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CRIMINAL TRIAL PROCEDURE

Francis C. Sullivan*

ATTACHMENT OF JEOPARDY—ARTICLE 592

A simple reading of article 592 of the Louisiana Code of Criminal Procedure would lead one to believe that when a defendant pleads not guilty jeopardy attaches for purposes of determining double jeopardy when the first witness is sworn at the trial on the merits. Such is not the case, however, since the United States Supreme Court held in Crist v. Bretz that the "federal rule that jeopardy attaches when the jury is empanelled and sworn is an integral part of the constitutional guarantee against double jeopardy." As a result, this constitutional rule has been effectively engrafted into article 592 despite the failure of the legislature to alert the unwary to this substantial change in the law. The change, recognized by the Louisiana Supreme Court in State v. Sermon, came before the Louisiana First Circuit Court of Appeal again this term in State v. Albert.

In Albert, the accused was charged in 1980 with the production of marijuana. The defendant pleaded not guilty to the information, and the trial date was set for May 6, 1981. After six jurors out of a total of twelve had been selected, the prosecutor advised defendant that he intended to introduce at trial an inculpatory statement of the accused. The defense objected on the basis that the statement had not been furnished despite appropriate discovery requests. After discussion on this point, the prosecution entered a nolle prosequi. On May 15, 1981, the prosecution filed an identical bill of information, and the defendant again pleaded not guilty. Prior to trial he moved to quash, urging only speedy trial grounds, and the court denied the motion. On October 28, 1981, with twelve jurors selected, trial began and the state called several witnesses to testify. On October 29, 1981, the trial judge declared a mistrial because of possible prejudice on the part of one of the jurors. The defendant made no objection at this point and made no motions. In April 1982,
the defendant was tried a third time, resulting in the conviction leading to this appeal. Defendant’s argument, made on appeal for the first time, was that jeopardy attaches in a jury trial when the first juror is sworn. This argument was doomed to failure since the Louisiana Supreme Court in *Sermon* had previously held to the contrary, and the appellate court here properly followed that holding. With reference to the mistrial, which of course came after jeopardy had attached since the jury had been selected and sworn, the court held that the failure of the defendant to object at that point amounted to an acquiescence in the mistrial, thus preventing his later objection that a subsequent trial violated his double jeopardy rights. This result seems quite correct, and once again points up the necessity of properly and timely objecting in order to properly preserve grounds for appeal.

**DISCRETION TO PROSECUTE**

In *State v. Tanner*, the prosecution charged the defendant, by bill of information, with two counts of negligent homicide, to which he entered a plea of not guilty. A grand jury subsequently returned “not a true bill” on the charges. The accused then filed a motion to quash the information on the ground that the state had agreed to accept the grand jury’s decision about whether to prosecute. The Louisiana Supreme Court had little difficulty in first holding that this issue was properly raised by motion to quash under the general authority of article 531 of the Code of Criminal Procedure, despite the fact that this ground does not appear in article 532 of the Code of Criminal Procedure which sets out the

9. 404 So. 2d at 262.
10. “When a mistrial is improperly ordered, the defendant must object at the time and reserve a bill of exceptions. Otherwise he will be deemed to have acquiesced in the court’s ruling. Art. 841.” LA. CODE CRIM. P. art. 775, comment (d).
11. An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. A bill of exceptions to rulings or orders is unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or of his objections to the action of the court, and the grounds therefor.
   The requirement of an objection shall not apply to the court’s ruling on any written motion. LA. CODE CRIM. P. art. 841.
12. 425 So. 2d 760 (La. 1983).
13. Article 444 of the Code of Criminal Procedure provides in part: “A grand jury shall have power to act, concerning a matter, only in one of the following ways: (1) By returning a true bill; (2) By returning not a true bill; or (3) By pretermitting entirely the matter investigated.”
14. “All pleas or defenses raised before trial, other than mental incapacity to proceed, or pleas of ‘not guilty’ and of ‘not guilty and not guilty by reason of insanity,’ shall be urged by a motion to quash.” LA. CODE CRIM. P. art. 531.
15. A motion to quash may be based on one or more of the following grounds:
general grounds for the motion to quash. This is certainly in keeping with the policy of the Code of Criminal Procedure and with the trend of decisions of the court in the recent past. Turning to the substance of the objection, the court pointed out that the discretion to prosecute—whom, when, and how—rests completely with the district attorney.

The relationship between the grand jury and the district attorney in the prosecution process is often misunderstood. Under the provisions of the Louisiana Constitution and the Code of Criminal Procedure, an

(1) The indictment fails to charge an offense which is punishable under a valid statute.
(2) The indictment fails to conform to the requirements of Chapters 1 and 2 of Title XIII. In such a case the court may permit the district attorney to amend the indictment to correct the defect.
(3) The indictment is duplicitous or contains a misjoinder of defendants or offenses. In such cases the court may permit the district attorney to sever the indictment into separate counts or separate indictments.
(4) The district attorney failed to furnish a sufficient bill of particulars when ordered to do so by the court. In such cases the court may overrule the motion if a sufficient bill of particulars is furnished within the delay fixed by the court.
(5) A bill of particulars has shown a ground for quashing the indictment under Article 485.
(6) Trial for the offense charged would constitute double jeopardy.
(7) The time limitation for the institution of prosecution or for the commencement of trial has expired.
(8) The court has no jurisdiction of the offense charged.
(9) The general venire or the petit jury venire was improperly drawn, selected, or constituted.

LA. CODE CRIM. P. art. 532.

16. The court retreated from its reasoning in State v. Francis, 345 So. 2d 1120 (La.), cert. denied, 434 U.S. 891 (1977), that the State's breach of its agreement not to prosecute is not a ground for a motion to quash. See Tanner, 425 So. 2d at 762 n.2.
18. "Subject to the supervision of the attorney general, as provided in Article 62, the district attorney has entire charge and control of every criminal prosecution instituted or pending in his district, and determines whom, when, and how he shall prosecute." LA. CODE CRIM. P. art. 61.

19. Prosecution of a felony shall be initiated by indictment or information, but no person shall be held to answer for a capital crime or a crime punishable by life imprisonment except on indictment by a grand jury. No person shall be twice in jeopardy for the same offense, except on his application for a new trial, when a mistrial is declared, or when a motion in arrest of judgement is sustained.

LA. CONST. ART. I, § 15.

20. A prosecution for an offense punishable by death, or for an offense punishable by life imprisonment, shall be instituted by indictment by a grand jury. Other criminal prosecutions in a district court shall be instituted by indictment or by information.

A prosecution for violation of an ordinance shall be instituted by affidavit. Other criminal prosecutions in a city court and prosecutions in a parish court shall be instituted by affidavit or information. Criminal prosecutions in a juvenile court or family court shall be instituted by affidavit, information, or indictment.

LA. CODE CRIM. P. art. 382.
indictment by a grand jury is required in order to commence any prosecution for a capital crime or one punishable by life imprisonment, and an indictment is an alternative method of commencement of felony prosecutions. In those circumstances where the crime may be commenced either by indictment or information, the return of "not a true bill," i.e., the refusal of the grand jury to return an indictment, does not in any way preclude the district attorney from proceeding independently to file a bill of information, thus properly and effectively commencing a prosecution against the same accused for the same crime. The Tanner court clearly recognizes the distinction and points out that the failure of the grand jury to indict is in no sense and for no purpose an acquittal. The supreme court did find that a commitment of an assistant district attorney to the effect that the charges against the accused would be dismissed if the grand jury brought in a no true bill was binding on the state. The court also found that the defendant, on the basis of this promise by the state, waived his privilege against self-incrimination and testified before the grand jury. Accordingly, the court refused to allow the state to repudiate this bargain and held that the defendant obtained complete or transactional immunity from prosecution for the negligent homicides for all purposes other than prosecution for false statements or perjury. In concurrence, Justice Blanche stated he would have decided the case on the basis of prosecutorial misconduct, since the defendant in testifying before the grand jury was placed at an unfair disadvantage by informing the state of all of his available defenses. Whether the state is wise in making such agreements with a potential defendant is questionable. But once made, there seems to be little question that the state must keep its bargain. The precise fiction or actual basis for enforcing the agreement seems to be of less consequence than the maintenance of confidence in the integrity of the prosecution and the quality of justice made available by the system.

Time Limitations—Article 579

Under the Louisiana Code of Criminal Procedure, the system of time limitations upon trial is a very simple one. The period at issue here is the period between commencement of prosecution by information or indictment and the commencement of trial. The general rule is set out in article 578 of the Code of Criminal Procedure: three years for capital

21. Article 386 of the Code of Criminal Procedure provides in part: "The failure or refusal of a grand jury to indict a defendant does not preclude a subsequent indictment by the same or another grand jury, or the subsequent filing of an information or affidavit against him, for the same offense." See also La. Code Crim. P. art. 444, comment (b).
22. 425 So. 2d at 764 (Blanche, J., concurring).
23. Except as otherwise provided in this Chapter, no trial shall be commenced:
   (1) In capital cases after three years from the date of institution of the prosecution;
cases, two years for felony cases and one year for misdemeanors. Under the provisions of article 579 of the Code of Criminal Procedure these periods are "interrupted" in two specific situations. The Louisiana Supreme Court in this term had the opportunity to interpret both of these provisions. In State v. Nations, the supreme court, in a per curiam opinion, held that the state bears a heavy burden of showing that it is excused from trying an accused on a charge within the period required by article 578. In Nations, the defendant was charged with a misdemeanor in December 1980 but was not tried until April 1982. At trial the defendant moved to quash the information on the basis that more than one year, the period provided in article 578, had passed since the prosecution had commenced. The supreme court, in reversing the trial court's denial of the motion to quash, held that the evidence did not warrant a finding that the defendant absented himself from his usual place of abode within the state with the purpose of avoiding detection, apprehension or prosecution, as provided in article 579 as a ground for interruption. Although the accused here did change apartments on two occasions, the court found that he notified his bonding company and completed a postal change of address form in each case, and that his telephone number at all times was correctly listed with directory assistance. He was at all times employed by the same employer as on the date of his arrest, and his employer's address appeared on the face of his bond.

