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CRIMINAL PROCEDURE II

Cheney C. Joseph, Jr.*

OPENING STATEMENT

In *State v. Bell*¹ the district attorney objected to the defense attorney's opening statement to the jury. The prosecutor said "Your honor, I hate to interrupt Counsel, but he is arguing his case, he is not allowed to do that, he is to outline the evidence he is to present, that's the purpose of an opening statement."² The defense counsel at the time of the objection was telling the jury that they must acquit the defendant unless the state proved every element of the charge beyond a reasonable doubt.³ The trial court sustained the objection on the basis that defense counsel was making a legal argument.⁴

The supreme court found no error in sustaining the objection. The court followed its earlier decision in *State v. Spencer*⁵ where it was held that although articles 766-69 of the Code of Criminal Procedure apply only to the state, if defense counsel avails himself of the opportunity to make an opening statement, he must confine his remarks to "an explanation of the nature of the defense and the evidence by which he expects to establish it."⁶ Quoting *Spencer*, the court said that wide discretion was vested in the trial court in controlling the defendant's opening statement within the above limits. The court held that the jurisprudence predating the Code which defined

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1. 263 La. 434, 268 So. 2d 610 (1972).

2. *Id.* at 445, 268 So. 2d at 614.

3. "Gentlemen of the Jury, as Mr. Ware stated when he read the statute of armed robbery to you, that through the evidence that he outlined, he must prove to your satisfaction to a moral certainty, that the Defendant was involved in this take, the Defendant had actual knowledge of what Sheppard did. Now, he must prove every element of this crime to a moral certainty. If he leaves out any evidence—if he leaves out any element, I mean, that doesn't satisfy your moral certainty, then you must acquit. Now, as I stressed in the Voir Dire examination, the Defendant, Leonard Bell, in this case, does not have to do anything. That as of this time, each of you told me, at this time you convened, the Defendant to be innocent and he is to remain innocent until the State of Louisiana can prove beyond a reasonable doubt or moral certainty, every element of the crime of armed robbery. Now, we don't ask for you to make any conclusions now and we know that you haven't, I didn't any way because you told me you hadn't. However, I do ask that when each of these witnesses takes the stand and you are the judge—." *Id.* at 444, 268 So. 2d at 614.

4. *Id.* at 446, 268 So. 2d at 614.

5. 257 La. 672, 243 So. 2d 793 (1971).

6. *State v. Bell*, 263 La. 434, 448, 268 So. 2d 610, 615 (1972), quoting *State v. Spencer*, 257 La. 672, 682, 243 So. 2d 793, 797 (1971).

the scope of the defense opening statement still had applicability.⁷ That jurisprudence referred to the "opening statement by counsel for the defendant at his option explaining the defense and the evidence by which he expects to prove the same."⁸

The writer does not feel that the court erred in limiting the scope of the defense opening statement. The defense counsel who avails himself of an opportunity to make an opening statement should not, for example, be permitted to misstate the law or to give his opinion of his client's innocence. Also, neither the prosecutor nor the defense counsel should be permitted to argue his case in the opening statement. If the opening statement is couched in argumentative terms, the court should have the discretion to limit counsel's remarks. However, the trial court should not limit defense counsel to an opening statement only when he intends to present an affirmative defense. If the defense theory is to put the state to its burden of proof, counsel should certainly be permitted to explain that in an opening statement.

It is submitted, however, that the court should not apply the exclusionary provisions of article 769 to the defendant who exercises his option to make an opening statement. That provision excludes that evidence "not fairly within the scope of the opening statement of the state" and clearly only applies to the state. Similarly, article 766 which the court has applied to the defense also seems to refer only to the state.

In *State v. Jones*⁹ the defense objected when the prosecutor stated in his opening statement, "Mr. Jones stated that he had purchased the unit,"¹⁰ obviously referring to the air conditioner defendant was charged with stealing. Citing its earlier decision, *State v.*

7. Former La. R.S. 15:333: "The jury having been impaneled and the indictment read, the trial shall proceed in the following order:

The reading of the plea to the jury; the opening statement of the district attorney explaining the nature of the charge and the evidence by which he expects to establish the same; the opening statement by counsel for the defendant at his option explaining the defense and the evidence by which he expects to prove the same; the introduction by the district attorney of all the evidence upon which he relies for a conviction; the introduction by the defendant of all of his evidence; the introduction by the district attorney of the rebuttal evidence; the argument of the district attorney of those matters upon which he relies for a conviction; the argument by the defendant or by his counsel; the reply by the district attorney to the argument of the defense; the judge's charge to the jury; the retiring of the jury under the custody of the sheriff; the rendition of the verdict or the entry of a mistrial, as the case may be; the discharge of the jury."

