Procedure: Criminal Trial Procedure and Postconviction Procedure

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CRIMINAL TRIAL PROCEDURE AND POSTCONVICTION PROCEDURE

Cheney C. Joseph, Jr.*

CAPACITY TO STAND TRIAL

An accused who is unable to understand the nature of the proceedings against him or to assist counsel in his own defense cannot be brought to trial1 nor be held on criminal charges for an indefinite period of time.2 However, prior to State ex rel. Lockhart v. Armistead,3 no Louisiana decision had formulated a test to determine the point at which a mentally incapacitated accused had to be released from criminal custody and judicially committed.

In Lockhart the defendant was charged with simple burglary; after a sanity commission determined his lack of present capacity to stand trial, he was committed to the East Louisiana State Hospital at Jackson. During the next fourteen months, physicians concluded that his condition, atherosclerosis with cerebral infarction, was permanent and irreversible. Following a habeas corpus proceeding instituted on behalf of the defendant, Lockhart was released on probation as it was decided he was no danger to himself or society.4

The supreme court ordered Lockhart discharged from all state custody, including probationary supervision. The court stated that the state can only hold a criminally committed accused for a reasonable period of time necessary to determine the probability that the defendant will attain capacity to stand trial.5 Therefore, on due process grounds, the state cannot continue to hold an accused under criminal commitment after it

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1. LA. CODE CRIM. P. arts. 641-49.
3. 351 So. 2d 496 (La. 1977).
4. Id. at 497-99.
5. In its opinion, the court held that a commitment to determine capacity to stand trial must be limited to a reasonable period. Id. at 499. In Lockhart it was shown that the likelihood of improvement was nonexistent.
becomes clear that he will "not attain competence to stand trial."  

Although the accused was able to show that he would probably never have that capacity, the court did not place the burden of proof on him. Rather, the court said that the state, because the defendant is subject to state custody, must justify further custody by proving that a reasonable probability exists that the defendant will eventually be competent to stand trial. The alternative of civil commitment serves the interest of protecting society from dangerous persons while assuring that the defendant's indeterminate commitment is surrounded with proper safeguards.  

**Juvenile Delinquency Proceedings—Right to Public and Jury Trial**

In *In re Dino*, the supreme court held that children alleged to be delinquent may opt to have the adjudication hearing conducted in a proceeding open to the public. Revised Statutes 13:1579(B) had provided that such proceedings must not be public and was, hence, declared unconstitutional. The supreme court concluded that a public trial is "among the essentials of due process and fair treatment" required by the "due process" provision of the Louisiana Constitution. The court analogized the protections of public trial to those afforded the accused by trial by jury and found the concern with "possible oppression" to lie at the heart of both. The court was satisfied that public exposure of the evidence and the manner in which proceedings are conducted may play a crucial protective role "by exposing improper judicial behavior to the indignation of the community."  

6. *Id.* at 498.
8. 359 So. 2d 586 (La. 1978).
9. *Id.* at 597.
11. 359 So. 2d at 597.
12. *Id.* In response to *Dino*, the new Louisiana Code of Juvenile Procedure (La. Code Juv. P.) provides that the adjudication hearing in delinquency proceedings shall be public if the child so moves. La. Code Juv. P. art. 69. Other hearings in delinquency proceedings are not open to the public, however, which is reflective of the desire to
Despite the analogy to jury trials, the majority turned aside a move to extend jury trials to delinquency proceedings. According to the court, "Louisiana due process" does not require jury trials even though the delinquent potentially faces a lengthy term of detention.

The legislature might well consider the question of jury trials and determinate sentences in delinquency proceedings where the juvenile is accused of serious criminal behavior. There is a legitimate argument that juveniles who commit serious crimes should be treated in the same manner as their adult counterparts and punished accordingly. The question of transfer for prosecution as an adult is closely related: If a youthful offender wants a jury trial, possibly he should be able to opt for one—and be required to opt for the more serious consequences of an adult conviction. That is not to say that he should be imprisoned with adult offenders if convicted. To make the option reasonable the Department of Corrections should be mandated and funded to create separate facilities for young offenders. Special sentencing alternatives and procedures for youthful offenders could also be enacted to provide trial courts with greater dispositional flexibility.

retain mandatory confidentiality to the extent constitutionally permissible. See La. Code Juv. P. art. 14(E). The legislature could, for example, have allowed both the state and the child to move for a public proceeding in delinquency matters.

13. 359 So. 2d at 597, 598. The writer applauds Justice Tate for his critical vote on both decisive issues. He joined the Chief Justice and Justices Marcus and Summers to form the majority on the question of no right to trial by jury and joined Justices Dennis, Dixon, and Calogero to form a majority on extending the right to public trials to accused juveniles. The Tate position is sound and logical. The accused delinquent is afforded ample protection by being able to open the proceedings to public scrutiny and does not need the added protection of a jury trial in order to assure fundamental fairness in delinquency proceedings.