All in all, the argument of the state that the sheriff's office attempted to serve the defendant with notice of arraignment but could not complete the service was an unacceptable excuse for the failure to meet the

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(2) In other felony cases after two years from the date of institution of the prosecution; and
(3) In misdemeanor cases after one year from the date of institution of the prosecution.

The offense charged shall determine the applicable limitation.
LA. CODE CRIM. P. art. 578.

24. The period of limitation established by article 578 shall be interrupted if:
   (1) The defendant at any time, with the purpose to avoid detection, apprehension, or prosecution, flees from the state, is outside the state, or is absent from his usual place of abode within the state; or
   (2) The defendant cannot be tried because of insanity or because his presence for trial cannot be obtained by legal process, or for any other cause beyond the control of the state.

   The periods of limitation established by Article 578 shall commence to run anew from the date the cause of interruption no longer exists.
LA. CODE CRIM. P. art. 579.

25. 420 So. 2d 967 (La. 1982) (per curiam).
26. In dissent, Justice Lemmon disagreed that the state should have a heavy burden. As he put it, the "question is more one of statutory interpretation, and prescription statutes should be strictly construed against the party who pleads prescription." Id. at 968 n.1 (Lemmon, J., dissenting).
time requirement of article 578. As a comment to article 579 indicates, this ground for interruption of the time limitation is simply a restatement of the general fugitive from justice rule. It would certainly seem that by no stretch of the imagination could the defendant in this case be considered to be a fugitive from justice, and this was simply a classic case of failure on the part of the state to make an adequate and timely inquiry into the defendant's whereabouts. Such an investigation should be a minimum requirement when the effect of any loose interpretation of article 579 will be a judicial extension of the periods mandated by the legislature in article 578. Such extension should not be allowed except in the most compelling cases.

In State v. Amarena, the Louisiana Supreme Court was faced with the case of a defendant who was charged on August 20, 1979 with armed robbery in Louisiana. On November 8, 1979, defendant was sentenced to four years in federal custody after pleading guilty in the United States District Court of the Northern District of California to interstate transportation of stolen goods. In January 1980, the Jefferson Parish district attorney requested extradition of the accused from the state of California, but this was of course impossible, and the district attorney was notified that Amarena was in federal custody. In May 1980, an arrest warrant for the defendant was sent to the federal officials to be lodged as a detainer, and the Jefferson Parish Sheriff's Office was notified that the detainer was filed and that the defendant's discharge date was scheduled for September 25, 1982. The accused was notified by federal officials of the untried charges against him in Louisiana and was advised of his rights on May 13, 1980. On April 14, 1981, defendant's California attorney wrote to the Jefferson Parish District Attorney requesting a Louisiana trial pursuant to the provisions of the California Penal Code and requesting a speedy trial. On June 1, 1981, a writ of habeas corpus and ad prosequendum was directed to the regional director of the Federal Bureau of Prisons in California requiring the production of the defendant for arraignment on July 1, 1981. Defendant failed to appear for arraignment on that date, and the prosecution was granted an indefinite continuance. After further correspondence, the Jefferson Parish Sheriff finally obtained custody of the defendant, who then appeared for arraignment on May 5, 1982, and entered a plea of not guilty. Trial was set for June 21, 1982.

The supreme court, speaking through the Chief Justice, held that the mere fact that a defendant is being detained in a state or federal prison

27. "Clause (1) of this article simply restates the fugitive from justice rule contained in Art. 575. See Comments thereunder." LA. CODE CRIM. P. art. 579, comment (b).
28. See LA. CODE CRIM. P. art. 575.
29. 426 So. 2d 613 (La. 1983).
30. Apparently, the proceeds of the Louisiana robbery constituted the basis for the federal crime.
will not alone interrupt prescription.\textsuperscript{31} The court held that the state did not follow the requirements of any statute or federal regulation in attempting to obtain custody of the defendant for prosecution, even though his presence in Louisiana was “easily obtainable.”\textsuperscript{32} Thus, despite the fact that prescription was originally interrupted when the accused fled to California, the interruption ceased when the state learned of the incarceration, location, and availability of the defendant, and the two-year period began to run again from that time. This interpretation follows from the last sentence of article 579, which provides that “[t]he periods of limitation established by Article 578 shall commence to run anew from the date the cause of interruption no longer exists.”\textsuperscript{33} The court found that the state learned of the location and availability of the accused in February of 1980 and that the arraignment of defendant on May 5, 1982, and thus the setting of trial for June 21, 1982, clearly fell beyond the permissible two-year period. Accordingly, article 578 was violated and the motion to quash should have been granted.\textsuperscript{34}

\textit{Amarena} represents a classic example of the general rule: the interruption operated to extend the limitation period, followed by the termination of the period of interruption so that prescription once more began to run against the state. While this case places a premium on close cooperation between the various law enforcement agencies and the prosecuting officials, as well as state and federal prison authorities, it seems to be the only possible answer to a very difficult problem brought about by the free movement of people throughout the United States and the availability of means to obtain the presence of prisoners for trial. The solution seems to be in keeping with the stated policy of the Code of Criminal Procedure and should do much to clarify what has been a matter of much confusion in the past.

The Louisiana Habitual Offender Law\textsuperscript{35} does not provide for any specific prescriptive period. This omission is probably based upon the

\begin{itemize}
\item \textsuperscript{31} See State v. Devito, 391 So. 2d 813 (La. 1980).
\item \textsuperscript{32} 426 So. 2d at 617.
\item \textsuperscript{33} LA. CODE CRIM. P. art. 579.
\item \textsuperscript{34} Justices Lemmon and Marcus dissented. 426 So. 2d at 619 (Lemmon & Marcus, JJ., dissenting).
\item \textsuperscript{35} If, at any time, either after conviction or sentence, it shall appear that a person convicted of a felony has previously been convicted of a felony under the laws of this state, or has been convicted under the laws of any other state or of the United States; or any foreign government or country of a crime, which, if committed in this state would be a felony, the district attorney of the parish in which subsequent conviction was had may file an information accusing the person of a previous conviction. Whereupon the court in which the subsequent conviction was had shall cause the person, whether confined in prison or otherwise, to be brought before it and shall inform him of the allegation contained in the information and of his right to be tried as to the truth thereof according to law and shall require the offender to say whether the allegations are true. If
assumption that, in the usual situation, the district attorney will file the appropriate bill of information immediately after conviction. However, despite the fact that the law provides that the information may be filed "at any time, either after conviction or sentence," the Louisiana Supreme Court has held that the bill must be filed within a "reasonable time" after the prosecutor knows that a defendant has a prior felony record. After conviction of a particular crime, the defendant is entitled to know the full consequences within a reasonable time, and the court has held that the enhancement of the sentence through the habitual offender provisions should not be unduly delayed. The question is, of course, what is a reasonable time.

The Louisiana Supreme Court had occasion to examine this question in *State v. Broussard*, where after the defendant pleaded guilty to a charge of simple burglary, he was sentenced in accordance with a plea bargain. Thirteen months later the district attorney filed an information charging the defendant with three prior felony convictions, and the defendant's motion to quash the information was denied. Evidently, all of the facts upon which the information was based were available to the district attorney at the time of the original sentencing, and no justification existed for delaying the filing of the habitual offender proceeding. Under these circumstances the court, with great restraint, stated: "[w]e do not consider that the district attorney acted reasonably in delaying the institution of the habitual offender proceedings." If the habitual offender enhancement theory is to have any significant effect as a sentencing tool, it seems obvious that it must be used in connection with a particular conviction and immediately upon the conviction. To allow delay in the filing of the information is simply to provide the prosecutor with a device for bringing a separate and distinct enhancement prosecution against the accused at any time. It is submitted that this was not and is not the purpose of the habitual criminal statutes, and an appropriate amendment placing a time limit in the law would be in order.

he denies the allegation of the information or refuses to answer or remains silent, his plea or the fact of his silence shall be entered on the record and the judge shall fix a day to inquire whether the offender has been convicted of a prior felony or felonies, as set forth in the information. If the judge finds that he has been convicted of a prior felony or felonies, or if he acknowledges or confesses in open court, after being duly cautioned as to his rights, that he has been so convicted, the court shall sentence him to the punishment prescribed in this Section, and shall vacate the previous sentence if already imposed, deducting from the new sentence the time actually served under the sentence so vacated.

