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## Procedure: Criminal Trial Procedure

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## CRIMINAL TRIAL PROCEDURE

John S. Baker, Jr.\*

## PRE-TRIAL ACQUITTAL

In *State v. Mims*,<sup>1</sup> the judge in a non-jury trial rendered a pre-trial verdict of not guilty after the assistant district attorney refused to commence trial. Earlier the prosecutor had assured the trial judge of his readiness for trial. By the time the court was ready to commence, the prosecutor found that two crucial state witnesses were missing. Though the assistant district attorney informed the court that he would be unable to proceed, the judge ordered him to begin his case. Following a temporary standoff, the state requested a brief recess; the court denied the request and adjudged the defendant not guilty. The supreme court reversed, finding that normally "to render a verdict of not guilty at any time prior to the close of the State's evidence is to act prematurely and therefore arbitrarily,"<sup>2</sup> and indicating that under article 17 of the Code of Criminal Procedure "[t]he court could have: ordered a continuance on its own motion; cited the recalcitrant assistant district attorney for contempt; or dismissed the prosecution without prejudice."<sup>3</sup>

This decision is in accord with other provisions of the Code of Criminal Procedure. Under article 386, a trial judge's discharge of a defendant after a preliminary hearing does not preclude the state from prosecuting the defendant on the same charge. If a judge's finding of no probable cause after a preliminary hearing does not operate as an acquittal, certainly a dismissal prior to the presentation of any evidence ought not to do so. The possible remedies suggested by the supreme court—continuance, contempt, and dismissal without prejudice—would prevent the trial court from having "to hold its business in abeyance on the chance that the missing witnesses would appear. . . ."<sup>4</sup> These remedies, however, would not in any way alter the state's basic control over the trial docket under article 702.<sup>5</sup>

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1. 329 So. 2d 686 (La. 1976).

2. *Id.* at 688.

3. *Id.*

4. *Id.*

5. LA. CODE CRIM. P. art. 702, comment (a) provides in part: "This article preserves the basic right of the state to control the prosecution. . . ."

## THE JURY

*Swearing and Sequestration*

In *State v. Smith*,<sup>6</sup> a juror who had been selected, sworn, and sequestered in a capital case temporarily separated himself from the other jurors. The juror had gone to his home a few blocks away, but quickly was missed and returned to the courthouse. The supreme court affirmed the conviction despite the presumption of reversible error that arises from the separation of a juror in capital cases.<sup>7</sup> The court held that the presumption could be, and in this case was, rebutted "where circumstances are such as to reasonably overcome the presumption of prejudice and where it affirmatively appears that no prejudice to the accused can have resulted. . . ."<sup>8</sup>

*State v. Martin*<sup>9</sup> put to rest, however, any thought that *Smith* meant to make the presumption of reversible error a generally rebuttable one. In *Martin*, the trial court permitted a capital jury, which had been selected but not sworn, to separate overnight. The supreme court refused to "extend [the] ruling [of *Smith*] to this case where the entire jury was separated for twenty-one hours."<sup>10</sup> The court implied that rebuttal of the presumption of prejudice is limited to purely technical or temporary violations of the sequestration rule.

*Martin* also discussed the fact that the trial judge allowed the jury to separate because they had not yet been sworn. Article 791 of the Code of Criminal Procedure provides for the sequestration of capital jurors after they are sworn, but does not specify when they are to be sworn. Article 788, however, clearly provides that jurors are to be sworn *immediately* after selection. Accordingly the fact that the jurors were not sworn "does not alter the result. . . [but] only compounds the error."<sup>11</sup> Reversal resulted from a "combination of these two factors."

## OPENING STATEMENTS

*Conspiracy*

The law of conspiracy has not played the prominent role in Louisiana criminal trials that it has in the federal courts. As a result of three recent

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6. 322 So. 2d 197 (La. 1975).

7. See *State v. Luquette*, 275 So. 2d 396 (La. 1973); *State v. Craighead*, 114 La. 84, 38 So. 28 (1905).

8. 322 So. 2d at 201.

9. 329 So. 2d 688 (La. 1976).

10. *Id.* at 691.