15. See 18 U.S.C. § 5005 et seq. (1976). See also 18 U.S.C. § 5039 (1976). In the writer's opinion, there is also much merit to Justice Dennis' well reasoned and thoughtful dissent on the jury trial issue. He does a masterful job of speaking for the point of view of the majority of his colleagues as author of the opinion of the court and then expressing his own dissenting views. However, with deference, the writer is pleased that his position did not carry the majority. The problems alluded to may be alleviated by allowing the juvenile a fair option of choosing to be treated as an adult or to be treated as a juvenile. The writer advisedly uses the term "fair option" because one could and should justly criticize the fairness of such a Hobson's choice if adult treat-
JOINDER AND SEVERANCE

In 1975 the legislature radically changed article 493 of the Code of Criminal Procedure regulating joinder of offenses.16 Rather than limiting each indictment to charging a single offense, the amendment to article 493 permitted joinder of similar offenses, offenses arising from the same transaction, and offenses committed as part of a common scheme with the limitation that the offenses joined be triable by the same mode of trial. Thus, offenses triable by a six-member jury cannot be joined with those triable by a twelve-member jury; offenses triable by a twelve-member jury whose verdict need not be unanimous cannot be joined with those requiring a unanimous verdict.17

The new joinder provisions are modeled on a similar provision of the Federal Rules of Criminal Procedure.18 However, in adopting the standard for severance the legislature did not initially adopt the federal “interest of justice” rule.19 Rather, the original standard for pre-trial motions to sever was whether severance was “appropriate to promote a fair determination of the defendant’s guilt or innocence.”20 This test became critical in cases of joinder of “similar offenses.” The similarity required for purposes of initial joinder as well as for purposes of keeping the counts together for trial over the defendant’s objection was outlined in State v. Carter21 and a series of subsequent cases.22

In Carter two unrelated armed robberies were joined for trial, and the court found that they were similar enough to be

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joined, upholding the denial of a motion to quash grounded on improper joinder.\textsuperscript{23} However, the court reversed and remanded the case because of the trial court’s denial of the defendant’s pre-trial motion for severance for separate trials. Although the offenses were similar in the manner of perpetration and fairly close in time to one another, the court determined that the two offenses would not have been mutually admissible under the standards of \textit{State v. Prieur}\textsuperscript{24} and progeny\textsuperscript{25} had they been separately charged. In evaluating the need for severance, the court relied heavily on whether the offenses would be mutually admissible in separate trials for each offense. Offenses arising from the same transaction and those which are part of a common scheme would, of course, normally be mutually admissible. The “similarity” test for severance seems closely related to the \textit{Prieur} standard, although the “similarity” test for initial joinder seems to be more flexible.\textsuperscript{26}

In addition to mutual admissibility, the court also said that the ability of the fact finder (judge or jury) to compartmentalize the evidence and to apply the law intelligently to the evidence presented must be considered.\textsuperscript{27} Obviously, mutual admissibility alone will not suffice; the complexity of the case could necessitate severance for trial even if the same facts could be presented in both trials.

Article 495.1 of the Code of Criminal Procedure was amended in 1978 to adopt the interest of justice standard of the federal rules rather than the “appropriate to promote” test applied in \textit{Carter}.\textsuperscript{28} The writer assumes that the legislature

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\item \textsuperscript{23} 352 So. 2d at 610, 611. In \textit{State v. Rheams}, 352 So. 2d 615 (La. 1977), decided the same day as \textit{State v. Carter}, 352 So. 2d 607 (La. 1977), the court refused to consider the defendant’s improperly presented motion to quash based on misjoinder. See La. Code Crim. P. art. 495.
\item \textsuperscript{24} 277 So. 2d 126 (La. 1973).
\item \textsuperscript{26} \textit{State v. Carter}, 352 So. 2d 607 (La. 1977).
intended that trial courts be given broader discretion in determining whether the tests of mutual admissibility and ability to compartmentalize had been met. The effect of confronting a jury with so much evidence of wrongdoing that jurors feel that the defendant must be guilty of "something" and convict him despite the weakness of evidence on each individual count is a problem created by joinder as well as by the admission of evidence of extraneous crimes. The "smoke-fire" analogy is a serious problem, and the trial courts will surely continue to evaluate pre-trial motions for severance in those terms.

SANCTION FOR SEQUESTRATION VIOLATION

When the 1966 Code of Criminal Procedure was adopted, reference to disqualification of witnesses for violation of sequestration orders was omitted because the contempt provisions of the Code were seen as adequate sanctions. Nevertheless, the supreme court has upheld the discretion of the trial court to refuse to permit disobedient witnesses to testify.

