Procedure: Criminal Trial Procedure

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CRIMINAL TRIAL PROCEDURE

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RIGHT TO SPEEDY TRIAL

Pre-arrest Delay

In *State v. Stetson*, defendant complained that a seven month delay between the alleged offense and his arrest hampered his ability to present his defense, thereby denying him due process of law. Although under the circumstances the court affirmed his conviction, it recognized that the “due process and fair trial” guarantees of the state and federal constitutions may be infringed by inordinate pre-arrest delay resulting in actual prejudice to an accused. It refused to presume prejudice from the seven month delay, rejecting the defendant’s assertion in brief that no witnesses were called to support his alibi because “no one could accurately testify to his whereabouts seven months before his arrest” as unsupported by the record.

As in cases dealing with delay prior to commencement of trial, the Louisiana Supreme Court recognized that there are two standards of protection for the accused. One is the statutory standard found in articles of the Code of Criminal Procedure. The other is a federal constitutional standard.

In *United States v. Marion* the United States Supreme Court recognized that applicable statutes of limitation do not necessarily fully define the constitutional rights of the accused. The Court rejected defendant’s argument that the sixth amendment right to speedy trial applied to pre-accusation delay. The sixth amendment by its terms only

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1. 317 So. 2d 172 (La. 1975).
2. Id. at 175.
3. Id.
5. LA. CODE CRIM. P. arts. 571-77 (limitations on the institution of prosecution).
applies once the defendant has become an “accused.” The Court, however, agreed, as the government conceded, that the due process clause of the fifth amendment would require dismissal of the prosecution if pre-accusation delay “caused substantial prejudice to [the defendant’s] right to a fair trial and . . . the delay was an intentional device to gain a tactical advantage over the accused.” The Court in Marion, however, did not forecast “when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution.” Stetson did not formulate detailed constitutional guidelines requiring dismissal for pre-accusation or pre-arrest delay either.

Justice Summers indicates in Stetson some of the differences between the not-yet-formulated constitutional test for “inordinate pre-accusation delay” and the statutory limitations set forth in the Code of Criminal Procedure. The statutes have the “desirable ingredient of predictability” not present in Marion’s vague guidelines. Further, the statutes protect against “possible, as distinguished from actual, prejudice.” Defendant must show actual prejudice for pre-accusation delay to result in a denial of due process. In neither Marion nor Stetson was actual prejudice shown, and in Stetson, as in Marion, the court hesitated to formulate a rule without the showing of actual prejudice.

The required showing of actual prejudice distinguishes pre- and post-accusation delay. In cases of post-accusation delay, Barker v. Wingo does not require that prejudice necessarily be shown. It is but one of several factors. However, if a defendant complains of prejudice to his due process

9. Similarly, La. Const. art. I, § 16 insuring the right to speedy trial, provides that “every person charged with a crime . . . is entitled to a speedy . . . trial . . .” (emphasis added).
10. 404 U.S. at 324.
11. Id.
12. Justice Summers stated: “To accommodate the sound administration of justice to the defendant’s rights to due process and a fair trial will necessarily involve a deliberate judgment based on the facts and circumstances of each case. It would be unwise at this juncture to forecast those decisions.” 317 So. 2d at 175-76.
13. Id. at 174.
right to a fair trial resulting from the delay of the prosecutor or police in bringing the "accusation," he bears the burden of showing prejudice.

Pre-trial Delay and the Barker Test

In three cases decided during the last term the Louisiana Supreme Court clearly recognized that the defendant's federal constitutional right to a speedy trial may well mandate trial within a shorter period than that provided by the Louisiana Code of Criminal Procedure. In State v. Moore, the court rejected the state's argument that the only criteria lay in the code provisions. The court held that the Barker v. Wingo "balancing test" must be employed to determine whether or not a defendant's federal constitutional right to speedy trial has been denied. The United States Supreme Court in Barker rejected "a rigid time formula" and outlined four factors which must be weighed:

The factors which are to be considered are the length of the delay, the reasons for the delay, the resulting prejudice to the defendant, and the defendant's assertion of his right to a speedy trial.

In State v. Bullock the Louisiana Supreme Court further recognized the trial or appellate court's authority to dismiss the prosecution if unconstitutional delay has occurred.

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18. The defendant, under Marion, becomes an accused when he is arrested or when an indictment or information is filed, whichever comes first. The concept of accusation is not synonymous with the Louisiana concept of institution of prosecution which results from the filing of formal charges by the prosecutor or grand jury as opposed to arrest and booking by a police officer. See LA. CODE CRIM. P. arts. 201, 228, 382. Marion clearly envisions the broad concept of becoming an "accused" as against the narrower concept of institution of prosecution. 404 U.S. at 313-19.


20. See LA. CODE CRIM. P. art. 578. See also State ex rel. Eames v. Amis, 288 So. 2d 316 (La. 1974). For the defendant's state constitutional right to a speedy trial, see LA. CONST. art. I, § 16.

21. 300 So. 2d 492 (La. 1974).

22. Earlier in State v. Gladden, 260 La. 735, 257 So. 2d 388 (1972), the court intimated that those limits might also reflect the outer limits of constitutional mandates.

23. 407 U.S. at 530-33.

24. Id. at 530.

25. 311 So. 2d 242 (La. 1975).
ertheless, in applying the balancing test to evaluate unconstitutional delay, appellate courts may approve rather lengthy periods.\textsuperscript{26}

In \textit{State v. Harris},\textsuperscript{27} the defendant, charged with aggravated rape, was arrested on December 19, 1972. He was not indicted until April 12, 1973, and thereafter arraigned on April 23, 1973. The defendant was presumably in jail during that period, bail or discharge having been denied following a preliminary examination on February 1, 1973. He moved for a speedy trial in July, 1973. When trial was set for October, 1973, the defendant moved to dismiss for denial of a speedy trial. His motion was denied and he was tried and convicted in October. The total period of incarceration from arrest to trial was ten months.

In \textit{State v. Moore},\textsuperscript{28} the court approved a twenty-six month delay from indictment to trial. Again, a defendant charged with aggravated rape was presumably incarcerated from arrest to trial.\textsuperscript{29} The court noted that all but the last month of delay was attributable to re-assignment by the state. However, at no time during that first twenty-five months did the defendant move for speedy trial on the indictment.\textsuperscript{30}

In \textit{State v. Bullock},\textsuperscript{31} the defendant was arrested in 1966 for murder and tried within nine months of his arrest. Following reversal of his conviction in 1971,\textsuperscript{32} the defendant did not file a motion for a speedy second trial until January, 1974. Four months thereafter, over eight years after the defendant's arrest for murder, the defendant was again tried. He was convicted of manslaughter.\textsuperscript{33}

In all three cases, the court found the delays reasonable

\textsuperscript{26} A delay of approximately five years was involved in \textit{Barker}.
\textsuperscript{27} 297 So. 2d 431 (La. 1974).
\textsuperscript{28} 300 So. 2d 492 (La. 1974).
\textsuperscript{29} During that period he was also \textit{convicted} of another rape with which he was charged. \textit{See State v. Moore,} 278 So. 2d 781 (La. 1973).
\textsuperscript{30} As noted, \textit{supra,} note 29, he was litigating another rape conviction.
\textsuperscript{31} 311 So. 2d 242 (La. 1975).
\textsuperscript{32} \textit{See State v. Bullock,} 263 La. 946, 269 So. 2d 824 (1972), \textit{after remand,} 294 So. 2d 218 (La. 1974).
\textsuperscript{33} The defendant was charged with killing a policeman and was originally sentenced to death. The subsequent conviction for manslaughter illustrates to the writer that the delay probably prejudiced the state and worked to the benefit of the accused. The court noted that the delay was to his benefit. 311 So. 2d at 245.
under the *Barker* test\textsuperscript{34} in light of attendant circumstances. The reasons found for the delay in *Bullock* were a new trial, then defense motions, and the defendant's desire to await clarifications of the law regarding the death penalty.\textsuperscript{35} Once the defendant in *Bullock* made a demand for a speedy trial, a lapse of only four months followed. Although the length of delay was extensive, there was no prejudice to the accused. On balance, there was, in the court's view, no denial of the defendant's sixth amendment rights.