11. *Id.*

cases,<sup>12</sup> however, it can be expected that the law of conspiracy will be employed more frequently at various stages of criminal trials in Louisiana.<sup>13</sup>

*State v. Brown*<sup>14</sup> and *State v. Kaufman*<sup>15</sup> permit the prosecutor to refer to the law of conspiracy during his opening statement to the jury even though a conspiracy has not been charged. The state may do so "whenever more than one person is charged with the commission of a crime and the State intends to prove a conspiracy in order to take advantage of La. R.S. 15:455. . . ."<sup>16</sup> which provides for the admission of acts and declarations of one co-conspirator against another.<sup>17</sup> The dangers, however, of referring routinely to the law of conspiracy in the opening statement of a multiple-defendant trial are mentioned by Justice Tate, concurring in *Kaufman*.

[P]rosecutors may well avoid the practice of instructing the jury as to the law of conspiracy in their opening statements in every case where the offense was committed by more than one person, for, if during the trial there is no prima facie showing of a conspiracy, the prejudicial impact of the earlier reference may necessitate a mistrial (or a reversal of a subsequent conviction).<sup>18</sup>

Caution, therefore, is advised because, as *State v. Carter*<sup>19</sup> holds, proof of a prima facie case of conspiracy does not follow automatically from the fact that two or more committed the crime.

We hold that when the only showing of a conspiracy is that two people committed a crime, and there is no showing that defendant either committed or conspired to commit the criminal act, no prima facie case of conspiracy has been established. We further hold that the

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12. *State v. Kaufman*, 331 So. 2d 16 (La. 1976); *State v. Carter*, 326 So. 2d 848 (La. 1975); *State v. Brown*, 326 So. 2d 839 (La. 1975).

13. In addition to opening statements, mention of the law of conspiracy may be appropriate under certain circumstances during 1) voir dire, *see State v. Brown*, 326 So. 2d 839, 843 (La. 1975); *but see id.* at 845 (La. 1975) (Tate, J., concurring); 2) closing argument; and 3) jury charge, *compare State v. Brown*, 326 So. 2d 839 (La. 1975) *with State v. Carter*, 326 So. 2d 848 (La. 1975).

14. 326 So. 2d 839 (La. 1975).

15. 331 So. 2d 16 (La. 1976).

16. 326 So. 2d at 843.

17. LA. R.S. 15:455 (1950): "Each coconspirator is deemed to assent to or to commend whatever is said or done in furtherance of the common enterprise, and it is therefore of no moment that such act was done or such declaration was made out of the presence of the conspirator sought to be bound thereby, or whether the conspirator doing such act or making such declaration be or be not on trial with his codefendant. But to have this effect a prima facie case of conspiracy must have been established."

18. 331 So. 2d at 27.

19. 326 So. 2d 848 (La. 1975).

fact, alone, that two or more have committed the crime charged is not sufficient to establish a prima facie case of conspiracy.<sup>20</sup>

#### WITNESSES

##### *Claiming the Privilege*

In *State v. Berry*<sup>21</sup> and *State v. Duhon*<sup>22</sup> the supreme court clearly adopted as its own the position of the American Bar Association Standards<sup>23</sup> that it is improper for either the prosecutor or the defense counsel to call a witness before the jury if he knows that the witness will claim his privilege against self-incrimination. *Berry* affirmed the refusal of the trial court to require that a severed co-defendant claim his privilege before the jury. In *Duhon* the court ordered a new trial because the prosecution called a severed co-defendant to the stand, causing him to claim his privilege in response to questions relating to the offense for which both he and the defendant were charged.

##### *Use of the Defendant's Testimony*

In *State v. Reed*,<sup>24</sup> the defendant attempted to limit the use that could be made of testimony given by him at an earlier trial. After reversal of his original conviction, the prosecution introduced, as part of its own case in the second trial, a transcript of testimony the defendant had given at the original trial. The defendant unsuccessfully urged the constitutional contentions that the transcript violated his privilege against self-incrimination and that, as part of the illegal original trial, it constituted "fruit of the poisonous tree." The defendant also urged unsuccessfully that article 857 of the Code of Criminal Procedure<sup>25</sup> precluded introduction of the transcript. The court rejected a reading of the article in light of the literal language of the official revision comment that "the slate is wiped clean when a new trial is granted."<sup>26</sup> The distinction was made that "merely tactical prejudice" to the defendant is not barred. Accordingly article 857 did not bar the introduction of the defendant's prior testimony "so long as the state does not

20. *Id.* at 854.

