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and indefinite as not to properly present a valid basis for a new trial.

The position taken by the majority seems preferable to that taken by the dissent for the trial judge should have the discretion to decide whether, on the basis of the allegations in the motion for a new trial, there is a valid reason for holding a hearing. If he is convinced that the allegations do not present a sufficient basis for a new trial, judicial economy would indicate that the motion should be denied without the necessity for a hearing. In most cases in which the mover alleges that he has discovered new evidence or that he has evidence of jury misconduct, the court will order a hearing to determine whether, in the light of this evidence, a new trial should be granted. In conclusion, the decision with respect to whether the motion for a new trial should be denied without a hearing can properly rest within the discretion of the trial judge because the mover's rights would be fully protected by an appeal.

CRIMINAL PROCEDURE

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Questioning—Detention on Suspicion

The arrest of defendant in *State v. Amphy*[1] was held to be valid on a finding of probable cause; defendant's constitutional rights had been respected and *Miranda* warnings given. However, the court's opinion is of special interest due to Justice Tate's discussion of the proper scope of interrogation upon "an investigatory detention—on the basis of grounds constituting less than the probable cause required for an arrest." Justice Tate cites United States Supreme Court authority for the sound proposition that "[s]uch sort of temporary (an hour or so) detention does not, however, necessarily offend federal constitutional guarantees against unlawful searches and seizures."[2] Further guidance as to proper police procedures for pre-arrest custodial interrogation is found in Justice Tate's reference, with apparent approval, to the American Law Institute's Model Code of Pre-Arraignment Procedure Rule which "proposes to permit such pre-arrest cus-

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1. 249 So.2d 560 (La. 1971).
2. *Id.* at 565.

todial interrogation, providing the individual is first informed that he has no legal obligation to furnish information or to cooperate."[3]

Search Incidental to Arrest

Limitations upon search incidental to an arrest are suggested in *State v. Roach*[4] where police officers, who had entered the defendant's apartment to arrest a third person, searched the apartment and found the narcotic substances and paraphernalia which were used in evidence against the defendant. There was considerable discussion of whether the articles seized were under the control of the suspect at the time of the arrest, which presented a fairly close question. However, the decision on rehearing was based largely upon the conclusion that the arrest was made by the police officers as a pretext for a search of the defendant's premises.[5]

In support of its conclusion that the arrest had been used as a means of searching the defendant's apartment without a warrant, the majority opinion stressed the unexplained failure to make an earlier arrest in the arrested person's own home, and that the arrest could have been made after the arrestee had left defendant's apartment. Dissenting Justice Sanders differed as to the factual premises upon which the majority opinion was based, and concluded that the majority holding "puts the courts in the business of second guessing policemen as to the proper time to make an arrest. Thus, it represents another obstacle thrown in the path of law enforcement officers in their efforts to suppress crime."[6]

A careful comparison of the reasons submitted in support of the factual conclusions in the majority and dissenting opinions shows that distinctly different conclusions can be bona fidely and reasonably drawn as to the motives of arresting officers. Why was the arrest not made earlier at the fugitive's own home? Why did the police not wait until the arrested person had left

3. *Id.* n.3, citing appropriate sections of the A.L.I. Tentative Draft.
4. 256 La. 408, 236 So.2d 782 (1970).
5. Chief Justice Fournet stated, "This is made clear by Officer Lampard who admitted they had neither personal knowledge nor any reliable information of any narcotics violations in defendant's house prior to entry therein, and when questioned as to why they did not wait until such time as Mixon (the suspect) left the house to arrest him, responded, 'Because we wanted to go into this house.'" *Id.* at 442-42, 236 So.2d at 793.
6. *Id.* at 444, 236 So.2d at 794.

defendant's apartment? Space does not permit recounting of the persuasive but diametrically opposed judicial answers to these questions. The significance of this conflict is that it shows why courts should be reluctant to move into the area of police motives for an arrest which is accompanied by a warrantless search and seizure.