8. *Id.*

9. 263 La. 164, 267 So. 2d 559 (1972).

10. *Id.* at 177, 267 So. 2d at 564.

Fink,¹¹ the court classified that statement as neither inculpatory nor a confession. The court seemed to say that the statement was not an "admission of incriminating facts" and was in fact exculpatory since the defendant was attempting to convince the police officers that he had purchased the air conditioning units which he was charged with stealing. Since the statement was classified as exculpatory it did not fall within the scope of article 767 of the Code of Criminal Procedure: "The state shall not, in the opening statement, advert in any way to a confession or inculpatory statement made by the defendant."¹²

It is evident that the prosecutor in *Jones* was not introducing that statement because of its tendency to exculpate the defendant. Rather he was probably using it for its inculpatory effect. The Supreme Court of the United States in *Miranda v. Arizona*¹³ did not distinguish between the inculpatory and exculpatory statements with regard to the need for *Miranda* warnings:

The privilege against self incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication.¹⁴

The Louisiana supreme court has, it seems, distinguished between inculpatory and exculpatory statements in interpreting article 767. The clear language of the article refers to confessions and inculpatory statements. It does not seem to include exculpatory statements which tend to have an inculpatory effect under the circumstances.

The theory underlying articles 767 and 768 is to exclude reference to the confession or inculpatory statement in the opening statement while still allowing the defendant to be aware that the state intends to use the statement by requiring written notice prior to the opening statement. This procedure avoids the possible prejudice which might

11. 255 La. 385, 231 So. 2d 360 (1970).

12. LA. CODE CRIM. P. art. 767. (Emphasis added.)

13. 384 U.S. 436 (1966).

14. *Id.* at 476.

flow from the district attorney's reference to a confession or inculpatory statement in his opening statement and then not being able to have the statement admitted into evidence.¹⁵ Since *Miranda* also applies to exculpatory statements, it would seem that the better practice would be to require the district attorney to use the article 768 notice provision if he intends to introduce the "exculpatory" statement of the defendant in evidence. Similarly article 767 should be applied to forbid the state's mention of the "exculpatory" statement in its opening statement. This avoids the possibility that the prosecutor and the court may disagree on the nature of the statement and also forecloses the possibility that the prosecutor may mention an exculpatory statement in his opening statement then not be able to introduce it.¹⁶

In *State v. Bell*,¹⁷ an armed robbery case, although reversed on other grounds, the court found reversible error in the prosecutor's opening remarks referring to four other armed robberies alleged to have been committed by the defendant. The court said that "[n]ot one scintilla of evidence, however, was offered on the trial connecting the defendant with two of these robberies."¹⁸ The only evidence connecting Bell to the other two robberies was through testimony elicited in the prosecutor's effort to impeach a co-defendant witness.

The court indicated disapproval of the mentioning of extraneous offenses in the opening statement which the state does not later prove. Article 770 mandates mistrial when the district attorney directly or indirectly mentions within the hearing of the jury "another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible."¹⁹ This provision directs itself to other crimes which are *not admissible* as opposed to other crimes which are admissible, but not introduced at trial. In *Bell* the court did not cite its earlier decision in *State v. Prieur*²⁰ and did not discuss the admissibility of evidence of the other unproved armed robberies. Rather the court in *Bell* was concerned with the fact that no evidence was introduced to prove the crimes and not whether the evidence

15. See LA. CODE CRIM. P. art. 769, comment (C)(2).

16. See *State v. Cannon*, 184 La. 514, 520, 166 So. 2d 485, 487 (1936), in which the prosecutor was charged with reading defendant's confession to the jury in his opening statement. The confession was admitted but the court said: "This would certainly have been reversible error if the confession, unless offered, had been excluded by the court . . ." *Cannon* is cited in comment (b) to article 769.

17. 279 So. 2d 164 (La. 1973).

18. *Id.* at 166.

19. LA. CODE CRIM. P. art. 770(2).

20. 277 So. 2d 126 (La. 1973).

would have been admissible had the state attempted to do so.