In State v. Jones, although continuing to recognize the inherent authority of the trial court to disqualify a witness for a sequestration violation, the supreme court required a finding that the party seeking to call the witness participated in or knew of the violation in order to justify disqualification. In Jones a witness subpoenaed by the district attorney remained in the courtroom after the sequestration order was imposed and heard the victim's testimony. Only later did defense counsel discover that the witness's version of the events was favorable to the defendant.

The trial court refused to allow the defense to call the witness or to make a proffer of his testimony for the record. On

Crim. P. 14. In State v. Sepulvado, 342 So. 2d 630 (La. 1977), the supreme court held that changes in the rules of joinder are procedural and not substantive. Thus the 1978 amendment will affect all matters tried after September 8, 1978, the effective date of the amendment, despite the date of the offense in question.

31. LA. CODE CRIM. P. art. 764, comment (b).
33. 364 So. 2d 530 (La. 1978).
appeal the supreme court remanded the matter to the trial court to determine whether the excluded testimony was “material and significant” to a degree which would require reversal and to determine whether the defendant or his counsel knew of, procured or consented to the sequestration violation. Otherwise, disqualification of the witness is not a “constitutionally permissible means of insuring reliable testimony.”

Arguably the witness was not in violation of the sequestration order because he was not called forward when the rule of sequestration was invoked; therefore the court could have approached the problem by concluding that neither the defense counsel nor the witness were in violation of the sequestration order because neither of them knew at the time of the order that the witness would be called. Further, there was no showing of a lack of diligence on defense counsel’s part in not realizing that a state witness might have favorable testimony; disclosure of such evidence is a duty of the district attorney. Nevertheless, the court’s decision confronted the problem of disqualification of a disobedient defense witness.

Several months after Jones, the court again addressed the problem of disqualification. In State v. Western, an aggravated rape case, the witness, the sister of the accused, sat in the courtroom while the victim testified. Identifying the defendant as her assailant, the victim testified that at the time of the rape the defendant had a “flat top” haircut but no facial hair. The defendant’s sister would have testified (as did the defendant’s mother and girlfriend) that the defendant wore a moustache and an “afro” haircut at the time of the rape (as he apparently did at the trial).

In affirming the conviction, the majority opinion by Chief

34. Id. at 532.
35. The court stated that the disqualification of a defense witness for a sequestration violation would not be permitted unless it was committed with the “consent, connivance, procurement or knowledge of the defendant or his counsel.” 354 So. 2d at 532. The supreme court was quoting from the opinion of the United States Court of Appeals for the Fifth Circuit in Braswell v. Wainwright, 463 F.2d 1148 (5th Cir. 1972).
36. 354 So. 2d at 532.
38. 355 So. 2d 1314 (La. 1978).
Justice Sanders noted the cumulative nature of the witness's testimony and, without citing the test outlined in *Jones*, upheld the trial court's decision to exclude the witness. In a concurring opinion, Justice Dennis, the author of *Jones*, noted that since the witness was the defendant's sister he "must have had knowledge of her presence in the courtroom during the trial."\(^{39}\)

In future cases, to avoid federal intervention through habeas corpus review,\(^{40}\) the writer submits that trial courts should carefully follow the rationale of *Jones*. If the district attorney seeks an order to disqualify a witness for violation of a sequestration order, the trial court should hold a hearing out of the presence of the jury at which the prosecution should be allowed to show either that the witness did in fact violate a sequestration order or that the defense counsel inexcusably failed to have a person who he knew or should have known would be called as a witness placed under the order of sequestration. The trial court should also require the state to prove by clear and convincing evidence that the defendant or his counsel consented to or at least knew of the violation or of the person's presence in the courtroom.\(^{41}\) The defense should be afforded an opportunity to establish the nature of the witness's testimony. The trial court should then balance the importance of the witness's testimony against the severity and flagrancy of the involvement by the defense in the violation of the sequestration order.

This balancing of interests by the court is fair and clearly dictated by federal constitutional principles.\(^{42}\) Although sequestration to prevent collusion, undue influence and perjury is mandatory when invoked by either party,\(^{43}\) the defendant's constitutional right to present evidence in his defense may outweigh this interest unless the defendant is personally involved.

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39. Id. at 1322.
40. See Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1974); Braswell v. Wainwright, 463 F.2d 1148 (5th Cir. 1972).
41. No such standard is adopted in State v. Jones, 354 So. 2d 530 (La. 1978). However, the supreme court has previously adopted this standard of proof where the critical question of admissibility of evidence of other crimes is involved. See State v. Prieur, 277 So. 2d at 129.
42. See Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1974); Braswell v. Wainwright, 463 F.2d 1148 (5th Cir. 1972).
43. LA. CODE CRIM. P. art. 764.
in or responsible for the violation. The trial court should consider penalizing counsel rather than the defendant if counsel alone is responsible for the violation. Bar association and contempt sanctions may be more appropriate than causing the accused to suffer the consequences of counsel's misconduct or ineptness.

