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Criminal Law

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Entrapment

The line between improper entrapment which constitutes a defense to crime, and proper police activity in laying traps for would-be criminals, is largely drawn with reference to the origin of the criminal plan. Was the defendant lured into crime by conviction-prone police, or did the police merely furnish an ostensible opportunity for crime to a defendant who had already planned such a venture? In *State v. Turner*[1] the defendants were "ready and willing," having solicited a correctional officer to assist them in smuggling contraband articles into the State Penitentiary. The plan was reported by the officer to his superiors, who instructed him to cooperate with the defendants' scheme in order to obtain evidence of the smuggling operation. In holding that the officer's cooperation did not constitute improper entrapment, the Supreme Court stressed the facts that "the crime was conceived in the minds of the defendants; it was there that the criminal intent was born. The defendants were not incited or induced to commit the offense by the Correctional Officer or any other official."[2] Justice Sanders stressed the "limited application" of the entrapment concept, and declared, "It is restricted to those instances in which a defendant is induced or incited to commit a crime not originally intended or contemplated by him, for the purpose of arresting him. . . There is a clear distinction between inducing a person to commit a crime and setting a trap to catch him in the execution of criminal designs of his own conception. . . the primary emphasis is on the defendant's predisposition to commit the crime."[3]

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28. 227 La. 347, 79 So.2d 333 (1955). This case has now been overruled legislatively by LA. CODE OF CIVIL PROCEDURE art. 1871 (1960). However, the appellate courts were powerless to apply the new code rule, since the case had been decided by the trial court prior to the effective date of the new procedural code. See LA. Acts 1960, No. 15, § 4(B)(2)(b).

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1. 241 La. 94, 127 So.2d 512 (1961).

2. 127 So.2d at 515.

3. 127 So.2d at 514. For another excellent statement of the law of entrapment, see Butler v. United States, 191 F.2d 433 (4th Cir. 1951).

Criminal Statutes — "Intentional" Means General Criminal Intent

Constitutionality of the much-challenged and frequently amended obscenity article of the Criminal Code[4] was considered in *State v. Roufa.*[5] The trial court had sustained a motion to quash on the ground that the obscenity article, upon which the information was based, "lacked the necessary requirement of *scienter.*" In reversing the trial court's ruling, the Supreme Court held that the word "intentional" in the obscenity article fully met the *scienter* requirement. In this regard it is significant that Article 11 of the Criminal Code expressly provides that in the definitions of crimes "in the absence of qualifying provisions, the terms 'intent' and 'intentional' have reference to 'general criminal intent.'" In view of this code statement, it would appear amply clear that when Article 106 recites that "Obscenity is the *intentional*: Production, sale, exhibition" etc., it is necessary that the prescribed criminal acts be accompanied by a general criminal intent. After a thorough survey of relevant federal and Louisiana jurisprudence, Justice Hamlin further apporpriately concludes "that the word 'intentional' and the phrase 'with intention' in the Louisiana Obscenity Statute mean that knowledge is implied where one has criminal intent. It leaps to the mind that knowledge is necessary to intention and that one cannot have intention without knowledge."[6] Under this normal and logical interpretation of Article 106, the innocent and unknowing possessor of obscene matter will not be subject to criminal prosecution.

The Supreme Court similarly held, in *State v. Kelly,*[7] that criminal intent is an essential element of the offense of malfeasance in office, which is defined by Article 134 of the Criminal Code as the "intentional" performance or non-performance of certain specified acts.

Sufficiency of Statutory Definition

Jury tampering is defined in Article 129 of the Criminal Code as "any *influencing of, or attempt to influence, any petit*

4. LA. R.S. 14:106 (1950), as amended by Act 388 of 1958. This provision was again amended by Act 199 of 1960, but retaining the language challenged in *Roufa.*

5. 241 La. 474, 129 So.2d 743 (1961).

6. 129 So.2d at 747.

