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Procedure: Criminal Trial Procedure

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PROCEDURE

CRIMINAL TRIAL PROCEDURE

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SPEEDY TRIAL

In *State v. Reaves*[1] the problem was presented as to the proper method for raising a claim of denial of the constitutional right to a speedy trial guaranteed by the Due Process Clause of the fourteenth amendment, the Louisiana Constitution, and the Code of Criminal Procedure.[2] After noting that the legislature had not provided a special method for raising speedy trial violations, the court pointed out that the motion to quash is the one general method of raising all defenses prior to trial which do not relate to the merits of the charge.[3] Finding that the speedy trial defense, if successful, requires dismissal of the charge, and that from its very nature such relief must be available before trial, the supreme court had no difficulty in concluding that the legislature really intended to implement the speedy trial guaranty when it adopted the motion to quash. While some might question this finding of intent, certainly the result is both sound and desirable. It should be noted that this ruling reverses a line of prior Louisiana jurisprudence holding that a claim of denial of speedy trial could not be raised by a motion to quash.[4]

PRE-ARREST DELAY

The Supreme Court of the United States[5] and the Supreme Court of Louisiana[6] both have held that the constitutional guarantees to a speedy trial do not apply prior to commencement of a criminal action by indictment or information, or at least until one

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1. 376 So. 2d 136 (La. 1979).

2. *See* Barker v. Wingo, 407 U.S. 514 (1972); LA. CONST. art. I, § 16; LA. CODE CRIM. P. art. 701.

3. LA. CODE CRIM. P. art. 531 provides: "All pleas or defenses raised before trial, other than mental incapacity to proceed, or pleas of 'not guilty' and of . . . 'not guilty by reason of insanity,' shall be urged by a motion to quash."

4. *See* State v. Augustine, 252 La. 983, 215 So. 2d 634 (1968); State v. White, 247 La. 19, 169 So. 2d 894 (1964).

5. United States v. Marion, 404 U.S. 307 (1971).

6. State v. Malvo, 357 So. 2d 1084 (La. 1978).

becomes an accused through the arrest process. During the period from commission of crime to arrest, it is normally considered that statutes of limitation provide sufficient protection against delay in the bringing of state criminal charges. If a prosecution is commenced within the period of the applicable statute of limitations, there is still a basis for dismissing a prosecution if the defense can show that the delay prejudiced the right of the accused to a fair trial and thus constituted a violation of the due process clause of the United States and Louisiana constitutions.[7]

The court faced a problem of this type in *State v. Crain*,[8] in which defendant filed a motion to quash, alleging that a delay of approximately six months between the alleged offense and his arrest impaired his ability to present evidence and to subpoena witnesses on his behalf. The trial court denied the motion, although the state showed no justification for this delay; but defendant presented no evidence of prejudice. At trial, defendant did not testify, nor did he produce any witnesses in his defense. On appeal he argued that the pre-arrest delay resulted in a loss of memory of his exact whereabouts on the days in question and a resulting inability to produce any witnesses. It is noteworthy that in this case there was no need to delay the arrest to protect the cover of an undercover police officer.[9] The delay was not caused by the state's inability to locate the defendant; no showing was made that a prompt arrest would have jeopardized any current investigation,[10] and it does not appear that the delay was the product of the decision-making process the state used in deciding to prosecute the defendant.[11] Against this background, the court emphasized the applicable six-year statutory limit,[12] found that the prosecution was brought well within this period, and found that the defendant had failed to demonstrate any prejudice from the state's delay, thus negativing any claim of denial of due process. In so doing, the supreme court rejected the opportunity to change the rule established earlier,[13] by which prejudice will not be presumed from the delay. Because of the short period of delay in this case, the result seems entirely fair. However, it does seem that, considering that a constitutional right is involved in the pre-arrest cases, that the applicable statute of limitations is a very