Similarly in *Moore*, despite a lengthy delay (twenty-six months) the defendant made no demand for speedy trial on the indictment in question for the first twenty-five months. The reason ascribed to the delay was "pre-occupation" by the state and defense with prosecution and appeal of another rape charge. Although the defendant did allege that the delay impaired the effectiveness of his alibi witnesses, thereby prejudicing him in his defense, again, on balance the court found no sixth amendment violation.

Likewise in *Harris*, in which the reason for the delay was a crowded docket and a summer (July-August) recess (and not the "procrastination"\textsuperscript{36} of the state) the court found no constitution denial. Once demand was made, the defendant was tried within three months. Despite the ten month length of delay, "no other prejudice than the delay itself"\textsuperscript{37} was claimed by the defendant.

All three cases are examples of the application of the *Barker* approach to the problem of speedy trials. The approach taken by the Louisiana court should be similar to the "unnecessary delay" test outlined in Rule 48(1) of the Federal Rules of Criminal Procedure.\textsuperscript{38} Of course no "balancing" is involved if the periods of limitations prescribed by the Code of Criminal Procedure lapse.\textsuperscript{39} Thus Louisiana now has two tests: the *Barker* test and the code test. A defendant's challenge can, of course, be leveled under one or both. The defendant's statutory and constitutional rights are protected by the courts but their extent is uncertain. If any single factor

\textsuperscript{34} 407 U.S. at 530-33.
\textsuperscript{35} See *Furman* v. Georgia, 408 U.S. 238 (1972).
\textsuperscript{36} 297 So. 2d at 432.
\textsuperscript{37} Id. at 433.
\textsuperscript{39} See LA. CODE CRIM. P. arts. 572-83.
appears significant, it is elapsed time until trial following demand.

This approach seems fair and reasonable. When the parties are not interested in achieving a quick trial, the interests of public justice do not necessarily demand that the case be prosecuted with haste. However, once a defendant demands a speedy trial, a period of sixty to ninety days should be the outside limits for holding an accused in custody without trial. The interim limits for the Speedy Trial Act of 1974 provide for a release from custody, not dismissal, in the event over ninety days lapse from the beginning of "continuous detention" to the commencement of trial.40

The writer submits that Louisiana trial and appellate courts should consider the use of their rulemaking power to effectuate a defendant's constitutional right to speedy trial.41 At the least the wrongly held prisoner should achieve release from custody without monetary conditions42 and the release should follow if an accused in custody is not tried within a short specified period following demand. Although speedy justice is often to the benefit of the state,43 not the defendant, and although many defendants may not want speedy justice, the courts should promulgate rules as a guide for setting quick criminal trials for those who demand them and who are incarcerated. The advantage local speedy trial rules44 might have over state-wide legislation is flexibility to meet local conditions and the size of the criminal docket.45

The writer does not suggest that the problem of protecting the defendant's constitutional right to a speedy trial should be viewed as the court's alone or the district attorney's alone. The writer merely suggests that some effort should be made toward establishing more certain constitutional limits than the loose criteria of the Barker test.46

41. U.S. CONST. amend. VI; LA. CONST. art. I, § 16. See also LA. CODE CRIM. P. art. 701.
42. See LA. CODE CRIM. P. art. 336 (providing for release on recognizance). See also ABA STANDARDS, Speedy Trial § 4.2 (1968).
43. LA. CODE CRIM. P. art. 701 provides that the state as well as the defendant has a right to a speedy trial.
44. See LA. CODE CRIM. P. art. 18. See also LA. CONST. art. V, § 5(A).
45. See, e.g., FED. R. CRIM. P. 50(b), providing for district court plans for the prompt disposition of criminal cases.
46. See also ABA STANDARDS, Speedy Trial §§ 2.1-4.2 (1968); NATIONAL
CHANGE OF VENUE

In State v. Bell, the court held that an accused has the right to offer evidence of pretrial publicity and community bias at a hearing on a motion for a change of venue. The defendant cannot be restricted to an examination of prospective jurors alone to determine whether he can obtain a fair trial in a particular community. He has the right to prove that "the state of the public mind against the defendant is such that jurors will not completely answer honestly upon their voir dire, or witnesses will be so affected by the public atmosphere that they will not testify freely and frankly."48

In Bell the defendants were "muslims" charged with inciting to riot, resulting in the deaths of two deputy sheriffs. In a sincere effort to determine whether or not the defendants could receive a fair trial in East Baton Rouge Parish the trial court proposed that a "dry run voir dire" be conducted. Three hundred individuals were randomly drawn from the jury wheel to be examined. This was an effort to determine from a cross-section of the community whether pretrial publicity and bias in the community would preclude a fair trial. Following examination of a number of the sample of prospective jurors, the trial court ruled, based on the responses given, that jurors could be selected from East Baton Rouge Parish who could fairly try the case.51

The trial court's error, according to the majority, lay in

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47. 315 So. 2d 307 (La. 1975).
48. LA. CODE CRIM. P. art. 622, comment (a), quoted with approval in 315 So. 2d at 310. Justice Dixon, author of the opinion, listed seven factors to be considered: "Some relevant factors in determining whether to change venue are (1) the nature of pretrial publicity and the particular degree to which it has circulated in the community, (2) the connection of government officials with the release of the publicity, (3) the length of time between the dissemination of the publicity and the trial, (4) the severity and notoriety of the offense, (5) the area from which the jury is to be drawn, (6) other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant, and (7) any factors likely to affect the candor and veracity of the prospective jurors on voir dire.” 315 So. 2d at 311.
49. 315 So. 2d at 311.
50. Id.
51. "The questioning was directed solely at the issue of whether the person could serve as an impartial juror or would be subject to challenge for cause at the defendant's trial." Id. at 312.
its refusal to permit defendants to offer other evidence in an effort to prove community bias.\(^5\) The court's analysis of the purport of article 622 is clear and direct. The concept of challenge for cause cannot be confused with the concept of change of venue, as the redactor's comments show. The language of article 622 reveals that "the defendants were entitled to a change of venue if they could show, even though it would be possible to select a jury whose numbers were not subject to a challenge for cause, that there were influences in the community which would affect the answers of the jurors on voir dire, or the testimony of witnesses at the trial, or that, for any other reason, a fair and impartial trial could not be obtained in the parish."

The majority's position is certainly consistent with the spirit of the Code of Criminal Procedure and of the handling of such problems by the United States Supreme Court. For example, in *Rideau v. Louisiana*,\(^3\) the Court, after discussing massive pretrial publicity, said that it would not "hesitate to hold, without pausing to examine a particularized transcript of the voir dire examination of members of the jury, that due process of law in [that] case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised interview."\(^4\)

Needless to say, the expenditure of time and funds concluding in a jury verdict which must be reversed on appeal presents an unhappy picture.\(^5\) As stated, however, the court's position is both just and sound. It is unfortunate that the defendant's pretrial application for writs was not granted.\(^6\) While piecemeal litigation of a case is not to be desired, in cases of such magnitude when fundamental issues\(^7\) are involved, the court would serve the interest of

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5. On this point the majority and dissent appear divided on the interpretation of the record of the trial proceedings. The writer's commentary is based on the majority's findings.