7. State v. Kelley, 241 La. 224, 128 So.2d 18 (1961).

juror in respect to his verdict in any cause pending, or about to be brought before him, otherwise than in the regular course of proceedings upon the trial of such cause." (Emphasis added.) In *State v. Robertson*[8] the Louisiana Supreme Court, by a 4 to 3 decision, held the jury tampering law unconstitutional. The majority opinion was predicated on the notion that the word "influence" failed to draw a sufficiently clear line between lawful and criminal conduct. In so holding the Supreme Court made a number of general statements which are eminently correct and well supported by precedent. Justice Sanders stated, "It is well established that the constitutional requirement of definiteness is violated by a criminal statute which fails to give a person of ordinary intelligence fair notice that his conduct is criminal. . . . Under this test a statute is valid in the absence of a detailed specification if the general phraseology used in defining the crime has a fixed, definite, or commonly understood meaning and application. . . . However, if the definition of the crime is couched only in general language which is ambiguous, vague, or indefinite to such an extent that the line between criminal and noncriminal conduct is obscure, the statute is repugnant to the state constitution."[9]

This writer is in complete agreement with the above statements in Justice Sanders' scholarly opinion, but not with the conclusion that in the jury tampering provision "the key word [influence] stands stark and bare."[10] Instead it is clearly limited by the article in which it is employed to influencing a petit juror "in respect to his verdict." As Justice Hamlin points out in his dissenting opinion, "it leaps to the mind" that the prohibited influence refers solely to the verdicts which the jurors may render at the trial. Proper court activity of attorneys and witnesses is expressly excluded from the offense by the concluding requirement that the influencing must be "otherwise than in the regular cause of proceedings upon the trial of the case." All other influencing or efforts to influence jurors constitutes jury tampering. It should be no objection to the Jury Tampering Article that it covers conduct with jurors that would otherwise come within the general offenses of Public Bribery[11] or Public Intimidation.[12] There are a number of situations where criminal

8. 241 La. 249, 128 So.2d 646 (1961).
9. 128 So.2d at 647, 648.
10. 128 So.2d at 649.
11. LA. R.S. 14:118 (1950).
12. *Id.* 14:122.

conduct may be punished under more than one code article. For example, Issuing Worthless Checks[13] could also be prosecuted as Theft;[14] and many Attempted Murder[15] cases could also be prosecuted as Aggravated Battery or Aggravated Assault.[16] Article 4 of the Criminal Code recognizes these situations and provides that "prosecution may proceed under either provision, in the discretion of the district attorney."[17] The majority opinion expresses a fear that "A newspaper article, a bribe, a gesture, a smile, a lifting of the eyebrows — all can be caught in its broad net."[18] It is inconceivable that any court would so hold in view of the universally recognized principle that a criminal statute is to be strictly construed in favor of the accused.

A more liberal attitude was evidenced in *State v. Hertzog*.[19] In *Hertzog* the Supreme Court upheld the anonymous phone call statute which makes it a crime to engage in an anonymous telephone call wherein "obscene, profane, vulgar, lewd, lascivious or indecent language" is used.[20] Defense counsel had urged that the term "vulgar," being a word of varied meanings and many gradations, lacked the certainty and definiteness which the Constitution requires. While arguing that the phrase "vulgar language," if standing alone would be subject to challenge, the Supreme Court pointed out that the word took added and more definite meaning from other qualifying language in the statute, *i.e.*, that the entire series, "obscene, profane, vulgar, lewd, lascivious or indecent language," has a clearly understandable meaning. In so holding, Justice Hamiter aptly concludes, "in the statute involved here the word 'vulgar' is accompanied by several specific adjectives which may and should be considered, under the rule *noscitur a socus*, as imparting to it a restricted and definite meaning. . . . Under this rule general and specific words, capable of analogous meaning, when associated together, take color from each other, so that general words are restricted to a sense analogous to less general."[21] The rule that the word "vulgar" in the statute takes color and meaning from the words with which it is associated does not carry over to the use of that

13. La. R.S. 14:71 (Supp. 1956).
14. La. R.S. 14:67 (1950).
15. *Id.* 14:27 and 30.
16. *Id.* 14:34 or 37.
17. *Id.* 14:4.
18. 128 So.2d at 649.
19. 241 La. 783, 131 So.2d 788 (1961).
20. La. R.S. 14:285 (1958).
21. 131 So.2d at 789.

word, without further qualification or associated terms, in an indictment charging the offense. Thus, the information in *Hertzog*, which charged only that the defendant used "vulgar language" in the alleged anonymous telephone call was quashed for insufficiency.