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37. State v. Wilson, 360 So. 2d 166 (La. 1978); State v. Bell, 324 So. 2d 451 (La. 1975).
39. 416 So. 2d 109 (La. 1982).
40. Id. at 111.
The problems of alleged prejudicial publicity are primarily problems of evaluating precise and variable factual situations. There are, however, lessons to be learned from a close reading of the opinions of the Louisiana Supreme Court dealing with the many and varied situations presented in this area. In *State v. Morris*, the defendant was originally convicted of second degree murder, but the conviction had been reversed. Upon remand, the defendant was convicted of manslaughter and adjudicated a third-felony offender. The defendant complained that the trial judge overruled her motion for a change of venue without considering the transcript of a voir dire examination which occurred in a trial held one month before the present one and in which a fair and impartial jury could not be selected, requiring the declaration of a mistrial. In the present case, the trial judge deferred ruling on the motion for change of venue until after voir dire, and when a jury was successfully selected, denied the motion. Justice Dennis, writing for the court, made it clear that the mere fact that a jury was successfully selected does not render the change of venue question moot. To be entitled to relief, the accused has the burden of establishing that he cannot obtain a fair trial in the particular parish. The traditional standard in this area is that it is sufficient if a juror can lay aside his impression or opinion and render a verdict based on the evidence presented in open court. However, as the Code of Criminal Procedure clearly points out the defendant is not foreclosed on a motion for change of venue simply by the answers given by the prospective jurors. The task for a defendant is not an easy one when a prospective juror asserts impartiality but may actually be prejudiced against the accused. The task of showing actual prejudice is indeed formidable, if not impossible, in most cases. Absent such a showing, rarely will a court presume that the defendant could not obtain a fair trial because of publicity, and thus require a change of venue. Here the court found nothing
to justify a presumption that a fair trial was impossible because of a "trial atmosphere utterly corrupted by press coverage."46 The defendant admitted that there was no actual prejudice, influence or other reasons existing in the community which would affect the jurors' answers on voir dire, and the supreme court's independent examination of the voir dire reached the same conclusion. The failure to transcribe and consider the prior voir dire examination was "perhaps an error," said the court, but one not prejudicial because of the intervening time period. As a result, the trial judge did not abuse his discretion in denying the motion for change of venue. The result clearly seems correct. In the future, the prudent trial judge would do well in a similar situation to consider the transcript of any prior voir dire examination in ruling on subsequent motions.

In State v. Brogdon,47 the Louisiana Supreme Court made it clear that, despite the mandatory language of article 621 of the Code of Criminal Procedure,48 a contradictory hearing is not required on a motion for change of venue where, without defense objection, the trial judge defers action on the motion until after the voir dire examination of prospective jurors. In Brogdon, the defendant did not object to the judge's ruling at any time nor did he reurge his motion for change of venue before, during, or after voir dire.49 Pointing out that the burden is upon the defendant to prove there exists such prejudice in the minds of the people of the community that a fair and impartial trial is impossible,50 the court held that the failure to object to the action deferring the motion and the failure to reurge the motion resulted in a failure to sustain defendant's burden of proof. The lesson should be crystal clear: If a defendant wishes to present evidence on a motion for change of venue, the motion must be made in accordance with article 621, proper and timely objections should be made to the action of the trial court in postponing a contradictory hearing to await the results of the voir dire examination, and further, the defendant must reurge the motion for change of venue at the voir dire examination of prospective jurors. Failure to do so will result in a waiver of the motion without the opportunity to present any evidence which may be available on the issue.

In State v. Harper,51 defense counsel found himself in a most unusual and uncomfortable "catch-22" situation, and even the supreme court agreed that he was in a damned-if-you-do-damned-if-you-don't situation.  

46. 429 So. 2d at 117.  
47. 426 So. 2d 158 (La. 1983).  
48. Article 621 provides in part: "A contradictory hearing shall be held upon the motion."  
49. LA. CODE CRIM. P. art. 841, quoted supra note 11; see State v. Bolton, 354 So. 2d 517 (La. 1978).  
51. 430 So. 2d 627 (La. 1983).
The defendant was charged with several serious offenses, and a special jury venire was summoned in Lincoln Parish for these particular trials. The problem arose because the same jury venire from which the jury was selected at his second trial had witnessed the jury voir dire in his first trial. The entire panel was present in court and observed the complete jury voir dire examination conducted in the first trial. After the first jury was selected those persons not selected remained on call, and the defendant was forced to select the jury for the second trial from this group. The second jury panel also had access to the newspaper and radio accounts of the first trial and saw the defendant sitting at the defense table during approximately one and one-half days of jury selection for the first trial. In the first trial, the defendant moved for and was denied individual voir dire examination of prospective jurors outside the presence of the others, and in the second trial, the defendant moved for a continuance and for a change of venue, both of which were denied. The defendant's problem in the voir dire examination at the second trial was that he needed to explore whether or not the prospective jurors had any knowledge of what had taken place at the first trial. The defendant was unable to ask meaningful questions because to do so would almost certainly disclose to the prospective juror, as well as to all others in the courtroom, what had in fact transpired. This made it almost impossible to intelligently exercise challenges for cause and peremptory challenges.

The supreme court quite properly reversed the second conviction on the basis that it was a violation of due process to have denied the motion for continuance or change of venue considering the unique circumstances and the publicity involved in the case. Interestingly, Justice Calogero, writing for the court, suggested that the trial judge might have taken steps to avoid or minimize the potential for prejudice in the case without specifically deciding what "might have been preferable, and whether any, or which, would have been sufficient to avoid prejudice to the defendant." The court pointed out three possibilities: (1) the trial judge might have allowed individual private voir dire examination of prospective jurors in the first trial; (2) he might have granted defendant's motion for change of venue, thus assuring that different jurors would be available; or (3) he could have granted a continuance in the second trial, also assuring a different jury venire through lapse of time. The court simply stated that some preventive measures were essential, the choice of which is within the trial judge's discretion in the first instance, leaving open and for the trial judge's discretion the question of what was the proper step in these particular circumstances.

This writer believes that the continuance, which would simply have produced a new venire, would be a possible solution but perhaps not the

52. Id. at 639.
best solution. Continuance would certainly have avoided the problem that arose in this case, but it also would have unfortunately and perhaps unnecessarily delayed the proceedings for some unknown period, with all the undesirable possibilities, including renewed publicity, that delay might produce. Granting the motion for a change of venue would likewise avoid the problem by having the trial take place in another parish with another jury venire, but of course this solution creates problems of expense, delay, and inconvenience to all parties concerned. The simplest and most effective way to avoid the problem is to allow the individual voir dire examination of each prospective juror out of the presence of all other prospective jurors. This would remove the prejudicial effect of having all of the other prospective jurors present in the courtroom observing the proceedings and listening to the voir dire examination, and yet it would have a minimal effect insofar as delay and expense are concerned. There seems to be no good reason why the device of individual voir dire should not be more readily used by trial judges.

RIGHT TO COUNSEL

In State v. Washington, defendant was charged as a multiple offender; in one of the prior convictions charged, the defendant had represented himself after he had dismissed his court appointed attorney. The original court minutes did not reflect that Washington had waived his right to court appointed counsel, and the trial judge ordered the minutes revised to show that Washington did waive that right. Both the original minutes and the amended minutes indicated that the trial judge advised the defendant of his right to court appointed counsel, but the record did not, as it must, indicate that the waiver of this right was made
intelligently and voluntarily. The major problem was that the minutes did not show in any way that the trial court had adequately informed the defendant, as required by prior cases, of the dangers and disadvantages of exercising his Faretta right to represent himself. The Louisiana Supreme Court therefore found that the minutes, even as amended, were insufficient to prove the prior conviction for enhancement purposes and reversed the multiple offender finding. In dissent, Justice Lemmon disagreed with the requirement that the record contain a colloquy which reveals the dangers of self-representation. He would allow the "totality of circumstances" to be considered in determining whether or not defendant has made an intelligent decision to represent himself based upon an awareness of the dangers of self-representation.

There seems to be no reason why the entire set of circumstances surrounding the making of this decision should not be considered in determining this issue. There is little reason to believe that mere statements, formulae, and colloquies can be any more meaningful in illuminating the understanding or knowledge of an individual. They provide only an easy method of avoiding the real and difficult underlying problem. If there were ever an area where the sound discretion of the trial judge should be given support, this writer believes waiver of rights is such an area, and the decision of the trial judge should be reversed, not on the basis of technicalities, but only when an abuse of discretion is clearly demonstrated.