6. 373 U.S. 723 (1963). The defendant's confession was televised following a highly publicized robbery-murder in Lake Charles, La.

7. *Id.* at 729. In the televised interview, the defendant confessed to the sheriff the murders for which he was subsequently tried and convicted. *Id.*

8. Both deputies who lost their lives were and several of the officers who were injured severely are friends of the writer.


10. The merits of none of the other ninety-nine bills of exceptions urged on appeal were discussed.
justice to both the state and the defendant in granting pre-trial review.58

THE JURY

Jury Venires—The Reaction to Taylor

The Louisiana Supreme Court had occasion to apply the decisions of the United States Supreme Court in Daniel v. Louisiana59 and Taylor v. Louisiana60 in several cases during the last term. Taylor, decided on January 21, 1975, held that the provisions of Art. VII, § 41 of the Louisiana Constitution of 192161 and article 402 of the Code of Criminal Procedure providing for the automatic exemption of women from jury service62 were unconstitutional.63 Six days later, on January 27, 1975, in Daniel, the Court held that Taylor "is not to be applied retroactively, as a matter of federal law, to convictions obtained by juries empanelled prior to the date of that

58. See, e.g., State v. Truss, 317 So. 2d 177 (La. 1975) (trial court's "palpable error" in denying defendant's motion to suppress reviewed and reversed following the defendant's pretrial application for writs). If the court considers the error to be obvious, as in Truss, the fairest step to take is to grant relief in an exercise of their supervisory jurisdiction. See, e.g., State v. Donahue, 315 So. 2d 329 (La. 1975), where the defendant moved to recuse (LA. CODE CRIM. P. arts. 680-81) the district attorney and his assistants because the district attorney himself was to be the state's "sole witness to the content of an oral confession" made by the defendant. The defendant's application for writs was granted and the district attorney was ordered recused from the case. See, e.g., State v. Birabent, 305 So. 2d 448 (La. 1974). Cf. LA. CODE CRIM. P. art. 2083; Hopkins v. Hopkins, 300 So. 2d 661 (La. App. 3d Cir. 1974).
60. 419 U.S. 522 (1975).
61. The Louisiana Constitution of 1974, which does not contain a similar provision exempting women from jury duty, explicitly repeals La. Const. art. VII, § 41 (1921) and became effective at midnight December 31, 1974. See LA. CONST. art. XIV, §§ 317 & 350. See also LA. CONST. art. I, § 33.
62. They were exempt unless they filed a written declaration of desire to serve with the clerk of court. See also former LA. CODE CRIM. P. art. 402, repealed by La. Acts 1974, Ex. Sess. No. 20 § 1 effective Jan. 1, 1975.
63. In Taylor, the United States Supreme Court held that "Louisiana's special exemption for women operates to exclude them from petit juries, which in our view is contrary to the sixth and fourteenth amendments." 419 U.S. at 538. To provide such a broad exemption in effect defeats the requirement that the pool from which trial jurors are ultimately selected represent a "fair cross section of the community." See Peters v. Kiff, 407 U.S. 492 (1972); Smith v. Texas, 311 U.S. 128 (1940).
decision." Since the question of retroactivity was one of tremendous consequence to Louisiana, Daniel told the full story in terms of the impact of Taylor on the Louisiana criminal justice system. Had Taylor been given retroactive effect, the federal and state district courts would have been filled with petitions for writs of habeas corpus from those who raised the issue and had it adversely decided as well as from those whose counsel failed to raise it. Since almost every Louisiana inmate was convicted following trial before a jury constituted in compliance with Louisiana Constitution Art. VII, § 41, Daniel was far more significant in easing the impact of Taylor, than Taylor was in changing the law in Louisiana.

Following Taylor and Daniel, the Louisiana Supreme Court rejected claims attacking the constitutionality of venires in cases where trials were held prior to January 21, 1975. The court rejected the contention that cases in the "appellate pipeline" should give Taylor full prospective application. Justice Dixon, in State v. Rester, said:

Opinions concerning retroactive or prospective application of new-found constitutional rights are not good subjects for careful analysis. They tend only to the conclusion that these results are dictated less by law and reason than by expedient judicial administration.

64. 420 U.S. at 32.
65. The issue was hotly litigated in Louisiana for several years prior to Taylor. The question was presented, but not decided, in Alexander v. Louisiana, 405 U.S. 625 (1972) (Douglas, J., concurring).
66. Had Taylor been given retroactive impact, innumerable problems of "waiver by counsel's procedural default" would have been spawned. See Tolette v. Henderson, 411 U.S. 258 (1973); Davis v. United States, 411 U.S. 233 (1973); Rivera v. Wainwright, 488 F.2d 275 (5th Cir. 1974); Winters v. Cook, 466 F.2d 1393, on rehearing 489 F.2d 174 (5th Cir. 1973).
68. The United States Supreme Court was, of course, aware of Louisiana's own changes. The invalid provisions themselves were repealed as a matter of state law approximately twenty-one days prior to the decision in Taylor.
70. See, e.g., State v. Nicholas, 312 So. 2d 856 (La. 1975); State v. Devore, 309 So. 2d 325 (La. 1975); State v. Rester, 309 So. 2d 321 (La. 1975). See also State v. Wright, 316 So. 2d 380 (La. 1975); State v. Groves, 311 So. 2d 230 (La. 1975).
71. 309 So. 2d 321 (La. 1975).
72. Id. at 323. The basis for the decision to give non-retroactive effect to
While the writer agrees with the court’s prospective application of Taylor, the court had no choice in view of Daniel. As a matter of "federal law," Daniel said Taylor was not retroactive. The Louisiana Supreme Court is bound by the United States Supreme Court’s interpretation of federal constitutional law. For the Louisiana Supreme Court to have given Taylor retroactive effect, it would have to have done so based on state law, and state law was clear in view of the constitutional provision.

An interesting series of cases from the Eighteenth Judicial District of Louisiana has provided a fascinating problem in view of the non-retroactive application of Taylor. Prior to the decision in Taylor, women in that district were being included in petit jury venires. In State v. Milton, the defendant moved to quash on the grounds that the inclusion of women who did not file the written declaration of willingness to serve violated Art. VII, § 41 of the then applicable Louisiana constitution as well as the former Code of Criminal Procedure article 402 which merely restated the applicable provisions.

Affirming the conviction, the court said that although Daniel held that Taylor “need not be applied retroactively,” Daniel was predicated on the theory that retroactive application of Taylor “would do little, if anything, to vindicate the sixth amendment interest at stake and would have a substantial impact on the administration of criminal justice in Louisiana.” The court said that Daniel did not indicate that the constitutional provision was valid when the defendant challenged the venire in Milton. The trial judge was therefore

Taylor was predicated on the United States Supreme Court’s earlier cases regarding retroactive application of new constitutional rules. See Linkletter v. Walker, 381 U.S. 618 (1965).

73. See note 68, supra.
75. Following Healy v. Edwards, 363 F. Supp. 1110 (E.D. La. 1973), some judges concluded, as did the federal district court in Healy, that LA. CONST. art. VII, § 41 (1921), was unconstitutional. They thus began to include women in petit jury venires. See State v. Kibby, 294 So. 2d 196 (La. 1974).
76. 310 So. 2d 524 (La. 1975).
77. The motion was filed prior to trial. The motion was denied on Sept. 23, 1974 and the defendant was tried on October 2, 1974, several months prior to Taylor v. Louisiana, 419 U.S. 522 (Jan. 21, 1975) or the effective date of the Louisiana Constitution of 1974 (midnight, Dec. 31, 1974).
79. 420 U.S. at 31.
correct in permitting the “inclusion of non-volunteering women.”