7. U.S. CONST. amend XIV; LA. CONST. art. I, § 2.
8. 379 So. 2d 1094 (La. 1980).
9. *See* State v. Malvo, 357 So. 2d 1084 (La. 1978).
10. *Id.*
11. *Id.*
12. LA. CODE CRIM. P. art. 572 (1). The crime charged was distribution of cocaine in violation of R.S. 40:967(A).
13. *See* State v. Stetson, 317 So. 2d 172 (La. 1975).

long one (six years) designed to prevent the avoidance of prosecution, and that the accused has great difficulty in demonstrating actual prejudice, some circumstances may well force the court to adopt a rule that will have the effect of shifting the burden to the state to justify periods of pre-arrest delay.[14]

RIGHT TO COUNSEL

In *Faretta v. California*[15] the Supreme Court of the United States held that an accused has a right to conduct his own defense without counsel when he voluntarily and intelligently elects to do so. This has created a number of problems.

State v. Bell[16] raised the question of whether the defendant knowingly and intelligently gave up his right to counsel. The court after reviewing the record determined that the trial judge did not produce sufficient information from the defendant to determine whether he actually made a knowing and intelligent decision to waive his right to counsel. Accordingly, the conviction was vacated and remanded for a new trial. It would seem that we may be on the way toward requiring a form of *Boykin*[17] examination in this waiver of counsel situation, and unless it is carefully done by the trial judge, more defendants may find themselves with "two bites at the apple."[18]

The court was faced with a different and difficult situation in *State v. Harper*.[19] There an indigent defendant had counsel appointed in a simple burglary case, but reported to the court that he did not wish this counsel to represent him and that he wanted counsel to be supplied by the American Civil Liberties Union. On several occasions the trial judge advised the accused that he had to accept appointed counsel or to represent himself, and defendant declared that he would not accept either alternative.[20] With the case in this posture, the trial judge proceeded to trial with appointed counsel ordered to remain and render any assistance defendant might request. The attorney, however, refused to participate in the trial,

14. For another case this term with substantially the same treatment, *see* State v. Coleman, 380 So. 2d 613 (La. 1980).

15. 422 U.S. 806 (1975).

16. 381 So. 2d 393 (La. 1980).

17. Boykin v. Alabama, 395 U.S. 238 (1969).

18. Justices Blanche and Marcus dissented. 381 So. 2d at 395 (La. 1980) (Blanche and Marcus, J.J., dissenting).

19. 381 So. 2d 468 (La. 1980).

20. The court advised defendant that the American Civil Liberties Union could not be appointed to represent him and that the court was under no obligation to appoint whatever attorney the accused might request. *Id.* at 469.

since he had been advised by defendant that his assistance was not wanted and he wished to avoid prejudicing the accused's case in any way. The supreme court held that the trial court was correct in insisting that defendant either accept the appointed counsel if he wished representation, or proceed *pro se*. The court restated the traditional view that an indigent accused is entitled only to the appointment of adequate counsel, not to the appointment of a specific person. Furthermore, the court found no difficulty in holding that defendant's refusal without good cause to proceed to trial with the appointed counsel amounted to a waiver by conduct of his right to counsel, despite his vehement statements to the contrary. Faced with the practicalities of the situation and the consequences of a contrary holding, the court held the actions to be a knowing and voluntary waiver of Harper's right to counsel so that he voluntarily proceeded *pro se*.

In many city courts the practice has been for the judge to advise collectively all persons in the courtroom of their constitutional rights. In *LeBlanc v. Watson*,[21] defendant, in an application for habeas corpus relief, alleged that he had not been advised personally of his right to counsel prior to pleading guilty to violations of the City Code in the City Court of Monroe. In fact, the defendant claimed to be outside of the courtroom when the judge gave a collective statement of rights to all present. Refusing to depart from a previous consideration[22] of this procedure, the court noted that this practice offers little assurance that an accused has in fact received and understood his constitutional rights, and particularly that he has knowingly and intelligently waived his right to counsel. Specifically the supreme court held that no waiver of the right to counsel, express or implied, will be inferred from the silent record made by the collective warning procedure. It seems clear that the death knell has been sounded loud and clear for this type of procedure in the city courts, despite its undoubted contribution to a speedy and efficient process.