The writer submits that, in fairness, the same approach should be followed if defense counsel moves to exclude testimony of a witness offered by the district attorney. Although no constitutional rights are involved, absent involvement of the party offering the witness, the state and the fact finder should not be deprived of the testimony. The traditional penalties of impeachment by exposure of the violation to the jury and contempt should suffice.

RESPONSIVE VERDICTS—PROCEDURAL CHANGES

In *State v. Martin*, the defendant was prosecuted in November of 1975 for a simple burglary committed in August of 1975. Prior to the trial, but after the commission of the offense, article 814 of the Code of Criminal Procedure, relating to responsive verdicts, was amended to provide that attempted burglary was responsive in the trial of an indictment charging simple burglary. Before the amendment, the only verdicts permitted were guilty and not guilty (and not guilty by reason of insanity if pleaded). The defendant objected to the trial court's failure to instruct the jury that attempted simple burglary was responsive.

On appeal the supreme court found that the 1975 amendment was procedural in nature and thus was applicable to the trial of the case; therefore, the conviction was reversed and the case remanded for a new trial. The court noted that the legislature could have, by specific provision, limited the procedural change to trials for offenses committed after the effective date of the legislation, but did not choose to do so.

The court's approach is logical considering the circum-

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44. 351 So. 2d 92 (La. 1977).
45. See LA. CODE CRIM. P. arts. 814(41), 816 (as they appeared prior to 1975 La. Acts, No. 335).
stances of the case. Previously article 814 prevented attempted simple burglary from being responsive although the attempt is certainly a "lesser and included grade of the same offense." The effect of the amendment was only to lift a procedural bar and not to expose the defendant to criminal liability for an offense not created at the time of his conduct.

The same result should not follow in cases of amendments to include as responsive verdicts offenses not created at the time of the offender's conduct. For example, if the legislature creates a new offense of a lesser nature and makes it responsive in trials of indictments charging the greater offense, the jury cannot be permitted to convict the accused of "a lesser offense" enacted after the time of the conduct in question.47

**Closing Argument**

In *State v. Hamilton* the assistant district attorney in his closing argument told the jury that he would not have brought the case to trial had he not believed the testimony of the state witnesses and that he had independently corroborated their testimony. Although the assistant district attorney may have been responding to defense counsel's argument, the supreme court was certainly required to reverse and remand for a new trial. As the court made clear by its citation of *State v. Accardo,* Louisiana prosecutors are not permitted to make an argument which implies to the jury that an independent investigation by the prosecution has revealed the guilt of the accused. Such an argument invites the jurors to speculate as to the presence of facts indicating guilt which were not offered into evidence for some "technical" reason. Such argument also invites jurors to convict because the prosecutor, a public off-

47. For example, by 1978 La. Acts, No. 239, adding La. R.S. 14:43.1, and No. 394, adding La. R.S. 14:34.1, the legislature, on recommendation of the Louisiana State Law Institute, created the offenses of sexual battery and second degree battery. They were not made responsive to the greater offenses of aggravated rape and aggravated battery because, among other reasons, they could not be responsive to offenses committed prior to their enactment.
48. 356 So. 2d 1360 (La. 1978).
49. Id. at 1362.
50. 129 La. 666, 56 So. 631 (1911).
cial who is bound to seek the truth, assures them that the accused is guilty and not necessarily because the evidence proves guilt. As guilt must be established solely on the basis of evidence introduced at the trial, reversal is necessary to compel adherence to that principle.51

Motion for a New Trial

In a criminal trial if the defense presents a case, the state is entitled to rebut the defense evidence,52 and the district attorney has the last chance to present evidence.53 However, when unanticipated prosecution rebuttal evidence can be strongly impeached by other defense evidence, no result is clearly forecast by the Code of Criminal Procedure.54

In State v. Ellender55 the supreme court seems to have carved out a special ground for a new trial when the defendant makes a strong post-trial showing that the state's unanticipated rebuttal evidence may have been perjured. In Ellender the defendant was charged with aggravated criminal damage to property in connection with labor violence. The evidence was disputed as to his incitement of and participation in the violence which resulted in death and in damage to property. The defendant testified that he had no idea that the damage would be done and made broad statements denying guilty knowledge.

In rebuttal the state called as a witness a confessed participant in the violence who testified that the defendant had on other occasions inspired him to commit wrongful acts of damaging property in connection with labor troubles. Following his conviction, the defendant, in a motion for a new trial, sought to call twenty-one witnesses to contradict the state's rebuttal witness's testimony. The trial court denied the motion.