The court's approach to the problem is sound. The validity of the Louisiana constitutional and statutory scheme was not at issue in Daniel. The scheme was constitutionally invalid and the trial court in Milton correctly foresaw that result.

**Jury Access to Testimony and Documents**

*State v. Freetime* and *State v. McCulley* concerned the application of Louisiana Code of Criminal Procedure article 793. In *Freetime*, the trial court acquiesced to a jury's request to inspect the defendant's written confession during its deliberations. In *McCulley*, the trial court permitted the jury during deliberation to replay the record of the testimony of a crucial state witness.

In both cases the Louisiana Supreme Court reversed, holding that the prohibition of the Code of Criminal Procedure article represented a clear legislative choice not to permit jury access to such evidence during deliberations. Despite a contrary position taken by the American Bar Association, the court felt bound to enforce the clearly expressed legislative mandate of article 793.

In both *Freetime* and *McCulley*, Justice Tate, writing for the court, rejected the state's harmless error argument. Earlier, in *State v. Ledet*, a case involving reference by a juror to notes, Justice Tate predicated his opinion on the theory of harmless error and noted with approval the ABA's position.

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80. 310 So. 2d at 526. Justices Barham and Summer dissented.
81. 303 So. 2d 487 (La. 1974).
82. 310 So. 2d 833 (La. 1975).
83. In *State v. Ledet*, 298 So. 2d 761 (La. 1974), the court also interpreted *LA. CODE CRIM.* P. art. 793. Since the result there involved the application of *LA. CODE CRIM.* P. art. 921, the case is treated separately in this symposium.
84. The testimony replayed was that of an undercover police officer whose testimony, along with that of another undercover officer, formed the "principal evidence of [drug] possession presented against the defendant.” 310 So. 2d at 834 n.1.
86. 298 So. 2d 761 (La. 1974). This case involved note-taking by jurors and reference to notes during deliberations. This is also prohibited by *LA. CODE CRIM.* P. art. 793.
87. ABA STANDARDS, *Trial by Jury* § 4.2 (1968). Justice Tate was also concerned with enforcing the policy expressed in *LA. R.S. 15:470* (1950) prohibiting juror impeachment of their verdict.
which was contrary to article 793. Despite the court's awareness that many academicians and practicing lawyers feel that jurors should, in the trial court's discretion, be permitted to replay testimony or refer to documentary evidence, it refused to ignore Louisiana's clear "policy choice."

In *Freetime*, the state urged the court to give the jury "sole discretion to determine whether physical examination is required by it of any documentary exhibit." Article 793 permits the jury to examine documentary exhibits when a "physical examination thereof is required to enable the jury to arrive at a verdict." This does not include an examination of a "documentary exhibit for its verbal content."

The interpretation urged by the state would have opened the door to examination of documents for their verbal contents. The trial court should certainly be given some discretion to determine whether the jury seeks the document for "physical examination" or examination of its verbal contents. However, if the purpose of the jury view of the document could only be, from the nature of the exhibit, to re-examine its verbal content, examination seems to fly in the face of the code article's clear proscription. Change in this area must come by legislative action, and not by a liberal application of the harmless error rule.

**Jury Charges**

In *State v. Nicholson*, the Louisiana Supreme Court disapproved of "Allen charges" to encourage deadlocked juries to reach a verdict. The court instead approved charges which comply with the American Bar Association Standards Relating to Trial by Jury. This is not to say that the court has strictly disavowed jury charges that encourage jurors to re-examine their views in order to reach a verdict. The ABA

88. 310 So. 2d at 835, 303 So. 2d at 490.
89. 303 So. 2d at 489.
91. The legislature meets in regular session every year. *LA. CONST.* art. III, § 2.
92. *LA. CODE CRIM.* P. art. 921.
93. 315 So. 2d 639 (La. 1975).
94. *ABA STANDARDS, TRIAL BY JURY* § 5.4 (1968). The court notes that an appropriate modification to (i) would of course be made in cases not requiring a unanimous verdict. See *LA. CODE CRIM.* P. arts. 779, 782.
Standards certainly approve some such charges. The court was simply concerned with a portion of the trial court's charge that indicated that the case would "definitely have to be tried again" in the event of mistrial following failure to reach a verdict. The court also disapproved of the trial judge's emphasis on "the desirability of reaching a verdict." The court has essentially promulgated the ABA Standards as guidelines to any supplemental charges given to juries having difficulty reaching verdicts. Hence, to the extent that those guidelines are carefully followed, trial courts may give jurors supplemental charges to aid a deadlocked jury in reaching a verdict.

In State v. Babin, on rehearing, the Louisiana Supreme Court held that the defendant was entitled to have the jury charged on "the consequence of a finding of not guilty by reason of insanity—the procedural aftermath of such finding." The court, recognizing the res nova nature of the issue, declined to follow State v. Blackwell, holding that "instructions on the post verdict status of a not guilty by reason of insanity acquittal are not properly analogous to instructions on post conviction sentencing." In Blackwell,
the court left the question of charging the jury as to the penalty in non-capital cases to the sound discretion of the trial court. Babin,\textsuperscript{102} however, clearly requires instructions regarding the procedures to be followed following a verdict of not guilty by reason of insanity "if they have been specially requested by defendant or by the jurors."\textsuperscript{103}

In holding that Code of Criminal Procedure article 803 requires the special charge, the court recognized that it was making a "judicial choice between a possible miscarriage of justice flowing from the imprisonment of one who should be hospitalized, because the jury does not understand the effects of its insanity verdict, and a possible invitation to the jury to consider matters extraneous to the merits . . . ."\textsuperscript{104} The choice in favor of requiring the charge, while inconsistent with Blackwell, is nonetheless fair and just.

**HARMLESS ERROR**

State v. Sneed\textsuperscript{105} again applies harmless error in a case involving the notice of intention to introduce inculpatory statements required by Code of Criminal Procedure article 768. The 768 notice requirement has provided a fertile field for harmless error.\textsuperscript{106} While the code requirement is rather clear and direct, the court has had no difficulty avoiding reversal for noncompliance with its mandate. Numerous exceptions have been recognized so that the type of statements covered by article 768 has been rather narrowly drawn.\textsuperscript{107}

In Sneed, the court announced what appeared to be a significant rule regarding the contents of the required notice, then concluded that the state's failure to comply with the

\textsuperscript{102} 318 So. 2d at 367.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} 316 So. 2d 372 (La. 1975).
\textsuperscript{107} See, e.g., State v. Wells, 306 So. 2d 695 (La. 1975) (LA. CODE CRIM. P. art. 768 only deals with statements made after the crime was committed); State v. Normand, 298 So. 2d 823 (La. 1974) (disclosing notice of intent to use confession in bill of particulars sufficient); State v. Himel, 260 La. 949, 257 So. 2d 670 (1972) (not required in a bench trial); State v. Jackson, 260 La. 561, 256 So. 2d 627 (1972) (where failure to give is inadvertent and in good faith and not to the detriment of defendant no harm from failure to give); State v. Fink, 255 La. 385, 231 So. 2d 360 (1970) (not applicable to statements made during the "res gestae" of the offense).
heretofore unrecognized standard was harmless error. In order to be "technically sufficient," the 768 notice must, it said, identify each confession or inculpatory statement "with sufficient specificity as to date or occasion and as to persons to whom give[n] as to afford adequate notice sufficient to permit the defendant a fair opportunity to meet the issue." Although a notice is "technically insufficient," no reversible error results when the accused is in fact given sufficient pre-trial notice. As examples the court referred to earlier cases in which the defendant was informed of the state's intent to use an inculpatory statement by letter or by response to a bill of particulars.