Contributing to the Delinquency of Juveniles

The principal question in *State v. Gonzales*[22] was whether the phrase "child under the age of seventeen" in Article 92 of the Criminal Code, which defines the offense of contributing to the delinquency of juveniles, includes persons under the age of seventeen who have been emancipated by marriage. In holding that the emancipated juvenile was not a "child" within the meaning of Article 92, the Supreme Court held that the term must be construed in conformity with its generally accepted legal meaning as of the time when the Criminal Code was adopted. "It is to be presumed," states Justice McCaleb, "that the Legislature used the word 'child' in its ordinary accepted meaning under the civil law, that is, a juvenile subject to parental control or guardianship and that it does not include a minor emancipated by marriage. Had it been its design to extend the law to all minors under the age of seventeen, irrespective of their legal status, the lawmaker would have used the word 'person' or 'anyone' under seventeen instead of 'child.' "[23] Justice Hawthorne, in a dissenting opinion, disagrees with the propriety of resorting to Civil Code analogies to limit the word "child" to juveniles who are unemancipated by marriage. Justice Hawthorne would follow the ordinary meaning of the word "child," and aptly concludes, "Had the legislature intended the statute not to apply to a married person, it could have made its language read 'any unmarried child under the age of seventeen,' as was done in the carnal knowledge statute, R.S. 14:80, in which the language 'unmarried female' is used."[24] A strong argument, stated by the majority opinion, wherein the term "child" is construed with its Civil Code limitations, is the fact that a change in the Orleans Parish Juvenile Court statute was made in order that emancipated juveniles would be subject to juvenile court jurisdiction; whereas, no such change was made in the Criminal Code article defining the offense of contributing to the delinquency of juveniles.[25]

22. 241 La. 619, 129 So.2d 796 (1961).
23. 129 So.2d at 798.
24. *Id.* at 800.
25. *Id.* at 799.

Criminal Procedure

Change of Venue

The change of venue articles of the Louisiana Code of Criminal Procedure[1] are based on the idea that a defendant should not be tried in a parish where there is such prejudice that a fair trial cannot be had. Extreme public prejudice will affect jurors and witnesses, and may even affect the presiding judge. In *State v. Wilson*,[2] an aggravated rape case, the Supreme Court reaffirmed the well-settled rules that the burden of proof of establishing "that a defendant could not secure a fair and impartial trial in the parish where the indictment is laid rests with the applicant"; and that applications for a change of venue are addressed to the sound discretion of the trial judge, whose ruling will not be interfered with unless an abuse of such discretion is shown.[3] In *Wilson* the defense had presented only one witness, and his testimony was not very strong. This proof fell far short of showing that a fair trial could not be had, and the trial judge had properly refused a change of venue. Even in a close case the trial judge's determination is invariably affirmed by the Supreme Court, for he is in the best position to size up the local situation.[4]

It is worthy of note that the *Wilson* opinion reiterates a well-settled Louisiana change of venue rule that the test to be applied is whether a fair and impartial jury can be obtained.[5] This test, looking only to whether an impartial jury can be secured, places a distinct and unfortunate limitation on the grounds which may be urged for a change of venue. It fails to take into consideration the fact that a fair trial may also be precluded by general public resentment and hostility which will so affect witnesses that they will not testify freely and frankly. The language of Article 292 of the Code of Criminal Procedure is broadly stated and should encompass all effects of the tensions caused by great

1. LA. R.S. 15:289-301 (1950). LA. CONST. art. I, § 19, recognizes the power of the legislature to provide for change of venue.
2. 240 La. 1087, 127 So.2d 158 (1961).
3. *Id.* at 1103, 127 So.2d at 164.
4. 18 Fed. Bar Assn. 56 (1958).
5. *Ibid.* Following the leading case in point of State v. Scott, 237 La. 71, 110 So.2d 530 (1959), and others.

public hostility — whether they be upon prospective jurors, the jury finally selected or upon witnesses.

Indictments Based on Illegal Evidence

The Louisiana Supreme Court has upheld a trial judge's refusal of a bill of particulars which sought information as to the nature of the evidence that had been presented to the grand jury which indicted the defendant.[6] In general, the so-called "veil of secrecy" as to the evidence considered by the grand jury will not be lifted to permit a review of the evidence upon which the indictment is based; and this despite the fact that Article 213 of the Code of Criminal Procedure clearly declares that "In the investigation of a crime the grand jury can receive no other than legal evidence." However, relief will be granted where, under clearly established facts, the indictment is founded on other than legal evidence. In *State v. Jamison*[7] the court held that an indictment was "an absolute nullity" when founded in part on testimony of the defendant when he was ordered before the grand jury and interrogated without being fully advised of his privilege against self-incrimination.