21. 324 So. 2d 822 (La. 1975).

22. 332 So. 2d 245 (La. 1976).

23. ABA STANDARDS, PROSECUTION FUNCTION § 5.7(c) (1971) and DEFENSE FUNCTION, § 7.6(c) (1971).

24. 324 So. 2d 373 (La. 1975).

25. LA. CODE CRIM. P. art. 857: "The effect of granting a new trial is to set aside the verdict or judgment and to permit retrial of the case with as little prejudice to either party as if it had never been tried."

26. *Id.*, comment (a).

make it apparent to the jury that the testimony was from a prior trial.''<sup>27</sup> The court's construction "of article 857 [was] not readily apparent from a reading of its language of the jurisprudence interpreting it.''<sup>28</sup> In reaching the result, however, the court correctly was guided by the principle that

[t]he law must presume that people under oath speak the truth, and we cannot conclude that the law requires us to determine that defendant's prior, presumably truthful, statement could 'prejudice' him later.<sup>29</sup>

#### MISTRIAL

##### *Reference to Other Crimes*

*State v. Roberts*<sup>30</sup> held that an improper question regarding the defendant's juvenile adjudication of delinquency did not require a mandatory mistrial under article 770 of the Code of Criminal Procedure. During cross-examination of the defendant, the prosecutor "asked him if in 1970 he had pleaded guilty in juvenile court to theft and shoplifting."<sup>31</sup> An objection was sustained, but a mistrial was denied. The supreme court affirmed, reasoning that inasmuch as a juvenile adjudication does not constitute a "crime" the prosecutor had not referred to inadmissible evidence of another crime. The prosecutor's reference to the juvenile offense was deemed to fall within article 771 that permits a mistrial only if "an admonition is not sufficient to assure the defendant a fair trial."

The court's narrow construction of article 770 may be attributable to the absence of actual prejudice in this particular case, for the prosecutor also had produced evidence of two non-juvenile convictions for purposes of impeachment. The court concluded that any "additional prejudice" from the improper question had been cured by the court's admonition. Had the juvenile adjudication been construed to be a "crime" under article 770, however, the court could not have avoided a reversal of the conviction by applying the harmless error rule of article 921.<sup>32</sup>

The writer suggests that this case should be limited to its facts. For the future, a distinguishing factor may be that in this case the prosecutor made

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27. 324 So. 2d at 381.

28. *Id.* at 380.

29. *Id.* at 381.

30. 331 So. 2d 11 (La. 1976).

31. *Id.* at 13.

32. *See State v. Green*, 315 So. 2d 763, 765 (La. 1975).

reference to an actual *adjudication* of juvenile delinquency. While not a conviction, a decree of juvenile delinquency is a determination of wrongdoing as opposed to a mere allegation of such.<sup>33</sup> But for the defendant's age at the time of commission, the offense would have been a crime and a proper basis for impeaching him. Thus the result in this case should not extend to a reference to a juvenile offense charge which has not resulted in an adjudication of delinquency.

In *State v. Price*<sup>34</sup> mere mention of the term "mug shot" almost resulted in the reversal of a conviction. The court's original opinion did reverse the conviction on the basis that mere use of that term is to be construed as an indirect reference to other crimes "when it is used in circumstances which suggest that the photograph was made before the commission of the offense for which the defendant is on trial."<sup>35</sup> On rehearing, however, the court reinstated the conviction stating that, "[w]hile the use of the word 'mugshot,' in circumstances different from those presented here, might violate the terms of article 770(2) we are convinced that its use in the instant case did not constitute such a violation."<sup>36</sup>

The following circumstances were found to negate any improper inference. During trial on a single charge of armed robbery evidence of other armed robberies had been admitted. This evidence, approved by the supreme court for the purpose of showing a "system," included identification testimony by the victims of other armed robberies. While questioning one of these other victims about his pre-trial identification of the defendant, the prosecutor twice referred to "mug shots." The court concluded, however, that the jury could have drawn only two "reasonable inferences" as to when the photographs were taken, namely, upon the defendant's arrest for the crime charged or upon his arrest for one of the other armed robberies about which the jury had heard testimony. As a result, the reference to "other crimes" did not constitute a reference to *inadmissible* evidence of other crimes.