Sneed is consistent with the court's earlier harmless error approach to article 768. If complete lack of notice does not bar admission absent prejudicial surprise, a fortiori the same result should follow if no prejudicial surprise results from giving a technically insufficient notice.

The court's approach in Sneed is well reasoned and fair, although, as Justice Dixon notes, the article 768 notice is "virtually useless in the defense of criminal cases" and is "honored more in the breach than in the enforcement." Article 768 provides little in the way of discovery for the defense; as Justice Tate recognized the district attorneys

108. Justice Tate refers to the technical sufficiency and insufficiency of the notice throughout the opinion.

109. 316 So. 2d at 376. The court reiterated its earlier position that the 768 notice need not give the content of the statement. See State v. Richey, 258 La. 1094, 249 So. 2d 143 (1971).

110. 316 So. 2d at 377.

111. In Sneed, in response to a prayer for oyer the DA agreed to furnish defense counsel with all oral statements of the defendant. 316 So. 2d at 377. Presumably this information was furnished.


114. 316 So. 2d at 380.

115. Id. Several months later in State v. Dupuy, 318 So. 2d 294 (1975) Justice Dixon, referring to Sneed and finding harmless error, wrote: "We did not there [in Sneed] hold that the 'bare bones notice,' like the one used in this case . . . was such a violation of the codal requirement that it would, without any showing prejudice, require reversal." 318 So. 2d at 297.

116. A recent amendment of FED. R. CRIM. P. 16 requires the government to disclose, upon request, to the defendant "the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent."
may wait until immediately prior to the beginning of the state's opening statement to give notice.\textsuperscript{117} He notes that "the purposes of the provision might better be served by notice more in advance of the trial date than the opening morning of the trial."\textsuperscript{118}

But because more advance notice is not required by the statute, it is easy to see why the court treats a technically insufficient article 768 notice as harmless error if it has been preceded by advance information. The court seems to imply that when the defendant gets more than he is entitled to under article 768, violations of that code provision will likely be deemed harmless error.\textsuperscript{119}

WITNESSES

Sequestration

\textit{State v. Bradford}\textsuperscript{120} addresses the trial court's authority to prohibit a witness from testifying as a sanction for violation of a sequestration order.\textsuperscript{121} In that case, a state witness discussed the case with a district attorney's investigator after the sequestration order.\textsuperscript{122} Defense counsel argued that Louisiana Code of Criminal Procedure article 764 permits only the district attorney or one of his assistants to discuss the case with prospective witnesses after the sequestration order. The trial judge permitted the state witness to testify. The Louisiana Supreme Court held that the trial judge did not abuse his discretion in permitting the witness to testify. The court assumed for purposes of the decision that the investigator's conversation with the witness violated the order. It noted that the witness was the first to be called by the district attorney, that the investigator was not a witness in the case, and that the discussion occurred prior to the testimony of any witnesses.\textsuperscript{123} Under the circumstances, the court said, the witness was "not being informed of events and testimony

\textsuperscript{117} 316 So. 2d at 377 n.2.
\textsuperscript{118} Id.
\textsuperscript{119} See also \textit{State v. Wright}, 316 So. 2d 380 (La. 1975) (decided the same day as \textit{Sneed}).
\textsuperscript{120} 298 So. 2d 781 (La. 1974).
\textsuperscript{121} See L.A. CODE CRIM. P. art. 764.
\textsuperscript{122} An order of sequestration had been given. See 298 So. 2d at 789 for the judge's instructions to the prospective witnesses.
\textsuperscript{123} 298 So. 2d at 793.
occurring within the courtroom."\textsuperscript{124} Finding that the "primary purpose of sequestration . . . is to insure that a witness will testify as to his own knowledge of the case without being influenced by the testimony of other witnesses,"\textsuperscript{125} the court concluded that the trial court properly permitted the witness to testify.

The court did not discuss its earlier decision in \textit{State v. Wills},\textsuperscript{126} in which a policeman was sent by the district attorney to speak with defense witnesses after the sequestration order. There reversing, the court spoke in terms of the defendant's "statutory right to have his witnesses secured from police interrogation."\textsuperscript{127} It clearly rejected the district attorney's contention that the police were his "investigatory arm"\textsuperscript{128} and should be able to act for him in speaking to witnesses after a sequestration order has been entered.

When the district attorney's investigator is not a witness in the case, the trial court should have authority to modify its sequestration order, upon request of the district attorney, to permit the investigator to interview witnesses for the district attorney. Article 764 permits the trial court to "modify its order in the interest of justice." The modification could be accompanied by appropriate safeguards. It could be limited to the state's witnesses, excluding the right to interrogate or interview defense witnesses. The trial court could also instruct the investigator not to inform witnesses of the testimony of other witnesses. Such safeguards could prevent abuse while permitting the investigator to aid a district attorney who, for example, may have to select a jury while his investigator goes over prior statements with state witnesses.

In \textit{State v. Holmes},\textsuperscript{129} the trial court prohibited the testimony of a defense witness because she was present during the entire trial in violation of the sequestration rule.\textsuperscript{130} The witness precluded from giving testimony was to testify in support of the defendant's alibi. She heard the entire tes-

\textsuperscript{124} \textit{Id.} at 790.
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} 260 La. 707, 257 So. 2d 378 (1972).
\textsuperscript{127} \textit{Id.} at 708, 257 So. 2d at 379. \textsc{La. Code Crim. P.} art. 764 permits counsel to speak to witnesses after the order sequestering the witnesses has been entered.
\textsuperscript{128} 260 La. at 708, 257 So. 2d at 379.
\textsuperscript{129} 305 So. 2d 409 (La. 1974).
\textsuperscript{130} \textit{Id.} at 410.
timony and cross-examination of another alibi witness. Affirming, the Louisiana Supreme Court agreed that "to have allowed [the witness] to testify would have violated the very reason for the sequestration of witnesses." The court cited earlier cases interpreting article 764 as permitting the trial court "the discretion to prohibit a witness who has violated the sequestration order from testifying."

Certainly the trial judge, given proper circumstances, can prohibit a witness who has violated the sequestration order from testifying. But the defendant's constitutional right to present witness in his own behalf must be balanced against the trial court's enforcement of its order of sequestration. Recently the United States Court of Appeals for the Fifth Circuit granted a new trial in collateral proceedings reviewing a Louisiana conviction. In *State v. Barnard,* the Louisiana trial judge had refused to permit the defense to call a witness who the district attorney contended violated the sequestration order. The witness was not present during the first day of the proceedings and was unaware of the order, invoked on behalf of the defendant. The witness entered the courtroom and heard about fifteen minutes of testimony of a state witness before a recess when the witness's presence was discovered. The Louisiana Supreme Court apparently approved the trial court's ruling that it was the responsibility of counsel to notify his witnesses of the sequestration rule. Since the witness's testimony would directly contradict the

131. *Id.* at 413. The court said: "The purpose behind the order of sequestration is to encourage development of the true facts of the case by preventing witnesses from being influenced by the testimony of other witnesses and by allowing for effective cross-examination." *Id.*


133. 305 So. 2d at 413.


135. U.S. CONST. amend. VI; LA. CONST. art. 1, § 16.

136. 287 So. 2d 770 (La. 1973).

137. The opinion was authored by William A. Culpepper, Justice Ad Hoc, and subscribed to by two regular members of the court. There were two dissents.