Privileged Testimony Before Grand Jury

In order to facilitate proof of the crime by co-conspirators in bribery cases, Article 19, Section 13, of the Louisiana Constitution provides that a person called to testify in a bribery investigation is denied the general privilege against self-incrimination, "but such testimony shall not afterwards be used against him in any judicial proceedings, except for perjury in giving such testimony." In *State v. Smalling*[8] this provision was invoked by a defendant who had been called before a grand jury which was investigating public bribery in which he was involved. Later the district attorney filed informations, based on the defendant's testimony before the grand jury, charging him with public bribery. These informations were quashed, upon the ground that the testimony secured in the grand jury proceeding could not be used "in the filing and prosecution of charges against him [the defendant]." Thus it is clearly established that the constitutional immunity of Article 19, Section 13, is not limited to cases where the person testifying appeared as a witness against some-

6. State v. Simpson, 216 La. 212, 43 So.2d 585 (1949).
7. 240 La. 787, 125 So.2d 363 (1960).
8. 240 La. 915, 125 So.2d 409 (1960).

one else. It also applies where he is summoned before the grand jury to testify "when he is the one being investigated for bribery."[9]

Amendment of Indictment

Under the express language of Article 253 of the Louisiana Code of Criminal Procedure, the trial court is given plenary authority to amend an indictment "in respect to any defect, imperfection or omission in form or substance." In *State v. Wilson*[10] the trial court permitted the state to amend an aggravated rape indictment by inserting the date of the alleged crime, which had been inadvertently omitted. The amendment was to cure a formal defect, since the time and date are not of the essence in the crime of rape.[11] Rape may be committed on any day of the week or at any time of the day; and, being a capital crime, is not subject to time limitations.[12] The amendment was timely, since it was made before arraignment and trial.[13] Also, the defendant had suffered no prejudice by the amendment, since there was no claim that his defense was an alibi. If the defendant had been relying on an alibi and was taken by surprise by the date stated in the amended indictment, he would have been entitled to a continuance to enable him to prepare to account for his presence on the date stated.[14]

Short-Form Indictments Upheld

The short form indictment, authorized by Article 235 of the 1928 Code of Criminal Procedure, provides effective relief from the technicalities of the old common law rules. The basic function of the indictment is to inform the accused of the crime charged, reserving a recital of the details of the offense for the bill of particulars which is not subject to the same rules of strict

9. *Id.* at 922, 125 So.2d at 411.

10. 240 La. 1087, 127 So.2d 158 (1961).

11. Under La. R.S. 15:234 (1950) an indictment is not insufficient "for omitting to state the time at which an offense is committed where time is not of the essence of the offense."

12. 240 La. 1087, 1095, 127 So.2d 158, 161, citing La. R.S. 15:8 (1950). Capital offenses are similarly excluded from time limitations under the 1960 Time Limitations law — on the theory that the book never closes on a capital crime. (See R.S. 15:7.1).

13. State v. Johnson, 181 La. 1, 158 So. 570 (1935).

14. La. R.S. 15:253 (1950), applied in State v. Singleton, 169 La. 191, 124 So. 824 (1929). *Cf.* State v. Jones, 195 La. 611, 197 So. 249 (1940) where the date of the offense was not material and a continuance was properly refused.

construction as the indictment. This precludes the use of the indictment as a vehicle for a battle of wits between the district attorney and defense counsel who seek to checkmate the state by reason of some inadvertent and often highly technical omission. The specific short forms of Article 235 have been consistently upheld.[15] A 1944 amendment of Article 235 extended the short forms to all Criminal Code crimes, providing that it would "be sufficient to charge the defendant by using the name and article number of the offense committed."[16] In *State v. Straughan*[17] an indictment drawn pursuant to the 1944 amendment sought to charge the multifarious and purely statutory crime of gambling by name and article number. The *Straughan* gambling indictment was held insufficient, but Justice Fournet's opinion clearly indicated that the Supreme Court would continue to uphold specific short forms for well understood crimes. Since *Straughan*, specific short forms have been upheld for attempted murder,[18] negligent homicide,[19] and murder.[20] In *State v. James*[21] the Supreme Court again upheld a short-form murder indictment. In *James* defense counsel, clutching at a technical last straw, argued that the definition of murder had been changed by the 1942 Criminal Code,[22] so that murder no longer had the "universal and common meaning" of "the unlawful killing of a human being with malice aforethought." The Supreme Court made short work of this hyper-technical contention; Justice Hawthorne pointed out that "the definition of murder was not changed in essence when the crime was defined in Article 30 of the Criminal Code of 1942."[23] As a matter of fact, the murder article was a codification, stripped of confusing common law fictions and terminology, of the well-settled murder concept. Clause (1) embraced homicides where there was a "specific intent to kill or to inflict great bodily harm"; while clause (2) codified the felony-murder doctrine.

