

Louisiana Law Review

Volume 45 | Number 2

Developments in the Law, 1983-1984: A Symposium

November 1984

Pre-Trial Criminal Procedure

P. Raymond Lamonica

Louisiana State University Law Center

Repository Citation

P. Raymond Lamonica, *Pre-Trial Criminal Procedure*, 45 La. L. Rev. (1984)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol45/iss2/17>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

PRE-TRIAL CRIMINAL PROCEDURE

P. Raymond Lamonica*

OBJECTIVELY REASONABLE UNREASONABLE SEARCHES

After having failed in *Illinois v. Gates*, "with apologies to all,"¹ to address the exclusionary sanction as was expected, the Court in *United States v. Leon*² and *Massachusetts v. Sheppard*³ announced the long-anticipated modification ("somewhat")⁴ of the exclusionary rule. Much, no doubt, will be written about these cases. It is appropriate here to present only a brief analysis.

The Court announced that when an officer relies on a search warrant lacking probable cause and such reliance was objectively reasonable, the exclusionary sanction will not apply. The eagerness to reach the exclusionary sanction issue is reflected by the Court's declining to determine whether probable cause would have existed under *Gates*.⁵

Ironically, in terms of judicial method, the opinion parallels that employed by Justice Clark in *Mapp v. Ohio*.⁶ *Mapp* was based, in part, upon the conclusion that it "plainly appears that the factual considerations supporting the failure of the *Wolf* Court to include the *Weeks* exclusionary rule . . . while not basically relevant to the constitutional consideration, could not, in any analysis, now be deemed controlling."⁷

In *Leon*, Justice White, who wrote for the majority, noted in examining the factual considerations that

Copyright 1985, by LOUISIANA LAW REVIEW

* Professor of Law, Louisiana State University.

1. 103 S. Ct. 2317, 2321, reh'g denied, 104 S. Ct. 33 (1983).

2. 104 S. Ct. 3405 (1984).

3. 104 S. Ct. 3424 (1984).

4. 104 S. Ct. at 3412.

5. *Id.* In *Massachusetts v. Sheppard*, 104 S. Ct. 3424 (1984), the only basis for exclusion was a technical error on behalf of the issuing magistrate; it therefore was not necessary to resolve the issue presented to reach a resolution as broad as *Leon*.

6. 367 U.S. 643, 81 S. Ct. 1684 (1961), modified, *United States v. Leon*, 104 S. Ct. 3405 (1984). Interestingly, both opinions rely heavily on the concept of "common sense." Justice Clark noted in *Mapp*, "There is no war between the Constitution and common sense," and based the decision in large part on the common notion of a remedy for violation of a right. 367 U.S. at 657, 81 S. Ct. at 1693. Justice White uses the term common sense many times in explaining the new exclusionary sanction. This may simply suggest that the invocation of common sense without articulation of the fundamental values involved and the assumptions and conclusions involving those values helps very little. It is impossible to turn such a phrase into a workable and understandable legal doctrine without such articulation.

7. *Id.* at 653, 81 S. Ct. at 1691. After suggesting that the *Wolf* court's refusal to adopt the exclusionary rule was "bottomed" upon factual considerations no longer valid

Many of these researchers have concluded that the impact of the exclusionary rule is insubstantial, but the small percentages with which they deal mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches or seizures. Because we find that the rule can have no substantial deterrent effect in the sorts of situations under consideration in this case . . . we conclude that it cannot pay its way in those situations.⁸

Justice Blackmun, in a concurring opinion emphasized the consequences of the method in referring to the decision as "unavoidably provisional" because of the "institutional limitations on [the Court's] ability to gather information about 'legislative facts,' and the exclusionary rule."⁹ He further warns, that if it should emerge from factual experience that "the good faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here. The logic of a decision that rests on untested predictions about police conduct demands no less."¹⁰

After reviewing briefly many of the cases which have laid the groundwork for an exception to the exclusionary rule¹¹ and after "weighing the costs and benefits of preventing the use in the prosecution's case-in-chief of inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective,"¹² the Court concluded that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."¹³

Justice White noted that the conclusion does not "suggest . . . that exclusion is always inappropriate . . . where an officer has obtained a

and thus should not be followed, Justice Clark took the view that the factual considerations are "not basically relevant" to the constitutional issue. This, of course, would preclude reconsideration of *Mapp* based upon changing factual considerations (*i.e.* views concerning the practical impact of the exclusionary sanction). The other justification for the exclusionary rule posited in *Mapp*—judicial integrity—was, however, not fully developed or explained in light of the contemporary views toward standing and attenuation which allowed the use by criminal courts of unconstitutionally seized evidence. See, e.g., *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407 (1963). It is problematic to suggest that *Mapp* was predicated primarily on a well-developed and articulated concept of "judicial integrity."