Justice Summers in his dissent said that the district attorney is required to make an opening statement in which he sets forth in general terms the nature of the evidence which he expects to offer. "The object of this law is to place the defendant on notice of the facts he has to face at the trial. At least this object is served by overstating what is intended to be proved."²¹ Justice Summers argued that a "strong inference would seem to follow"²² when the state does not produce evidence against a defendant that the state "could not prove its whole case—an inference favorable to the accused."²³ Justice Summers further argued that the court should not reverse unless the district attorney is in bad faith by referring to other crimes, then not producing any evidence of them. He pointed to the logic of this position particularly in cases where such proof may be unnecessary and merely cumulative. He also cited the vicissitudes of a trial which are unforeseeable, where as in *Bell*, a witness who had previously given evidence against an accused had to be impeached.

The writer submits that the court should take the position that, due to the notice provisions in *Prieur*, the district attorney should not mention any other offense in his opening statement which is covered by the notice. This would certainly keep the prosecutor from having to run the risk of mentioning other crimes which would be admissible, but which it later develops he cannot prove. It would prevent the possibility of prejudice to the defendant while still giving him advance notice of their intended use.

MOTION FOR A NEW TRIAL

In *State v. Randolph*,²⁴ the supreme court found that the trial court abused its discretion in its denial of a new trial. The defendant, charged with armed robbery, was alleged to have stolen \$96.00 which the defendant claimed were back wages owed by the victim. At a preliminary hearing a trial judge found no probable cause to hold the defendant for armed robbery and reduced his bail substantially. Randolph was nevertheless prosecuted and convicted of armed robbery. The supreme court stated that "fairly untechnically construed, the defendant's motion for a new trial raises the contention that there is a total lack of evidence that he took anything of value belonging to another, an essential element of the offense of armed robbery."²⁵

21. *State v. Bell*, 279 So. 2d 164, 167 (La. 1973).

22. *Id.* at 167.

23. *Id.*

24. 275 So. 2d 174 (La. 1973).

25. *Id.* at 176. See LA. CODE CRIM. P. art. 386.

The court based its finding that the trial court abused its discretion in denying a new trial on several factors.²⁶ What is interesting about the opinion is its apparent willingness to reverse a trial court's refusal to grant a new trial "in the interest of justice."²⁷ The court cited article 858²⁸ limiting review of a trial court's refusal to grant a new trial except for an error of law. The court nevertheless said that "an abuse of the trial court's discretion on either of the grounds cited²⁹ has been regarded as a question of law—although, of course, great weight must be attached to exercise of the trial court's discretion, which should not be disturbed on review in absence of clear abuse."³⁰

In a similar vein, the court reversed a conviction in *State v. Dickerson*.³¹ Again, the court seems to have been presented with a

26. The court also found that the trial court erred in failing to provide a full transcript. "Our finding is to some extent based upon the extreme facts of this case, which show: (a) without contradiction, a bona fide dispute about the payment of wages in the presence of many witnesses, i.e., no pattern of criminal conduct; (b) the belated but diligent discovery, after conviction, of witnesses only transiently at the scene, who strongly indicate the defendant's innocence of criminal conduct or intent (and no real opportunity, until after the trial, to produce such independent proof, where the defense at the trial was based upon the testimony of the defendant alone); (c) the actions of the trial court at the preliminary examination, indicating the apparent weakness of the state's case; (d) the testimony of the prosecuting witness at the trial substantially increasing and changing the alleged criminal nature of the defendant's conduct, as compared with his testimony at the preliminary examination (with the intimations of prosecutorial overkill); and (e) the lack of a real opportunity, until the new witnesses were discovered after the conviction, to present evidence from independent witnesses which casts great doubt upon the version of the prosecuting witness, nor the real need to do so until the prosecuting witness produced his trial version of the incident." *State v. Randolph*, 275 So. 2d 174, 176-77 (La. 1973).

27. LA. CODE CRIM. P. art. 851(5): "The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.

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

"(5) The court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right."

28. LA. CODE CRIM. P. art. 858: "Neither the appellate nor supervisory jurisdiction of the supreme court may be invoked to review the granting or the refusal to grant a new trial, except for error of law."

29. The motion also alleged the existence of new and material evidence not discovered which probably would have changed the verdict. See LA. CODE CRIM. P. art. 851(3).

30. 275 So. 2d at 177.

31. 282 So. 2d 456 (La. 1973).

