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Procedure: Criminal Procedure II

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CRIMINAL PROCEDURE II

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INDICTMENTS

The much cited case of *State v. McDonald*[1] held a burglary indictment charging burglary of the "American Hat Company" fatally defective for failure to specifically allege that a "building or structure" had been burglarized. In *State v. Wright*,[2] the Louisiana supreme court refused to extend the technical *McDonald* holding, and upheld an indictment which simply charged burglary of "Rinaudo's Red and White Grocery, located at 2532 Government Street." The court concluded that "grocery" connoted a structure or building more emphatically than "hat company." Similarly, *State v. Bowers*[3] upheld a burglary information which described the burglarized premises as "West Madison Garage." This, according to the court's succinct *per curiam*, "connotes in ordinary language a structure devoted to the garage business."[4]

The importance of making sure to state all elements of the crime, where the so-called long form indictment is employed,[5] is shown by *State v. Baker*.[6] In *Baker*, an indictment for aggravated crime against nature was held fatally defective for failure to specify by which circumstance, of several enumerated in the definition of the aggravated crime, the offense was committed. The care and precision with which long form indictments must be formulated was further illustrated by *State v. Spina*,[7] where the information for malfeasance in office had simply followed the broad general language of the code definition of that crime in alleging that the defendant intentionally failed to perform his duties as "lawfully required of him" as a Baton Rouge police officer. In approving the trial judge's ruling which had sustained a motion to quash, the supreme court reaffirmed the previous holding that "[w]hen the statute characterizes the offense in gen-

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1. 178 La. 612, 152 So. 308 (1934).
2. 254 La. 521, 225 So.2d 201 (1969).
3. 260 La. 436, 256 So.2d 435 (1972).
4. *Id.* at 438, 256 So.2d at 435.
5. LA. CODE CRIM. P. art. 464 requires "a plain, concise and definite written statement of the essential facts constituting the offense charged."
6. 261 La. 233, 259 So.2d 306 (1972).
7. 261 La. 397, 259 So.2d 891 (1972).

eral or generic terms, an indictment or information charging the offense in the words of the statute is insufficient and the specific facts upon which the charge is based must be set out."[8] In *Baker*, the indictment would have been sufficient if it had followed one of the specific enumerations of the statute. In *Spina*, where there was no such specification and elaboration, a specific statement of facts showing how the crime was committed was required.

In *State v. Raby*,[9] the information charged aggravated arson, a crime for which a specific (short) form is provided by article 465 of the Code of Criminal Procedure. However, the prosecutor did not elect to employ the specific form and thus was required to set out all elements of the offense charged. The information was held insufficient for failure to allege foreseeable danger to human life which "is the gravamen of aggravated arson."[10] The importance of utilizing the specific form, where one is available under article 465, is shown by the fact that the prescribed specific form, alleging that "A.B. committed aggravated arson of a dwelling located at . . . ," would have been clearly sufficient.

Where the short form is employed, care must be exercised to be certain that the sacramental language of the specific form is followed. In *State v. Thomas*,[11] the specific form charging forgery had been loosely drawn and considerable legal legerdemain was necessary for the supreme court to conclude that the information had adequately stated the nature of the defendant's act, *i.e.*, the forging of the instrument and signing a false signature. The decision was a close one, and unfortunately space does not permit a comparative analysis of the well-stated majority and dissenting opinions. This writer tends to agree with the practical approach of Justice Tate's majority opinion. In essence, it would appear that omission of the word "by" did not render the nature of the charge unclear or the information fatally defective. Also, Justice Tate's practical construction of the charge was supported by the conjunctive charging authority stated in article 480 of the Code of Criminal Procedure. However, the *Thomas* case indicates the prime importance of meticulous adherence to the language provided in the specific (short) forms.

8. *Id.* at 403, 259 So.2d at 893.
9. 259 La. 909, 253 So.2d 370 (1971).
10. *Id.* at 913, 253 So.2d at 371.
11. 260 La. 784, 257 So.2d 406 (1972).