8. *Leon*, 104 S. Ct. at 3413 n.6.

9. *Id.* at 3424.

10. *Id.*

11. *Id.* at 3413-16.

12. *Id.* at 3412-13.

13. *Id.* at 3421.

warrant and abided by its terms. . . ." [I]t is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued."¹⁴ He then noted four circumstances when reliance on a warrant will not be considered objectively reasonable: (1) When the magistrate was misled by relevant information in an affidavit which was known by the affiant to be false or which he should have known to be false as set forth in *Franks v. Delaware*;¹⁵ (2) When the magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York* (magistrate actively participating in search/investigation); (3) When the affidavit is so lacking the indicia of probable cause as to render official belief in its existence entirely unreasonable (the so called "bare bones" or clearly conclusory affidavit); and (4) When a warrant is facially deficient, such as failing to comply with the particularity requirements.¹⁶

Having articulated the situations in which exclusion in warrant cases is still appropriate, Justice White advised that "the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time."¹⁷ The opinion elaborated: "[I]n the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or *could not have harbored an objectively reasonable belief in the existence of probable cause.*"¹⁸

Leon thus adds to the Fourth Amendment analysis the need to determine when an officer may have an objectively reasonable belief in the existence of probable cause when a search was conducted pursuant to a warrant which was unreasonably issued because of the absence of probable cause.

This new dimension raises intriguing questions about the relationship between judges issuing warrants and police, and between reviewing courts and warrant-issuing magistrates. An officer is deemed to lack objective good faith when the judge issues a warrant "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."¹⁹ In terms of the limited deterrence rationale, it appears the officer is penalized for relying upon a judge who failed to comply with the minimal legal standards. This strained reasoning results from

14. *Id.*

15. *The Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978), requirement that the false information be necessary to establish probable cause does not work when there is an *absence* of probable cause as *Leon* allows. Thus, it appears that *Leon* may expand the protections of *Franks* to, at a minimum, "relevant" evidence.

16. *Id.* at 3421-22.

17. *Id.* at 3422.

18. *Id.* at 3423 (emphasis added).

19. *Id.* at 3422 (citing *Brown v. Illinois*, 422 U.S. 590, 610-11, 95 S. Ct. 2254, 2265 (1975)).

Justice White's unwillingness to suggest that the exclusionary sanction might well be an appropriate remedy for substandard *judicial*, as opposed to police, action. Thus, the officer must be deemed objectively unreasonable for relying upon the unreasonable actions of a judge.

In litigation this places defense counsel in the position of arguing to a judge that the officer was objectively unreasonable for relying upon the earlier judicial action. This is not an enviable position from which to begin argument.

From a reviewing court perspective, the court in most cases can simply assume the absence of probable cause and then determine whether the officer was objectively reasonable. If the warrant application is not flagrantly defective,²⁰ then the officer's action was "objectively reasonable" and no exclusionary sanction lies, absent other sufficient grounds. Of course, if courts generally assume the absence of probable cause, the substantive Fourth Amendment issue is not addressed and thus Fourth Amendment developments are frozen; more importantly, lower courts are given no further substantive guidance. Justice White suggested that lack of instruction to lower courts would not necessarily result "by allowing reviewing courts to exercise an informed discretion in making [the] choice"²¹ of whether to address the principal Fourth Amendment issue.

This aspect of the decision emphasized that the standard announced is not one addressed to the police or issuing magistrate as are most Fourth Amendment decisions. The standard is one for review. It remains inappropriate for issuing magistrates or police to approach the warrant issue in terms of whether the exclusionary sanction will apply; the proper approach remains to determine whether there is probable cause traditionally and in light of the relaxed standard of *Illinois v. Gates*.²² To suggest, however, that issuing magistrates will not issue warrants under circumstances where probable cause is very doubtful but when the issuance would not likely result in the officer being found to be objectively unreasonable may be unrealistic.²³ This new approach presents a substan-

20. The opinion does not fully articulate what degree of *lack* of probable cause renders the warrant unreasonable for reliance by an officer. While a "bare-bones" affidavit *i.e.*, "bare conclusions" of others, 104 S. Ct. at 3417, may not be relied upon, it is not certain that an affidavit that includes more than "bare-bones" but less than one in which there is a "substantial basis for . . . concluding that probable cause existed", *Illinois v. Gates*, 103 S. Ct. 2317, 2332 (1982) (citation omitted), must lead to a reviewing court excluding evidence. Justice White indicates a reviewing court "may" exclude. 104 S. Ct. at 3417. It thus is not entirely clear that the reviewing standard in *Leon* for purposes of determining application of the exclusionary rule is the same as that articulated in *Gates* for purposes of reviewing a probable cause determination. See *infra* note 38.