“hard case.”³² The defendant was charged with possession of heroin discovered near his car by officers.³³ Another individual, present with the defendant at the time of the arrest and seizure, testified at a motion to suppress.³⁴ The witness was subpoenaed by the defendant for the trial, but failed to appear. The defense orally moved to continue, arguing the necessity of his testimony. The defendant’s attorney argued that the testimony of the witness would corroborate the defendant’s allegation that certain details of the police officers’ account of the arrest and seizure were incorrect.³⁵ The trial court denied the motion but issued a subpoena.³⁶ The defense sought to introduce the testimony given by the witness at the motion to suppress which was also denied.³⁷ The jury found the defendant guilty. It was deter-

32. See *Metropolitan Nat. Bank v. Campbell Comm. Co.*, 77 F. 705 (8th Cir. 1896).

33. The court cited these details in a footnote: “The officers testified that they followed defendant’s car, with their blue lights flashing, in order to issue a citation for illegal exhausts and that they pulled behind defendant’s vehicle when it parked on the right side of S. Liberty Street, but parked closer to the curb than defendant had. They further testified that they exited their police vehicle before the defendant and Hunter left their car, and Office Pacaccio testified that he saw the defendant drop a whitish object from his left hand as he was exiting from the driver’s side. The officer acknowledged that it was dark at the time he approached defendant’s car, but insisted that he could see adequately because his police vehicle, with headlights on, was parked closer to the curb than defendant’s car, and the headlights shown down the side of defendant’s car and adequately illuminated defendant’s exist. Both officers testified that Dickerson exited from the driver’s side of the vehicle and Hunter exited from the passenger side.

“On the other hand, Hunter, an admitted heroin addict, and the defendant, testified that the police vehicle was parked on the street, alongside their car, and not behind it. They estimated that the police vehicle’s front door was even with their back door. Dickerson and Hunter both testified that Hunter exited from the driver’s side, like Dickerson, and not from the passenger side. Dickerson stated that the passenger door was stuck. Both men testified that the heroin was found in a handkerchief on the ground. The police, even when asked about the presence of a handkerchief, stated that the heroin was found in a clear cellophane container, and that there was no handkerchief. Both men testified that the officer who was looking around the car used a flashlight to look inside the car and around on the ground. The police officer who recovered the heroin stated that he did not have a flashlight on his person, and that he could see the heroin dropped to the ground because his headlights were illuminating the area.” *State v. Dickerson*, 282 So. 2d 456, 457 (La. 1973).

34. The witness was arrested but not tried with the defendant.

35. See facts cited in note 33 *supra*.

36. Article 707 requires a *written* motion for continuance.

37. Article 295 of the Code of Criminal Procedure provides for the admission of testimony given at a preliminary hearing under the proper circumstances. There are also provisions in La. R.S. 15:257-58 regarding the perpetuation of testimony of witnesses and the circumstances under which this is available to a defendant. Neither were applicable in this case.

mined later that the witness was at the time of the trial in jail on an unrelated charge under a different name and had told no one of the subpoena.³⁸

In his motion for a new trial, the defense attorney alleged that he discovered subsequent to the trial that the witness was a police informant. No evidence of this was produced but the trial judge nevertheless found that the "newly discovered evidence" probably would not have changed the verdict. The supreme court reversed, stating

we believe that this bit of new evidence, coupled with the new information that Hunter had been in Central Lockup under an alias at the time his testimony was needed for defendant's trial and was unavailable for reasons beyond the defendant's control, should require and does require that defendant be granted a new trial and be allowed to present for jury's consideration Hunter's corroborative version of the facts which led to the officers' discovery of the heroin and the subsequent arrest of Dickerson and Hunter.³⁹

The court recognized that the defendant's motion to continue was not in proper form. The refusal to admit the testimony taken at the suppression hearing was not necessarily an abuse of discretion.⁴⁰ Nevertheless, on the basis of "all of these matters . . . accumulated and considered in light of the motion for new trial,"⁴¹ the court found that to affirm would constitute "a denial of due process and a deprivation of a fair trial for the defendant."⁴²

The writer respectfully submits that the court here, and in *Randolph*, reversed because it basically felt that the "ends of justice

38. Defense counsel checked the jail but did not, of course, find the name of the witness on the jail list.

39. 282 So. 2d at 458-59.

40. "It has been held, and it must be recognized, that evidence taken in a preliminary proceeding upon a limited issue different or foreign to the one presented on the trial of the case cannot be admitted at the trial because its admission would infringe on the defendant's constitutional right to confront the witness." *State v. Augustine*, 252 La. 983, 999, 215 So. 2d 634, 639 (1968). The court cited *Augustine* and while the sixth amendment right to confrontation applies only to the defendant, the state also must have the right to cross-examine the defense witnesses on the *issues* presented at trial. In its per curiam the trial judge said: "The testimony of the witness from the hearing on the motion to suppress was inadmissible at the trial because at that hearing, the district attorney's cross-examination was limited to the issue before the Court, *i.e.*, the admissibility of the evidence seized. The district attorney's cross-examination at trial would not have been so limited." *State v. Dickerson*, 282 So. 2d 256, 259.