15. State v. White, 172 La. 1045, 136 So. 47 (1931) (murder); State v. Pete, 206 La. 1078, 20 So.2d 368 (1944) (theft); State v. Chanet, 209 La. 410, 24 So.2d 670 (1946) (aggravated rape); State v. Nichols, 216 La. 622, 44 So.2d 318 (1950) (manslaughter).

16. *Accord*: A.L.I., CODE OF CRIM. PROC. § 154a (1930).

17. 239 La. 1036, 87 So.2d 523 (1956).

18. State v. Elias, 234 La. 1, 99 So.2d 1 (1958).

19. State v. Coleman, 236 La. 629, 108 So.2d 534 (1959).

20. State v. Eyer, 237 La. 45, 110 So.2d 521 (1959).

21. 241 La. 233, 128 So.2d 21 (1961).

22. LA. R.S. 14:30 (1950).

23. 128 So.2d at 22.

Bill of Particulars — Conjunctive Charges

Many crimes, including those defined in the Criminal Code and in miscellaneous criminal statutes, provide that the offense may be committed in a number of different ways. Frequently the prosecution is not sure in advance of trial as to just which form or forms of the crime will be established by the evidence. In this situation Article 222 of the Code of Criminal Procedure authorizes "conjunctive" allegations, in the indictment, of the acts, means, intents, or results, any of which will constitute the crime under the code article or statute. Where an offense is charged conjunctively, proof of either act, means, or intent will support a conviction.[24] In *State v. Thomas*[25] the principle of conjunctive allegations was applied, in conformity with prior well-reasoned decisions of the Supreme Court,[26] to the statements in a bill of particulars. In *Thomas* the indictment charged aggravated rape according to the specific form authorized by Article 235 of the Code of Criminal Procedure. Under the aggravated rape article of the Criminal Code[27] the crime may be committed in three different ways. Clause (1) covers the situation where force is employed to overcome the victim's resistance. Clause (2) applies where the victim is prevented from resisting by threats of great bodily harm. Clause (3) bases liability on the fact that the victim is under the age of 12 years — in which case the law resists for her. The defendant's motion for a bill of particulars sought information as to the "particular type of aggravated rape" that the state proposed to establish — being principally directed toward securing a specification as to whether the rape was committed by actual force or by threatened force. The trial judge held that the state could properly answer that it was proceeding under all subsections of the aggravated rape article, and could not be required to elect between them in advance of trial. The theory of the Supreme Court's decision upholding the sufficiency of the conjunctive bill of particulars was nicely put in an excerpt from *State v. Jackson*,[28] which was quoted with approval in Justice Viosca's opinion. "The statute itself pro-

24. State v. Bryan, 175 La. 422, 143 So. 362 (1932).
25. 240 La. 419, 123 So.2d 872 (1960).
26. State v. Prince, 216 La. 989, 45 So.2d 366 (1950), discussed 11 LOUISIANA LAW REVIEW 240 (1951); State v. Jackson, 227 La. 642, 80 So.2d 105 (1955), discussed 16 LOUISIANA LAW REVIEW 335 (1956).
27. LA. R.S. 14:42 (1950).
28. Note 26 *supra*; State v. Jackson, 227 La. 642, 648, 80 So.2d 105, 107 (1955).

vides that aggravated rape may be committed under 'any one or more of the following circumstances.' This means that the circumstances may consist entirely of those set out in any one of the subsections or may be a combination of those set out in any two or in all three."[29] The district attorney's statement that it "is not required to elect on which portion of the statute it intends to proceed; the State elects to proceed on all parts of the statute," was held sufficient in *Thomas*; but that type of answer is not recommended. A more satisfactory answer, which would conform with the analogous provision of Article 222 for charges in the indictment, was the one given by the district attorney in *State v. Prince* where "the answer to the bill of particulars informed the defendant that he was being prosecuted for attempted aggravated rape under subsections (1) *and* (2) of Article 42 of the Criminal Code."[30] (Emphasis added.) In both *Thomas* and *Prince* the offense was probably committed by means of both force and threats of force; but while *both* are charged, proof of either means would support a conviction. To charge the means disjunctively (by "or") would leave the nature of the charge uncertain and would probably be held insufficient.[31]