A number of additional significant rules were reaffirmed in this series of cases. The *Raby* decision held that where the long form indictment is employed, failure to state all elements of the crime may be considered *ex proprio motu* on appeal even though the defect had not been urged by defense counsel, either by motion to quash, motion in arrest, or assignment of error. Basic sufficiency of the indictment is essential to a valid trial and the omission of an essential element of the offense charged comes within article 920(2) of the Code of Criminal Procedure as a reversible error "discoverable by a mere inspection of the pleadings and proceedings."[12]

In *Spina*, the supreme court held that a bill of particulars, which had stated the specific acts upon which the charge was based, was not part of the formal charge and "cannot amend, aid or validate an otherwise invalid or insufficient information or indictment."[13]

In *State v. Thomas*, the supreme court followed an express provision of article 577 of the Code of Criminal Procedure that "[t]he state shall not be required to allege facts showing that the time limitation [for the institution of a prosecution] has not expired . . . ." This provision of the 1966 Code had overruled the prior jurisprudential rule that the running of time limitations must be negatived in the indictment—a rule which had been the source of many confusing decisions and "neat cases."[14] Article 577, the effects of which are clearly and succinctly summarized in Justice Tate's opinion and footnotes,[15] expressly provides that, when the time limitation issue is raised, "the state has the burden of proving the facts necessary to show that the prosecution was timely instituted." It would appear that the best defense procedure is to urge the time limitation by motion to quash and avoid the necessity of going to trial, but the defense is of such a basic nature that article 577 permits it to be "raised at any time, but only once." Thus, it may be urged after conviction by motion in arrest or habeas corpus.

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12. This provision was based on and is in conformity with articles 503 and 560 of the 1928 Code of Criminal Procedure.

13. 261 La. at 404, 259 So.2d at 893.

14. *See* LA. CODE CRIM. P. art. 577, comment (d)(2).

15. 260 La. at 790-94, 257 So.2d at 409.

NOTICE OF INTENDED INTRODUCTION OF CONFESSION OR INCULPATORY STATEMENT

The Code of Criminal Procedure requirement that the state must give the defendant written notice of its intention to introduce a confession or inculpatory statement prior to beginning the opening statement[16] has been liberally construed. Where the failure to provide timely notification was inadvertent and in good faith, and the court found that the defendant had not been taken by surprise or prejudiced in his defense, the non-compliance was treated as harmless error in *State v. Lacoste*.[17] In *State v. Jackson*,[18] the lack of notification was neither inadvertent nor non-prejudicial. In fact, the state had actually informed the defendant and the court that no inculpatory statements given to any officer would be introduced, and had agreed to suppress all such statements. In addition to alleging surprise by the introduction of testimony as to the defendant's inculpatory statement, defense counsel claimed that the defendant would not have taken the stand if he had known such statement was to be introduced in evidence. On the basis of this showing, the supreme court held that the failure to comply with the advance notice requirement was reversible error. In between the clearly established prejudicial error of *Jackson* and the inadvertent non-compliance of *Lacoste*, it will be interesting to see where the "harmless error" line may be drawn. It would seem that failure to give proper notice should, in order to fully effectuate the purpose of the Code requirement, normally raise a sufficient presumption of prejudice to call for a new trial.

In *State v. Himel*,[19] the supreme court logically held that the first four provisions of the general normal order of trial article of the Code of Criminal Procedure[20] do not apply to bench trials. It further held that the written notice of intention to introduce a confession or inculpatory statement was not required in judge-tried cases. Since the notice requirement is intended as a protection against surprise by the sudden and unanticipated use of such incriminating statements, the justification for limiting it to jury trials is difficult to perceive.

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16. LA. CODE CRIM. P. art. 768.
17. 256 La. 697, 237 So.2d 871 (1970).
18. 260 La. 561, 256 So.2d 627 (1972).
19. 260 La. 949, 257 So.2d 670 (1972).
20. LA. CODE CRIM. P. art. 765.

PROSECUTION FOR INCLUDED NONCAPITAL OFFENSE

State v. Ford[21] involved the procedure to be followed when a district attorney elects to prosecute a defendant under a murder indictment for the lesser included offense of manslaughter. When the prosecution is for manslaughter, a nine out of twelve verdict will suffice, and other special procedures for capital trials will not apply. In *Ford*, the district attorney amended a murder indictment, on the day of the trial, to charge manslaughter. After trial and conviction, defense counsel urged that the district attorney was without authority to amend and reduce a grand jury indictment.

In affirming the conviction, Justice Sanders stressed the district attorney's codal authority to prosecute the lesser crime of manslaughter.[22] He also relied on *State v. Doucet*,[23] where the supreme court had squarely upheld the district attorney's authority to abandon the greater crime charged (murder) and go to trial on the lesser included charge (manslaughter). In *Doucet*, the reduction of the charge was by motion in open court and no formal amendment of the indictment was necessary. Possibly the better course to follow in *Ford* would have been by motion to proceed on the reduced charge as in *Doucet*; or it might have been appropriate to move for the court to amend the indictment to conform with the reduced prosecution for manslaughter. This authority might be found by analogy to the court's amendatory powers under articles 487 and 488 of the Code of Criminal Procedure. It should be noted that no new or different crime is being charged since the murder charge necessarily includes the lesser and included crime of manslaughter.