The problems associated with the withdrawal of counsel are illustrated in State v. Wisenbaker. A nonresident defendant was charged with theft and extradited to Louisiana. The defendant retained two Texas lawyers as well as local counsel. The local attorney filed a pretrial discovery motion, but subsequently was allowed to withdraw from the case. The prosecutor then filed a motion to traverse, and since neither defendant nor counsel appeared for the hearing, the judge dismissed the defense motions. On the subsequent trial date, defendant appeared but was not represented; the two Texas lawyers failed to appear, and the Louisiana lawyer had been permitted to withdraw. The defendant at this time ob-

59. City of Monroe v. Wyrick, 393 So. 2d 1273 (La. 1981); State v. Bell, 381 So. 2d 393 (La. 1980).
61. 421 So. 2d at 891 (Blanche & Lemmon, JJ., dissenting).
62. Only the incurable optimist would hold that the required statements in such areas as confessions, see Miranda v. Arizona, 384 U.S. 436 (1966), and guilty pleas, see Boykin v. Alabama, 395 U.S. 238 (1969), have produced much in the way of solutions to the particular waiver problems involved.
63. 428 So. 2d 790 (La. 1983). Apparently defendant had the assistance of counsel for a portion of the trial, which the court held to be "not of controlling significance." Id. at 794 n.11.
jected to going to trial without an attorney and requested a continuance in order to obtain counsel, which was denied.\textsuperscript{64} The Louisiana Supreme Court pointed out that the defendant cannot be charged with a waiver of right to counsel unless he was responsible for the nonappearance,\textsuperscript{65} and that the facts in this case did not establish any voluntary waiver of his right to counsel or any conduct which might be deemed to constitute an implied waiver. Since the defendant was denied the assistance of counsel during his trial, the court reversed the conviction.\textsuperscript{66} The court commented that the problem could have been avoided at the hearing on the discovery motions when it first became apparent that the accused was unrepresented by Louisiana counsel.\textsuperscript{67} The Court suggested that the trial judge should have at that point either required defendant to obtain a Louisiana attorney within a reasonable time, obtained a waiver of counsel or appointed counsel to represent the defendant.\textsuperscript{68} Any one of these actions would surely have been effective to protect the rights of the accused and would have avoided getting to the trial date without having either local counsel or a valid waiver of counsel. The major error, however, probably took place at the time the Louisiana lawyer was allowed to withdraw from the case. As the court pointed out, trial judges may refuse to grant a motion to withdraw until another lawyer has been either retained or appointed.\textsuperscript{69} If this simple rule were observed rigorously, it is difficult to see how a problem like that in \textit{Wisenbaker} could arise. In fact, the attorney here was allowed to withdraw by a district judge other than the trial judge (which only complicates matters) and the rule might well be that only the judge who will try the case should grant a motion of counsel to withdraw. The court’s condemnation of the attorney’s conduct is worth repeating: “[T]he record here portrays an individual abandoned by counsel who had previously indicated a willingness and ability to represent him . . . .”\textsuperscript{70} More is expected of counsel.\textsuperscript{71}

\textsuperscript{64} After the state had prosecuted its case, an attorney from New Orleans appeared and attempted to assist the defendant. \textit{Id.}
\textsuperscript{65} City of Baton Rouge v. Dees, 363 So. 2d 530 (La. 1978).
\textsuperscript{66} The court remanded the case for a new trial. 428 So. 2d at 794.
\textsuperscript{67} This comment is not intended to criticize a competent trial judge, but rather to point out one spot in the proceedings where the protection of defendant’s right to counsel broke down, despite diligent efforts by the prosecutor and the judge to bring the matter to trial on the appointed date. One can easily understand why the trial judge, at this point in the proceedings, did not anticipate the possibility that retained counsel from Texas would not appear for trial, inasmuch as he had appeared twice for preliminary matters. \textit{Id.} at 792 n.4.
\textsuperscript{68} The judge could not, of course, compel the attendance of the nonresident counsel. \textit{Id.}
\textsuperscript{69} \textit{Id.} at 792 n.6. Had the trial judge known defendant was not represented by Louisiana counsel, he could have appointed such or required defendant to retain counsel, which would have enabled the trial judge to compel counsel’s attendance. \textit{Id.} at 793 n.8.
\textsuperscript{70} \textit{Id.} at 793 (emphasis deleted).
\textsuperscript{71} It should be noted that the supreme court limited its holding as follows:
In *Morris v. Slappy*,\(^{12}\) the United States Supreme Court considered whether an accused who has had appointed counsel assigned and has developed a relationship with this attorney has a right to a continuance until that particular attorney is available to try the defendant’s case. In *Morris*, the original deputy public defender appointed to represent the accused appeared at the preliminary hearing and supervised an extensive investigation. Shortly before trial, however, he was hospitalized for emergency surgery and another deputy was assigned. The trial judge denied the defendant’s motion for continuance which would have allowed the original public defender to try the case, and after conviction, the United States Ninth Circuit Court of Appeals\(^ {73}\) held that the denial violated defendant’s sixth amendment right to the assistance of counsel. Chief Justice Burger, speaking for the Court, disposed of this ruling as follows:

The Court of Appeals’ conclusion that the Sixth Amendment right to counsel “would be without substance if it did not include the right to a *meaningful attorney-client relationship*” . . . is without basis in the law. No authority was cited for this novel ingredient of the Sixth Amendment guarantee of counsel, and of course none could be. No court could possibly guarantee that a defendant will develop the kind of rapport with his attorney—privately retained or provided by the public—that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel. Accordingly, we reject the claim that the Sixth Amendment guarantees a “*meaningful relationship*” between an accused and his counsel.\(^ {74}\)

Although the language about “*meaningful relationship*” is clearly dicta in this case,\(^ {75}\) the majority of the Court, in a proper case, would probably have no difficulty holding that the scope of the sixth amendment right is limited solely to the provision of a reasonably prepared competent attorney.

Those interested should note that the Louisiana legislature in the 1983 Regular Session amended sections 145 and 146 of title 15 of the Louisiana Revised Statutes which provide for the powers and duties of the

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\(^{12}\) We do not here attempt to outline the procedures to be taken in a case in which a person appears without counsel for trial. All we decide here is that the record does not support a conclusion that defendant expressly or implicitly waived his right to the assistance of counsel.

\(^{72}\) Id. at 793 n.10.

\(^{73}\) *Slappy v. Morris*, 649 F.2d 718 (9th Cir. 1981).

\(^{74}\) *Slappy v. Morris*, 649 F.2d 718, 720 (9th Cir. 1981).

\(^{75}\) Justices Blackmun, Brennan, Marshall, and Stevens all objected to the inclusion of this language in the majority opinion. *Id.* at 1620-21, 1625.
judicial district indigent defender boards and their funding, respectively.

**Notice of Confession—Article 768**

In *State v. Billiot*, the prosecution offered an inculpatory statement against the defendant without giving the advance notice required by arti-

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76. LA. R.S. 15:145(A), (B)(1) (1981), as amended by 1983 La. Acts, No. 16, § 1. Subsections 145(A) and (B)(1) now provide:
   A. Each district board shall maintain a current panel of volunteer attorneys licensed to practice law in this state and shall additionally maintain a current panel of nonvolunteer attorneys under the age of fifty-five licensed to practice law in this state and residing in the judicial district. The panel of nonvolunteer attorneys shall not include any attorney who has been licensed to practice in this state for thirty or more years.
   B. Each district board shall select one of the following procedures or any combination thereof for providing counsel for indigent defendants:
      (1) Appointment by the court from a list provided by the district board of volunteer attorneys licensed to practice law in this state. In the event of an inadequate number of volunteer attorneys, appointment shall be from a list provided by the district board of nonvolunteer attorneys as provided in Subsection A of this Section. The court may delegate appointing power to the district board. All appointments shall be on a successive basis. Deviations from the panel list shall be permitted only to comply with Article 512 of the Code of Criminal Procedure and in exceptional circumstances upon approval of the district board.

77. LA. R.S. 15:146(B) (1981), as amended by 1983 La. Acts, No. 649, § 1. Subsection 146(B) now provides:
   B. There shall be remitted to the district indigent defender fund the following sums, which shall be taxed as special costs by every court of original jurisdiction in this state, except mayor's courts in municipalities having a population of less than four thousand and in the town of Jonesville which are hereby exempted from such taxation and remittance, in addition to all other fines, costs, or forfeitures lawfully imposed:
      (1) The sum of four and one-half dollars for each misdemeanor violation of state law or parish or municipal ordinance, other than parking violations, in every court of original jurisdiction located within the judicial district where a defendant is convicted after a plea of guilty or a trial or forfeits bond. Upon the recommendation of the district board this sum may be increased to not more than ten dollars by a majority vote of the judges of courts of original criminal jurisdiction within the district. In any district with a population which exceeds two hundred thousand according to the most recent United States census, and in the Eighteenth Judicial District, upon the recommendations of the district board, this sum may be increased to not more than fifteen dollars by a majority vote of the judges of courts of original criminal jurisdiction within the district.
      (2) The sum of ten dollars for each felony offense in every court of original jurisdiction in this state where the defendant is convicted after trial or after a plea of guilty or forfeits bond.
   Such amounts shall be remitted by the respective recipients thereof to the judicial district indigent defender fund monthly by the tenth day of the succeeding month.

78. 421 So. 2d 864 (La. 1982). The court was comprised of Chief Justice Dixon, Associate Justices Calogero, Dennis, and Watson, and Judges Byrnes, Ward, and Williams of the fourth circuit as Associate Justices Pro Tempore.
cle 768 of the Code of Criminal Procedure. The defendant was charged with first degree murder and was convicted of second degree murder. Article 768 was designed as a part of a reorganization of the Louisiana law concerning reference to confessions and inculpatory statements in opening statements. The intention was to avoid surprise, to allow adequate time for preparation of a defense, and to prohibit reference to confessions and inculpatory statements in opening statements. However, after the adoption of the Code of Criminal Procedure in 1966, article 716 of the Code of Criminal Procedure was added in 1977 to provide for discovery of defendant's statements. This change was reflected in article 768 by a 1982 amendment, and there are now three exceptions to the notice requirement: (1) if the defendant has been granted pretrial discovery of the statement, (2) if the statement is one against interest, or (3) if the statement is a part of the res gestae. In Billiot, the Louisiana Supreme Court disagreed with the finding of the trial court that the statement was part of the res gestae, but held that, under the circumstances, the error was harmless since defendant could not explain what he would have done differently in presenting a defense had he known of the prosecutor's in-

79. Article 768 provides:

Unless the defendant has been granted pretrial discovery, if the state intends to introduce a confession or inculpatory statement in evidence, it shall so advise the defendant in writing prior to beginning the state's opening statement. If it fails to do so a confession or inculpatory statement shall not be admissible in evidence.

