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Procedure: Criminal Procedure

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CRIMINAL PROCEDURE

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TRIAL AND POST-CONVICTION REMEDIES

Indictments—Burglary

The indictment must state "the essential facts constituting the offense charged,"[1] and in burglary it is essential, even where the specific (short) form is employed,[2] to allege that the burglary was of a "structure, watercraft or movable." The sacramental nature of this element of the crime of burglary has long been recognized. Thus, in *State v. McDonald*[3] a conviction was set aside because the information alleging that the defendant had burglarized "The American Hat Company, located at 810 Texas Avenue" had not specifically alleged the breaking or entering of a building or structure. This holding may have been unduly technical, but technical construction of indictments is the rule, and it was conceivable that the entry of the Hat Company premises might not have included the entry of a building or structure. In *State v. Wright* the Supreme Court of Louisiana refused to extend the *McDonald* holding to a case where the short form information charged "simple . . . burglary of Rinaudo's Red and White Grocery, located at 2532 Government Street."[4] The issue was concisely and logically disposed of when Justice Summers stated, ". . . the bill of information before us connotes very clearly, without using the word 'structure,' that a structure was entered by referring to 'Rinaudo's Red and White Grocery, located at 2532 Government Street.' The word 'grocery,' unlike the term 'bar' or 'hat company,' is a generic term, which, by definition, describes a structure or place more emphatically than the word 'store' standing alone, because it describes a more particular type of store. It is, in other words, a special type of store, which is invariably a structure of one kind or another."[5] It may be that a hyper-technical rule (*McDonald*) is being avoided by a super-technical exception in *Wright*; but it was important, as Justice Summers pointed out, that "defendants were not misled

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1. LA. CODE CRIM. P. art. 464.
2. LA. CODE CRIM. P. art. 465.
3. 178 La. 612, 615, 152 So. 308, 309 (1934).
4. 254 La. 521, 525-26, 225 So.2d 201, 202 (1969).
5. *Id.* at 538-39, 225 So.2d at 207.

to their prejudice."[6] Also, it makes good sense to recognize the fact that the word "grocery" contemplates a business conducted in some sort of building or structure.

Conjunctive Charging and Allegations

Many crimes may be committed in more than one way, with various acts, intents, and results, any of which is sufficient for conviction, listed in the statutory definition of the offense. Frequently the prosecution is not sure in advance of trial as to which form of the crime will be established by the evidence. In such a situation, article 480 of the Code of Criminal Procedure provides that the different possible acts, means, intents or results may be set forth *conjunctively* (by "and") in the indictment or in a bill of particulars. It further stipulates that "proof of any one of the acts, means, intents or results, so set forth, will support a conviction."

In *State v. Redden* the bill of information had followed article 480 in charging that the defendants "*actually and constructively possessed and controlled* a barbituate and a central nervous system stimulant."[7] (Emphasis supplied.) The Supreme Court of Louisiana held that the defense was not entitled to force the state, by interrogatories or a bill of particulars, to elect between actual or constructive possession. After pointing out that it was appropriate "to charge actual possession and constructive possession," the court stated, "[C]lassification of possession as actual or constructive is often quite hazardous for the state in advance of trial. The defendant, on the other hand, is fully advised by the charge that he must be prepared to defend against both actual and constructive possession."[8] It was to meet the problem of charging multifarious crimes, such as the narcotics law where the exact form of the offense is frequently impossible to state with precision in advance of trial, that the rule of article 480 was formulated; and, as Justice Sanders aptly concluded, the bill of particulars "should not be converted into a trap for the unwary."[9] In *State v. Pratt*[10] the defendant in an aggravated rape case applied for a bill of particulars furnishing information as to whether the state was going to prove that the victim's re-

6. *Id.* at 538, 225 So.2d at 207.
7. 255 La. 291, 292, 230 So.2d 817 (1970).
8. *Id.* at 294-95, 230 So.2d at 818.
9. *Id.* at 295, 230 So.2d at 818.
10. 255 La. 919, 233 So.2d 883 (1970).