The court did not indicate what "circumstances different from those presented here, might violate the terms of article 770(2). . . ."<sup>37</sup> The absence of admissible evidence of other crimes might well constitute

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33. See LA. R.S. 13:1580 (1950), as amended by La. Acts 1975, No. 756, § 1; and LA. R.S. 13:1569 (13), (14), (15) (1950), as amended by La. Acts 1975, No. 738, § 1.

34. 325 So. 2d 780 (La. 1975).

35. *Id.* at 782.

36. *Id.* at 786.

37. *Id.*

sufficiently different circumstances to constitute a reference to other crimes. The prudent prosecutor would do well to eliminate the term "mug shot" from his courtroom vocabulary because it serves no legitimate purpose that cannot be satisfied equally well by the word "photograph," and its potential for unnecessary prejudice to the defendant may prompt the court in future cases to declare a mistrial.

#### MOTION FOR ACQUITTAL

In *State v. Smith*<sup>38</sup> the defendant moved unsuccessfully for a judgment of acquittal after the prosecution's evidence in a non-jury trial. Thereafter he offered evidence in defense to a misdemeanor charge of receiving stolen goods, but, nevertheless, was convicted. On appeal, he contended that the trial judge should have granted his motion because the prosecution produced no evidence of an essential element of the crime, *i.e.*, that he knew or had good reason to believe that the automobile in question was stolen. The supreme court affirmed the conviction finding that the missing element in the proof had been supplied during the defense case by the testimony of the defendant and two other witnesses.

The defendant urged that denial of the motion for acquittal should be reviewed on the basis of the prosecution's evidence alone. Rejecting this contention, the court held that "on review the appellate court may consider, in determining whether there is evidence of guilt, not only the evidence before the court at the time of the motion but the entire admissible evidence contained in the record of the trial."<sup>39</sup> The court's holding rests not upon any provision of the Code of Criminal Procedure, but upon an adoption of the position held by a majority of American jurisdictions and approved by the ABA Standards.<sup>40</sup> Neither article 778 nor any other code provision specifies the basis for appellate review of a denial of a motion for acquittal. The majority of states, however, base review upon the entire record according to a "waiver theory."

The "waiver" rule has been adopted from civil procedure.<sup>41</sup> Making the motion does not waive the defendant's right to present evidence if the motion is denied. If the defendant offers evidence after the denial of his motion, however, he waives the right to have the motion reviewed solely on the basis of the prosecution's evidence. Thus after denial of his motion the

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38. 332 So. 2d 773 (La. 1976).

39. *Id.* at 776.

40. ABA STANDARDS, TRIAL BY JURY § 4.5 (1968) [hereinafter cited as TRIAL BY JURY].

41. *Cephus v. United States*, 324 F.2d 893, 896-97 (D.C. Cir. 1963).



defendant faces a dilemma. Should he rest his case without putting on a defense, thus gambling that the appellate court will reverse the trial court? Or do the uncertainties of appeal indicate he should use the opportunity to present a defense? This dilemma has aroused the criticism that the "waiver" doctrine "unfairly forces the defendant to put on a case. . . ."42 The supreme court nevertheless adopted the majority rule, citing the fact that "the authoritative, scholarly, and balanced American Bar Association standards have recently reviewed the issue and have reached the considered recommendation that the merits of the majority view outweigh its demerits."<sup>43</sup>

Reliance in this instance upon the ABA Standards seems inappropriate. Article 778 differs significantly from the recommendations of the ABA Standards regarding the motion for acquittal.<sup>44</sup> Moreover, the "waiver" theory expressed by *Smith* differs from that underlying the majority rule adopted in the ABA Standards. The "waiver" doctrine of the ABA Standards contemplates that the defense will renew its motion at the close of all the evidence.<sup>45</sup> Without such a renewal the defendant is not entitled to obtain review of the motion's denial because he has waived review by presenting evidence.<sup>46</sup> Thus the theoretical basis for reviewing all evidence, not simply that of the prosecution, stems from the fact that the only motion being reviewed is the one made at the close of all the evidence. *Smith*, however, "expressly d[id] not hold, . . . and article 778 provides otherwise. . . . that a defendant waives his right to have the denial of his

42. 332 So. 2d at 775.

43. *Id.* at 776.