Extradition Proceedings — Review by Supreme Court

In *Extradition Proceedings v. Palmer*[32] a defendant sought to appeal from a judgment of the district court which, after an extradition hearing, affirmed the propriety of the extradition and ordered that the defendant be delivered to the authorities of the demanding state. In denying its appellate jurisdiction from the extradition hearing, the Supreme Court very properly held that Article VII, Section 10, of the Louisiana Constitution limited its appellate jurisdiction to cases in which the penalty is or may be imposed "under the laws of this state." The extradition proceeding does not contemplate any penalty under Louisiana law; but rather the defendant's return to another state where he is to stand trial. Where the district court improperly approves a defendant's extradition,[33] his remedy is to invoke the discretionary supervisory jurisdiction of the Supreme Court.

29. 240 La. 419, 425, 123 So.2d 872, 875 (1960).
30. Note 26 *supra*; State v. Prince, 216 La. 989, 991, 45 So.2d 366, 367 (1950).
31. Judicial disapproval of disjunctive or alternative charges is indicated in City of Shreveport v. Bryson, 212 La. 534, 33 So.2d 60 (1947).
32. 240 La. 784, 125 So.2d 164 (1960).
33. LA. R.S. 15:167 (1950) states specific grounds for a defendant's discharge at an extradition hearing.

Defense of Present Insanity — Examination and Hearing

Mental incapacity to proceed exists when, as a result of insanity or mental defect, a defendant presently lacks the capacity "to understand the proceedings against him or to assist in his defense."[34] In a case where the court has substantial reason to doubt the defendant's mental capacity to proceed it may appoint a sanity commission and order a mental examination of the defendant.[35] The scope and adequacy of the sanity commission's examination was challenged in two 1961 aggravated rape cases. In *State v. Augustine*,[36] a sanity commission consisting of two physicians, the coroner and a psychiatrist, had been appointed on application of the defendant. Based on the sanity commission's report and testimony, the trial judge held that the defendant was presently sane and capable of standing trial. At the hearing, and subsequently on appeal, defense counsel sought to discredit the report and testimony of the commission physicians by urging that their examination had been cursory and inadequate. In rejecting this contention the Supreme Court pointed out that each of the court-appointed physicians had examined the defendant two times while he was in the parish jail, and that those examinations had included substantial conversations with the defendant and with the deputy in charge of his tier in the jail. In upholding the sufficiency of these examinations, Justice Hawthorne reaffirmed Chief Justice Fournet's practical holding in *State v. Faciene*[37] that, "There is nothing in the statute requiring that an accused be kept under constant observation for any fixed period of time, and the legislature has not therein attempted to dictate to these experts the manner and method to be employed by them in conducting their examination, undoubtedly feeling, as do we, that they are eminently better qualified to know just exactly how to best carry out their duties in this respect as the particular facts of each case may warrant." The Supreme Court's reluctance to second-guess sanity commission procedures is further shown by *State v. Wilson*[38] where the sanity commission had been composed of the coroner, a psychiatrist, and a local general practitioner. The psychiatrist, who had examined the defendant for about forty-five minutes in the parish

34. *Id.* 15:267.
35. *Ibid.*
36. 241 La. 761, 131 So.2d 56 (1961).
37. 233 La. 1028, 1048, 99 So.2d 333, 340 (1957).
38. 240 La. 1087, 127 So.2d 158, 165 (1961).

jail, was convinced as to his present sanity and ability to assist in his defense. The general practitioner had conducted an hour and a half examination. The coroner had examined the defendant three times — once by himself and along with the other two commission members. Again the Supreme Court rejected the defense contention that the sanity examination had been inadequate.

Both *Augustine* and *Wilson* reaffirmed well-settled propositions that the trial judge determines the issue of present insanity;[39] and that "the law presumes that every man is sane. And to warrant the sustaining of a plea of present insanity, thereby preventing trial of a criminal accused, it must appear by a preponderance of evidence that the accused is so mentally deficient that he lacks capacity to understand the nature and object of the proceedings against him and to assist in conducting his defense in a rational manner."[40] The defendant had not met this burden of proof in either case.