Indigent's Right to Court-Appointed Counsel

The indigent defendant is entitled to court-appointed counsel, and such counsel must be competent and not prejudiced against the defendant. In *State v. Austin*,[7] the court-appointed counsel moved, on the morning the trial was to begin, to withdraw on the ground that the defendant had indicated dissatisfaction with him. The defendant stated that the appointed attorney "is going into the case with a defeatist attitude, he feels that he can't win the case."[8] In affirming the trial judge's ruling that the court-appointed counsel should continue, the supreme court stressed several factors. The motion to withdraw was not timely, since it came on the morning of the trial and without the defendant having procured another attorney to handle the case. On the merits, the unfounded nature of defendant's dissatisfaction had been demonstrated by defense counsel's excellent brief and oral argument in a prior successful appeal from a conviction.

The *Austin* decision was clearly justified on the special facts of that case, but it supports a broader principle which should be a valuable guide to trial judges in dealing with difficult-to-satisfy indigent defendants. Justice Dixon cited, with approval, a federal decision which held that "lack of rapport or communication" between the defendant and his counsel does not, without more, preclude effective representation. This federal court had concluded: "A defendant cannot base a claim of inadequate representation upon his refusal to cooperate with appointed counsel. Such a doctrine would lead to absurd results."[9]

Preliminary Hearing Discretionary after Information Filed

Prior to the finding of an indictment or the filing of an information, the defendant is entitled to a prompt preliminary ex-

7. 258 La. 273, 246 So.2d 12 (1971).
8. *Id.* at 278, 246 So.2d at 13.
9. Shaw v. United States, 403 F.2d 528, 529 (8th Cir. 1968).

amination.[10] If it is determined at the preliminary examination that there is not "probable cause" to charge the defendant with the offense for which he is held, he is entitled to release from custody.[11] A grand jury indictment authoritatively settles the issue of probable cause, and an indicted defendant cannot thereafter demand a preliminary examination.[12] The court may still, in its discretion, order a preliminary hearing for the purpose of fixing bail or perpetuating testimony of witnesses likely to be unavailable at the trial.[13]

The filing of an information by the district attorney is a valid official charge in non-capital cases, but it is not accorded the same official finality on the issue of "probable cause" that is given to a grand jury indictment. Thus, the court may order the defendant's release from custody pending trial, despite the information, if it determines at a preliminary examination that the state does not have a solid prima facie case against him.[14] A question has arisen in several recent Louisiana Supreme Court decisions as to whether the filing of an information by the district attorney is a proper basis for denial of a preliminary hearing. Two of these cases will be discussed.

In *State v. McCoy*,[15] the defendant moved for a preliminary examination several months after an information had been filed. Although it was alleged "that defendant believes a hearing will establish his right to be released," defense counsel did not explain the late filing of the motion and was apparently planning to use the examination to "aid him in planning his defense" (a sort of discovery procedure). The supreme court held that "under the facts and circumstances" of that case the refusal of the belated motion for a preliminary examination was a proper exercise of judicial discretion. While discovery may be a by-product of the preliminary examination, it is not a recognized purpose for holding the hearing.

In *State v. Pesson*,[16] the arrested defendant had filed a motion for a preliminary hearing. Immediately thereafter, and before a preliminary hearing was ordered, the district attorney

10. LA. CODE CRIM. P. art. 292.
11. *Id.* art. 296.
12. State v. Singleton, 253 La. 18, 215 So.2d 838 (1968); LA. CODE CRIM. P. art. 292.
13. LA. CODE CRIM. P. art. 296.
14. *Id.* comment (c).
15. 258 La. 645, 247 So.2d 562 (1971).
16. 256 La. 201, 235 So.2d 568 (1970).

filed a bill of information charging the crime of abortion. The supreme court held, following Code of Criminal Procedure article 292, that the granting of a preliminary hearing after an information had been filed was in the discretion of the trial judge. The facts that the defendant had already been released on bail and was not seeking the perpetuation of testimony tended to support the supreme court's conclusion that these rights of the defendant had not been impaired by the denial of a preliminary hearing.