21. *Id.* at 3423.

22. 103 S. Ct. 2317 (1983), discussed *infra* text accompanying notes 48-51.

23. As with "harmless error", a magistrate should not intentionally commit error. A similar problem may exist here. See, e.g., *State v. Michelli*, 301 So. 2d 577 (La. 1974).

tial challenge to the integrity of the judiciary, all of whom (including issuing magistrates) are bound to support the constitutions and laws of the state and the United States.²⁴ The absence of a remedy does not and should not diminish that responsibility. State constitutional or supervisory control of this difficult problem may be appropriate.

Undoubtedly, more difficult issues will arise in connection with the application of a "good faith" standard to non-warrant cases. While it is clear that the holdings of *Leon* and *Sheppard* relate only to warrant cases (and thus *Mapp*, a non-warrant case, has not been overruled), it is equally clear that the opinion's author did not feel bound by the strict holding. In an opinion²⁵ issued the same day as *Leon* and *Sheppard*, Justice White, dissenting from the majority position that the exclusionary rule does not apply to civil deportation proceedings, indicated his understanding of *Leon*'s application to non-warrant cases: "[I]f the agents neither knew nor *should have known* that they were acting contrary to the dictates of the Fourth Amendment, evidence will not be suppressed even if it is held that their conduct was illegal."²⁶ That the issue of non-warrant application was not inadvertently addressed is evident from Justice Stevens' dissent in which he joins Justice White's opinion except for the portion that relies upon *Leon*, "[b]ecause the court has not yet held that the rule of *United States v. Leon* . . . has any applications to warrantless searches."²⁷

The test of *Leon* does not provide sufficient guidance in non-warrant cases. The Court did not address the essential question of by what standards one determines when an officer without a warrant is objectively reasonable. The opinion does not give adequate guidance on whether there are different concerns when an officer relies upon an unconstitutional state constitutional or statutory provision, or unconstitutional administrative rules or common practice.²⁸ It may be that in connection with non-warrant cases a strict objective standard that does not take into account subjective good faith, as well as other purposes of the exclusionary sanction, would not be acceptable. Further careful analysis remains necessary.²⁹

24. La. Const. art. X, § 30.

25. *INS v. Lopez-Mendoza*, 104 S. Ct. 3479 (1984).

26. *Id.* at 3493 (White, J., dissenting) (emphasis added).

27. *Id.* at 3496 (Stevens, J., dissenting).

28. Justice White suggested that the exclusionary sanction still applies in cases where a statute is unconstitutional by authorizing searches "under circumstances that did not satisfy the traditional warrant and probable cause requirements" 104 S. Ct. at 3415 n.8. However, he did not explain how this position of non-exclusion fits the limited deterrence rationale of *Leon* or the difference between such authorized searches as compared to arrests.

29. The United States Court of Appeals for the Fifth Circuit has, in *dicta*, suggested broader application of a "good faith" exception. See *United States v. Williams*, 622 F.2d

Leon heightens the need for the Louisiana Supreme Court to determine whether there exists an exclusionary sanction for article I, section 5 of the Louisiana Constitution which supplements and is independent of the exclusionary sanction arising from the Fourth Amendment. This writer has previously suggested³⁰ that article I section 5, because of its expanded standing, has an exclusionary rule beyond and independent of the United States Constitution. In several cases the Louisiana Supreme Court had already adopted an exclusionary sanction broader than, and independent of, that required by the United States Supreme Court.³¹ There is therefore no reason to assume that the exclusionary sanction in Louisiana must follow that of *Leon* and *Sheppard*. That issue should be carefully and realistically addressed on a case-by-case basis to develop a fundamentally sound solution.