80. See LA. CODE CRIM. P. art. 769, comments (b), (c).


82. Article 716 provides:

A. Upon motion of the defendant, the court shall order the district attorney to permit or authorize the defendant to inspect and copy, photograph or otherwise reproduce any relevant written or recorded confession or statement of any nature, including recorded testimony before a grand jury, or copy thereof, of the defendant in the possession, custody, control, or knowledge of the district attorney.

B. Upon motion of the defendant, the court shall order the district attorney to inform the defendant of the existence, but not the contents, of any oral confession or statement of any nature, made by the defendant, which the district attorney intends to offer in evidence at the trial, with the information as to when, where and to whom such oral confession or statement was made.

C. Upon motion of the defendant, the court shall order the district attorney to inform the defendant of the substance of any oral statement which the state intends to offer in evidence made by the defendant, whether before or after arrest, in response to interrogation by any person then known to the defendant to be a law enforcement officer.


84. 421 So. 2d at 867.

85. "To constitute res gestae the circumstances and declarations must be necessary incidents of the criminal act, or immediate concomitants of it, or form in conjunction with it one continuous transaction." LA. R.S. 15:448 (1981).
tention to offer the inculpatory statement. In addition, all of the other evidence indicated the defendant's overwhelming guilt. With the availability of discovery this notice requirement has lost much of its original significance, and this writer believes the more appropriate procedure is to require the accused to use the very adequate provisions of article 716 rather than to rely upon the notice provision.

WITNESSES

Although article 738 of the Louisiana Code of Criminal Procedure makes no specific reference to the location of witnesses who may be summoned at the expense of the parish, the Louisiana Supreme Court in State v. McCabe held that the article applies only to witnesses subpoenaed from within the state. Therefore, in order to compel the attendance of witnesses located in other states, articles 741-745 of the Code of Criminal Procedure, which follow the Uniform Act to Secure the Attendance of Witnesses from without a state in criminal proceedings (Uniform Act), must be utilized. The importance of this distinction is that the right to a subpoena under Article 738 is limited only by number, while the right under the Uniform Act is subject to the requirement that a defendant show that the requested witness is a material witness. The Uniform Act then places discretion in the trial judge to issue a certificate to the appropriate court of another state requesting that court to compel the particular witness to appear in this state for the purpose of testifying. In McCabe, the defendant simply attempted to obtain the witnesses under the wrong article of the Code of Criminal Procedure and thus failed to make the necessary showing of materiality required by article 741. For that reason the supreme court found no error in the refusal of the trial judge to issue the required statutory certificate. The result is obviously correct; counsel must use the proper tool for the specific task.

86. Justices Calogero and Watson concurred. Justice Dennis found that the error was not harmless since the inculpatory statement was a critical piece of evidence. 421 So. 2d at 869 (Dennis, J., dissenting).
87. Article 738 provides: "At a trial on hearing, each defendant in a misdemeanor case shall be allowed to summon six witnesses at the expense of the parish, and in a felony case twelve witnesses. A defendant shall have the right of compulsory process for additional witnesses at his own expense."
88. 420 So. 2d 955 (La. 1982). The court was comprised of Chief Justice Dixon, Associate Justices Blanche, Lemmon, and Marcus, and Judges Byrnes and Williams of the fourth circuit as Associate Justices Pro Tempore.
89. 11 U.L.A. 5-31 (1936).
90. Each defendant may summon respectively, six and twelve witnesses in a misdemeanor or felony case. LA. CODE CRIM. P. art. 738.
91. Article 741 of the Code of Criminal Procedure provides in part: "If a person is a material witness a judge may issue a certificate . . . ."
92. LA. CODE CRIM. P. art. 741.
The question of the right of a defendant to compel the victim of the charged crime to submit to a pretrial interview was presented to the court in an unusual manner this term. In *State v. Smith*, the defendant claimed that his right to full voir dire examination guaranteed by the Louisiana Constitution had been abridged, arguing that he could not intelligently conduct the voir dire examination and properly exercise peremptory challenges and request challenges for cause without interviews with the victim and her husband. Treating the argument as novel but unfounded, the Louisiana Supreme Court held that the right to voir dire examination is a trial right only, and does not create any right to discovery. The right to full voir dire examination under the constitution, said the court, is designed to afford the defendant wide latitude in questioning prospective jurors in order that the defendant may intelligently exercise the substantial right to exercise peremptory challenges and challenges for cause. How the accused is to obtain the knowledge necessary to formulate the proper questions was not answered by the court as it held that the constitutional right cannot be extended to compel state's witnesses to submit to pretrial interviews. Perhaps the Court should re-examine its prior holdings to the effect that the decision to speak with defense counsel before trial rests solely with a witness. One might well wonder whether the defendant can properly exercise the right to prepare a defense, guaranteed by both the state and federal constitutions, under such a limitation.

**PUBLIC TRIAL**

In *State v. Birdsong*, the Louisiana Supreme Court took the opportunity to review under its supervisory jurisdiction the denial by the trial judge of a motion for a closure order in a hearing on a motion to suppress in a capital case. A similar issue had been presented to the United States Supreme Court in *Gannett Co. v. DePasquale*, where

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93. 430 So. 2d 31 (La. 1983).
94. LA. CONST. art. I, § 17.
96. 430 So. 2d at 35.
97. State v. Harris, 367 So. 2d 322 (La. 1979); State v. Hammler, 312 So. 2d 306 (La. 1975) (state may not deny defense access to witnesses).
98. LA. CONST. art. I, § 16.
100. 430 So. 2d at 35. It should be pointed out that the victim refused the request of both the trial judge and the prosecutor to testify.
101. 422 So. 2d 1135 (La. 1982).
102. Justice Lemmon concurred, 425 So. 2d 1266 (La. 1983), and Chief Justice Dixon, and Justices Calogero and Dennis dissented.
the defendants, the prosecutor, and the trial judge all agreed that the closure of the pretrial suppression hearing was necessary to protect the defendant's right to a fair trial. The closure in that case was objected to by the press. The Court in *DePasquale* held that a defendant does not have a sixth amendment constitutional right to compel a private hearing. However, the Supreme Court did agree that there are certain circumstances in which the accused's right to a fair trial can be protected and guaranteed only by closing a pretrial hearing. What the circumstances might be was left for future determination.

In *Birdsong*, Justice Marcus first noted that it is appropriate to require an accused to show actual prejudice resulting from the denial of a closed pretrial suppression hearing when the matter comes before the court on appeal, as the court had previously held. On review prior to trial, as in this case, however, it is necessary only to show a "reasonable likelihood of substantial prejudice to his right to a fair trial by the dissemination of his confession, if proven inadmissible, throughout the community." Indicating that the court should be overly cautious when considering the constitutional rights of a defendant charged with a capital offense, the plurality opinion then states: "Defendant's right to a fair trial can be protected from the adverse effects of pretrial publicity by simply closing the suppression hearing to the public and press who do not have an enforceable right to be present."

Concurring in a very helpful opinion, Justice Lemmon set forth his belief that the trial judge should first exhaust other available means of protecting the rights of an accused, but should have available, if necessary, the authority to close a suppression hearing should he find this to be necessary or effective. Justice Lemmon stated that he would have the record affirmatively show the judge's reasons for utilizing the closure in lieu of other alternatives and recommended that the trial judge consider the following as alternatives: continuance, change of venue, individual voir dire of jurors and voluntary cooperation of the media.

Only Justice Dennis filed a dissenting opinion, stating his belief that the trial judge may under no circumstances bar the public from any pretrial hearing because of the guarantee in the Louisiana Constitution.

104. 443 U.S. at 382. The Court also held that the sixth amendment right to a public trial belongs only to the criminal defendant and not to the public or press.
105. State v. McDonald, 404 So. 2d 889 (La. 1980); State v. Kent, 391 So. 2d 429 (La. 1980).
106. This case came before the court on a supervisory writ granted before trial. State v. Birdsong, 416 So. 2d 936 (La. 1982).
107. *Birdsong*, 422 So. 2d at 1138.
108. *Id.* at 1139.
110. 422 So. 2d at 1139 (Dennis, J., dissenting).
that "[a]ll courts shall be open.""111 There seems to be little basis for the position urged by Justice Dennis.112 The present status of the law in this state is that closure is an available tool for the trial judge where it is necessary to protect the rights of an accused at a pretrial suppression hearing, but the prudent trial judge will use the closure device only as a last practical resort after first examining the other available alternatives and making a decision of record that none of these alternatives will adequately protect the constitutional rights of the accused.113 Only at that point should a pretrial suppression hearing be closed and the press and the public be excluded, and this device should certainly be considered as the exceptional and unusual situation rather than the usual and customary method of conducting such hearings.

RIGHT TO JURY TRIAL

There is no doubt that when two or more charges are joined, it is the aggregate punishment which may be imposed which determines whether the accused possesses a right to trial by jury.114 Should the total possible

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111. La. Const. art. I, § 22.