51. If defense counsel improperly conducts himself in argument, the district attorney's remedy is contemporaneous objection and request for an admonition by the trial court. See LA. CODE CRIM. P. art. 774 (delineating the proper scope of closing argument); LA. CODE CRIM. P. arts. 771 and 841.
52. LA. CODE CRIM. P. art. 765(5).
53. LA. CODE CRIM. P. art. 765.
54. LA. CODE CRIM. P. art. 765(5) allows the trial court to "permit the introduction of additional evidence prior to argument."
55. 354 So. 2d 600 (La. 1978).
On appeal the supreme court found that the state's witness's testimony was proper rebuttal in light of the issues raised by the defense. However, the court found that the defendant in his motion for a new trial established that the state's rebuttal witness testified falsely, and the court seems to have predicated the reversal on that finding.

In the writer's opinion the court's emphasis is unfortunate. The opinion is couched in constitutional terms relating to the perjured nature of the state's evidence with the intimation that the prosecutors had reason to believe that it might be perjured. A more traditional approach would have sufficed. It seems only fair to hold that the defendant may be entitled to a new trial if counsel makes a showing that evidence is available which strongly contradicts unanticipated state rebuttal evidence. In such a case, prior to the state's rebuttal, the defendant could not be expected to know that such evidence would be necessary or admissible. Simply put, when the issues are broadened by the defense's case, and the state rebuts, considerations of fairness dictate that defense counsel be given an opportunity to challenge the credibility of such evidence. Absent a statutory right to rebut the rebuttal, the proper vehicle is the motion for a new trial. Where critically damaging other crimes evidence becomes admissible only in rebuttal, an opportunity to meet and contradict such evidence seems necessary to serve the "ends of justice."

**Disclosure of Presentence Information**

Through a series of cases, the supreme court has moved closer to adopting standards regulating the exercise of discretion to disclose presentence data to the accused. The decisions

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56. Id. at 503.
57. However, if the defendant is prepared to impeach the rebuttal, Code of Criminal Procedure article 765(5) gives the trial court discretion to permit such evidence to go to the jury at that time.
58. See LA. CODE CRIM. P. art. 851(3) and (5).
59. LA. CODE CRIM. P. art. 851(5).
61. LA. CODE CRIM. P. art. 877 permits the trial court to disclose to the defendant or his counsel the "factual contents and conclusions of any pre-sentence investigation report."
do not approach the problem in precisely those terms, but the writer submits that this should be the ultimate and logical result.

In *State v. Underwood* the defendant, a businessman with no prior criminal record, was convicted of three counts of distribution of marijuana to an undercover police officer. He was sentenced to serve twenty-five years at hard labor. The closing paragraphs of the opinion noted the severity of such a sentence for a first offender convicted of a "non-dangerous offense."  

After imposition of sentence and pending appeal, the defendant petitioned the trial court for relief, alleging that the exceptional sentence must have been based on "prejudicial and inaccurate information in a pre-sentence report." The defense sought disclosure of the presentence report and an opportunity to rebut unfavorable information. When relief was denied, the defendant applied for writs and the matter was remanded by the supreme court to the trial court. At the hearing conducted on remand, the trial court refused to disclose the entire presentence report. The trial court informed the defense counsel that the report contained an "unevaluated" intelligence report of information supplied by a former employee of the defendant. The anonymous informant, apparently in an effort to help himself in connection with unrelated criminal charges, told narcotics investigators that the defendant was bringing large quantities of marijuana into the area for distribution. The sentencing judge stated that he had not considered the information in imposing sentence. However, in discounting such disclaimer, the supreme court did not ignore the "reasonable probability" that he was "at least unconsciously influenced."  

The court remanded for resentencing and ordered that the defendant be given access to the presentence report and an opportunity "to rebut as false any derogatory information in

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62. 353 So. 2d 1013 (La. 1977).
63. *Id.* at 1019.
64. *Id.* at 1015.
65. *Id.* at 1016.
66. *Id.* at 1019.
In granting relief, the court relied not only on its somewhat strained interpretation of the statutes but on consideration of due process. Significantly, the court recognized the relationship between fundamental fairness in the sentencing process and a right to know and challenge the information relied on by the sentencing court.

In *State v. Segers* the defendant was sentenced to four years at hard labor for conspiracy to distribute marijuana and eight years for possession with intent to distribute marijuana. In addition, he was sentenced to pay stiff fines. In assigning reasons for sentence, the trial court referred to information received by him to the effect that the defendant, even after apprehension and release on bail, continued to use an airplane for "illicit traffic" in drugs from Mexico. As in *Underwood*, the court remanded to provide the defendant with an opportunity to "deny or explain the facts relied upon by the trial judge in imposing sentence."  

In *State v. Bosworth* the defendant pled guilty to contributing to the delinquency of a juvenile. Prior to the imposition of sentence, the defendant moved for disclosure of the presentence report. The defendant, a first offender who alleged that he was of "good community and professional reputation," made the request after receiving "an intimation" from the trial court that the sentence would be imprisonment at hard labor. The defendant sought access to the report and an opportunity to rebut adverse information contained in it.