NON-UNANIMOUS VERDICTS—TWELVE PERSON JURIES

An effort to extend the ruling in *Burch v. Louisiana*[23] requiring unanimity in six-person juries to those composed of twelve persons

21. 378 So. 2d 427 (La. 1979).

22. State v. Carlisle, 315 So. 2d 675 (La. 1975).

23. 441 U.S. 130 (1979). *See* Note, *Right to Trial By Jury: New Guidelines for State Criminal Trial Juries*, 40 LA. L. REV. 837 (1980). It should be noted that *Burch* was given retroactive effect in Brown v. Louisiana, 100 S. Ct. 2214 (1980).

failed in *State v. Jones*.[24] This attempt ignored both the basis for the ruling, which was the reduced size of the six-person jury, and the fact that the Supreme Court of the United States has in the past upheld the use of less-than-unanimous verdicts in juries of twelve.[25]

WAIVER OF TRIAL BY JURY

Article 780 of the Code of Criminal Procedure[26] authorizes a defendant to waive trial by jury and to elect to be tried by the court. *State v. Manning*[27] raises the question as to the time within which defendant must exercise this election, since Article 780 is silent on this point, as is Article 782B. The court used comment (d) to Article 780[28] to find that a court has general authority to determine when a defendant may exercise this right and proceeded to uphold the trial judge's ruling to the effect that defendant's request to waive jury trial on the second day of trial and after the jury had been sworn was untimely. Despite defendant's contention that grounds for the jury waiver did not exist until jury selection was complete, the supreme court found that he had failed to exercise his right timely. We are left to speculate as to the specific meaning of "timely." This writer feels a rule requiring election prior to the commencement of the voir dire examination would be both fair and reasonable.

PEREMPTORY CHALLENGES OF BLACK PROSPECTIVE JURORS

Following last term's reversals in *State v. Brown*[29] and *State v. Washington*,[30] due to the prosecutor's systematic use of peremptory

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24. 381 So. 2d 416 (La. 1980). The same result was reached in *State v. McIntyre*, 381 So. 2d 408 (La. 1980).

25. Apodaca v. Oregon, 406 U.S. 404 (1972) (ten jurors out of twelve); Johnson v. Louisiana, 406 U.S. 356 (1972) (nine jurors out of twelve).

26. LA. CODE CRIM. P. art. 780 provides: "A defendant charged with any offense except a capital offense may knowlingly and intelligently waive a trial by jury and elect to be tried by the court. At the time of arraignment, the defendant in such cases shall be informed by the court of his right of waiver and election."

LA. CODE CRIM. P. art. 782B provides: "Trial by jury may be knowingly and intelligently waived by the defendant except in capital cases."

27. 380 So. 2d 54 (1980).

28. LA. CODE CRIM. P. art. 780 comment (d) provides:

> This article makes no mention of the time when the defendant must elect nor of the situation in which the defendant wishes to revoke his waiver. The provisions of this article have been operative since 1921, and there has been no problem with such matters. They have been handled satisfactorily under the general authority of courts to regulate their business.

29. 371 So. 2d 751 (La. 1979).

30. 375 So. 2d 1162 (La. 1979).

challenges to excuse black prospective jurors, this term the court faced a number of cases raising the same objection. The court requires that a defendant seeking relief on this basis make a prima facie showing that there has been a historical pattern of systematic exclusion—purposeful discrimination—of blacks from jury service over a period of time through the exercise of peremptory challenges by the prosecution. Once this has been done, the state must proceed to show that no discrimination was present in the exercise of the state's challenges in this particular case. In the three cases[31] considered, the supreme court was unable to find any evidence of the required systematic exclusion of blacks over a period of time, and hence this assignment of error was unsuccessful in each case.