sistance had been overcome by force, or that the victim had been prevented from resisting by threats of great and immediate bodily harm.[11] In its bill of particulars the state had stated that it would show resistance to the utmost "and/or" prevention of resistance by threats of great and immediate bodily harm. This conjunctive/disjunctive answer was not in strict compliance with the formula of article 480 which authorizes the bill of particulars for a disjunctive crime to be phrased "conjunctively." In holding that the bill of particulars was sufficient, the supreme court pointed out that the defense had been fully notified that the state would prove that the rape was accomplished by force and by threats, and that it must be prepared to defend against both allegations. This basis of the supreme court's holding was epitomized in Justice Hamlin's statement that, "We do not find a violation of the conjunctive rule; the use of the word 'or' under the allegations of the answer to the bill of particulars was superfluous."[12] The *Pratt* decision must be read and applied with caution. It is submitted that the purported distinction between *Pratt* and *City of Shreveport v. Bryson*[13] is only a make-weight argument, and would not have supported the holding in *Pratt* if the bill of particulars had simply used the disjunctive "or" which was held insufficient in *Bryson.* Also, the formula of article 480, calling for setting forth the charges or allegations "conjunctively" should be followed, and the "and/or" form condoned in *Pratt* should not be employed as a pattern for future indictments and bills of particulars.

Defendant's Presence When Petit Jury Venireman Excused by Judge

A defendant charged with a felony must be present "at the calling, examination, challenging, impanelling and swearing of the jury."[14] This requirement is an implementation of his right to aid in the voir dire examination of prospective jurors. In *State v. McGuire*[15] the defendant was not present when the trial judge examined members of the petit jury venire for the coming week to ascertain whether they were qualified and available to serve. At that time, he excused an uncle of the assistant district attor-

11. In either event the offense would have been aggravated rape under LA. R.S. 14:42 (1950).
12. 255 La. 919, 927, 233 So.2d 883, 886 (1970).
13. 212 La. 534, 33 So.2d 60 (1947).
14. LA. CODE CRIM. P. art. 831 (3).
15. 254 La. 560, 225 So.2d 215 (1969).

ney who was to prosecute cases during the week. In holding that the defendant's right to be present during the jury selection process had not been violated, the court pointed out that the jurors had not been called for voir dire examination, but were merely called in order that the judge could determine whether an adequate number of qualified jurors were available for service during the week. Thus no voir dire examination rights had, or could have been, prejudiced by the defendant's absence. It is only in the adversary jury selection process that the presence of the defendant is of real significance; and, as Justice Hamlin appropriately pointed out, to hold that the defendant's presence was required when the judge is seeking to determine the qualifications and availability of the jurors on the petit jury venire "would be to require that all defendants and their attorneys must be present on the Monday of the trial week, regardless of which day their trial was scheduled for, or, the equally ridiculous requirement that all jurors summoned for duty during any given trial week, be required to re-appear in court each day to ascertain their qualifications, regardless of whether or not they had been previously determined to be unqualified. This would be an absurd result."[16]

Witherspoon Limitation upon Challenge of Jurors with Conscientious Scruples Against Capital Punishment

The United States Supreme Court in *Witherspoon v. Illinois*[17] held an Illinois procedure unconstitutional which permitted the state to challenge prospective jurors in capital cases for cause if they had conscientious scruples against capital punishment. A jury thus selected, according to the Supreme Court, did not represent a fair cross-section of the community.[18] In 1968 the Louisiana legislature amended article 798 of the Code of Criminal Procedure, in conformity with the United States Supreme Court's footnote suggestion in *Witherspoon*, and authorized the challenge of a juror with conscientious scruples against capital punishment if he made it "unmistakably clear (a) that he would *automatically* vote against the imposition of capital punishment without

16. *Id.* at 567, 225 So.2d at 217.

17. 391 U.S. 510, 519 (1968), noted in Note, 29 LA. L. REV. 381 (1969).

18. Mr. Justice Stewart stated that by eliminating all jurors who had conscientious or religious scruples against capital punishment, "the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die." Witherspoon v. Illinois, 391 U.S. 510, 520-21 (1968).

regard to any evidence that might be developed at the trial . . . ." (Emphasis supplied.)