Remanding with directions to disclose the report (after deletion of any confidential communications), the court, as in *Underwood* and *Segers*, emphasized the relationship between fundamental fairness in sentencing and a right to know and challenge adverse information relied on by the sentencing court.

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67. *Id.* at 1018.
68. 357 So. 2d 1 (La. 1978).
69. *Id.* at 2.
70. 360 So. 2d 173 (La. 1978).
71. *Id.* at 174.
72. "[I]mportant due process and fairness values require the sentencing court to disclose data unknown to the defendant upon which the court relies in exercising its sentencing discretion." 360 So. 2d at 175.
In all three cases it was alleged that false information was contained in the reports. Arguably, disclosure is required only if the defendant makes a showing that the report contains false or misleading information. However, the thrust of the opinions appears to favor disclosure of any adverse information contained in reports or otherwise communicated to the sentencing court.

In *Bosworth* the court recognized that a full scale evidentiary hearing is not required since merely affording the accused a chance to respond to adverse information does not require the taking of testimony. However, should the defendant deny certain allegations it may become appropriate to permit the accused to offer sworn testimony to support his contentions. Again, fairness and the universally agreed upon principle that sentences should be predicated on factually accurate information demand no less.

The legislature has granted discretion in article 877 of the Code of Criminal Procedure to trial courts to disclose presentence data. In light of *Underwood, Segers*, and *Bosworth*, trial courts should be required to exercise that discretion in favor of disclosure of all adverse information, unless some justification appears for not disclosing (such as confidentiality of the identity of the sources of factual information). The writer hopes that trial courts will not require a showing that the report may contain false information prior to authorizing disclosure. Such a requirement in effect would compel the accused to challenge

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73. However, in *State v. Berain*, 360 So. 2d 822 (La. 1978), the court noted that there was no showing that the report contained prejudicially false information. However, in *Berain*, the record did not reflect a timely request for disclosure of the presentence report.

74. 360 So. 2d at 176.

75. An appendix to the court's opinion in *Bosworth* contains the provisions of the Uniform Rules of Criminal Procedure and commentary to the American Bar Association Standards on disclosure. The court could have also included rule 32(c)(3) of the Federal Rules of Criminal Procedure. The federal rule, the Uniform Rule, and the ABA Standards accommodate the defendant's right to be made aware of and to explain or deny the information to be considered by the sentencing court (or even to introduce evidence at the discretion of the court) with the need for confidentiality of some data (such as sentence recommendations by probation officers).

76. *La. Code Crim. P. art. 877* contains a specific provision prohibiting disclosure of "sources of confidential information."
information about which he has had no notice. It is unrealistic to require such a showing prior to disclosure. Disclosure should routinely be made of all adverse information to allow the accused to challenge its veracity if he chooses to do so.77

HABITUAL OFFENDER PROCEEDINGS—EFFECT OF THE AUTOMATIC PARDON

During the last term the supreme court held that the restoration of citizenship following the release of a convicted felon did not preclude the use of the conviction for purposes of sentencing the accused as a habitual offender under Revised Statutes 15:529.1, because restoration of citizenship did not restore the "status of innocence."78 In State v. Adams79 the supreme court similarly distinguished the full gubernatorial pardon from the pardon automatically granted by the Louisiana Constitution to first offenders upon completion of their sentence.80 Such a pardon, reasoned the court, was not designed to restore the status of innocence but rather to restore certain basic privileges normally taken from those convicted of felonies. Citing the debates of the Constitutional Convention of 1973,81 the court found no intent to preclude the use of such convictions to enhance penalty if the pardoned offender later engaged in criminal activity.

The distinction is logical and makes good sense. The defendant is fully forgiven in the sense that he is not precluded from engaging in activities normally barred to convicted felons.82 However, he can be required to face the stiffer conse-

77. For instance, in enacting the Code of Juvenile Procedure, the legislature required trial courts to disclose the "factual contents and conclusions" of the equivalent of pre-sentence reports in juvenile delinquency proceedings. The new Code further requires trial courts to "afford" counsel for both sides "fair opportunity to controvert factual contents and conclusions." Certainly an accused adult should be entitled to no less. LA. CODE JUV. P. art. 82.


79. 355 So. 2d 917 (La. 1978).

80. LA. CONST. art. IV, § 5(E).

81. 355 So. 2d at 922 n.4.

quences of enhanced sentence (and presumably denial of parole or good time credits) if he again is convicted of felonious criminal conduct.