It should be noted that Mr. Justice Dennis filed a concurring opinion in *State v. Allen*[32] which reads in part as follows:

> I continue to think it unfortunate that this Court should ignore our state constitution and require a defendant to prove that a prosecutor has practiced racial discrimination "over a period of time" before the defendant can, in his one particular case, show that he has been prejudiced by racially motivated peremptory challenges.[33]

It will be interesting to see if the court will extend this view to the prosecution's systematic exclusion by peremptory challenges of all those under thirty in possession of narcotics cases or to all women prospective jurors in certain types of sex cases, should such a case arise in the proper posture.

It should also be pointed out that Mr. Justice Calogero in *State v. Manning*[34] listed the appropriate motions for raising the issue of denial of equal protection by the state's discriminatory exercise of peremptory challenges as motion to quash the jury panel, motion for a mistrial, or motion for a new trial.

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31. State v. Manning, 380 So. 2d 54 (La. 1980); State v. Allen, 380 So. 2d 28 (La. 1980); State v. Qualls, 377 So. 2d 293 (La. 1979).

32. 380 So. 2d 28 (La. 1980).

33. *Id.* at 32. *See* State v. Eames, 365 So. 2d at 1364 (La. 1978) (Dennis, J., concurring).

LA. CONST. art. I, § 3 provides:

> No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

34. 380 So. 2d 54 (La. 1980).

CHALLENGES FOR CAUSE

The court decided three cases involving the correctness of the decision of the trial judge in failing to grant challenges for cause. In the view of this writer all three of these cases were exceedingly close and might well have been decided the other way. These problems are largely factual and to a very great extent matters of interpretation. The rule giving vast discretion to the trial judge in the disposition of such challenges and providing that the ruling of the trial court will not be disturbed in the absence of a showing of an abuse of discretion[35] is a sound one in this area, provided that abuses actually are corrected. The reluctance of the supreme court to reverse a conviction supported by the evidence and to remand for a second trial because of an error of this type is certainly understandable, but the real question must be whether the defendant received a fair trial under all of the surrounding circumstances.

In *State v. Sonnier*,[36] a first degree murder case, one juror was related to the victims of the crime and additionally was the sister of the sheriff of a neighboring parish;[37] another juror initially believed the defendant to be guilty based upon what he had read in the newspaper and would require the defendant to change this opinion. The supreme court considered this second juror to be rehabilitated after instruction and examination by the trial court.

In *State v. Allen*,[38] again a first degree murder case, one juror was the sister and granddaughter of policemen, and another juror indicated that he would give more weight to the testimony of a police officer than to that of a lay witness. The supreme court, however, found that the jurors had been rehabilitated by further examination to the extent that they demonstrated their willingness and ability to decide the case impartially according to all of the law and evidence.

In the third case considered, *State v. McIntyre*,[39] the decision in an aggravated rape case provoked a dissent from Mr. Justice Dennis which reads in part:

> I think it unlikely that a prospective juror, his protests to the contrary notwithstanding, can be impartial after: (1) having read

35. State v. Drew, 360 So. 2d 500 (La. 1978).

36. 379 So. 2d 1336 (La. 1979).

37. The court recognized the "closeness of this issue," but determined that her "state of mind was not such that she would have been unable to render impartial justice in this case." *Id.* at 1352.

38. 380 So. 2d 28 (La. 1980).

39. 381 So. 2d 408 (La. 1980).

a newspaper account of defendant's first trial and agreed with the guilty verdict after being peremptorily challenged by defendant, or (2) having discussed the case with a fellow employee who was a member of the jury in defendant's first trial and convinced of his guilt.[40]

This writer has serious doubts about the wisdom of a continued use of the doctrine of rehabilitation to rebut or really ignore bias on the part of prospective jurors. Human nature is such that once the prospective juror learns what the trial judge wants him to say, he will choose the easy, non-embarrassing way out by protesting his fairness and impartiality. What will surface during deliberations of the jury may be something quite different.[41] The court in *McIntyre* gave the usual effect to rehabilitation.

In all of the above cases, and the many similar cases, it would be well to consider the effect on the general public of using jurors in serious criminal cases where there are substantial questions concerning their ability to render a fair decision. The courts should see that justice is not only done, but seen to be done.