It should be noted that the *Witherspoon* formula permits interrogation of prospective jurors as to their attitude about capital punishment—to the end that those who could *never* render a capital verdict, regardless of the evidence, may give rise to challenges for cause.

Two 1969-1970 cases, where capital convictions were upheld, point the way to the care which must be exercised, and the role of the trial judge, in determining that a juror is so unalterably opposed to the rendering of a capital verdict that he is subject to a challenge for cause by the state.[19] In one of these cases, *State v. Poland*, the court made an appropriate footnote observation "that Louisiana accords an accused a similar right to challenge for cause any juror who entertains a prejudice against rendering a qualified verdict, the converse of the situation here."[20] The form of such correlative questioning, in view of the strict limitation on the state's right to challenge jurors with scruples against capital punishment, may raise some nice questions.

Prior Notice of Confession or Inculpatory Statement

The 1966 Code of Criminal Procedure provided an entirely new approach to the requirement of notice that a confession or other inculpatory statement would be introduced at the trial. The former Louisiana jurisprudence had held that if a confession was not announced in the opening statement, it could not be used as evidence.[21] Some questions had been presented as to how detailed the opening statement specification should be. If a confession was read to the jury in the opening statement and later ruled inadmissible, reversible error had been committed.[22] There had been no such ruling where the inadmissible confession was merely specified in the opening statement, although even the mention was inevitably damaging to the defendant. The new 1966 procedure solved this dilemma in a fair and prac-

19. State v. Poland, 255 La. 746, 763-66, 232 So.2d 499, 506 (1970); State v. Williams, 255 La. 79, 229 So.2d 706 (1969).

20. 255 La. 746, 766 n. 8, 232 So.2d 499, 507 n. 8 (1970). State v. Weston, 232 La. 766, 95 So.2d 305 (1957); State v. Jackson, 227 La. 642, 80 So.2d 105 (1955); State v. Henry, 196 La. 217, 198 So. 910 (1940).

21. State v. Palmer, 227 La. 691, 80 So.2d 374 (1955).

22. State v. Cannon, 184 La. 514, 166 So. 485 (1936).

tical way. Article 767 prohibits any reference to a confession or inculpatory statement in the district attorney's opening statement. Article 768 requires the State to advise the defense in writing prior to the opening statement of its intention to introduce the confession, thus satisfying the notice requirement even more fully than reference in the opening statement would have done. Failure to give such notice, even though there may have been a prior ruling on the motion to suppress, renders the confession or inculpatory statement inadmissible in evidence.[23]

In *State v. Fink*[24] the supreme court held that the term "inculpatory statement," as used in articles 767 and 768, "refers to the out-of-court admission of incriminating facts made by a defendant *after the crime has been committed.*"[25] (Emphasis supplied.) Applying this definition, the court held that it was not necessary to give prior written notice of the fact that the state intended to introduce incriminating evidence of prior conversations with officers wherein the defendant made arrangements to sell marijuana to them. The negotiations with the officers, not being considered as an "inculpatory statement," had been properly mentioned in the state's opening statement. The phrase "inculpatory statement" if found alone, would normally be defined as broadly synonomous with "incriminatory statement."[26] However, since the phrase is coupled with "confessions," it was logical to color and limit its meaning by the more restrictive word with which it is associated.[27]

The importance of the *Fink* decision is that it settles the procedure to be followed where incriminating statements are to be introduced at the trial. When the statements are confessions or other inculpatory admissions made after the crime, the procedures of articles 767 and 768 must be followed. When statements which tend to incriminate the defendant were made be-

23. LA. CODE CRIM. P. art. 703, comment (f).
24. 255 La. 385, 231 So.2d 360 (1970).
25. *Id.* at 390, 231 So.2d at 362.
26. BLACK'S LAW DICTIONARY 908 (4th ed. 1951), states the following general definition: "*Inculpatory.* In the law of evidence. Going or tending to establish guilt; intended to establish guilt; criminative."
27. J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4908 (1943). "In case the legislative intent is not clear, the meaning of doubtful words may be determined by reference to their association with other associated words and phrases. Thus when two or more words are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the special word."

fore the crime, they must be specified in the state's opening statement of the evidence to be submitted at the trial.