44. Standard 4.5 of TRIAL BY JURY provides for a judgment of acquittal (directed verdict), and a judgment notwithstanding the verdict in jury cases. Louisiana's 1966 Code of Criminal Procedure does not provide for a judgment notwithstanding the verdict. Article 778 of the Code of Criminal Procedure was amended in 1975 to eliminate the directed verdict from jury trials.

45. See TRIAL BY JURY, commentary to § 4.5(a).

46. "A number of cases hold that if the defendant does then introduce evidence, and does not renew his motion for judgment of acquittal at the close of all the evidence, the earlier motion can no longer be considered, and the appellate court cannot review the sufficiency of the evidence except for plain error. If this meant only that the motion must be made twice, it would be a harmless, if rather pointless, requirement. It stems, however, from a more important rule. This is that the introduction of evidence by defendant after his motion has been denied is a waiver of that motion. Accordingly even if the motion is renewed at the close of all the evidence, it is only the denial of the later motion that may be claimed as error, and the conviction will be affirmed, even though the prosecution may have failed to make a prima facie case, if the evidence for the defense supplied the defect, and the whole record is sufficient to sustain a conviction." C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 463 (3d ed. 1969) (criminal).

motion for acquittal reviewed by introducing defense evidence."<sup>47</sup> Accordingly, the court reviewed *both* defense motions for acquittal: the one made at the close of the prosecution's evidence and the one renewed at the close of all the evidence. Unlike the majority rule, the *Smith* "waiver" doctrine applies only to the question of which evidence, not also which motion, will be reviewed.

Disregarding such disparities, the court agreed with the "value adhered to" by the majority rule that:

Despite the potential unfairness of the policy to a defendant, an erroneous denial of a motion for acquittal is nevertheless not cause for reversal if the evidence as a whole, including the defendant's case, justifies the affirmance as guilty (assuming no other reversible error). To reverse, in such an instance, is to reverse not because the evidence as a whole does not prove guilt; but because of an erroneous interlocutory ruling which was cured by subsequent evidence.<sup>48</sup>

#### RESPONSIVE VERDICTS

*Roberts v. Louisiana*<sup>49</sup> cited the operation of Louisiana's responsive verdict system in murder cases as a factor contributing to the unconstitutionality of the state's death penalty scheme. The Court's plurality opinion disapproved the fact that "every jury in a first-degree murder case is instructed on the crimes of second-degree murder and manslaughter and permitted to consider those verdicts *even if there is not a scintilla of evidence to support the lesser verdicts.*"<sup>50</sup>

The responsive verdict system, however, was only one factor in the demise of the death penalty scheme. First of all, the mandatory nature of the death penalty was a sufficient cause for unconstitutionality.<sup>51</sup> Secondly, it was the responsive verdict system together with the fact of "no meaningful appellate review of the jury's decision" that indicated the death penalty scheme "fail[ed] to comply with *Furman's* requirement that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences."<sup>52</sup>

In response to *Roberts*, the Louisiana legislature enacted a new death

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47. 332 So. 2d at 776.

48. *Id.*

49. 96 S. Ct. 3001 (1976).

50. *Id.* at 3007 (Emphasis added).

51. *See id.*, citing *Woodson v. North Carolina*, 96 S. Ct. 2978 (1976).

52. 96 S. Ct. at 3007.

penalty scheme.<sup>53</sup> Act 657 of 1976 amended the definition of first and second degree murder.<sup>54</sup> Act 694 of 1976 provided for a separate sentencing hearing and review by the supreme court of every death sentence to determine if the death sentence is "excessive." No amendments were made, however, to the responsive verdict procedure.<sup>55</sup>

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53. La. Acts 1976, No. 657 *amending* LA. R.S. 14:30 (Supp. 1975); La. Acts 1976, No. 694, *adding* LA. CODE CRIM. P. arts. 905-05.9.

54. *Formerly*, first and second degree murder were defined as follows:

§ 30. First degree murder

First degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape, aggravated burglary, or armed robbery; or

(2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or peace officer who was engaged in the performance of his lawful duties; or

(3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or

(4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or

(5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.

§ 30.1 Second degree murder

Second degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or inflict great bodily harm; or

(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill.

*Presently*, first and second degree murder are defined as follows:

§ 30. First degree murder

First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm.