41. 282 So. 2d 456, 459 (La. 1973).

42. *Id.*

would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right."⁴³ A possible reason why the court would hesitate to reverse on that ground is the difficulty in determining that it was an "error of law" for the trial judge to refuse to grant a new trial. However, in *Randolph*, the court seemed to say that an abuse of discretion in refusing to grant a new trial where the "ends of justice" required it was an error of law. The writer submits that the court should make it clear that they will review the exercise of discretion in the trial judge's refusal to grant a new trial where the "ends of justice will be served" as an error of law if in fact that is what the court is doing. It would seem that this would aid defense counsel, prosecutors, and trial judges in building a proper record.

INDIGENT'S RIGHT TO TRANSCRIPT

Louisiana's bill of exceptions procedure⁴⁴ and our constitutional limitation on the appellate jurisdiction of the Louisiana supreme court to questions of law in criminal cases⁴⁵ had led the court to hold that indigents are only entitled to an appellate transcript which is only sufficient to allow the court to review all of the defendant's bills of exceptions reserved.⁴⁶ In *State v. Brewer*,⁴⁷ the defendant filed a motion for a new trial alleging that his conviction was contrary to the law and the evidence.⁴⁸ He later supplemented his motion by urging that there was no evidence to support the conviction. The defendant, an indigent, argued that he was entitled to a full transcript to assure proper review of that bill of exception.

The court affirmed the trial court's refusal to produce a full transcript, pointing to the fact that the defendant's motion failed to allege with specificity the missing elements or evidence. The court noted that

the scope of appellate review in criminal matters covers 'questions of law alone.' Determination of factual questions of guilt or innocence, such as whether, or not the defendant acted in self defense, or in the heat of passion upon provocation, or was under

43. LA. CODE CRIM. P. art. 851(5).

44. *Id.* arts. 841, 920.

45. LA. CONST., art. VII, § 10.

46. *Mack v. Walker*, 372 F.2d 170 (5th Cir. 1966); *State v. Anderson*, 254 La. 1107, 229 So. 2d 329 (1969); *State v. Mack*, 243 La. 369, 144 So. 2d 363 (1962).

47. 263 La. 113, 267 So. 2d 541 (1972).

48. LA. CODE CRIM. P. art. 851(1).

the influence of alcohol, as he alleges inter alia, is within the sole province of the jury.⁴⁹

The court felt that the partial transcript provided a full base for appellate review.

In *State v. Randolph*,⁵⁰ the court felt that due to the circumstances presented⁵¹ the trial court erred in refusing to provide a full transcript. The court made it clear that every defendant who moves for a new trial based on a total lack of evidence of an essential element of the offense will not automatically be entitled to a full transcript. Total lack of evidence of an essential element of an offense is, of course, a question of law.⁵² Because of the unique circumstances, the court felt that full review of the defendant's allegations of error would be impossible without a full transcript. The court, however, noted in the opinion that if the state felt that a review of the full transcript would lead to a different conclusion, the court would consider a remand to complete the transcript upon the state's application for rehearing.⁵³

In *State v. Gilbert*,⁵⁴ the defendant moved for a directed verdict immediately after the state rested. When this was denied the defense attorney moved that the court supply the defendant, an indigent, with a transcript of all of the evidence presented by the state to attach to his bill of exceptions. The trial judge denied the request. On appeal, the defendant was supplied with those portions of the transcript necessary to his other bills of exceptions. The court found that from that testimony alone the state had established a prima facie case against the accused.⁵⁵ The court, citing *Mayer v. Chicago*,⁵⁶ thus concluded that the defendant had shown no "colorable need for a complete transcript."⁵⁷

The writer submits that the approach taken by the cases is consistent and reasonable. If the defendant makes allegations of error

49. 263 La. at 122, 267 So. 2d at 544.

50. 275 So. 2d 174 (La. 1973).

51. See note 26 *supra*.

52. *State v. Douglas*, 278 So. 2d 485, 491 (La. 1973).

53. No rehearing was applied for by the state.

54. 286 So. 2d 345 (La. 1973).

55. "Included in that transcript was the testimony of several eyewitnesses to the armed robbery," 286 So. 2d 345, 350 (La. 1973).

56. 404 U.S. 189 (1971).

