD"

In State v. Hoffman, following the defendant's conviction of
attempted aggravated rape, the state sought to have the penalty enhanced
in a habitual offender proceeding. On original hearing, although affirming
the conviction, the supreme court set the enhanced sentence aside and
remanded to the trial court for resentencing. On rehearing, however, the
conviction was reversed on unrelated grounds, and the matter was remand-
ed for a new trial.

On original hearing, the enhanced sentence was set aside because the
records of the prior felony convictions used to enhance were silent as to
the presence or waiver of counsel representing defendant. The court
followed the same logic as it had earlier followed in City of Monroe v.
Fincher. In that case, the state was not allowed to use a prior DWI

177. 344 So. 2d 997 (La. 1977).
178. The defendant was convicted of three simple burglaries on Feb. 27, 1964.
On June 30, 1964, he was sentenced to three consecutive terms of imprisonment.
180. See text at notes 170-75, supra.
181. The total for all three was eight years. The sentences were consecutive, not
concurrent. See LA. CODE CRIM. P. art. 883.
182. 344 So. 2d at 1002.
183. 345 So. 2d 1 (La. 1977) (on original hearing).
184. 305 So. 2d 108 (La. 1974).
conviction to enhance the penalty where the record of the prior conviction "does not establish that he had counsel or had made a waiver of counsel." It was seen as the state’s burden to establish the presence of counsel or, absent that, a valid waiver of counsel. In Hoffman, the supreme court said that in the absence of such a showing "such convictions cannot serve to enhance the penalty under the multiple offender statute." Because the conviction was reversed on rehearing, no resentence was ultimately required. However, in the event of a new conviction, the state might then attempt to build the record required by the court on original hearing. In such a case the court would have to decide whether to allow the state to go beyond the silent record in establishing the presence or waiver of counsel. The Hoffman decision, citing City of Monroe v. Coleman, indicates that if the record of the earlier conviction does not reflect the presence or waiver of counsel, the conviction may not be used.

**APPELLATE REVIEW OF SENTENCE**

Despite a series of cases raising the issue, the supreme court’s duty to review sentences for excessiveness under article I, section 20 of the state constitution remains unclear.

The decisions in State v. Bryant and State v. Williams do clarify one point. In order to present the issue, a contemporaneous objection must be made to the sentence. The objection calls to the trial court’s attention the defendant’s complaint and, as is traditionally the function of the contemporaneous objection rule, allows the trial judge the opportunity to correct his own error, if indeed, there is error.

185. 345 So. 2d at 4.
186. Id.
187. 304 So. 2d 332 (La. 1974).
188. See State ex rel. LeBlanc v. Henderson, 261 La. 315, 259 So. 2d 557 (1972). See also La. Code Crim. P. art. 514 (requires the minutes to reflect the presence of counsel or that the court informed the defendant of his right to court appointed counsel); State v. Coody, 275 So. 2d 773 (La. 1973).
190. The writer strongly favors appellate review of sentence.
In *State v. Norris*, the defendant contended that the trial judge did not afford him adequate opportunity to contradict and explain unfavorable material in the presentence investigation report. The supreme court refused to consider the contention due to the failure of defense counsel to object and request access to the presentence report. The opinions speculated that such a request might have prompted the trial court to disclose such factual contents and conclusions and to allow the defendant to controvert contested material.

In two cases, sentences were imposed following trials after unsuccessful plea negotiations. In *State v. Frank* the district attorney, the trial judge and defense counsel discussed pleas and possible sentences. The defendant was charged with armed robbery. The trial judge agreed to impose a sentence of twenty years should a guilty plea be entered. The defendant, apparently not satisfied with the offer, elected to go to trial. Following conviction, a sentence of thirty-three years was imposed.