138. The Louisiana Supreme Court also found the error, if any, harmless in view of the testimony of another defense witness who did testify at the trial.
testimony of the other witness whom she heard, the court approved the disallowance of the testimony.\textsuperscript{139}

In ordering a new trial, the Fifth Circuit indicated that the trial court may only exclude crucial defense witnesses from testifying when the sequestration violation was with the "knowledge, procurement, or consent" of the defendant or his counsel.\textsuperscript{140} The test applied by the Fifth Circuit is, of course, based on federal constitutional grounds. It would also appear to satisfy the defendant's Louisiana constitutional right to call witnesses on his own behalf.\textsuperscript{141} Although the decision in \textit{Holmes} might pass the constitutional test outlined by the Fifth Circuit, the decision of the court does not address the problem in those terms. Given the availability of collateral review of state convictions by lower federal courts,\textsuperscript{142} the tests employed by those courts in applying federal constitutional standards must at least be recognized and discussed by Louisiana courts.

\textit{Questioning by the Trial Court}

In two recent cases the Louisiana Supreme Court approved the trial court judge's examination of witnesses. In \textit{State v. Layssard},\textsuperscript{143} a bench trial, although the judge did not put the questions directly to the witness, he instructed the district attorney to ask certain questions.\textsuperscript{144} In \textit{State v. Groves},\textsuperscript{145} a jury trial, the judge asked five questions of a state witness in the presence of the jury. The questions dealt with whether the deceased committed an "overt act" or "hostile demonstration" prior to being killed.\textsuperscript{146}

\textsuperscript{139} 287 So. 2d at 775.

\textsuperscript{140} Barnard v. Henderson, 514 F.2d 744, 745 (5th Cir. 1975), citing Braswell v. Wainwright, 463 F.2d 1148 (5th Cir. 1972) (containing a full discussion of what the court in \textit{Barnard} calls the "Braswell test" for determining whether, without violating the constitutional rights of the defendant, a defense witness can be barred from giving testimony due to his violation of a sequestration order).

\textsuperscript{141} LA. CONST. art. I, § 16.


\textsuperscript{143} 310 So. 2d 107 (La. 1975).

\textsuperscript{144} They dealt with laying the foundation for the admission of evidence of the witness' conclusion that the defendant, charged with DWI, was drunk at the time of his arrest. In the court's view, telling the DA \textit{what} to ask and asking the questions himself was no different. 310 So. 2d at 109. The witness was apparently a state trooper.

\textsuperscript{145} 311 So. 2d 230 (La. 1975).

\textsuperscript{146} See LA. R.S. 15:482 (1950), as amended by La. Acts 1952, No. 239.
In both cases, relying on prior jurisprudence, the court suggested that trial judges may question witnesses in order to clarify the witnesses' testimony or to "supply an omission of proof on a material point." In bench trials the trial judge may question witnesses to clarify the evidence in his mind. In jury trials, the trial judge must avoid questions which comment on the evidence or indicate "his opinion on the merits" or express "any doubt as to the credibility of the witness."

In Layssard the trial court is given broad latitude to question witnesses in bench trials:

Unless [the trial court's] participation in the trial is to such an extent and of such a nature that it deprives the defendant of a fair trial, there is no error.

It seems, under the quoted test, that the trial court must practically assume the role of prosecutor in order to commit error in questioning witnesses.

Similarly, under the test approved in Groves for jury trials, the trial judge has broad latitude. Although he must not appear through his questions to take sides, the fact that his questions clarify testimony or supply elements, thereby in effect aiding either the prosecution or the defense, is of no moment.

The court's analysis fits very nicely with the theory that the trial judge is not merely an umpire or referee of a purely adversary process. It also conforms nicely to the theory that the trial court has a duty to aid in the development of facts so that the jury can reach the truth. However, trial judges

147. State v. Coffin, 222 La. 487, 62 So. 2d 651 (1952); State v. Wilson, 204 La. 24, 14 So. 2d 873 (1943); State v. Graffam, 202 La. 869, 13 So. 2d 249 (1943).
148. 311 So. 2d at 240.
149. 310 So. 2d at 108.
150. Id. See also LA. CODE CRIM. P. art. 772.
151. 311 So. 2d at 240.
152. 310 So. 2d at 108.
154. See text at notes 149-51, supra.
155. The same guidelines appear applicable to federal district judges. For an interesting example of a trial court's improper "cross-examination" of a testifying defendant in a federal criminal prosecution for importation of marijuana, see United States v. Hokey, 483 F.2d 359 (5th Cir. 1973).
156. See United States v. Hokey, 483 F.2d 359 (5th Cir. 1973); United States v. Lewis, 338 F.2d 137 (6th Cir. 1964); Smith v. United States, 331 F.2d 265 (8th Cir. 1964); Knapp v. Kinsey, 232 F.2d 458 (6th Cir. 1966); United States v. Marzano, 149 F.2d 923 (2d Cir. 1945).
must use restraint and must not ignore the adversary nature of the process. It is the district attorney's responsibility, not the court's, to see that the state's case is established beyond a reasonable doubt. That burden of proof falls on the state.157

CONTROLLING THE OBSTREPEROUS DEFENDANT

In *State v. Brewer*158 the trial court ordered the defendants, Brewer and Wilkinson, bound and gagged in the presence of the jury. On appeal, in Brewer's case the Louisiana Supreme Court affirmed; in Wilkinson's, it reversed. The difference in results stemmed directly from the difference in the two defendants' conduct preceding the trial court's order that they be bound and gagged.159

The court recognized the trial judge's authority under Louisiana Code of Criminal Procedure article 17160 to take such action when the defendant has "made clear his intention to disrupt the court and his disrespect for the proceedings."161 By implication, in reversing Wilkinson's conviction, the court also made it clear that such action will not be approved unless the record supports the trial court's finding that the defendant was sufficiently disruptive to warrant the measures.

The court relied upon *Illinois v. Allen*,162 a United States Supreme Court decision recognizing the authority of a trial judge to bind and gag a disruptive defendant or even exclude him from the courtroom, under certain conditions.163 There the Court found extreme conduct, repeated warnings of the consequences of continued misbehavior, and an invitation to return on the defendant's agreement to behave in an orderly fashion.164

The test is the same for binding and gagging, as in Brew-

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158. 301 So. 2d 630 (La. 1974).
159. A full colloquy of the proceedings is reported. 301 So. 2d at 634.
160. *LA. CODE CRIM. P.* art. 17 provides: "[The court] has the duty to require that criminal proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done. . . ."
161. 301 So. 2d at 635.
164. 397 U.S. at 346.
er, and exclusion, as in Allen. Once it is satisfied, the trial court should determine which course to follow. Arguably, if the defendant is accused of a capital crime, binding and gagging is the only option available to the court, since the Code of Criminal Procedure provides a strong mandate for the defendant’s presence in capital cases. Nevertheless, for such extreme measures to be justified, more than a minor disruption must occur. In view of Allen, trial judges would be advised to warn the defendant, for the record, prior to such measures, regarding the consequences of further disruption. In this manner, the trial court provides a clear, unequivocal record on which the reviewing court can evaluate the justification for the action taken.