State v. Anderson held that the notice requirement of article 768 was sufficiently satisfied by a statement that the state intended to introduce "each and every confession and statement of each and everyone of these defendants, *whether same be oral* or recorded (and later transcribed into writing) or written...."[28] Only some of the statements were described in detail. In so holding, Justice Sanders stated that the notice given "apprises the defendants of the State's intention to introduce oral confessions and statements. The notice in our opinion substantially complies with Article 768. . . ."[29]

Exclusion of Witnesses—Effect of Violation of Exclusion Order

Sequestration of witnesses prior to their being called to the stand to testify is an important device for exposing and refuting combinations to falsify. Thus, under article 764 of the 1966 Code of Criminal Procedure the exclusion of witnesses is demandable by either the state or the defendant as a matter of right.[30] It is not necessary that the moving party show why he needs the exclusion, for the ever-present chance of exposing perjury is sufficient. When exclusion is ordered, the witnesses are removed from the courtroom and are usually placed in the custody of a deputy sheriff, with orders not to return until they are called to testify and to "refrain from discussing the facts of the case or the testimony of any witness with anyone other than the district attorney or defense counsel."[31] Of course, the primary purpose of such instruction, and it is well for the court to specifically include this in its instruction to the excluded witnesses, is that they shall not discuss the case with other witnesses.

In *State v. Coleman*[32] the supreme court provides a logical and clear exposition of the effects of a violation by the witnesses of a court's exclusion order. Two doctors, who had been excluded and apparently instructed pursuant to article 764, had inadver-

28. 254 La. 1107, 1133-34, 229 So.2d 329, 338 (1969).

29. *Id.* at 1134, 229 So.2d at 338-39, reaffirming the Supreme Court's prior holding in State v. Palmer, 251 La. 759, 206 So.2d 485 (1968).

30. LA. CODE CRIM. P. art. 764 states that "upon request of the state or the defendant the court *shall* order that the witnesses be excluded . . . ." (Emphasis supplied.)

31. LA. CODE CRIM. P. art. 764.

32. 254 La. 264, 223 So.2d 402 (1969).

tently entered into a discussion concerning a medical issue in the case. In upholding the trial judge's refusal to disqualify the witnesses, the supreme court pointed out that the conversation was strictly inadvertent and did not affect the doctors' testimony. The appeal could have been disposed of under the general "harmless error" provision of the Code.[33] However, the supreme court posited its decision on a much broader base. Justice Summers stressed a change brought about by article 764 of the 1966 Code. The former codal provision had expressly provided for disqualification of witnesses who disobeyed a sequestration order.[34] However, except where there had been connivance with the litigant, the penalty of disqualification had been largely eroded by the jurisprudence. Article 764 of the 1966 Code had therefore, as the Reporter's Comment indicated,[35] deleted the provision for disqualification of a witness who disobeyed the court's order. The complainant's remedy, as pointed out by Justice Summers,[36] was to present evidence of the improper conversation to the jury and to use it to attack the credibility of the witnesses' testimony. Also, as was pointed out in both the Code comment and Justice Summer's opinion, the trial judge was authorized "in his discretion, to punish the witness for contempt for the disobedience."[37] Such punishment would not have been appropriate under the *Coleman* facts.

While article 764 advisedly omitted the automatic disqualification provision of the 1928 Code, the court would still have authority to disqualify a witness who violated an exclusion order with "the consent, connivance, procurement or knowledge" of the party for whom he was to testify.[38] If the discussion in *Coleman* had been of a more significant nature it might have been argued that, since the doctors were conversing in the presence of the district attorney, their disqualification as prosecuting witnesses was called for.