57. 345 So. 2d at 350. The court further said: "We also conclude that the defendant suffered no prejudice as a result of the trial judge denying a complete transcript of the testimony for had he been supplied with a complete transcript, his motion for a directed verdict would nonetheless have been denied, in view of the testimony of Mr. O'Corr, without more." *Id.* at 350.

which require the entire transcript, under *Randolph*, they are entitled to it. However, under *Brewer*, the defendant must pinpoint to a reasonable degree of certainty the elements of the crime which have been omitted so that the trial court can decide, as in *Gilbert*, whether evidence provided with other bills, or specific additional transcript, will be sufficient to permit full review by the supreme court.

The problem presented by Justice Barham in *State v. Anderson*⁵⁸ regarding the application of harmless error principles still exists. Justice Barham, in *Anderson*, said in order to apply the federal harmless error standard the reviewing court, among other things, "must determine from its examination of the complete record whether the untainted—that is, admissible—evidence overwhelmingly supports a finding of the guilt of the accused."⁵⁹ The writer submits that even under article 921 of the Code of Criminal Procedure a review of the entire transcript may be necessary for the court to determine whether or not "after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, is prejudicial to the substantial rights of the accused, or constitutes a substantial violation of a constitutional or statutory right."⁶⁰ Trial judges should be liberal in providing full transcripts for indigents on appeal if it is anticipated that the question of harmless error may arise.

USE OF PRELIMINARY HEARING TESTIMONY

In *State v. Sam*,⁶¹ the supreme court reversed a manslaughter conviction as a result of the prosecutor's use of the preliminary hearing testimony of a witness who the state contended was unavailable. The court did not feel that the state had shown that the witness was "diligently sought without avail"⁶² or that the state had made "a good faith effort to secure the witness' presence at the trial."⁶³ Article 295 of the Code of Criminal Procedure provides for the use of the testimony of a witness taken at a preliminary hearing in "any subsequent proceeding in the case"⁶⁴ if the trial court finds that the witness "cannot be found"⁶⁵ and his absence was not procured by the party seeking to introduce the testimony.

58. 254 La. 1107, 229 So. 2d 329 (1969).

59. *Id.* at 1143, 229 So. 2d at 342.

60. LA. CODE CRIM. P. art. 921.

61. 283 So. 2d 81 (La. 1973).

62. 283 So. 2d at 85.

63. *Id.*

64. LA. CODE CRIM. P. art 295.

65. *Id.*

The witness was a 15-year-old high school student who testified at the preliminary examination that he had seen the defendant and no other persons go to the decedent's apartment near the time estimated by the medical witness to be the approximate time of death.⁶⁶ The defendant was represented by counsel at the preliminary hearing.⁶⁷ The court noted that

[t]he examination and cross-examination as to where he [the witness] was when he observed the defendant and how consecutive and detailed his observation was of other possible visitations was at best sketchy. This might be expected of a pre-indictment preliminary examination principally directed to probable cause for a charge for the offense with which held. . . .⁶⁸

The state issued a subpoena for the witness which was returned by the sheriff with a notation that the sheriff was "unable to locate—Moved to *unknown*."⁶⁹ The state introduced only the sheriff's return as its predicate for admitting the preliminary examination testimony. The supreme court noted that "*Barber v. Page* indicates that the state may nevertheless introduce such testimony taken at a preliminary examination 'where the witness is shown to be actually unavailable . . . ,' provided adequate opportunity for cross-examination was afforded at the preliminary examination."⁷⁰ *Barber*⁷¹ involved a case where the prosecutor made no effort to obtain

66. The witness said he saw the defendant, an estranged boyfriend of the victim, enter the apartment at 11:00 a.m. and leave approximately ten minutes later. He further said he saw no one else enter or leave the apartment until 3:00 p.m. when he left his home, a nearby apartment. Medical testimony placed the time of death between 9:45 a.m. and 12:00 noon. The court found that the witness' testimony was the "only testimony to place him [the defendant] there within the medical estimate of the probability of death between 9:45 a.m. and noon." 283 So. 2d 81, 83. There was no eyewitness to the killing, and the victim was found dead in her apartment.

67. See *Pointer v. Texas*, 380 U.S. 400 (1965); *Coleman v. Alabama*, 399 U.S. 1 (1970).

68. 283 So. 2d at 82.

69. "The state argues that Bellizan's preliminary-examination testimony could be introduced at the merit-trial because he was unavailable and could not be found. The state introduced no testimony to this effect but simply relied upon the sheriff's return of December 22, 1971, to a subpoena to Bellizan issued on December 17, 1971. The return was dated one month and two days before the trial date of January 24, 1972.

"The address of Bellizan shown on the subpoena is his address at the time of the preliminary examination some five months earlier. Without further elaboration, the sheriff's return checked printed descriptive phrases: 'Unable to locate' and 'Moved to *unknown*', the last italicized word being completed in ink." *State v. Sam*, 283 So. 2d 81, 84 (La. 1973).