112. Justice Lemmon commented: "In my opinion section 22's guarantee of open courts primarily refers to availability to litigants of adequate remedy by legal procedures." 425 So. 2d at 1266 n.2 (Lemmon, J., concurring).

113. Miami Herald Publishing Co. v. Lewis, 426 So. 2d 1 (Fla. 1982), established the following requirements before a pretrial closure is ordered:

1. Closure is necessary to prevent a serious and imminent threat to the administration of justice;
2. No alternatives are available, other than change of venue, which would protect a defendant's right to a fair trial; and
3. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

Id. at 3. The court also established the following safeguards:

(1) Notice must be given to at least one representative of the local news media when a motion for closure is filed and when it is heard by the court. See State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So. 2d 904, 912 (Fla. 1977) (Sundberg, J., concurring).

(2) Those seeking closure have the burden of producing evidence and proving by a greater weight of the evidence that closure is necessary, the presumption being that a pretrial hearing should be an open one.

(3) The news media have no first amendment right to attend the pretrial hearing as long as closure is ordered, the transcript of the hearing is made available to the news media at a specified future time, when the danger of prejudice will be dissipated (for example, after the trial jury is sequestered).

(4) Where possible, the court should exclude the contents of a confession or of a wiretap, or the nature of the evidence seized, when the issues involved relate to the manner in which the prosecution obtained this material.

(5) The trial judge shall make findings of fact and conclusions of law so that the reviewing court will have the benefit of his reasoning in granting or denying closure.

Id. at 8-9.

114. State v. McCarroll, 337 So. 2d 475 (La. 1976); see Sullivan, supra note 54, at 386.
punishment exceed six months imprisonment, the accused is entitled to trial by jury. This apparently simple and innocuous little rule has created practical problems in this state. It is very undesirable to have a jury trial, with the attendant delay and expense, in every situation in which the aggregate of minor charges arising out of an incident might total to more than the triggering amount of six months; yet to try each one of these minor charges separately means in many cases that the same witnesses must present the same evidence several different times at great loss of time to all concerned and, of course, with substantial expense. The prosecutor frequently can avoid this problem only by trying an accused on less than the proper number of charges, and this solution certainly does not seem to be a desirable answer to the problem.

This year the legislature attempted another solution by creating a new article of the Code of Criminal Procedure providing that where two or more misdemeanors are joined the maximum total penalty that may be imposed shall not exceed six months or a fine of more than five hundred dollars or both. The legislation is an obvious attempt to solve the problem by making it impossible for the defendant to have a right to trial by jury in the situation in which misdemeanors are joined by the prosecutor in the same information or indictment. The rationale, of course, is that the accused is not entitled to trial by jury on any individual charge, the penalty being under the triggering amount, and therefore should not be entitled to trial by jury simply because the procedural device of joinder is used for purposes of efficiency and economy in the trial process. For the time being, the question must remain open whether this new article will affect the defendant moving to consolidate charges separately brought where the aggregate penalty would entitle the accused to a jury trial. State v. Comeaux pointed out that where defendant moves to con-

115. Duncan v. Louisiana, 391 U.S. 145 (1968); State v. Nettleton, 367 So. 2d 755 (La. 1981). Article 779(A) of the Code of Criminal Procedure provides: "A defendant charged with a misdemeanor in which the punishment may be a fine in excess of five hundred dollars or imprisonment for more than six months shall be tried by a jury of six jurors, all of whom must concur to render a verdict."

116. "Whenever two or more misdemeanors are joined in accordance with Article 493 in the same indictment or information, the maximum aggregate penalty that may be imposed for the misdemeanors shall not exceed imprisonment for more than six months or a fine of more than five hundred dollars, or both." LA. CODE CRIM. P. art. 493.1, added by 1983 La. Acts, No. 149, § 1 (effective August 30, 1983).

117. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan; provided that the offenses joined must be triable by the same mode of trial.

LA. CODE CRIM. P. art. 493.

118. 408 So. 2d 1099 (La. 1981); see Sullivan, supra note 54, at 387.
solidate, the trial court is under a duty to order the consolidation unless the state shows a "legitimate prosecutorial end in opposing consolidation." Under article 706 of the Code of Criminal Procedure, the consolidation article, the procedure after consolidation "shall be the same as if the prosecution were under a single indictment." Since the new article 493.1 relates only to penalty and it is only as a result of the penalty that there is no right to jury trial, it would seem that article 706 would not in an appropriate case compel the court to hold that there is no right to trial by jury after consolidation where the aggregate penalty justifies a jury trial.

JURY CHALLENGES

In the 1983 regular session, the legislature changed the method of tendering jurors. Under the prior law, after the voir dire examination, prospective jurors were to be tendered first to the state to be accepted or challenged, and if accepted, then tendered to the defendant for acceptance or challenge. Under the amendment, the trial courts are no longer required to use this one system but may provide by local rule for a system of "simultaneous exercise" of peremptory challenges.

Also in this session, the legislature made a significant change in the number of peremptory challenges by reducing the number available in trials of capital cases and crimes punishable only by imprisonment at hard labor from twelve to eight. For all other cases, six challenges were

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119. 408 So. 2d at 1105.
120. Article 706 provides:

Upon motion of a defendant, or of all defendants if there are more than one, the court may order two or more indictments consolidated for trial if the offenses and the defendants, if there are more than one, could have been joined in a single indictment. The procedure thereafter shall be the same as if the prosecution were under a single indictment.

121. It must be remembered, however, that the prosecution may dismiss and recharge in a joined form. LA. CODE CRIM. P. art. 706, comment (b).
123. The amended version of article 788 of the Code of Criminal Procedure, see supra note 122, provides:

After the examination provided by Article 786, a prospective juror may be tendered first to the state, which shall accept or challenge him. If the state accepts the prospective juror, he shall be tendered to the defendant, who shall accept or challenge him. When a prospective juror is accepted by the state and the defendant, he shall be sworn immediately as a juror. This Article is subject to the provisions of Articles 795 and 796.

If the court does not require tendering of jurors, it shall by local rule provide for a system of simultaneous exercise of challenges.
125. The amended version of article 799 of the Code of Criminal Procedure, see supra note 124, provides: "In trials of offenses punishable by death or necessarily by imprisonment-
retained. It should be noted also that the system of giving the prosecution the same number of challenges as each defendant was retained.126

Under the past practice in Louisiana, a defendant was severely limited in objecting to the trial court's refusal to sustain his challenge for cause because of the statutory requirement that such an objection could be made only when all of the peremptory challenges available to the accused had been exhausted during the voir dire examination.127 The theory of the rule was that defendant could show no prejudice from a ruling on the challenge for cause unless the challenged juror could not have been excused through the exercise of a peremptory challenge. The rule, of course, failed to fully appreciate the effect of the tendering doctrine in article 788 of the Code of Criminal Procedure, requiring that peremptory challenges be exercised individually and per tendered juror rather than in one group. The legislature finally abolished this rule in the 1983 regular session,128 by requiring only that a contemporaneous objection be made to the action of the court.129 The question of prejudice can hardly be ignored, however. Both trial courts and reviewing courts have displayed a substantial degree of reluctance to grant challenges for cause, and it is in this context that a defendant must make the difficult choice whether to gamble either on the lack of prejudice of the particular juror or on the fact that relief may be granted by a reviewing court based upon the denial of the challenge for cause, or whether, as a matter of sound trial practice, when in doubt,

126. Cf. Fed. R. Crim. P. 24(b). Rule 24(b) provides:
If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.
129. The amended version of article 800 of the Code of Criminal Procedure, see supra note 128, provides:
A defendant may not assign as error a ruling refusing to sustain a challenge for cause made by him unless an objection thereto is made at the time of the ruling. The nature of the objection and grounds therefor shall be stated at the time of objection.
The erroneous allowance to the state of a challenge for cause does not afford the defendant a ground for complaint, unless the effect of such ruling is the exercise by the state of more peremptory challenges than it is entitled to by law.
to use an available peremptory challenge. The choice for defense counsel is indeed a difficult one and probably the amendment to the Code of Criminal Procedure does little to assist in making the proper decision.

INSTRUCTIONS

The question of the propriety of charging a jury as to the penalty provisions applicable to the charged crime, and particularly as to the responsive verdicts available, was presented to both the Louisiana Supreme Court and to the Louisiana First Circuit Court of Appeal during this reporting period. The supreme court in State v. Hooks addressed a first degree murder charge in which one of the allowable responsive verdicts is "guilty of second degree murder." Each of these crimes requires the imposition of a mandatory sentence. Defense counsel made a timely motion requesting the trial judge to charge the jury on the penalty for the charged crime and all responsive verdicts, but the trial judge denied the motion. The supreme court found that the trial court erroneously denied the motion but that defense counsel had ample opportunity during closing argument to explain the penalty provisions, although he failed to take advantage of the opportunity. Thus, under all of the circumstances, the ruling of the trial court was error, but harmless error. The rules carved out by the Louisiana Supreme Court in this area are basically simple: If the statute imposes a mandatory penalty, then the trial judge must inform the jury of the penalty if the defendant properly requests a special written charge in accordance with article 807 of the Code of Criminal Procedure. When the statute provides only a range of penalties leaving


131. 421 So. 2d 880 (La. 1982). The court was comprised of Chief Justice Dixon, Associate Justices Calogero, Dennis, and Watson, and Judges Byrnes, Ward, and Williams of the fourth circuit as Associate Justices Pro Tempore.