Double Jeopardy—Victim Dies after Conviction of Attempted Murder

Article 596 of the 1966 Code, which provides a general statement of the scope of the double jeopardy concept, recognizes

33. LA. CODE CRIM. P. art. 921.
34. Formerly, LA. R.S. 15:371 (1928).
35. *See* LA. CODE CRIM. P. art. 764, comment (b).
36. 254 La. 264, 269, 223 So.2d 402, 403 (1969).
37. *Id.*
38. *See* Taylor v. United States, 388 F.2d 786 (9th Cir. 1967).

double jeopardy in a second trial where the charge in that trial is "(1) Identical with or a *different grade of the same offense* for which the defendant was in jeopardy at the first trial, whether or not a responsive verdict could have been rendered in the first trial as to the charge in the second trial; . . . ." (Emphasis supplied.) The concluding clause of the above statement makes it abundantly clear that double jeopardy is not limited by responsive verdict restrictions. Thus, where the state chooses to prosecute for a lesser degree of the crime, it would normally not be permitted to subsequently prosecute for the major crime. For example, a prosecution for negligent homicide or manslaughter would bar a subsequent trial for murder, even though a murder verdict would not have been responsive to either of those lesser charges.

A different situation was presented in *State v. Poland*[39] where the defendant had pleaded guilty of attempted murder and had been sentenced. The victim subsequently died, and the defendant was indicted and brought to trial for murder. The defendant argued that murder and attempted murder were "different grades of the same offense" within the meaning of article 596 (1). This contention was further bolstered by a provision in the general attempt article of the Criminal Code that an attempt is a "lesser grade of the intended crime."[40] In holding that the double jeopardy plea had been properly overruled, the Supreme Court of Louisiana followed a well-established and logical line of jurisprudence and legal authorities.[41] The most persuasive and logical reason for holding that the defendant had not been in jeopardy as to murder when he pleaded guilty of attempted murder was the fact that the murder was not complete and could not have been prosecuted when the attempted murder plea was entered. Chief Justice Fournet quoted with approval from a United States Supreme Court holding: "The death of the injured person was the principal element of the homicide, but was no part of the assault and battery. At the time of the trial for the latter the death had not ensued, and not until it did ensue was the homicide committed. Then, and not before, was it possible to put the accused in jeopardy for that offense."[42]

39. 255 La. 746, 232 So.2d 499 (1970).
40. LA. R.S. 14:27 (1950).
41. 255 La. 746, 752, 232 So.2d 499, 501-02 (1970).
42. *Id.* at 753, 232 So.2d at 502, quoting from Diaz v. United States, 223 U.S. 442, 449 (1912).

Jury Trial for Serious Misdemeanors

The 1968 Legislature, in order to square Louisiana penalties and procedures with the apparent petty offense line of *Duncan*, adopted two important statutes. Act 647 reduced the penalties of a number of misdemeanors to a fine of not over $500.00 or a prison sentence of not more than six months, or both. Act 635 amended article 779 of the Code of Criminal Procedure so as to provide a tribunal for misdemeanor trials which would conform with *Duncan* standards. It provided for a five man jury where the misdemeanor charged was punishable by "a fine in excess of five hundred dollars or imprisonment for more than six months." In *State v. Seals*[43] the defendant was charged with illegal carrying of weapons[44] for which the 1968 penalty revision statute had fixed a maximum penalty of $500.00, or six months imprisonment, *or both*. Defense counsel argued that the possible penalty, which was similar to numerous other penalties which had been reduced by Act 647 of 1968, exceeded $500.00 *or* six months imprisonment and that he was thus entitled to a jury trial under amended article 779.

In rejecting defense counsel's claim to a jury trial, the Supreme Court of Louisiana construed the 1968 statutes *in pari materia* and concluded that the phrase "or both," which was consistently used by Act 647 in conformity with the federal "petty offense" line, had probably been inadvertently omitted in the amendment of article 779 of the Code of Criminal Procedure. The court was thus giving effect to the overall 1968 legislative intent in holding that the penalty for illegal carrying of weapons did not call for a jury trial under article 779.

The supreme court made it clear however, that its decision was also posited on another and even more explicit base, i.e., a construction of the language of amended article 779 itself.[45] Justice Hamiter stressed the fact that the offense charged could not be punished by a fine in excess of $500.00, or by imprisonment in excess of six months, and concluded, "We believe that the true intent of the Legislature was that so long as the fine im-

43. 255 La. 1005, 233 So.2d 914 (1970).
44. LA. R.S. 14:95 (1968).
45. Amended article 779 of the Code of Criminal Procedure reads, ". . . misdemeanor in which the punishment may be a *fine in excess of five hundred dollars* or *imprisonment for more than six months*. . . ." (Emphasis supplied.)

posed under a criminal statute does not exceed $500.00 and the jail sentence does not exceed six months, a jury trial is not mandatory under Article 779 of the Code of Criminal Procedure."[46] It is submitted that the true legislative intent, and a very beneficial practical result, was achieved in the *Seal* decision.