**EXPUNGEMENT OF RECORDS**

Important social values associated with the presumption of innocence underlie the legislative policy allowing an acquitted accused to have the records of his arrest and prosecution destroyed.83 Public access84 to facts surrounding one’s arrest or trial may continue to damage reputation and to leave a cloud of suspicion despite acquittal.85

Revised Statutes 44:9(A)86 permits a defendant to move to

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86. La. R.S. 44:9(A) (Supp. 1976) provides:

A. Any person who has been arrested for the violation of a municipal ordinance or for violation of a state statute which is classified as a misdemeanor may make a written motion to the district court for the parish in which he was arrested for expungement of the arrest record, if:

1. The time limitation for the institution of prosecution on the offense has expired, and no prosecution has been instituted; or

2. If prosecution has been instituted, and such proceedings have been finally disposed of by dismissal, sustaining of a motion to quash, or acquittal.

If the court finds that the mover is entitled to the relief sought, for either of the above reasons, it shall order all agencies and law enforcement offices having any record of the arrest, whether on microfilm, computer card or tape, or on any other photographic, electronic or mechanical method of storing data, to destroy any record of arrest, photograph, fingerprint, or any other information of any and all kinds or descriptions. The court shall order such custodians of records to file a sworn affidavit to the effect that the records have been destroyed and that no notations or references have been retained in the agency's central repository which will or might lead to the inference that any record ever was on file with any agency or law enforcement office. The original of this affidavit shall be kept by the court so ordering same and a copy shall be retained by the affiant agency which said copy shall not be a public record and shall not be open for public inspection but rather shall be kept under lock and key and maintained only for internal record keeping purposes to preserve the integrity of said agency's files and shall not be used for any investigative purpose. This Subsection does not apply to arrests for a first or second violation of any ordinance or statute making criminal the driving of a motor vehicle while under the influence of alcoholic beverages or narcotic drugs, as denounced by R.S. 14:98.
expunge his record of arrest for a misdemeanor offense if the case prescribed without conviction, was dismissed, or if the trial of the case resulted in his acquittal. A person arrested for a felony and subsequently acquitted does not fall within the purview of the statute.

In State v. Sims the supreme court treated a felony arrest which was later formally charged by the district attorney as a misdemeanor in the same manner as a misdemeanor arrest. The supreme court, in evaluating the applicability of section 9, found the “actual offense” committed to be determined by the district attorney’s filing of a bill of information. The court termed the arrest as having been “styled when made” as a felony, although “[i]t was in fact only an arrest ‘for violation of a state statute which is classified as a misdemeanor.’” Therefore expungement was ordered.

Although the writer applauds the court’s willingness to expand the scope of protection of arrest data from general public inspection, the decision appears to rest on a tenuous premise—that the prosecutor’s later decision to characterize the conduct as a misdemeanor affects the nature of the arrest. It may be unfair to allow the police to characterize the nature of the arrest as a felony and thereby affect the defendant’s right to expungement in the event of acquittal, and the wisdom of the legislative scheme may be challenged. However, the arrest is for a felony even though a later prosecutorial decision (or jury verdict) disagrees with the arresting officer’s initial assessment.

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87. See also LA. CODE CRIM. P. arts. 571-83, 691.
88. 357 So. 2d 1095 (La. 1978).
89. Despite the “booking charge” (see LA. CODE CRIM. P. art. 228), the district attorney has charge of the prosecution (LA. CODE CRIM. P. art. 61), and his decision governs regarding the characterization of the offense in the bill of information. See LA. CODE CRIM. P. arts. 381, 382, 384.
90. Sims was arrested for possession of marijuana with intent to distribute (a felony) but was charged in a bill of information with simple possession of marijuana (a misdemeanor). See LA. R.S. 40:966(A) and (D) (Supp. 1970).
91. 357 So. 2d at 1097.
92. Id.
93. Id. at 1097, 1098 (emphasis by the court).
94. In Sims the prosecution charged the defendant with a misdemeanor instead of a felony because he chose to enter a plea of guilty. In some cases plea negotiations occur prior to the filing of formal charges.
of the case.

The court’s approach, dependent on the prosecutor’s later misdemeanor charge being filed, could produce curious results. For example, suppose that an individual is arrested for aggravated battery for striking a fellow barroom patron with a chair following a verbal dispute. If the prosecution decides to charge him with simple battery and he is acquitted on grounds of self defense, under Sims, he is entitled to have his record expunged. However, if the district attorney interviews the witnesses prior to filing a charge, decides that the claim of self defense is valid, and closes the case without filing a charge, the Sims rule would not apply. The trial court presented with a motion to expunge would only be left with the police booking charge of aggravated battery—a felony. In such a case, for Sims to apply, the prosecution would have to file a misdemeanor charge and dismiss it.