"PRONGS" AND PURPOSES

If any doubt lingered about the fundamental change caused by the "common sense" approach to probable cause announced in *Illinois v. Gates*³² last term, that doubt should be dissipated by the *per curiam* opinion in *Massachusetts v. Upton*.³³ The Supreme Judicial Court of Massachusetts had concluded,

We do not view the *Gates* opinion as decreeing a standardless "totality of the circumstances" test. The informant's veracity and the basis of his knowledge are still important but, where the tip is adequately corroborated, they are not elements indispensable [sic] to a finding of probable cause. It seems that, in a given case, the corroboration may be so strong as to satisfy probable cause in the absence of any other showing of the informant's "veracity" and any direct statement of the "basis of his knowledge."³⁴

The Massachusetts court found that the affidavit provided insufficient information to establish probable cause. It reached that conclusion

830 (5th Cir.), cert. denied, 449 U.S. 1127 (1980), discussed in Lamonica, *Developments in the Law, 1979-1980—Pretrial Criminal Procedure*, 41 La. L. Rev. 643, 643 (1981).

30. See Lamonica, *The work of the Louisiana Appellate Courts for the 1975-1976 Term—Pretrial Criminal Procedure*, 37 La. L. Rev. 535, 542 (1977).

31. See *State v. Longlois*, 374 So. 2d 1208 (La. 1979) (a unanimous opinion by Blanche, J.); *State v. Patton*, 374 So. 2d 1211 (La. 1979); *State v. Case*, 363 So. 2d 486 (La. 1978). See also Lamonica, *supra* note 29, at 646. Cf. *State v. Daniels*, 373 So. 2d 149 (La. 1979); *State v. Mora*, 307 So. 2d 317 (La. 1975), vacated, 423 U.S. 809 (1975), on remand 330 So. 2d 900 (La. 1976), cert. denied, 429 U.S. 1004 (1977); *State v. Wells*, 221 So. 2d 50 (La. 1969).

32. 103 S. Ct. 2317 (1983).

33. 104 S. Ct. 2085 (1984).

34. *Id.* 2087 (quoting *Commonwealth v. Upton*, 390 Mass. 562, 568, 458 N.E.2d 717, 721 (1983)).

primarily because there was insufficient information to corroborate the previously untested credibility of the informant. The corroboration was only through "innocent, nonsuspicious conduct as related to an event that took place in public."³⁵

The Supreme Court's *per curiam* attempted to amplify *Gates*: We think that the . . . [Massachusetts court] misunderstood our decision in *Gates*. We did not merely refine or qualify the "two-pronged test." We rejected it as hypertechnical and divorced from "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." . . . We noted in *Gates* that "the two-pronged test has encouraged an *excessive dissection of informants' tips*, with undue attention being focused on isolated issues that cannot sensibly be divorced from other facts presented to the magistrate."³⁶

The error of the Massachusetts court appears to be its insistence "on judging bits and pieces of information in isolation against the artificial standards provided by the two-pronged test."³⁷ It also erred in failing to defer to the issuing magistrate.³⁸

When one examines the Supreme Court's approval of the affidavit, however, it appears that the error may be more in terms of application than in fundamental concepts. In finding probable cause, the court looked to facts which justified reliance upon the informant's tip. With respect to the manner in which the information was obtained (reliability),³⁹ the first-hand observation easily satisfied the traditional requirement. Thus, the critical issue was the informant's credibility. The Supreme Court examined this question analytically in a traditional manner. The informant provided a reasonable basis (including motive) to believe she was telling the truth, and to justify initial anonymity: "fear of Upton's retaliation . . . her recent breakup with Upton and her

35. *Id.*

36. *Id.* at 2087-88 (citations omitted).

37. *Id.* at 2088.

38. *Id.* The Court in *Gates* addressed the now distinct roles of the issuing magistrate and reviewing court: "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found . . . [T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." 103 S. Ct. at 2332 (citations omitted).

39. The term "reliability" is not consistently used; it often refers to the total question of whether the informant has provided truthful information (and thus is credible and has obtained it in a dependable manner). Sometimes when there is a focus on the manner of obtaining information alone, the question is addressed to the method of obtaining the information (firsthand or hearsay). See, e.g., Lamonica, *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Pretrial Criminal Procedure*, 36 La. L. Rev. 575, 579 (1976).

desire 'to burn him.'"⁴⁰ Additionally, the informant confirmed the officer's guess as to her identity.⁴¹