Mental Defect, Short of Insanity, To Preclude Specific Intent

In *State v. James*[41] no plea of insanity at the time of the crime had been filed. At the trial defense counsel sought to introduce psychiatric testimony as to the defendant's amnesia at the time of the crime — for the purpose of showing that he could not have entertained the specific intent to kill which is essential to murder under Clause (1) of Article 30 of the Criminal Code.[42] The evidence was held inadmissible, and the court cited *State v. Gunter*[43] for the proposition "that where insanity or mental defect at the time of the commission of the crime is urged, evidence tending to prove or establish such insanity or mental defect is not properly admitted in the absence of a special plea of insanity."[44] Thus, where there has been no special plea of insanity, evidence of insanity or mental defect is neither admissible as a complete defense under the "right from wrong" test (*Gunter*), nor for the purpose of negating a specific intent which is essential to the crime charged (*James*).

39. LA. R.S. 15:267 (1950).
40. In *Wilson* the court was quoting, 240 La. 1087, 1110, 127 So. 158, 166 (1961), from State v. Riviere, 225 La. 114, 119, 72 So.2d 316, 317 (1954). *Accord*: State v. Eubanks, 240 La. 552, 578, 124 So.2d 543, 552 (1960).
41. 241 La. 233, 128 So.2d 21 (1961).
42. LA. R.S. 14:30(1) (1950).
43. 208 La. 694, 23 So.2d 305 (1945).
44. 128 So.2d at 24.

A substantive criminal law problem, not squarely presented in *James*, is whether a mental defect or disorder, short of insanity under the "right from wrong" test, can be shown to reduce the degree of a crime by negating an essential specific intent or knowledge.[45] In any event, if partial insanity or mental defect short of insanity is to be urged as a defense, it must be specifically pleaded at the arraignment. This is a sound rule as to all insanity defenses, since it enables the trial judge to appoint a sanity commission to examine the defendant in advance of the trial.

Right to Counsel

The indigent defendant's right to counsel, as provided for in Article 143 of the Louisiana Code of Criminal Procedure,[46] is conditioned upon his making an affidavit that he "is unable to procure or employ counsel," and the right to counsel may be waived by the defendant's failure to request it.[47] *State v. Lindsey*[48] emphasizes the importance of the indigent defendant's right to court-appointed counsel, by holding that the right to counsel may be urged, for the first time, immediately before the case is called for trial. In *Lindsey* the defendant had pleaded not guilty and stated that he would employ counsel. Just before the case was called for trial the defendant moved for a continuance and for court-appointed counsel, on the ground that he had been unable to secure an attorney. To appoint counsel and grant a continuance at this late date would, according to the trial judge who denied the defendant's motion, "allow an accused to use this as a device to delay the trial."[49] In deciding that the refusal to appoint counsel constituted reversible error, the Supreme Court held that the defendant's statement upon arraignment that he would procure counsel did not constitute a waiver of his right to counsel. The Supreme Court apparently felt that there was not an adequate showing that the defendant had appreciated the right of an indigent defendant to court-appointed counsel, for it states that the defendant "did not intelligently and understand-

45. This facet of the problem will be discussed by a student note in the next issue of this Review.

46. LA. R.S. 15:143 (1950).

47. State v. Hilaire, 216 La. 972, 45 So.2d 360 (1950). *Cf.* In a capital case where the defendant is incapable of conducting his own defense, it is the duty of the court to appoint counsel, whether requested or not; and failure to do so may constitute a denial of "due process." Powell v. Alabama, 287 U.S. 45 (1932).

48. 241 La. 205, 128 So.2d 11 (1961).

49. *Ibid.*

ingly waive his right to counsel." If at arraignment the defendant fully understood his rights and assumed the responsibility for procuring counsel, there might be some question as to his right to demand court-appointed counsel just before the trial started, as in *Lindsey*. In this regard, however, the only statutory rule is Article 143 of the Code of Criminal Procedure, which provides for "immediate" assignment of counsel "whenever an accused charged with a felony shall make affidavit that he is unable to procure or employ counsel."

After appointment of counsel, the trial court should give careful and favorable consideration to a motion for a reasonable continuance. In this regard, Justice Hamiter reaffirms a very sound statement from *State v. Howard*[50] that "to make the constitutional right to assistance of counsel effective, counsel must be accorded a reasonable time for preparation of the case — that is, time to investigate the facts and the law applicable. However, what constitutes a reasonable time depends on the facts and circumstances of each case, and there should be a showing that such time was needed, requested, and denied."[51] Another well-recognized implementation of the indigent defendant's right to assigned counsel is the rule that counsel appointed after the arraignment must be given a reasonable time to withdraw any motions, pleas or waivers made by the defendant and to enter any other motion or plea.[52]