70. *Id.*

71. 390 U.S. 719 (1968).

the presence of a witness who was out of state in federal custody.⁷²

The court has clearly shown that it will require the prosecutor offering such testimony to carry the burden of showing a diligent search without avail or a good faith effort to have the witness at trial. It will not presume that this has been done simply because a subpoena was issued and the witness not located. The court seems to require a showing by the state regarding what was done by the subpoena server to locate the witness. The court cited its earlier affirmances in *State v. Jones*⁷³ and *State v. Nelson*.⁷⁴ In *Nelson* the state produced the testimony of a district attorney's investigator, to the effect that he checked the last known address and phone number and that he checked utility and credit bureau records. The state also called a person who had known the witness for two years who was unable to "supply any information that would be helpful in locating her."⁷⁵ In *Jones* the state introduced the preliminary examination testimony of two foreign seamen at the defendant's trial for armed robbery of one of the seamen. Although the state only issued a subpoena the day before the trial and the sheriff's return only indicated that the seamen could not be located because their ship was not in port, the court held that the "belated and limited search"⁷⁶ was sufficient because

a specific purpose of the preliminary examination was to perpetuate the testimony of the Norwegian seamen for later use at the trial, because they would be unavailable when their Norwegian ship left immediately after the preliminary examination. . . . From the testimony taken at the preliminary examination, there

72. "In its unanimous reversal of the state conviction, the Supreme Court stated, 'In short, a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation clause unless the prosecutorial authorities have made a good-faith effort to obtain his presence at the trial.' 390 U.S. 724-25. The court concluded, 390 U.S. 725-26: 'The right to confrontation is basically a trial right. It includes both the opportunity to cross-examination and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demand of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case.'" *State v. Sam*, 283 So. 2d 81, 84 (La. 1973).

73. 261 La. 422, 259 So. 2d 899 (1972).

74. 261 La. 153, 259 So. 2d 46 (1972).

75. *Id.* at 164, 259 So. 2d at 50.

76. 261 La. at 428, 259 So. 2d at 902.

was no expectation that they would return to Louisiana for the trial.⁷⁷

Clearly the court will interpret article 295 in light of the defendant's constitutional right to confront the witnesses against him.⁷⁸ The court will require that the phrase "cannot be found" be interpreted in light of the *Barber* requirement that the state make a diligent, good faith effort to obtain a witness' presence before using preliminary hearing testimony. Perhaps more significant is the fact that the court seems to require that the state make a showing on the record regarding the effort made to locate the witness and to obtain his presence.

The writer submits that the court's position is fair and reasonable. By requiring a showing of the efforts to locate the witness (other than merely the fact that a subpoena was issued and not served because the server could not locate the witness), the reviewing court has the facts before it necessary to insure that there has been compliance with constitutional standards. The court does seem to suggest that the state has not done enough by simply causing a subpoena to be issued. If the process server does not use reasonable diligence in locating the witness, the court seems to imply that the prosecutor has not done enough to comply with the *Barber* standard.

SCOPE OF VOIR DIRE EXAMINATION

Article 786 gives little guidance dealing with the scope of questioning in selecting trial jurors other than to codify the right of counsel to question the prospective jurors themselves.⁷⁹ It provides that the "scope of the examination shall be within the discretion of the court."⁸⁰ In *State v. Jones*,⁸¹ the court said that while "it might appear that article 786 intended to give the trial judge almost unlimited discretion to control the examination of prospective jurors,"⁸² counsel must be "allowed a wide latitude in voir dire examinations,"⁸³ and "the scope of inquiry is best governed by a liberal discretion on the

77. *Id.* at 429, 259 So. 2d at 902. See also *Mancusi v. Stubbs*, 408 U.S. 204 (1972).

78. *Mancusi v. Stubbs*, 408 U.S. 204 (1972); *Barber v. Page*, 390 U.S. 719 (1968); *Pointer v. Texas*, 389 U.S. 400 (1965).

79. See *State v. Guidry*, 160 La. 655, 107 So. 479 (1926) (cited by the court). The supreme court reversed a conviction when a trial judge, under a local rule of court, refused to permit the lawyers to examine prospective jurors but rather conducted the examination himself.

80. LA. CODE CRIM. P. at 786.

81. 282 So. 2d 422 (La. 1973).

82. *Id.* at 428.