The court thus appears to have considered the same indicia of credibility as it did prior to *Gates*. While the Court has declared the two-pronged test to be an "artificial standard," the Court appears to be determining probable cause by looking in a less stringent manner at the underlying purposes of the traditional test.⁴² That is appropriate since the underlying conceptual concerns hardly can be characterized as "artificial." In any evidentiary situation, a reasonable person considers the (known or assumed) truth-telling propensity of the declarant and the basis or reliability of the manner in which the information was obtained before relying upon it: the earth-bound Bishop who says that the other side of the moon is made of green cheese reasonably can be relied upon no more than the habitual liar who says he personally "put the check in the mail." Credibility and the manner of obtaining information are distinct. It hardly can be said that the purposes of the "two prongs" are artificial. Rather, the purposes conform to "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."⁴³ Of course, the two purposes are often blurred as when the credibility is established by corroboration of the facts stated, or when the degree of detail of facts presented is such that one reasonably may infer first-hand observation or if corroboration confirms truth-telling propensity.⁴⁴

Of great substantive significance is the court's willingness in *Gates* to allow greater reliance when "a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality."⁴⁵ The Court is willing to allow greater interplay between credibility concerns and the method of obtaining the information: "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability [that the information presented is likely to be true, like corroboration or degree of detail]."⁴⁶ The Court appears willing to assume that people who have given truthful information about criminal conduct in the past are likely to provide truthful information in the present. Implicit in that conclusion is that the informants also used adequate means of obtaining the information in the

40. 104 S. Ct. at 2088.

41. *Id.*

42. See *supra* note 38.

43. 103 S. Ct. at 2328 (citing *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

44. See Justice Tate's early recognition of the need for a flexible view of the two-prong test in *State v. Paciera*, 290 So. 2d 681 (La. 1974).

45. 103 S. Ct. at 2329.

46. *Id.*

present, as in the past.⁴⁷ How far that assumption will extend will, of course, be controlled by future developments and could result in profound changes.

In *Gates* itself the court took a rather traditional evidentiary approach. It concluded, "[w]e agree . . . that an informant's 'veracity,' 'reliability' and 'basis of knowledge' are all highly relevant in determining the value of his report."⁴⁸ The disagreement was whether the two-pronged test was to be "rigidly exacted"⁴⁹ and whether the two prongs are "entirely separate and independent requirements."⁵⁰ The Court recognized that the separate concerns are "closely intertwined issues that may usefully illuminate the common sense, practical question whether there is probable cause" ⁵¹ Stated differently, the court reminded us that we should not, as in any area of the law, lose sight of the purpose of the rule and its conceptual basis and decide cases based on inflexible applications which do not always promote the rule's purpose. Keeping the two purposes of the "two prongs" in mind should help deal with an otherwise apparently unstructured "totality of the circumstances" test.

*State v. Ruffin*⁵² is an example of Louisiana's response to *Gates*. A detective received a telephone call from a confidential informant who said that Ruffin would be standing at a particular intersection, possessing a stolen check in a large amount. The informant told the detective that Ruffin was attempting to get someone to accompany him to cash the check. The detective knew Ruffin had been incarcerated in the past. The detective had received truthful information from the informant in the past which resulted in thirty to forty convictions. Based on this the detective obtained a warrant.

Reversing the court of appeal,⁵³ the Louisiana Supreme Court determined that there was no probable cause because of the absence of

47. See the court's citation of Judge Clark's opinion in *United States v. Sellers*, 483 F.2d 37 (5th Cir.), cert. denied, 417 U.S. at 908 (1973). See also *Gates*, 103 S. Ct. at 2330 n.9, which illustrates the contrary "rigid-application" approach. The court does not elaborate on distinctions between "professional" and "non-professional" informants. See, e.g., *State v. Searle*, 339 So. 2d 1194 (La. 1976), discussed in Lamonica, *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Pretrial Criminal Procedure*, 37 La. L. Rev. 535, 538 (1977).

48. 103 S. Ct. at 2327.

49. *Id.* at 2328.

50. *Id.* at 2327-28.

51. *Id.* at 2328.

52. 448 So. 2d 1274 (1984). See also, *State v. Raheem*, 454 So. 2d 214 (La. App. 1st Cir. 1984); *State v. Stewart*, 452 So. 2d 186 (La. App. 4th Cir. 1984); *State v. Fleniken*, 451 So. 2d 1342 (La. App. 1st Cir. 1984); *State v. Manso*, 449 So. 2d 480 (La. 1984), cert. denied, 53 U.S.L.W. 3237 (1984); *State v. Kleinpeter*, 449 So. 2d 1043 (La. App. 1st Cir.), cert. denied, 450 So. 2d 661 (La. 1984).