The Voir Dire Examination

The purpose of the voir dire examination is not limited to a determination of those prospective jurors who are subject to a challenge for cause. It may also include pertinent inquiries which will enable the defense and the state to exercise intelligently their right of peremptory challenge. It was upon this latter ground that great latitude of questioning was recognized by the Supreme Court in *State v. Hills*.[53] In *Hills*, where a Negro defendant was prosecuted for aggravated rape of a white woman, defense counsel sought to question prospective jurors concerning their sympathy with or membership in segregation organizations. It was not seriously contended that a prospective juror would be subject to challenge for cause by reason of his

50. 238 La. 595, 603, 116 So.2d 43, 45 (1959).
51. 128 So.2d 11, 13.
52. State v. Lyons, 180 La. 158, 156 So. 207 (1934).
53. 241 La. 345, 129 So.2d 12 (1961).

membership in or sympathy with a segregation organization, for school segregation was not an issue in the aggravated rape prosecution. The primary justification for the questioning was that the answers would be considered by defense counsel in determining the best use to be made of the twelve peremptory challenges allowed by law.[54] Justice Hamlin's majority opinion at the original hearing, which upheld the trial judge's refusal to permit the questioning, suggested that the questions were "too general" and served to confuse the issues in the case. On rehearing, one of the principal grounds for reversal was the trial judge's refusal to permit questions concerning the prospective juror's membership in or sympathy with segregationist organizations. In this regard, Chief Justice Fournet stressed the importance of the voir dire examination as a means of enabling counsel to determine attitudes which play an important part in the exercising of peremptory challenges. "The *intelligent* exercise of the right of rejection, by use of those twelve peremptory challenges," states the Chief Justice, "is the meat of the privilege, and can be substantially weakened by a restriction of questions — the answers to which might be regarded as informative of a juror's attitude and therefore of vital importance to his defense . . . . 'Parties have a right to question jurors on their examination not only for the purpose of showing grounds for a challenge for cause, but also, *within reasonable limits*, to elicit such facts as will enable them intelligently to exercise their right of peremptory challenge.' "[55] The questions in *Hills* would appear to be of high relevancy and to have a reasonable relation to a determination of the use of peremptory challenges. However, it is important that such questioning be kept "within reasonable limits." The door should not be thrown open to a broadside of capricious questioning under the guise of assisting counsel in the exercise of peremptory challenges.

The importance of full interrogation of prospective jurors on the voir dire examination is illustrated by *State v. Newton*.[56] A false answer on voir dire examination, as to a matter which might serve as a disqualification or basis of a challenge for cause, will enable defense counsel subsequently to raise the issue after verdict by a motion for a new trial.[57] However, a different

54. LA. R.S. 15:354 (1950).
55. 129 So.2d at 31, quoting, in part, from State v. Henry, 196 La. 217, 234, 198 So. 910, 915 (1940).
56. 241 La. 261, 128 So.2d 651 (1961).
57. LA. R.S. 15:355 (1950).

situation is presented where the juror has merely remained silent concerning a ground for disqualification, or as to an opinion which might serve as the basis for a challenge for cause or a peremptory challenge. In *Newton*, defense counsel failed to establish, by the alleged "barbershop conversations," that the juror had falsified when he stated that he had not formed any conclusion as to the guilt or innocence of the defendant in the instant case. It was admitted, however, that the juror had made statements showing a hostility toward aggravated rapists and a belief that they should be given capital punishment, if convicted.[58] This attitude, if established by voir dire examination, might well have served as a ground for a challenge for cause. As a corollary of the state's right to challenge a juror in a capital case who "has conscientious scruples against the infliction of capital punishment,"[59] the defense may challenge a juror who is opposed to qualified verdicts of "guilty without capital punishment."[60] In *Newton* no questions concerning the prospective juror's attitude toward qualified verdicts, or aggravated rapists as a class, had been asked; and he was under no obligation to volunteer information as to attitudes which might subject him to a challenge for cause or a peremptory challenge. It is only where there has been a false answer on voir dire examination that the defendant has a right to urge incompetency or prejudice of the juror as the basis of a motion for a new trial.[61]

58. 128 So.2d at 654, where the court cites the juror's admitted statement that if a defendant in an aggravated rape case "were proven guilty," he wouldn't hesitate to cast the first vote as to his guilt "and if necessary if they needed somebody he'd pull the switch."

59. LA. R.S. 15:352(2) (1950).

60. State v. Henry, 196 La. 217, 198 So. 910 (1940).

61. LA. R.S. 15:355 (1950).