83. *Id.* at 430.

part of the court.”⁸⁴ It is submitted that the court did little in *Jones* other than to mandate that a rule of liberal discretion be followed by trial courts in controlling the scope of voir dire. The court does not purport to give definite guidelines. By overruling *State v. Bell*⁸⁵ and *State v. Sheppard*⁸⁶ to the extent that they conflict with the “principles expressed” in *Jones*, the court said it was, essentially, returning to the jurisprudence as it existed at the time of the adoption of the Code of Criminal Procedure in 1966.⁸⁷ The court seemed to premise its holding on *State v. Hills*.⁸⁸ The court noted that “paragraph (d) of the Official Revision Comments (to Art. 786) refers to *State v. Hills* . . . , as if the doctrine of that case qualified the discretion which article 786 seemed to vest in the trial court.”⁸⁹ Quoting extensively from *Hills*,⁹⁰ the court emphasized the purpose of voir dire examina-

84. *Id.*

85. 263 La. 434, 268 So. 2d 610 (1972).

86. 263 La. 379, 268 So. 2d 590 (1972).

87. *State v. Jones*, 282 So. 2d 422, 430 (La. 1973).

88. 241 La. 345, 129 So. 2d 12 (1961).

89. *State v. Jones*, 282 So. 2d 422, 429 (La. 1973).

90. “It is a general view as to voir dire examination that the defendant in a criminal prosecution is entitled to make reasonable and pertinent inquiries of the prospective juror so that *he may exercise intelligently and wisely his right of peremptory challenge*—since each party has the right to put questions to a juror not only to show that there exists proper grounds for a challenge for cause, but to *elicit facts to enable him to decide whether or not he will make a peremptory challenge*. (Emphasis added.) For this reason, a wide latitude is allowed counsel in examining jurors on their voir dire, and the scope of inquiry is best governed by a liberal discretion on the part of the Court so that if there is any likelihood that some prejudice is in the juror’s mind which will even subconsciously affect his decision, this may be uncovered. It is by examination into the attitudes and inclinations of jurors before they are sworn to try a case that litigants are enabled to reject those persons, by use of peremptory challenges where necessary, who are deemed to be unlikely to approach a decision in a detached and objective manner. The Constitution itself (LA. CONST. of 1921, art. 1 § 10) guarantees to the accused the right to peremptorily challenge jurors, ‘the number of challenges to be fixed by law’; that number, in the trial of any crime for which the penalty is death or necessarily imprisonment at hard labor, is twelve (R.S. 15:354). The *intelligent* exercise of the right of rejection, by use of those twelve peremptory challenges, is the meat of the privilege, and can be substantially weakened by a restriction of questions—the answers to which might be regarded as informative of a juror’s attitude and therefore of vital importance to his defense. In *State v. Henry*, 196 La. 217, 198 So. 910, 915, this Court quoted with approval from 35 C.J. at pages 387, 405 and 406; ‘parties have a right to question jurors on their examination not only for the purpose of showing grounds for a challenge for cause, but also *within reasonable limits*, to elicit such facts as will enable them intelligently to exercise their right of peremptory challenge, and . . . it is error for the court to exclude questions which are pertinent for either purpose. . . . The right of peremptory challenge is a substantial right, and its freest exercise should be permitted.’” *State v. Hills*, 241 La. 345, 395, 129 So. 2d 12, 31 (1961).

tion by the defendant as not simply to expose challenges for cause,⁹¹ but also to aid the defendant in the intelligent exercise of his peremptory challenges.⁹²

Although the question in *Jones* was one dealing with the juror's willingness to apply a principle of law,⁹³ it is submitted that the rule of liberal discretion should be applied to other areas as well. The court reiterated the "recognized distinction between examining a juror on his knowledge of the law and examining a juror on his ability and willingness to apply a principle of law. . . ."⁹⁴ Chief Justice Sanders, in his dissent, suggested that the court should uphold a trial judge's decision to limit rather carefully the scope of voir dire "especially when current judicial reform is moving in the direction of expediting voir dire examination as a means of reducing court delays."⁹⁵

91. LA. CODE CRIM. P. art. 797.

92. *Id.* art. 799.

93. The question was: "Mr. Juneau, do you believe that if a grand jury indicts someone this man is guilty?"

"By the Court: This is improper, as I've said earlier. We are not going to quiz these people on their knowledge of the law. He comes in here. He's just as innocent of experience with the law as your client is with guilt, and we are not going to permit you to ask him questions about this." The prospective juror was a former member of the Rapides Parish Grand Jury. *State v. Jones*, 282 So. 2d 422, 427-28 (La. 1973).

94. *Id.* at 428.

95. *Id.* at 433.