COMPLETION OF JURY

During the period after the regular jury panel has been selected but before alternate jurors are chosen, what is the situation when one of the regular jurors becomes physically incapable of serving? In *State v. Delore*[42] defendant demanded a mistrial.[43] The trial court denied the motion and instead proceeded to select a twelfth juror from a panel of alternate jurors on the basis of the little-used article 796 of the Code of Criminal Procedure.[44] The supreme court points out that since the trial court granted the defense two additional peremptory challenges[45] to be used in selection of the twelfth juror,

40. 381 So. 2d at 412 (Dennis, J., dissenting).

41. There are only few instances in which the court has found that a prospective juror would be partial or biased, despite his statements to the contrary. *See* State v. Monroe, 366 So. 2d 1345 (La. 1978).

42. 381 So. 2d 455 (La. 1980).

43. LA. CODE CRIM. P. art. 775 provides in part: "A mistrial may be ordered, and in a jury case the jury dismissed, when: . . . (5) It is physically impossible to proceed with the trial in conformity with law . . . . "

44. LA. CODE CRIM. P. art. 769 provides: "If it is discovered after a juror has been accepted and sworn, that he is incompetent to serve, the court may, at any time before the first witness is sworn, order the juror removed and the panel completed in the ordinary course." It is clear that "incompetent to serve" as used in the article included a disability caused by illness as in this case. State v. Rounsavall, 337 So. 2d 190 (La. 1976).

45. Defendant had exhausted his twelve peremptory challenges on the voir dire of the original panel. 381 So. 2d at 460.

the defendant's rights were fully protected and no prejudice arose. This seems to be a most fair and practical solution to an unusual problem, and there seems little justification for undoing what was accomplished up to that point by declaring a mistrial.

SUBPOENAS IN CRIMINAL CASES

The legislature has taken a significant step forward in the simplification of the method of obtaining the presence of witnesses at criminal trials. The cumbersome procedure to obtain a subpoena for a witness residing in another parish, including a written application supported by affidavit and at least a token private hearing by the court, has now been abolished.[46] As a result all subpoenas directed for service within the state will issue under the authority of article 731 of the Code of Criminal Procedure.[47]

RECESS BASED UPON ABSENCE OF WITNESS

The court previously[48] has pointed out the distinction between a continuance and a recess. Article 708[49] of the Code of Criminal Procedure draws the line between the two devices at the commencement of trial, and article 761[50] defines commencement as the calling of the first prospective juror in a jury trial or the swearing of the first witness in a non-jury trial. Motions for continuances are required by article 707[51] to be in writing, to state specifically the grounds of the motion, and if made by defendant, to be verified either by the defendant or by his attorney. A motion for a recess, on

46. 1980 La. Acts, No. 286, *amending* LA. CODE CRIM. P. art 731. 1980 La. Acts, No. 286 § 2 provides: "Article 740 of the Louisiana Code of Criminal Procedure is hereby repealed in its entirety."

47. LA. CODE CRIM. P. art. 731 provides: "The court shall issue subpoenas for the compulsory attendance of witnesses at hearings or trials when requested to do so by the state or the defendant. Clerks of court may issue subpoenas except as provided in Article 739." The method of obtaining witnesses from outside the state is set out in LA. CODE. CRIM. P. arts. 741-45.

48. State v. Mizell, 341 So. 2d 385 (La. 1976); State v. Hines, 311 So. 2d 871 (La. 1975).

49. LA. CODE CRIM. P. art. 708 provides: "A continuance is the postponement of a scheduled trial or hearing, and shall not be granted after the trial or hearing has commenced. A recess is a temporary adjournment of a trial or hearing that occurs after a trial or hearing has commenced."

50. LA. CODE CRIM. P. art. 761 provides: "A jury trial commences when the first prospective juror is called for examination. A trial by a judge alone commences when the first witness is sworn."