MISTRIAL

Prejudicial Remarks by the District Attorney

In State v. Gaspard the Louisiana Supreme Court reversed the trial court’s refusal to order a mistrial following the prosecutor’s reference to plea bargaining arrangements between the defendant and the state. The court found that the remark fell outside the scope of Louisiana Code of Criminal Procedure article 770, but that an admonition to disregard it was not enough to cure the prejudicial impact and to “assure the defendant a fair trial.” Although article 770 did not require a mistrial in this situation, the court recognized that there are situations other than those listed in article 770 requiring the granting of a mistrial. When a remark by the

165. Id.
166. LA. CODE CRIM. P. art. 831 provides: “A defendant charged with a felony shall be present: (1) At arraignment; (2) When a plea of guilty, not guilty, or not guilty and not guilty by reason of insanity is made; (3) At the calling, examination, challenging, impanelling, and swearing of the jury, and at any subsequent proceedings for the discharge of the jury or of a juror; (4) At all times during the trial when the court is determining and ruling on the admissibility of evidence; (5) In trials by jury, at all proceedings when the jury is present, and in trials without a jury, at all times when evidence is being adduced; and (6) At the rendition of the verdict or judgment, unless he voluntarily absents himself.”
167. The contempt power may be sufficient to control disruptive behavior of a lesser nature. See LA. CODE CRIM. P. arts. 17, 21-22, 25.
168. 301 So. 2d 344 (La. 1974).
169. Id. at 356.
170. Id.
district attorney is not within the scope of article 770, mistrial is unnecessary only if the admonition will suffice to allay prejudice. Although article 771 speaks in terms of the trial court's discretion to grant a mistrial "if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial," Gaspard makes it clear, by implication, that the code article requires the granting of a mistrial unless the trial court's admonition is sufficient to assure the defendant a fair trial.

The court's analysis is correct. Article 770 lists grounds for mandatory mistrial in which the legislature has determined that admonition will never suffice unless the defendant waives his right to a mistrial. Article 771, on the other hand, lists those sorts of prejudicial remarks that may, but do not always, require a mistrial on defendant's motion. In the event that the court finds that the improper remarks could not reasonably be cured by admonition, a new trial must be ordered. In such cases, the trial court's discretion to rely on an admonition is still subject to review.

Remarks by Police Witnesses

A series of cases have dealt with the perennial problem of references by police witnesses to inadmissible evidence of other crimes. The Louisiana Supreme Court has not abandoned the theory that such a reference by an officer not "obtained by design of the prosecutor" does not fall within the scope of article 770. Such remarks by officers are improper but do not require mistrial if the trial court is satisfied that an admonition to the jury to disregard them will suffice "to assure the defendant a fair trial."

In State v. Foss, Justice Barham warned prosecutors

171. LA. CODE CRIM. P. art. 771.
172. State v. Lepkowski, 316 So. 2d 727 (La. 1975); State v. Lewis, 315 So. 2d 626 (La. 1975); State v. Smith, 310 So. 2d 580 (La. 1975); State v. Foss, 310 So. 2d 573 (La. 1975); State v. Gabriel, 308 So. 2d 746 (La. 1975); State v. Johnson, 306 So. 2d 724 (La. 1975); State v. Jackson, 301 So. 2d 598 (La. 1974).
174. LA. CODE CRIM. P. art. 770 mandates a mistrial if requested by the defendant if the district attorney or the judge or a "court official" refers directly or indirectly to evidence of other offenses committed by the defendant as to which evidence is not admissible.
175. LA. CODE CRIM. P. art. 771.
176. 310 So. 2d 573 (La. 1975).
177. His opinion was signed by Justice Tate. Justices Calogero and Dixon
that the court was growing "increasingly suspicious" of police officers who, while testifying, "seemingly explode with nonresponsive, inadmissible remarks of great prejudice when asked innocent questions by the State and the defense." In *Foss*, a narcotics case, in response to a question posed by defense counsel during cross-examination, the officer labeled the defendant as the "King pin" of a burglary organization. Reversing the conviction, the court said that "when gratuitous information supplied by a witness effectively jeopardizes the defendant's due process right to a fair trial," the trial court must grant a mistrial. Under the circumstances, Justice Barham found that the admonition was insufficient "to totally cure the prejudice" and that the circumstances were such that a mistrial alone would "preserve the defendant's right to a fair trial."

In *State v. Smith*, decided the same day as *Foss*, the court affirmed the trial court's denial of a mistrial where a police officer mentioned an unrelated narcotics sale. The officer was responding to defense cross-examination. The trial court, admonishing the jury to disregard the remarks, refused to order a mistrial. Following its earlier cases, the court found that the trial court was within the scope of discretion provided by article 771. It said that the remark in question was not "clearly unresponsive" due to the "indefiniteness" of defense counsel's question. The court also found no indication that the prosecution participated in planning the reference to inadmissible evidence by the officer.

In both *Foss* and *Smith*, the court toys with the idea, 

concur...
expressed by Justice Barham's dissent in *State v. Johnson*, that "prejudicial injection of inadmissible evidence by a law enforcement officer" testifying as a state witness should be considered prejudicial action by the state presumably within the scope of the mandatory mistrial provisions of article 770. In both cases, however, the court specifically notes that the decisions did not reach that issue.

A later case indicates that the court has not abandoned its earlier position and will not adopt Justice Barham's suggestion in *Johnson*. In *State v. Lepkowski*, the court affirmed the trial court's refusal to grant a defense motion for a mistrial following an officer's reference to inadmissible evidence of another offense. In response to a question by the district attorney, the officer said he learned that the defendant had a "previous conviction." The court found that the district attorney's question was not designed to place inadmissible evidence before a jury. It held that the trial court's admonition to disregard the remark was sufficient.

Similarly, in *State v. Lewis*, also decided after *Smith* and *Foss*, the court affirmed the trial court's refusal to grant a mistrial based on a police officer's remark. Following the officer's testimony concerning the defendant's confession of the offense charged, the officer said that the defendant told him "he wanted to tell . . . about some other things he had done." Though the court said the remark did not necessarily imply that the defendant had referred to other crimes, that determination was not crucial to the decision. The court found the remark to be an "inadvertent reference . . . not chargeable to the State." The admonition to the jury to disregard the remark was sufficient.

No inference of change in approach may be drawn from the court's recent decisions regarding unresponsive answers

188. 306 So. 2d 724, 731 (La. 1975) (Barham, J., dissenting).
190. Id.
191. 316 So. 2d 727 (La. 1975). Justice Dixon wrote the court's opinion.
192. Id. at 728.
193. Id. at 729. The prosecutor's lack of design was not contested by defense counsel. The trial court similarly found no improper design on the prosecutor's part.
194. 315 So. 2d 626 (La. 1975).
195. Id. at 630.
196. Id.
by police witnesses that effectively put inadmissible evidence of other offenses before the jury. Several members of the court have expressed a wary attitude toward police officers who seem to seize the opportunity during cross-examination to make damaging remarks about the defendant. However, if there ever was a temptation on the part of a majority of the court to place prejudicial remarks made by police witnesses within the scope of the mandatory mistrial provisions of article 770,\textsuperscript{197} it has passed.

\section*{DOUBLE JEOPARDY}

\textit{Re-prosecution Following Mistrial}

In \textit{State v. Birabent},\textsuperscript{198} the Louisiana Supreme Court decided that the defendant's second prosecution following a mistrial violated the statutory provisions\textsuperscript{199} regarding double jeopardy, thereby avoiding a very interesting federal constitutional problem. The mistrial ending the first trial was declared on motion of the district attorney after the first witness was sworn,\textsuperscript{200} when the district attorney realized, following a defense motion,\textsuperscript{201} that the indictment charged the defendant with manslaughter, not murder.\textsuperscript{202} The trial court denied the district attorney's motion to amend the indictment to charge the defendant with murder\textsuperscript{203} then granted the state's motion for a mistrial over defense objection. Following the mistrial, the district attorney moved to "correct" the indictment to have it charge the defendant with

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198. 305 So. 2d 448 (La. 1975).

199. \textit{LA. CODE CRIM. P.} arts. 591-98.