132. See LA. CODE CRIM. P. art. 814(A)(1).


134. The state and the defendant shall have the right before argument to submit to the court special written charges for the jury. Such charges may be received by the court in its discretion after argument has begun. The party submitting the charges shall furnish a copy of the charges to the other party when the charges are submitted to the court.

A requested special charge shall be given by the court if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent.

It need not be given if it is included in the general charge or in another special charge to be given.

135. Counsel may also argue the penalty to the jury. State v. Washington, 367 So. 2d 4 (La. 1978); State v. Prater, 337 So. 2d 1107 (La. 1976).
the specific sentence to the discretion of the trial judge, the trial judge is not required to charge the jury as to the authorized statutory sentence, but may do so as a matter of discretion if the defendant submits a timely and proper request for a special written charge on this subject. Against this background, the result in Hooks appears to be quite correct and under the circumstances perfectly fair. However, it would seem more appropriate for information concerning the penalty in the mandatory sentence situation to be restricted to the court's charge so that the matter is kept in proper perspective and the trial does not become simply one as to whether or not a particular statutory penalty is proper for certain conduct. Certainly it seems desirable to inform the jury as to the relative impact of responsive verdicts as this penalty-effect is probably the greatest single reason for selection of a particular responsive verdict by a conscientious jury.

In State v. Napoli, the first circuit once again shot down a defense attempt to define all crimes where there is a mandatory minimum sentence as providing mandatory sentences. The crimes in question were in the familiar "not less than" and "not more than" formula making the specific sentence discretionary with the trial judge. The only unique portion of the statutory sentence for each crime was a restriction on suspension of sentence, probation, and parole. Although it chose not to discuss the point, the court quite properly did not feel that the special sentencing provisions made the sentences "mandatory" for the purpose of informing the jury as to the appropriate penalties.

May the trial court on its own motion give an additional instruction to the jury after the jury retires and is deliberating? The Louisiana Supreme Court answered this question in the negative in State v. Parker, even though the action of the trial court in this particular case was found not

136. State v. Carthan, 377 So. 2d 308 (La. 1979); State v. Chatman, 337 So. 2d 1106 (La. 1976); see State v. Prater, 337 So. 2d 1107, 1109 (La. 1976) (Tate, J., concurring).
137. This is not to say that there are not certain unexplained inconsistencies in the jurisprudence. See State v. Parish, 405 So. 2d 1080 (La. 1981); State v. Blackwell, 298 So. 2d 798 (La. 1974).
138. 428 So. 2d 957 (La. App. 1st Cir. 1983).
140. La. R.S. 14:42.1 on forcible rape provides in part: "Whoever commits the crime of forcible rape shall be imprisoned at hard labor for not less than two nor more than forty years. At least two years of the sentence imposed shall be without benefit of probation, parole, or suspension of sentence." La. R.S. 14:89.1 on aggravated crime against nature provides in part: "Whoever commits the crime of aggravated crime against nature shall be imprisoned at hard labor for not less than three nor more than fifteen years, such prison sentence to be without benefit of suspension of sentence, probation or parole."
141. See supra note 140.
142. 425 So. 2d 683 (La. 1982).
to be prejudicial. Article 808 of the Code of Criminal Procedure\textsuperscript{143} authorizes the court to give an additional charge to the jury during deliberations but only upon the request of a member of the jury. Once the request is made the court must charge the jury further in the courtroom in the presence of the defendant, his counsel, and the district attorney, and may do so verbally. The comment to article 808\textsuperscript{144} specifically points out that the article does not authorize the court to recall the jurors to give them additional or corrective instructions except with the consent of all of the parties. Here, the defense attorney objected to the procedure, but the objection was overruled. Although the lack of a statutory authority for the court to give additional instructions on its own motion proved not to have any adverse effects in this particular case, this writer believes that the principle is indeed a very dangerous one. To slavishly adhere to the comment and prevent a trial judge from correcting an error\textsuperscript{145} at a time when it can be corrected seems to run counter to all of the principles of modern judicial administration as well as those of the administration of justice.\textsuperscript{146} It seems unreasonable to place the burden upon counsel to agree to something that may in fact adversely affect the rights of the party, and certainly this possibility cannot be judged accurately at the time when consent is requested. The responsibility is that of the trial judge to assure that the jury is properly charged. It does not seem at all unreasonable to conclude that this responsibility includes the power to assure that the jury receives accurate instructions, and that if an error is discovered at a time when it may easily be corrected, the judge may do so in the simplest manner possible by recalling the jury and giving them the correct instruction.

Once again, this year the Louisiana Supreme Court was faced with the problem of applying the contemporaneous objection rule\textsuperscript{147} to the in-

\textsuperscript{143} Article 808 provides:
If the jury or any member thereof, after having retired to deliberate upon the verdict, desires further charges, the officer in charge shall bring the jury into the courtroom, and the court shall in the presence of the defendant, his counsel, and the district attorney, further charge the jury. The further charge may be verbal.

\textsuperscript{144} \textit{La. Code Crim. P.} art. 808, comment (c).

\textsuperscript{145} Here the error was the omission of a section of the charge defining second degree murder. The accused was convicted of first degree murder. The court also noted that the given charge was more favorable to the accused than the correct one. 425 So. 2d at 697.

\textsuperscript{146} The principle that correctable errors should be rectified at trial if possible is exemplified by article 841 of the Code of Criminal Procedure.

\textsuperscript{147} The court shall charge the jury after the presentation of all evidence and arguments. The court shall reduce its charge to writing if it is requested to do so by either a defendant or the state prior to the swearing of the first witness at the trial on the merits. The court’s written charge shall be read to the jury. The court shall deliver a copy thereof to the defendant and to the state prior to reading it to the jury.

A party may not assign as error the giving or failure to give a jury charge
struction area. The court has emphasized the contemporaneous objection rule in recent years at all points of the criminal trial. Primarily, the rule is designed to alert the trial judge at the time an error takes place so that corrective action may be taken immediately, thus avoiding later problems perhaps including retrials. The rule is also designed to prohibit the old practice of searching the record after conviction to locate any possible errors for use on appeal. It is just as true in criminal trials as elsewhere that one cannot have one's cake and eat it too, so that one must either promptly and properly object when an error takes place or waive it. As with most things in life, of course, there is an exception to the operation of the contemporaneous objection rule in the instruction area. The court has held that fundamentally erroneous misstatements of the essential elements of the charged offense will require a reversal despite the failure to make a contemporaneous objection in the trial court. The exception, to this writer at least, seems to be reasonable since a fundamental error in the statement of the law which the jury is required to apply should make it quite impossible for a fair and accurate result to be expected from the jury. However, all courts have been wary of the use of this principle by counsel for trial strategy purposes. The fear is that counsel may knowingly allow such a basically defective charge to be given to the jury as a tactical gamble that the jury may bring in a not guilty verdict, with the knowledge that this fundamental error may still be appealed should disaster occur. Because of this possibility the defendant has the burden of convincing the reviewing court that the failure to object was excusable and not simply a part of counsel's trial tactics.

In State v. Mart, the trial court gave a clearly erroneous instruction defining the elements of manslaughter which was a responsive verdict to the charge of second degree murder. Defense counsel, however, failed to object to the instruction, a most unfortunate lapse. As Justice Lemmon put it: "If counsel had objected to this instruction and the trial judge had failed to correct the error, we would be required to reverse defendant's conviction." The court held that the defendant did not meet

or any portion thereof unless an objection thereof is made before the jury retires or within such time as the court may reasonably cure the alleged error. The nature of the objection and grounds therefor shall be stated at the time of objection. The court shall give the party an opportunity to make the objection out of the presence of the jury.

L.A. CODE CRIM. P. art 801. The second paragraph was added by Act 458 of 1982. See Sullivan, supra note 54, at 396-98.

148. See L.A. CODE CRIM. P. art. 841.
150. 419 So. 2d 1216 (La. 1982). The court was comprised of Chief Justice Dixon, Associate Justices Calogero, Dennis, Lemmon, and Watson, and Judges Ciaccio of the fourth circuit and Gaudin of the fifth circuit as Associate Justices Pro Tempore.
152. 419 So. 2d at 1218.
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the burden of convincing the court that the failure was excusable, and further emphasized that the erroneous instruction related only to a responsive verdict and not to the offense charged. On this basis relief was denied.

The holding should serve as a warning to all counsel to scrutinize charges in the light of the contemporaneous objection rule, rather than traditional principles of trial tactics, and particular attention should be paid to definitions of responsive crimes since it is apparent that the supreme court will look upon these instructions quite differently. The clear solution to this type of problem, in this writer's opinion, is the procedure established for the federal courts by rule 30 of the Federal Rules of Criminal Procedure. A meeting between counsel and the trial judge would force an early consideration of any problems in the charge to be given to the jury and would pinpoint the time when objections must be made. Trial judges should consider requiring an instruction conference even though there is no current Louisiana statutory authority since to do so seems clearly within the inherent power of the trial judge to control the proceedings in the trial.

JURY DELIBERATIONS

In State v. Perkins, a written inculpatory statement by the defendant was introduced into evidence, and at the request of the jury, the statement was sent into the jury room during deliberations. The Louisiana Supreme Court held that the sending of this written statement to the jury deliberation room constituted reversible error. Article 793 of the Code of Criminal Procedure prohibits the jury from having available

153. Rule 30 provides:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

See Sullivan, supra note 54, at 396.