§ 30.1 Second degree murder

Second degree murder is the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill.

55. House Bill No. 1506 (1976) which would have amended article 814 to eliminate the responsive verdicts to first degree murder, aggravated rape, and aggravated kidnapping was favorably reported by the House Committee on the Administration of Criminal Justice but was defeated on the floor of the House of Representatives.

The new scheme undoubtedly faces constitutional challenges. The separate sentencing hearing, because it focuses on the aggravating and mitigating circumstances of the offense, eliminates the mandatory quality of the scheme.<sup>56</sup> Appellate review of the death sentence for excessiveness provides a "safeguard against the arbitrary and capricious imposition of death sentences."<sup>57</sup> The unamended responsive verdict system remains a likely basis for attack because the jury in a first degree murder case yet can return a verdict of second degree murder or manslaughter "even if there is not a scintilla of evidence to support the lesser verdicts."<sup>58</sup> On the other hand, a significant constitutional defect in the responsive verdict system seems to have been eliminated by the separate sentencing hearing; that is to say, the responsive verdict system no longer "invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate."<sup>59</sup>

Apart from the constitutional considerations, however, the redefinitions of first and second degree murder have, it seems to the writer, actually undermined the rationale of the responsive verdict system. The former first degree murder statute included the elements of second degree murder. First degree murder required proof of specific intent to kill or to inflict great bodily harm *plus* an enumerated felony or other aggravating circumstance. Second degree murder required proof of *either* the specific intent element *or* an enumerated felony. Thus evidence of specific intent to kill or to do great bodily harm necessary for first degree murder also proved one type of second degree murder. As redefined, first degree murder requires proof of specific intent to kill or to do great bodily harm, but no longer requires proof of any independent felony or other aggravating circumstance. Second degree murder under the new definition consists only of felony murder, *i. e.*, a killing during perpetration or attempted perpetration of one of several enumerated felonies. Specific intent to kill or to do great bodily harm is irrelevant to second degree murder. The present definitions of first and second degree murder, in other words, are mutually exclusive. Although article 814 of the Code of Criminal Procedure continues to list second degree murder as a responsive verdict to first degree murder, it must be recognized that evidence probative of murder in the first degree no longer actually proves murder in the second degree.

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56. Compare *Roberts v. Louisiana*, 96 S. Ct. 3001, 3006 (1976) with *Gregg v. Georgia*, 96 S. Ct. 2909, 2932-41 (1976).

57. 96 S.Ct. at 3007.

58. *Id.*

59. *Id.*

In the past the Louisiana Supreme Court has refused, for example, in murder<sup>60</sup> and rape<sup>61</sup> cases, to determine whether evidence presented at a particular trial warranted conviction on a responsive verdict. Nevertheless, in some cases<sup>62</sup> the court has analyzed the rational basis for the legislative determination that a particular verdict is responsive to another to be whether the greater offense necessarily includes the elements of the lesser offense.<sup>63</sup> Application of the same analysis to the present first and second degree murder statutes, the writer respectfully submits, demonstrates the lack of a rational basis for making second degree murder responsive to first degree murder.

#### MOTION FOR A NEW TRIAL

In *State v. Gilmore*<sup>64</sup> the supreme court reversed the trial court's denial of a new trial which had been requested on the basis of newly discovered evidence.<sup>65</sup> In so doing, the court recognized an expanded declaration-against-interest exception to the hearsay rule,<sup>66</sup> thus making certain newly offered testimony admissible and found that the evidence "was material and controverted much of the State's evidence upon trial . . . [and] would probably have changed the verdict of the jury."<sup>67</sup> The court also discussed the statute's requirement that failure to discover the

60. *State v. West*, 319 So. 2d 901, 905-06 (La. 1975); *State v. Peterson*, 290 So. 2d 307, 311 (La. 1974); *State v. Cooley*, 260 La. 768, 770-73, 257 So. 2d 400, 401-02 (1972).

61. *State v. Miller*, 237 La. 266, 111 So. 2d 108 (1959).

62. *See State v. Peterson*, 290 So. 2d 307 (La. 1974); *State v. Miller*, 237 La. 266, 111 So. 2d 108 (1959).

63. *See* 290 So. 2d at 309-10.