200. \textit{See LA. CODE CRIM. P.} art. 592: "When a defendant pleads not guilty, jeopardy begins when the first witness is sworn at the trial on the merits . . . ."

201. Defense counsel moved that the trial court restrict the state to evidence "pertaining to the crime of manslaughter." 305 So. 2d at 449. The validity of such motion was not at issue due to the mistrial.

202. The indictment charged that the defendant "unlawfully killed [the victim]." This is the short form indictment for manslaughter. Thus despite the endorsement "Murder," the indictment charged manslaughter, not murder. \textit{See LA. CODE CRIM. P.} art. 465.

203. The trial court viewed this as a "defect of substance" and refused to permit the amendment. \textit{See LA. CODE CRIM. P.} art. 487.
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murder. After the indictment was amended, defendant moved to quash, alleging double jeopardy. The trial court denied the plea of double jeopardy.

On the basis of the provisions of the Louisiana Code of Criminal Procedure, the court held that the trial court erred in refusing to sustain the defendant's plea of double jeopardy. The court reasoned that the indictment as it originally appeared was a "valid indictment for the crime of manslaughter." There was no "defect of substance" entitling the state to a mistrial under article 487. There was no "legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law." Because the original mistrial was not legally entered, jeopardy attached at the first prosecution and barred re-prosecution.

Assuming that the court was correct in finding no "defect of substance" in the indictment, is the state powerless, after the first witness is sworn, to correct a lesser error or must the district attorney simply proceed to verdict? For example, had the trial court, albeit improperly, permitted the amendment to charge the defendant with murder, what would the supreme court have done on appeal? Very probably it would have reversed and remanded for a new trial.

Had the court determined that the mistrial was valid under Louisiana law, a federal constitutional problem would have appeared. In *Illinois v. Somerville* a similar factual setting developed. After the jury was selected and sworn, but prior to the presentation of evidence, the district attorney realized that the indictment lacked an essential averment. Being unable under Illinois law to cure the defect by amendment, the prosecutor, over defense objection, moved for a mistrial. The invalidity of the indictment was a jurisdictional defect not waived by failure to assert and any verdict of

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204. The state produced evidence to prove that the grand jury intended to indict the defendant for murder.
205. 305 So. 2d at 451.
206. LA CODE CRIM. P. art. 775(3).
207. See id. art. 591.
208. Assuming, of course, conviction for murder. See id. art. 598.
210. The indictment charged theft but did not allege an intent to deprive permanently. Because this was not a "formal defect" it could not be removed by amendment. The error was discoverable without objection and was reversible on appeal. It was not waived by the defendant's failure to object. See also State v. James, 305 So. 2d 514 (La. 1974).
guilty could have been upset on appeal. Following mistrial, the district attorney amended the indictment and the defendant was convicted. The defendant contended that the subsequent trial constituted double jeopardy.

Balancing the defendant's "valued right to have this trial completed by a particular tribunal,"211 the United States Supreme Court concluded that:

[W]here the declaration of a mistrial implements a reasonable state policy and aborts a proceeding that at best would have produced a verdict that could have been upset at will by one of the parties, the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice.212

The situation in Birabent is certainly distinguishable from the situation in Somerville insofar as the Louisiana Supreme Court indicates that a valid conviction for manslaughter could have been obtained. Had that not been the case, articles 487 and 775(3) would have mandated mistrial despite the defendant's objection. In such a case, the court would have been unable to avoid dealing with the federal constitutional balance required by Somerville.213 Somerville involved a mistrial granted before the presentation of any evidence. Once the state begins to present its case the balance begins to shift. Despite the state's interest in obtaining a judgment which cannot be upset on appeal, at some point in the trial the right of the accused to have the case go to verdict with the possibility of acquittal or conviction of a lesser offense (barring retrial for the greater) may emerge dominant.214 Because Birabent was solely grounded on the code, it gives no hint as to the resolution of the federal constitutional problem.

Defining the Same Offense

Following State v. Didier,215 many Louisiana lawyers were puzzled by the court's "gravamen test"216 for determin-

211. 410 U.S. at 466.
212. Id. at 471.
213. Id. at 472.
216. "Where the gravamen of the second offense is essentially included within the offense for which first tried, the second prosecution is barred because of the former jeopardy." 262 La. at 378, 263 So. 2d at 327.
ing whether the prosecution was for an offense “identical with or a different grade of the same offense for which the defendant was in jeopardy in the first trial. . . .”217 Several cases highlight the problem of multiple charges arising from a single transaction. City of Baton Rouge v. Jackson218 clarifies to some extent the state’s right to prosecute for multiple traffic violations arising from the same incident. The defendant was charged with running a flashing red light219 and driving while intoxicated.220 At arraignment, the accused pled guilty to running the light and not guilty to driving while intoxicated. Defense counsel thereafter moved to quash the latter charge on the basis of double jeopardy. The city court sustained the defense motion and the city prosecutor applied for writs.

The Louisiana Supreme Court held that the case must be remanded for trial, clearly rejecting the defense argument that the city was foreclosed from prosecuting for DWI because the two offenses arose from the same incident: “Louisiana has not adopted a ‘same transaction’ test which would prohibit prosecutions for different crimes committed during one sequential, continuing course of conduct.”221 The court avoided deciding whether or not jeopardy would bar prosecution if the city’s only evidence of driving under the influence of alcohol coincided in time with defendant’s driving under the light without stopping.222 It noted that the issue was not before it because the state might “prove operation of a motor vehicle while intoxicated for some point in time other than at the involved intersection” and might offer evidence of driving while intoxicated well beyond simply proceeding through an intersection without stopping for the flashing red light.223

The court’s result and reasoning are rational. It recognized the need for a record of the proceedings to determine whether the “gravamen” of the offenses is the same.224 Both

217. LA. CODE CRIM. P. art. 596(1).
218. 310 So. 2d 596 (La. 1975).
221. 310 So. 2d at 598. See also State ex rel. Wikberg v. Henderson, 292 So. 2d 505 (La. 1974); State v. Pettle, 286 So. 2d 625 (La. 1973); State v. Richmond, 284 So. 2d 317 (La. 1973).
222. 310 So. 2d at 599-600.
223. Id. at 600.
State v. Bonfanti and Didier involved review of the second prosecution after one conviction with a full record of the second prosecution available to support the defense contention. In Jackson the court was only presented with the face of the two affidavits. No record of the evidence supported the defendant's contention that jeopardy barred the second prosecution under the gravamen test. Furthermore, the two crimes involved in Jackson are, unlike the situation in State ex rel. Wikberg v. Henderson, quite different in law.

The hypothetical problem posed by the court in a footnote to the decision gives an important insight to the court's thinking. Suppose the defendant is charged in two separate bills of information with reckless driving and driving on the wrong side of the road. On the face of the bills of information, are the offenses the same? It may be impossible to determine by inspection of the bills of information alone. But with responses to bills of particulars or with records of the two trials, one could determine whether or not the state was essentially charging that the defendant was guilty of reckless driving because he was driving on the wrong side of the road. If that is what made his driving "reckless" (driving on the wrong side), then to permit prosecution for both offenses would violate the principle that "conduct punished as one crime may not be relabeled a different crime and be punished again."

225. 262 La. 153, 262 So. 2d 504 (1972).
226. 292 So. 2d 505 (La. 1973). The court could decide the issue of double jeopardy based on the informations (and responses to bill of particulars) in a case involving convictions of attempted armed robbery and felony murder without resort to the evidence. The basis of the decision was the supreme court's determination that attempted armed robbery is in effect a lesser included offense of felony murder when the state relies on the theory of felony murder.
228. Id. at 599.