51. LA. CODE CRIM. P. art. 707 provides: "An application for a continuance shall be by written motion alleging specifically the grounds upon which it is based, and when made by a defendant, must be verified by his or her counsel's affidavit."

the other hand, need not be in writing and is strictly an informal request.[52] Under the terms of article 709[53] a motion for continuance based upon the absence of a witness must show the materiality and necessity of the missing testimony, the probability that the witness will be available at a new date, and the fact that the moving party exercised due diligence in an effort to procure the attendance of the witness. The article refers in specific terms to continuances; there is no similar provision relating to a motion for recess.

In *State v. Bertrand*,[54] when a state trooper failed to appear in response to an instanter subpoena issued during trial at defendant's request, the trial court denied a defense motion for recess.[55] Pointing out the traditional rule that the disposition of a motion for recess is largely within the discretion of the trial court, whose ruling will not be overturned absent a clear abuse of discretion, the supreme court found no abuse of discretion here.

The most significant point of this decision is that Mr. Justice Marcus, speaking for the court and examining the exercise of the trial judge's discretion for possible prejudice to the accused, used the requirements provided in article 709 for motions for continuance. Thus, the court found no prejudice to the defendant, since he had failed to state the materiality of the missing testimony and the necessity of the presence of the absent witness. Additionally, the defendant had failed to exercise and show the required degree of due diligence in his efforts to procure the attendance of the witness.

This would seem to make it clear that a motion for recess based upon the absence of a witness should be tested by the same standard as is a motion for continuance under article 709.

CLOSING ARGUMENT—DEFENDANT'S FAILURE TO TESTIFY

In *State v. Marcello*[56] the defense attorney on closing argument advised the jury that the accused had not testified because of ill-

52. State v. Mizell, 341 So. 2d 385 (La. 1976).

53. LA. CODE CRIM. P. art. 709 provides:

A motion for continuance based upon the absence of a witness must state:

(1) Facts to which the absent witness is expected to testify, showing the materiality of the testimony and the necessity for the presence of the witness at the trial;

(2) Facts and circumstances showing a probability that the witness will be available at the time to which the trial is deferred; and

(3) Facts showing due diligence used in an effort to procure attendance of the witness.

54. 381 So. 2d 489 (La. 1980).

55. Erroneously referred to by defendant as a motion for continuance, this was, in fact, treated by the supreme court as a motion for a recess.

56. 375 So. 2d 94 (La. 1979).

ness. In rebuttal the prosecutor argued that the defendant failed to testify because he feared cross-examination. The denial of defendant's motion for mistrial was reversed by a closely divided supreme court.[57] The court was faced with the question of whether the mandatory language of article 770[58] is applicable to a comment of the prosecutor after the defense attorney has called attention to the fact that the accused did not testify. To require a mistrial in such a situation seems to misconstrue the purpose of the article. It seems clear that it was designed to afford protection to a defendant who desires that nothing be said by anyone concerning his failure to testify. To the same extent that a defendant who chooses to testify may be cross-examined and impeached, so, too, one who opens the door and discloses the failure to testify no longer should be protected against fair comment. This seems consistent with the view of Justice Marcus in dissent[59]—that the prosecutor's argument was merely a fair and reasonable response—and that of Justice Dennis[60] emphasizing the defendant's waiver of the mistrial remedy by his conduct.

INSTRUCTIONS—CONTEMPORANEOUS OBJECTION RULE

The court took the opportunity in *State v. Jefferson*[61] to stress the importance of the contemporary objection rule as applied to jury charges. In this case the jury, after retiring to deliberate, requested further instructions, and the trial judge proceeded to give the instructions and to answer questions from jurors. No objection was made by defense counsel at this time, and only a general objection was made for the defense after the jury again retired to deliberate. This, of course, violates the contemporaneous objection rule, and the alleged error was not properly before the supreme court.[62] The court reminded us that this rule is not a mere procedural technicality but one designed to allow the trial judge to correct an error at a time when this can be done. For this reason, to be timely, objections must be made before the jury retires. Because of the unique possi-

57. Chief Justice Summers, Justice Marcus, and Justice Dennis dissented. Justice Blanche, author of the opinion, reluctantly joined the majority. *Id.* at 96 n.1.