The extensive nature of the trial judge's discretion was further spelled out, by way of dictum, in the supreme court's opinion. The court stated that, even if a preliminary examination had been ordered, the holding of the hearing was discretionary with the court once the bill of information was filed, and the trial judge was authorized to cancel the hearing.[17] Many factors enter into the trial court's exercise of this discretion, and the Louisiana Supreme Court has shown a proper reluctance to second-guess the trial judge in the exercise of his discretion. This means that the trial judge should carefully weigh the circumstances of the case when a preliminary examination is sought after an information has been filed. In cases like *McCoy*, defense counsel should not be permitted to urge belated preliminary hearings for discovery purposes. On the other hand, the district attorney should not be able to defeat bona fide requests or orders for preliminary hearings on "probable cause" by the simple expedient of filing an information.

Sequestration of Witnesses

Sequestration of witnesses is an important device for exposing combinations to falsify. As Justice Sanders has so aptly stated, it serves "to prevent witnesses from being influenced by the testimony of prior witnesses and to strengthen the role of cross-examination in developing the facts."[18] Under article 764 of the Louisiana Code of Criminal Procedure, both the defendant and the state can demand exclusion of witnesses as of right, and it is not necessary to spell out why such exclusion is required. The ever-present possibility of better detecting perjury and pre-

17. *Id.* at 207, 235 So.2d at 570, *citing* State v. King, 255 La. 501, 231 So.2d 402 (1970), *and* State v. Fitzimmons, 255 La. 787, 232 So.2d 515 (1970).

18. State v. Raymond, 258 La. 1, 11, 245 So.2d 335, 338 (1971).

venting witnesses from being influenced by the testimony of others is a sufficient reason.

The time for making a motion to sequester witnesses is not specified in article 764. In *State v. Simpson*,[19] defense counsel's motion to sequester the witnesses was rejected on the ground that "it came too late as the case 'was half over' at the time counsel sought to have the witnesses excluded from the courtroom."[20] In holding that the refusal to sequester constituted reversible error, Justice McCaleb pointed to the mandatory ("shall order") language of article 764 and concluded that "it suffices that the request be made *at any time* during the taking of evidence." (Emphasis added.)

Dissenting Justice Sanders raised some interesting considerations. On the facts of the case, the refusal of the belated sequestration request may have been "harmless error," since the witness to be sequestered had already heard the main testimony of the witness whose cross-examination was well under way.[21] Justice Sanders was also concerned with the fact that the *Simpson* holding would enable the defense counsel or district attorney "to fragmentize the sequestration and choose the testimony to be kept from the witnesses."[22]

In reaffirming the supreme court's original judgment, after a rehearing, Justice Dixon again emphasized the mandatory nature of article 764, and did not see any substantial dangers from the possible fragmentation or

> "[P]roblems of 'gamesmanship' that might arise should selective requests for sequestration of witnesses be made after testimony has begun. Simple foresight in demanding the sequestration of witnesses before trial will prevent any advantage, fancied or real, from accruing to either party."[23]

In support of Justice Dixon's liberal position, it is suggested that the right to sequestration of witnesses is an important right which should be available at whatever stage of the testimony

19. 249 So.2d 536 (La. 1971).
20. *Id.* at 537.
21. *See* dissent by Justice Sanders. *Id.* at 538. *Cf.* Justice Dixon's view on rehearing that the court could not determine that the error was harmless when it did not have the benefit of a complete transcript of the testimony. *Id.* at 539.
22. *Id.* at 538.
23. *Id.* at 539-40.

the defense or state choose to assert it. A fixed cut-off date, such as when the testimony begins, might have some unfortunate results.

While sequestration of witnesses is a matter of right under the mandatory language of article 764, the last sentence of that article authorizes the court to "*modify its order in the interest of justice.*" This judicial discretion was broadly and soundly interpreted in *State v. Raymond*,[24] where two minor departures from the strict letter of the rule were upheld "in the interest of justice, obviously meaning that he (the trial judge) did so to facilitate the trial of the case with no prejudice to the defendant." The first variance was the exemption of certain witnesses from the exclusion order. Three of these witnesses, two medical experts and a law enforcement officer, had been unavoidably absent at the opening of the trial, and therefore were not included. The other exempted witnesses were law enforcement officers who testified only to the discovery of the crime or to a minor segment of the factual picture. It was significant that these witnesses had not testified as to the "overriding factual issue" concerning the defendant's connection with the criminal homicide. Thus, there was no indication that the omission of the witnesses in question from the sequestration order could have had any prejudicial result.