The trial judge, in a per curiam, outlined the factors considered in imposing the sentence. He noted the defendant's attitude during trial, the severity of the offense, the risk of its repetition, and the severe maximum penalty. The trial judge also noted his desire to facilitate endeavors to plea bargain in aid of the prompt disposition of cases and his feeling that "guilty pleas manifest a feeling of repentance." The court rejected the defendant's contention that a sentence after trial which exceeds that offered in the event of a guilty plea violates due process. The supreme court said that "[a] judge's disposition to impose a lenient sentence during plea discussions should not be understood as setting a limit for the justifiable sentence ... ." Although only three justices joined the opinion of the court, the views expressed seem sound provided that the trial judge gives his reasons.
for the longer sentence so that the supreme court may review those reasons. The Frank decision correctly seems to view the trial judge's offer of leniency to one who accepts his guilt as appropriate. Should a trial judge use the threat of increased sentences as a device to coerce guilty pleas, the supreme court's review of the factors assigned as justifying the sentence imposed would presumably reveal the unfairness. It should not be presumed, however, that trial judges will engage in tactics designed to coerce guilty pleas, nor that judges will hold against a defendant the fact that he exercises his constitutional right to a trial. If the record does not support the greater sentence, the supreme court must and surely will remand with instructions to reduce the sentence.

In State v. Williams both the district attorney and defense counsel recommended that the trial judge impose a nine year sentence should the defendant plead to the armed robbery with which he was charged. The trial judge refused and the case was tried. Following conviction, the trial court imposed a sixty year sentence. Upon defense objection to the sentence, the trial judge commented that he did not consider nine years adequate for armed robbery and that he would not have considered imposing a sentence of less than thirty-five years.

The defendant objected on the ground that the trial judge refused to exercise the discretion vested in him by the legislature. The supreme court found this to be a serious contention and said that the trial judge would have been in error had he abdicated his "responsibility to exercise the sound discretion mandated by the legislature." However, the court did not feel that facts presented reflected the trial judge's "refusal . . . to give consideration to the full range of penalty prescribed by the legislature."

In State ex rel. Robertson v. Maggio the court did express concern with the failure of the trial court to exercise the sentencing discretion vested in him by law. In Robertson, the trial court, following a hearing.

202. The writer agrees with Justice Tate's view that a sentencing hearing should be conducted on the record and would have also favored remand for such a hearing.
203. 341 So. 2d 370 (La. 1976).
204. See Fed. R. Crim. P. 11, regarding the United States Attorney and defense counsel's entering into plea agreements respecting sentence recommendations.
205. 341 So. 2d at 379.
206. Id. at 380.
207. Id.
208. 341 So. 2d 366 (La. 1976).
209. The hearing was constitutionally deficient for other reasons and such deficiency required remand for a new hearing.
revoked defendant's probation and imposed a five year sentence. In imposing sentence, the trial judge's remarks indicated his feeling that he must revoke probation and impose sentence even if the violation of the conditions of probation was minor.\footnote{341 So. 2d at 368.} The supreme court noted the trial court's discretion to revoke, reprimand, intensify supervision, or add conditions of probation in the event of a violation of probation conditions.\footnote{Id. at 369. See L.A. CODE CRIM. P. art. 900.} By remanding to the trial court for reconsideration, \textit{Robertson} clearly appears to require the record to reflect the "exercise of judicial discretion."\footnote{341 So. 2d at 370.}

Whether the supreme court will review the \textit{results} of an exercise of discretion in sentencing remains an unanswered question. Nevertheless, the court has at least indicated its willingness to review the record to assure that the trial court does not disregard the discretion vested in it by the legislature. In view of the enactment of article 894.1\footnote{See 1977 La. Acts, No. 635; L.A. CODE CRIM. P. art. 894.1.} giving legislative guidelines for and requiring a record of the exercise of the trial court's discretion in sentencing, a review of the manner in which that discretion is exercised should follow as the next logical step. Under its general supervisory authority,\footnote{L.A. CONST. art. V, § 5.} the supreme court has an obligation to review the exercise of all discretionary decisions by the lower courts. This duty would seem to require review of the discretion exercised in the imposition of sentences.

\begin{itemize}
  \item \footnote{341 So. 2d at 368.}
  \item \footnote{Id. at 369. See L.A. CODE CRIM. P. art. 900.}
  \item \footnote{341 So. 2d at 370.}
  \item \footnote{See 1977 La. Acts, No. 635; L.A. CODE CRIM. P. art. 894.1.}
  \item \footnote{L.A. CONST. art. V, § 5.}
\end{itemize}