In State v. Bradley⁹⁵ the accused was acquitted following his arrest for driving while intoxicated. His motion to expunge the arrest record was challenged by the state on the basis that the expungement statute specifically exempts DWI arrests from its scope.⁹⁶ The trial court rejected the distinction and declared the provision excluding DWI arrests unconstitutional as effecting an unreasonable distinction between DWI and all other misdemeanor arrests. The supreme court agreed and rejected various arguments by the state purporting to justify the difference in treatment. The court found that the statutory scheme created classifications which bore no “rational relation to a legitimate State interest”⁹⁷ and that the district attorney had not demonstrated “any rational basis for the different treatment afforded DWI misdemeanor arrests.”⁹⁸ The court’s reference to article I, section 3 of the Louisiana Constitution as well as to the fourteenth amendment of the United States Constitution is significant as it bases the court’s approach on both Louisiana and federal constitutional grounds.

Whether Bradley will have far reaching or only limited impact is interesting to consider. In light of Sims, there may

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⁹⁵. 360 So. 2d 858 (La. 1978).
⁹⁷. 360 So. 2d at 861.
⁹⁸. Id. at 862.
be no rational basis for distinguishing between felony arrests when no charges at all are filed and felony arrests when misdemeanor charges are filed resulting in acquittal. Such a result could lead to an extension of the right of expungement to all cases of felony arrests where formal charges are never filed.

For that matter, in the writer's opinion, there is little justification for disallowing expungement in the sense of rendering the record confidential where the defendant is formally charged with a felony and subsequently acquitted. Both the acquitted felon and the acquitted misdemeanant are clothed with the same presumption of innocence, and both have the same interest in having their past accusations rendered confidential. The equal protection approach taken in *Bradley* may be a very significant development toward the expansion of an acquitted accused's right to deny public access to his prior arrest record.

**Appellate Review—Sufficiency of Evidence**

In *State v. Lindinger* the supreme court found a total lack of evidence for conviction and reversed the defendant’s conviction for DWI. The evidence offered by the district attorney at the trial was solely circumstantial. A police officer testified that Lindinger was found “resting against a pickup truck” approximately 50 to 100 feet off the highway in a field. The defendant appeared to be intoxicated and an almost empty bottle of whiskey was found in the truck. A state police officer testified that skidmarks indicated that the truck skidded off the highway after the driver applied the brakes.

The writer does not criticize the court's conclusion that the conviction should be reversed. However, the writer does criticize the court for its continued refusal to abandon the total lack

100. It is the writer’s view that the true evil is public access to records of arrest. If held on a strictly confidential basis, with access only to law enforcement officers and other officials of the court, the writer sees no problem. *See State v. Sims*, 357 So. 2d 1095 (La. 1978).
101. 357 So. 2d 500 (La. 1978).
103. 357 So. 2d at 501.
of evidence standard for review. Rather than simply stating that a question of law\textsuperscript{104} is presented when the evidence is not sufficient to prove the guilt of the accused beyond a reasonable doubt, the court strains the meaning of "total lack of evidence" to achieve that result. The test, as Justice Tate comes close to saying, should be reformulated. The court must determine on appeal whether the evidence is sufficient to permit the trier of fact reasonably to conclude that there was proof beyond a reasonable doubt. Too many doubts remained in Lindinger's case. As the court pointed out, the trial court was required to find not only that the truck had in fact been driven, but that Lindinger had been driving it, and that he was in an intoxicated condition while driving.

Although all of the facts proved were relevant to establishing guilt, standing alone they were simply insufficient. With the presumption of innocence, and the concurrent notion that the accused need not prove his innocence, the court must reverse if a trial court even unconsciously permits the failure of the defendant to deny guilt to weigh in the balance of proving guilt beyond a reasonable doubt. Had the writer been the trier of fact he would also have been apt to convict absent Lindinger's ability to explain those highly suspicious circumstances. However, as suspicious as they were, proof beyond a reasonable doubt was lacking.

As noted, the writer only quibbles with the unwillingness of the court to accept the fact that the sufficiency of evidence to convict is a question of law and that it is not necessary to rationalize its results by finding a total lack of evidence.\textsuperscript{105} If the evidence is not sufficient, the conviction must not be affirmed. The "total lack of evidence" test reflects an unwillingness to abandon the old view and recognize that Louisiana's standard of review of criminal convictions does not differ from that used in other systems.\textsuperscript{106}

\textsuperscript{104} In criminal cases, the supreme court's appellate jurisdiction is limited to questions of law. See La. Const. art. V, § 5.

\textsuperscript{105} The writer could similarly criticize the approach taken in review of other convictions. See, e.g., State v. Brown, 351 So. 2d 690 (La. 1977) (involving "total lack of evidence" of guilty knowledge). In Brown the court seemed to recognize that the evidence was really "insufficient" to prove the offense charged. 352 So. 2d at 694.

\textsuperscript{106} See the excellent discussion of the standard of review of convictions in the federal system in United States v. Stephenson, 474 F.2d 1353 (5th Cir. 1973).