In *Ford*, the supreme court did not pass upon the propriety of the procedure followed, since defense counsel had not made timely objection. Even with timely objection, the procedure followed was, at most, "harmless error," since the district attorney could have validly proceeded with the manslaughter trial without resorting to the possibly invalid amendment. In future cases, it would appear safest to either follow the informal *Doucet* procedure, or to simply file an information charging manslaughter and proceed to trial on that separate lesser charge.

21. 259 La. 1037, 254 So.2d 457 (1971).
22. Relying on LA. CODE CRIM. P. art 61.
23. 177 La. 63, 147 So. 500 (1933).

CHALLENGE OF JUROR ON GROUND OF PARTIALITY

One of the most frequently urged challenges for cause is that "(2) the juror is not impartial, whatever the cause of his partiality."[24] The necessarily wide discretion of the trial judge in ruling on challenges on this ground is illustrated by *State v. Higginbotham*,[25] where the trial judge had ruled that a prospective juror was not subject to challenge for cause because he was a social acquaintance and member of the same Rotary Club as one of the partners of the hardware company which had been burglarized. "It is not per se evidence of partiality," stated Justice Summers, "that a prospective juror is friendly with the party injured by the offense. The relationship must be such that it is reasonable to conclude that it would influence the juror in arriving at a verdict." Similarly, another juror who was a "pretty good" acquaintance of the officer who arrested the defendants was found not subject to challenge. Justice Summers' conclusion to this part of the supreme court's decision significantly stated, "[i]t is essential that the trial judge have a wide latitude in deciding upon a juror's qualifications. The particular facts and circumstances of each case are to be carefully considered before an appellate court is warranted in finding that this latitude has been breached."[26]

SEQUESTRATION OF WITNESSES—EFFECT OF VIOLATION

In *State v. Wills*,[27] the witnesses in a burglary trial had been sequestered and ordered by the court not to discuss the case with anyone other than the district attorney or defense counsel.[28] After the sequestration order, the district attorney sent uniformed police officers to the homes of two of the witnesses who were taken to police headquarters and required to make statements. Defense counsel's motion for a mistrial was denied by the trial judge. In reversing the conviction on appeal, the supreme court clearly rejected the district attorney's contention that the interrogating police were "one of the investigating arms of the district attorney's office." Thus, the issue was squarely presented as to whether police interrogation of sequestered defense witnesses was ground for a mistrial.

24. LA. CODE CRIM. P. art. 797.
25. 261 La. 983, 261 So.2d 638 (1972).
26. 261 La. at 992-93, 226 So.2d at 641.
27. 260 La. 707, 257 So.2d 378 (1972).
28. The sequestration order was pursuant to LA. CODE CRIM. P. art. 764.

The majority opinion was based on the premise that the right of sequestration included a right to have defense witnesses free from police interrogation which might influence or at least color their later testimony. In his dissenting opinion, Justice Sanders relied on the oft-quoted statement that:

> "The objective of witness-sequestration is to prevent witnesses from being influenced by the testimony of other witnesses and to strengthen the roll [*sic*] of cross-examination in exposing false testimony. The primary purpose of the instruction limiting discussion of the case to the district attorney and defense counsel is to prohibit the witnesses from discussing the case with each other other."[29]

The broad majority construction of the purpose and scope of the witness sequestration may pose future problems. What about interrogation of a sequestered witness by an investigator in the district attorney's office? Can the effects of oppressive and intimidating police interrogation of a key witness be cured by ordering a mistrial? Such impermissible official action might mean, as Justice Sanders infers, that irreparable damage has been done which will preclude any fair trial, and thus be a bar to a retrial of the case. The facts stated in *Willis* do not show any coercive questioning by the police, and so it would appear that defendant's rights were properly safeguarded by the procedure followed by the trial judge. In any event, the purpose and scope of the sequestration order may have been given a new and somewhat unexpected dimension by the *Wills* decision. In any event, the decision is not authority for a denial of the district attorney's right to properly interrogate, through his staff or investigators, sequestered witnesses.

EVIDENCE

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RELEVANCY

Past Acts of Misconduct

The admissibility of other criminal acts, a matter which recently has so much plagued and divided the court, was again

29. 260 La. at 712, 257 So.2d at 379.

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