64. 332 So. 2d 789 (La. 1976). The writer wishes to acknowledge that he represented the state during some of the post-trial proceedings in this case, although he did not act as trial counsel for the state. Thus, his views may be influenced by considerations outside the written record.

65. LA. CODE CRIM. P. art. 851 provides in part:

" . . . .

The court, on motion of the defendant, shall grant a new trial whenever:

. . . .

(3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at trial it would probably have changed the verdict or judgment of guilty;

. . . ."

66. "Therefore, we hold, under these circumstances, the statements which clearly were against Sparks' penal interest would be admissible as an exception to the hearsay rule." 332 So. 2d at 792.

67. *Id.* at 793-94.

evidence prior to or during trial not have resulted from a lack of "reasonable diligence."

The defendant was charged with second degree murder<sup>68</sup> and convicted of manslaughter for a killing which occurred outside a barroom. The state produced evidence that the defendant and a companion approached a group of people, that the companion became embroiled in an argument with a third person, and that the companion produced a gun over which he and the third party struggled. The state witnesses testified that the defendant produced a second gun with which he shot and killed the third party. The defense claimed that the companion committed the killing. One defense witness testified that the companion, who had since died, confessed to him that he did the killing.

At the hearing on the motion for a new trial, the defense produced three witnesses directly contradicting the state's evidence. Two of them testified that one of the state's eyewitnesses to the crime had not in fact been present at the scene of the crime. The same witnesses also testified that neither saw the defendant in the vicinity of the barroom on the night of the crime. Finally, a third witness testified that the dead companion had, on the day following the killing, admitted to the actual shooting.

Of particular interest is the court's statement concerning "reasonable diligence."

Had the defendant been represented by retained counsel perhaps we would expect the kind of diligent investigation for evidence which would have resulted in the earlier tracking down of these witnesses. However, the defendant here, who was incarcerated from the time of his arrest until trial, was provided a defense by court appointed counsel through the Orleans Indigent Defender Program. In light of its limited resources we are not prepared to say that it failed to exercise reasonable diligence in this case. *However, even if it did, the defendant, as an indigent, should not be made to suffer because of a possible shortcoming of counsel provided by the court.*<sup>69</sup>

The court's treatment of the "reasonable diligence" requirement is subject to two possible interpretations. Standing alone, the statement that "the defendant, as an indigent, should not be made to suffer because of a possible shortcoming of counsel provided by the court" might indicate that the court considers the "reasonable diligence" requirement irrelevant in

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68. The original indictment for the first degree murder was amended to second degree murder by the state approximately four months prior to trial.

69. 332 So. 2d at 793 (Emphasis added).

cases involving indigents. On the other hand, the court seems to have been faced with a “hard case,” requiring reversal “in the interest of fairness and justice.”<sup>70</sup>

The “reasonable diligence” requirement reflects the principle that “[a]n application for a new trial on the ground of newly discovered evidence should be viewed with extreme caution.”<sup>71</sup> To ignore the requirement generally in the case of indigents would lessen the incentive in some cases to do the necessary pre-trial investigation. The indigent who is unquestionably guilty might benefit by withholding investigative leads from his court-appointed counsel in order to insure the production of “new and material evidence” after a possible conviction.

The writer respectfully submits that, read in the context of its unusual facts, *Gilmore* does not stand for a general elimination of the “reasonable diligence” requirement in the case of indigents. *Gilmore* involves an eyewitness to the killing and two other witnesses from the vicinity of the crime who did not testify at trial, but who contradicted the state’s witnesses on the only issue in the case, identity of the killer. Not surprisingly, the supreme court disagrees with the trial court’s conclusion that the new evidence “would not have altered the jury’s verdict.”<sup>72</sup> The court’s disregard of the “reasonable diligence” requirement, it is submitted, simply reflects its willingness in some few compelling cases to “review the exercise of discretion in the trial judge’s refusal to grant a new trial where the ‘ends of justice will be served’ as an error of law. . . .”<sup>73</sup>

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70. *Id.* at 794.

71. *State v. Jefferson*, 305 So. 2d 465, 468 (La. 1974).

72. 332 So. 2d at 793.

73. *The Work of the Louisiana Appellate Court for the 1972-1973 Term—Criminal Procedure II*, 34 LA. L. REV. 427, 435 (1974).