The second alleged irregularity related to the court's admonition to those witnesses who were sequestered. Under article 764, excluded witnesses are to be instructed to refrain from discussing the case or testimony "with anyone other than the district attorney or defense counsel." The judge's instructions in *Raymond* banned discussion with anyone except counsel for the state. Defense counsel contended that the order should also have permitted discussion with defense counsel. Pointing to the court's express authority to "modify" its order, Justice Sanders concluded that the trial judge was empowered "to make the instruction to the witness stricter than the normal instruction mentioned in the article," and also stressed that "at no time during the trial did defense counsel request special permission of the judge to discuss the case with any of the witnesses."[25]

The *Raymond* decision represents a practical and non-tech-

24. 258 La. 1, 245 So.2d 335 (1971).
25. *Id.* at 13, 245 So.2d at 339.

nical, yet eminently sound, application of the sequestration article. The supreme court could have held that the departures were "harmless error."[26] However, it is much better that the decision is posited upon a broader base that will recognize proper flexibility in future sequestration orders, *i.e.*, as an exercise of the court's express authority to "modify its order in the interest of justice."

Article 764 deleted the former mandatory disqualification of a witness who violated a sequestration order. Such disqualification could work great hardship on an entirely blameless party who was relying on the witness's testimony. This change was construed in *State v. Rouse*[27] as vesting broad discretion in the trial judge to decide whether the witness should be disqualified, ruled in contempt, or both. Thus, in *Rouse*, a witness who had been in the courtroom throughout the trial was held to have been properly disqualified by the trial judge. Except in cases where there has been connivance or consent of the witness' attorney, or where the danger of testimonial influencing is great, trial judges should be reluctant to order disqualification. Contempt citation of the witness appears the more appropriate normal remedy.

Comment on Failure of Defendant's Spouse to Testify

The fifth amendment privilege against self-incrimination is applicable to the states via the "due process" clause of the fourteenth amendment. In support of this important privilege, the United States Supreme Court has held that neither the court nor the district attorney may comment upon the failure of the defendant to take the stand.[28] Louisiana has implemented this rule by providing, in article 770(3) of the Code of Criminal Procedure, that comment on "the failure of the defendant to testify in his own defense" is a ground for a mistrial per se.

No such constitutional privilege is involved where the spouse of the defendant refuses to testify, and *State v. Jones* followed the previously established rule that "the district attorney has the right to comment on the failure of the accused to have his witness spouse testify in his behalf."[29]

26. LA. CODE CRIM. P. art. 921.
27. 256 La. 275, 236 So.2d 211 (1970).
28. Griffin v. California, 280 U.S. 609 (1965). Such comment, according to Justice Douglas, "cuts down on the privilege by making its assertion costly." *Id.* at 614.
29. 257 La. 966, 973-74, 244 So.2d 849, 852 (1971).

Closing Arguments—Penalty Considerations

There is an oft-quoted maxim that "hard cases make bad law." Conversely, it appears that bad law sometimes makes hard cases. Just such a situation was presented in *State v. Harris*.[30] In an apparent effort to further deter the current wave of armed robberies, the penalty for that offense was drastically increased in 1967.[31] In addition to raising the maximum penalty to ninety-nine years, the legislature also provided a minimum sentence of five years which must be served "without benefit of parole, probation or suspension of sentence." This meant that *all* defendants convicted of armed robbery must actually serve at least five years in Angola. It stripped the sentencing judge of his usual power to impose a light sentence, or place the offender on probation in the case of youthful first offenders or where other special circumstances called for judiciary leniency. In *Harris*, the trial judge had refused to permit defense counsel to urge, in his closing argument to the jury, the severity of the mandatory armed robbery penalty. In upholding the trial judge's ruling, Justice Sanders' majority opinion stressed the relative functions of the judge (who determines the sentence in all non-capital cases) and the jury which "is concerned only with guilt."[32] Justice Sanders reiterated and applied the previously established rule that

> "[S]entence regulations in non-capital cases, such as those relating to mandatory terms, probation, or parole, are inappropriate subjects for the judge's charge to the jury. These matters are foreign to the jury's function of guilt determination and, consequently, form no part of 'the law applicable to the case.' "[33]

Along the same line, and directly controlling in the case at hand, the opinion concluded: "The prevailing rule is that when the penalty is the responsibility of the judge alone, the sentencing law is an improper subject for argument to the jury."[34]

Three of the Justices of the Louisiana Supreme Court felt that the jury "ought to know" when a conviction, like one for armed robbery, could result in a harsh and arbitrary sentence.