Mistrial—Comments Concerning Other Crimes

The 1966 Code of Criminal Procedure provides more complete guidelines as to the effect of prejudicial remarks made before the jury. Article 770, which follows lines established by the jurisprudence, embraces remarks by the court, the district attorney or any court official which are so highly prejudicial that they cannot be adequately cured by an admonition from the court. In these situations the defendant is entitled to a mistrial, unless he prefers that the court admonish the jury and proceed with the trial. The second ground for a mistrial is reference to "another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible." In *State v. Kreller*[47] the defendant was charged with sale of narcotics, and the district attorney outlined a separate subsequent narcotics sale in his opening statement.[48] In approving the prosecution's reference to the subsequent narcotics sale, the Supreme Court of Louisiana pointed out that such evidence was admissible, under LA. R.S. 15:445 and 15:446, for the purpose of showing system, intent and guilty knowledge. *Kreller* followed the supreme court's previous holding[49] that the exception allowing proof of other similar crimes applied "not only to prior criminal offenses committed by the defendant, but also to offenses committed *subsequent* to the offense charged."[50] (Emphasis supplied.)

Companion article 771 covers other irrelevant prejudicial remarks where a prompt admonition by the court will generally be sufficient to assure the defendant of a fair trial. It embraces remarks by a witness or other person which would be a ground for an automatic mistrial under article 770 if made by the court

46. State v. Seals, 255 La. 1005, 1016-17, 233 So.2d 914, 918 (1970).
47. 255 La. 982, 233 So.2d 906 (1970).
48. LA. CODE CRIM. P. art. 769 states: "Evidence not fairly within the scope of the opening statement of the state shall not be admitted in evidence."
49. State v. Johnson, 228 La. 317, 82 So.2d 24 (1955).
50. 255 La. 982, 992, 233 So.2d 906, 909 (1970).

or district attorney. Remarks by witnesses do not have the same weight with jurors as do official statements. Also, witnesses cannot be fully controlled and there is not the same official responsibility for their utterances. In these situations judicial admonition is the normal remedy. In *State v. Arena*[51] a police officer, who was testifying in a bad check case as to serving notice of the checks being dishonored, spontaneously stated that he had recognized the defendant as a person previously arrested. It was obvious that the district attorney was as surprised by the utterance as was the defense. Thus the case was one where the normal remedy of an admonition to disregard the remark was sufficient. The prejudice was not so great as to require drastic relief by way of a mistrial.[52]

EVIDENCE

*George W. Pugh**

JUDICIAL NOTICE

In *Brown v. Collins*[1] an issue arose as to whether plaintiffs in a personal injury suit had been guilty of contributory negligence by riding with a driver whom they allegedly knew was under the influence of intoxicating beverages. In order to establish the driver's state of inebriation, evidence had been introduced that the alcoholic content of his blood was .255 mg. percent. There was, however, no expert testimony as to the significance of this datum, nor had blood-alcohol charts been introduced in evidence. The Third Circuit Court of Appeal took the position that "this is a matter of scientific opinion of which the judge may not take judicial notice,"[2] concluding that no weight could be given to the evidence of alcoholic content. With deference, it seems to this writer that some weight could properly have been given to the evidence. This was a case tried to a judge alone, and one of the advantages in judge-tried cases is that a judge is normally more competent to weigh and evaluate evidence than an untrained juror. A scientific chart was readily

51. 254 La. 358, 223 So.2d 832 (1969).

52. After stating the normal relief by way of a prompt admonition to the jury to disregard, LA. CODE CRIM. P. art. 771 concludes that "the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial."

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1. 223 So.2d 453 (La. App. 3d Cir. 1969).

2. *Id.* at 456.