154. 423 So. 2d 1103 (La. 1982). The court was comprised of Chief Justice Dixon, Associate Justices Calogero, Dennis, and Watson, and Judges Byrnes, Ward, and Williams of the fourth circuit as Associate Justices Pro Tempore.

155. Defense attorney was not present at this time and hence no objection was made. A motion for mistrial was made as soon as possible. Id. at 1109.

156. Id. at 1110. Associate Justice Pro Tempore Byrnes dissented.

157. Article 793 provides:

A juror must rely upon his memory in reaching a verdict. He shall not be permitted to refer to notes or to have access to any written evidence. Testimony shall not be repeated to the jury. Upon the request of a juror and in the discre-
during deliberations written evidence, and the court has construed the provision to mean that the jury may not have access to written evidence for the sole purpose of assessing its verbal contents. The article further provides that the juror may have access to any document received in evidence when a physical examination of the document itself is required in order to determine an issue in the case, and this rule is generally construed to mean that the jury may have access to a document for the purpose of seeing or feeling the document itself or examining the writing or signature, as distinguished from focusing upon the contents of the document. Since the court had previously prohibited the sending of a written confession to the jury room, it is no surprise that the court in Perkins held that an inculpatory statement by the defendant presented the danger that undue weight might be given to the particular statement and should be excluded. In strict compliance with the legislative choice as expressed in article 793, the court found it had little choice but to find that a violation of the statute resulted in reversible error. The wisdom of this legislative policy of forcing a jury to rely upon memory and to speculate as to the contents of documents is highly suspect and deserves mature re-examination.

158. See State v. Passman, 345 So. 2d 874 (La. 1977); State v. Freetime, 303 So. 2d 487 (La. 1974).
159. See State v. Freetime, 303 So. 2d 487 (La. 1974).
161. III Standards, supra note 43, std. 15-4.1. Standard 15-4.1 provides:

(a) The court in its discretion may permit the jury, upon retiring for deliberation, to take to the jury room a copy of the charges against the defendant and exhibits and writings which have been received in evidence, except depositions, and with the consent of both parties copies of instructions previously given.

(b) Among the considerations the court should take into account in making this determination are:

(i) whether the material will aid the jury in proper consideration of the case;

(ii) whether any party will be unduly prejudiced by submission of the material; and

(iii) whether the material may be subjected to improper use by the jury.

The commentary to this standard states:

There is a split of authority on whether written confessions and admissions should be allowed in the jury room. Some states treat a confession merely as documentary evidence and admit it. In other jurisdictions, it has been held error to send written confessions or admissions to the jury room. In a leading Illinois case, the court stated: "It is error to permit the jury to take ... depositions or dying declarations ... The same rule applies to confessions or other instruments of evidence depending for their value on the credibility of the maker." A trial judge should have the authority to send admissions and confessions to the jury room, as it will sometimes be appropriate for the jury to give these documents close scrutiny.

III id. std. 15-4.1, commentary at 15 & 118 (footnotes omitted) (quoting People v. Spranger,


State v. Graham

presents an interesting discussion of the problems presented when jurors conduct an experiment during the course of deliberations. The experiment dealt with the time required for blood coagulation, a topic with which the court found everyone to be familiar. It was, however, the subject of expert testimony during the course of the trial, and the jurors' experiment tended to corroborate the opinion of the expert witness presented by the prosecution. The court found no error in this case, believing that there was no reasonable possibility that the experiment contributed decisively to the guilty verdict. Although the particular facts in this case clearly support the judgment of the court that the experiment was of little importance, they do point up the dangers of jurors basing their decision on material not presented in evidence at the trial. Doing so effectively bypasses all of the safeguards built into the system, and the rights of cross-examination and confrontation are effectively denied to the accused. The solution may be found in a strong charge by the trial judge to the jury to the effect that they are not to participate in any experiments and are to base their decision solely upon the evidence presented in open court.

At what point is a jury "hung"? In State v. Alexander, after some five hours of deliberation, the jury returned to the courtroom and indicated some disagreement as to whether or not further deliberations would accomplish anything. The trial judge then stated: "I'm not going to entertain a hung jury at this time." The jury was then excused for further deliberations, and after thirty minutes returned a verdict of guilty on a responsive verdict. It is noteworthy that defense counsel did not object at the time to the trial judge's statement, but this was not a factor in the supreme court's ruling since the trial judge had not based his adverse decision on the contemporaneous objection ground.

Louisiana follows the general rule that the length of jury deliberations is a matter within the sound discretion of the trial judge. With only one exception, the prior Louisiana cases have found no error where the jury foreman reports that the jury is deadlocked but the trial judge continues the deliberations.

314 Ill. 602, 612, 145 N.E. 706, 710 (1924).
162. 422 So. 2d 123 (La. 1982).
163. 430 So. 2d 621 (La. 1983).
164. Id. at 625.
165. Id. at 627; see LA. CODE CRIM. P., art. 841.
166. See State v. Monroe, 397 So. 2d 1258 (La. 1981); State v. Governor, 331 So. 2d 443 (La. 1976); III Standards, supra note 43, std. 15-4.4(b). Standard 15-4.4(b) provides in part: "If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in paragraph (a)."
167. State v. Rodman, 208 La. 523, 23 So. 2d 204 (1945).
168. State v. Governor, 331 So. 2d 443 (La. 1976); State v. Knight, 323 So. 2d 765 (La. 1975).
judge, after further charging the jury, sends them back for further deliberation. Although the line many times is a very narrow one between giving a prohibited Allen-type instruction\(^{169}\) and impressing upon the jury the importance of the case and urging them to come to an agreement, the trial judge is in a most difficult position and has little choice. To grant a mistrial because of a hung jury\(^{170}\) means retracing the entire history of the trial and beginning anew with all of the incident delay and cost which is involved. Although there may be cases in which a jury might be coerced by the language of a trial judge and placed under pressure to reach a verdict, which pressure will result in prejudice to an accused,\(^{171}\) Alexander certainly does not present such a case. To inform a jury which has deliberated for only five hours in a serious case\(^{172}\) that they should continue their deliberations does not strike one as being unduly prejudicial, but rather as the reasonable exercise of the responsibility that each trial judge has to attempt to bring a case to a successful conclusion. Given half a chance many juries would seek to avoid the hard responsibility of reaching a decision, and this tendency is to be guarded against by making certain that a hung jury is accepted by a trial judge only when it appears the jury is truly incapable of reaching a verdict. The hung jury should certainly be a rare exception to the usual process of returning a jury verdict.

**Bail**

In Louisiana, as in most jurisdictions, arrested defendants have been released on bail of three types: surety posted by a third person, generally a surety company;\(^{173}\) a personal undertaking of the defendant secured by a deposit of cash, etc., in an amount equal to the amount of the bail;\(^{174}\) and release on his own recognizance.\(^{175}\) These devices, with the exception

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170. Article 775 of the Code of Criminal Procedure provides in part: "A mistrial may be ordered, and in a jury case the jury dismissed, when: ... (2) The jury is unable to agree upon a verdict . . . ."

171. "The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement." III Standards, *supra* note 43, std. 15-4.4(c).


173. LA. CODE CRIM. P. arts. 323-329.

174. LA. CODE CRIM. P. art. 333.

175. LA. CODE CRIM. P. art. 336.
of the personal recognizance, focus heavily upon the financial ability of the accused to post in one form or another valuable security, which is many times simply unavailable to the indigent. As a result, the bail system has drawn strong attack as being highly discriminatory. Against this background, many efforts have been made to shift away from a strict reliance upon financial security as the sole means of assuring that an accused will appear for the trial—the sole aim of the bail process.

In the 1983 regular session, the Louisiana Legislature adopted a new article of the Code of Criminal Procedure authorizing the court to utilize any condition of release that is "reasonably related" to guaranteeing the required future appearance of the accused. This provision makes available to the trial judge an excellent tool for tailoring the bail process to the needs of the individual defendant and the precise situation. This seems to be a very desirable provision and will make it possible to reduce the number of persons held in custody where there is no substantial risk of nonappearance in court, but the accused is simply unable to meet the financial requirements or is faced by sometimes unduly restrictive views as to the granting of release on the basis of own recognizance.

It should be noted that article 325.1 of the Code of Criminal Procedure relating to immovable property in another parish which is used as security for bail bond was repealed in the 1983 Regular Session. Article 271 of the Code of Criminal Procedure relating to bail in extradition cases was also amended, as were articles 338 and 339 of the Code of Criminal Procedure.

176. See Pugh v. Rainwater, 557 F.2d 1189 (5th Cir. 1977).
179. New article 336.1 of the Code of Criminal Procedure, see supra note 178, provides: "In addition to any other forms of bail provided by law, the court may impose any condition of release that is reasonably related to assuring the appearance of the defendant before the court. Violation of such condition by the defendant shall be considered as a constructive contempt of court."
180. Before its repeal by Act 256 of 1983 article 325.1 provided:
A personal surety who furnishes as security for a bail bond immovable property located in another parish in the state shall present to a judge of the parish in which the property is located an assessment certificate, a homestead exemption waiver, if applicable, and a mortgage certificate. Prior to presenting the bond to the court having jurisdiction over the offense charged, the bond shall be recorded in the mortgage office of the parish where the immovable property is located and recording shall be evidenced on the mortgage certificate.