30. 258 La. 720, 247 So.2d 847 (1971).
31. La. Acts 1967 (E.S. No. 5), *amending* LA. R.S. 14:64 (1950).
32. 258 La. 720, 730, 247 So.2d 847, 850 (1970).
33. *Id.*
34. *Id.* at 731, 247 So.2d at 851.

Dissenting Justice Dixon felt that "[a] large part of the value of the jury system is that a jury might refuse to enforce an oppressive law, even though it be proved that the defendant violated its provisions. The penalty is part of the law."[35] Justice Barham, in another vigorous dissent, agreed with the Dixon position that the penalty was "an essential part of the law," and concluded that the jury is entitled to know and is legitimately concerned with the sentence which can be imposed under their verdict.[36] Justice Tate agreed with the majority opinion that the trial judge had not erred in refusing to permit defense counsel to argue the severity of the sentence; but he expressed concern as to the procedure followed by the trial judge, stating, "for the reasons noted by the dissenting opinions he feels it preferable procedure to permit such argument and no abuse of discretion to do so."[37]

While the writer agrees with the majority opinion, one is impressed with the practical considerations underlying the Dixon and Barham dissents. However, the real difficulty is in the harsh amended penalty of the armed robbery article. The sponsors of that amendment should review the results of their handwork. Has it resulted in a marked deterrence and reduction of armed robberies? Or has it resulted in hardship cases where appropriate punishment is only possible if the district attorney chooses to charge the lesser crime of simple robbery, or if the jury somehow gets notice of the hard penalty and refuses to follow the law calling for conviction of armed robbery? The remedy, if the penalty for armed robbery is out of line with humanitarian penal concepts, is by legislative action, rather than by judicial perversion of the jury function.

Increased Sentence upon Re-Conviction

The United States Supreme Court, in *North Carolina v. Pearce*,[38] clearly forbids the vindictive imposition of a higher sentence where a defendant has been re-convicted after a new trial. To justify an enhanced sentence, there must be special circumstances, such as

> "[O]bjective identifiable conduct on the part of the defendant occurring after the time of the original sentencing

35. *Id.*
36. *Id.* at 735, 247 So.2d at 852-53.
37. *Id.* at 732, 247 So.2d at 851.
38. 395 U.S. 711 (1969).

> proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal."[39]

In *State v. Rutledge*,[40] the record was barren of any reason for increasing the original one-year sentence to two and a half years. Thus, the Louisiana Supreme Court remanded the case for re-sentencing in conformity with the *Pearce* decision. If there had been a justification for the increased sentence, it was too late to supply that factual data after the appeal was taken.

Under the *Pearce* and *Rutledge* decisions, the sentencing judge who increases the sentence after a re-conviction must point to some substantial additional considerations which were not available at the time of the original sentence, and this factual basis must be made a matter of record when the new sentence is imposed.

EVIDENCE

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WITNESSES

Examination of Witnesses—Responsiveness

An attorney questioning a witness, whether on direct or cross-examination, may insist that the answer given by the witness be responsive to the question, *i.e.*, that the witness answer the question asked and *only* the question asked. In *State v. Rouse*,[1] involving theft by the use of a credit card, the prosecuting witness (the person to whom the credit card had been issued) was asked on cross-examination whether the bank (who apparently had issued the credit card) had ever confirmed to him that they had received his notification of the loss of the credit card. To this question the witness replied:

> "Well on November the 7th Mr. Ross Johnston called me and advised me that a receipt had shown up or they had gotten a call from a place in Baton Rouge that my card had been used in the name of Joe B. Smith for a lodging in a

39. 395 U.S. 711, 726 (1969).
40. 250 So.2d 734 (La. 1971).
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1. 256 La. 275, 236 So.2d 211 (1970).