58. LA. CODE CRIM. P. art. 770 provides in part: "Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to: . . . (3) The failure of the defendant to testify in his own defense . . . ."

59. 375 So. 2d at 96.

60. *Id.* at 97.

61. 379 So. 2d 1389 (La. 1980).

62. Despite this waiver of the objection, the court considered the objections and found them without merit.

bilities for correction of errors in charges, both original and supplemental, it seems to the writer that the contemporaneous objection rule should be strictly enforced in this area.

JUROR IMPEACHMENT OF VERDICTS

The supreme court has held that despite the statutory prohibition[63] against impeachment of verdicts, jurors may testify as to unauthorized communications to the jury or prejudicial conduct by third persons which might influence the verdict.[64]

In *Wisham I*,[65] the supreme court remanded the case for a hearing on defendant's motion for new trial directing the trial court to hear evidence from the jurors concerning whether they viewed the arrest of the defense alibi witness for perjury and whether the other jurors were informed of the arrest. The hearing was held, and the appeal from the second denial of the motion for new trial came to the supreme court as *Wisham II*.[66] Despite the warning of the supreme court in *Wisham I*,[67] the trial judge allowed the prosecution to cross-examine the jurors as to the effect (or really non-effect) of the event upon the deliberations and the verdict, and this questioning was held in *Wisham II* to violate the prohibition of the statute.[68] The court has now held clearly that evidence of the mental processes and reasons for decision of the jury are inadmissible in *support* of a verdict as well as in impeachment thereof—despite the rather specific language of the statute. Such a decision is fully in keeping with the policy of protecting the confidentiality of jury deliberations and the freedom of discussion among jurors and of preserving the doctrine of finality of verdicts.

In this very close case,[69] the court held that the conduct and the

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63. LA. R.S. 15:470 (1950) provides:

> No juror, grand or petit, is competent to testify to his own or his fellows' misconduct, or to give evidence to explain, qualify or impeach any indictment or any verdict found by the body of which he is or was a member; but every juror, grand or petit, is a competent witness to rebut any attack upon the regularity of the conduct or of the findings of the body of which he is or was a member.

64. State v. Wisham, 371 So. 2d 1151 (La. 1979); State v. Marchand, 362 So. 2d 1090 (La. 1978). *See* FED. R. EVID. 606.

65. State v. Wisham, 371 So. 2d 1151 (La. 1979).

66. State v. Wisham, 384 So. 2d 385 (La. 1980).

67. 371 So. 2d at 1154 n.2.

68. LA. R.S. 15:470 (1950).

69. Justice Watson concurred in the result. Justice Blanche dissented without reasons. Justice Marcus dissented on the basis that the testimony of the jurors was prohibited by the statute, and that any change in the Louisiana rule required legislative action.

communication had been established by the jurors' testimony, thus creating a presumption of prejudice which the state failed to rebut. As a result, the supreme court reversed and remanded for a new trial, perhaps to set the stage for *Wisham III*.

In *State v. Charles*[70] the trial court on the last day of trial in an armed robbery case advised both the prosecutor and defense counsel that certain jurors had been threatened and that because of the threats the jury would be polled by written ballot.[71]The trial judge provided no other information about the alleged threats, and the supreme court indicated that the record simply establishes that some type of threat was made to one juror. With the record in this state it is difficult to see why the court remanded for an evidentiary hearing.[72] To do so makes this case simply a wasted appeal. This writer feels that this would have been the ideal case to emphasize that the trial court has much discretion in denying motions for new trial and motions to hold evidentiary hearings and that here the defendant had simply failed to show any abuse of such discretion. As it now stands, this case leaves open the question of when a trial judge must hold an evidentiary hearing.

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70. 377 So. 2d 344 (La. 1979).

71. *See* LA. CODE CRIM. P. art. 812.

72. Chief Justice Summers and Justice Marcus dissented. 377 So. 2d at 346 (Summers, C.J., and Marcus, J., dissenting).