53. 434 So. 2d 1246 (La. App. 1st Cir. 1983).

any "indication in the informant's statement that the informant had personal knowledge"⁵⁴ of the facts he represented. The corroborated facts involved only the location of the defendant on a public street. Justice Blanche, writing for the majority, recognized that

in expressing that the test to be utilized should be an examination of the totality of circumstances, the Court did not abandon the need for an examination of the two prong test of *Aguillar-Spinelli*. Rather instead of mechanical application . . . each prong should still be examined as a separate factor contributing to the totality of the circumstances.⁵⁵

Ruffin does not appear inconsistent with the *Upton* result. *Upton* dealt with facts bearing on credibility; the informant asserted personal knowledge plus specific details from which personal knowledge could be inferred. In *Ruffin*, there were facts traditionally accepted as indicative of credibility, but no information on how the information was obtained.

Interestingly, *Ruffin* appears predicated on both the state and federal constitutions.⁵⁶ This reliance on both constitutions is now less likely to preclude the Supreme Court from reviewing the federal grounds.⁵⁷ Justice Stevens, concurring in *Upton* made some interesting and perhaps increasingly significant observations regarding federal-state relations relating to the Fourth Amendment and review by the Supreme Court. He urged that it is "important that state judges do not unnecessarily invite this Court to undertake review of state court judgments."⁵⁸ In urging state courts to first decide Fourth Amendment issues on state grounds, he reminds us that

for the first century of this nation's history, the Bill of Rights of the Constitution of the United States was solely a protection for the individual in relation to federal authorities. State constitutions protected the liberties of the people of the several States from abuse by state authorities. . . . The States . . . remain the primary guardian of the liberty of the people.⁵⁹

Justice Stevens is urging state courts to base their decisions on their own constitutions if they desire to provide more expansive or more consistent protections with those of the last two decades. This limits federal review and reduces the work load of both federal courts initially and state courts on possible reversal, remand, or both. In the process of redefining prob-

54. 448 So. 2d at 1279.

55. Id. at 1278.

56. Id. at 1277.

57. *Michigan v. Long*, 103 S. Ct. 3469 (1983).

58. 104 S. Ct. at 2090 (Stewart, J., concurring).

59. Id. at 2091.

able cause, Justice Steven's suggestion might well provide greater certainty within the state court system at this stage in the development of new doctrines by the United States Supreme Court.

MURDER SCENE SEARCHES—*le mort saisit le consentement?*

Justice Stewart, writing for a unanimous Court in *Mincey v. Arizona*,⁶⁰ recognized an emergency exception to the warrant requirement:

We do not question the right of police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises.⁶¹

The Court found that the search in question exceeded the emergency justification: "All the persons in Mincey's apartment had been located before the investigating officers arrived And a four-day search that included opening dresser drawers and ripping up carpets can hardly be rationalized in terms of the legitimate concerns that justify an emergency."⁶²

*State v. Thompson*⁶³ added a new dimension to emergency search cases. In a majority opinion subscribed to by four members of the court, Justice Blanche distinguished *Mincey* not only on its facts relevant to the legitimate concerns that justify an emergency case, but also on the basis that the victim in *Mincey* "could not have consented to the search of the apartment he was shot in, as he had no authority over that apartment. . . . [The victim in *Thompson*] had authority over the premises . . . and, had he survived until the police arrived, could have consented to their search"⁶⁴ The notion of implied consent by a victim is interesting, but it directs the focus of analysis away from the traditional emergency exceptions. Justice Lemmon's concurrence, emphasizing that "when a resident of the premises is murdered, there is a significant diminishing of the expectations of privacy of the other

60. 437 U.S. 385, 98 S. Ct. 2408 (1978).

61. Id. at 392, 98 S. Ct. at 2413.

62. Id. at 393, 98 S. Ct. at 2414.

63. 448 So. 2d 666 (La. 1984).

64. Id. at 671. Reliance on consent will no doubt result in far-ranging legal issues. In *Thompson*, the defendant was a wife who attempted suicide. Presumptively the home was community property and owned one-half by the wife with the remaining one-half becoming subject to her usufruct upon the victim's death. Such ownership concerns are irrelevant and only add confusion.

persons residing there,"⁶⁵ is more realistic and focuses on the real issue: reasonable protection of privacy. That reasonable people can disagree on factual applications of the test is reflected in Justice Dennis' dissent.⁶⁶

The United States Supreme Court granted *certiorari* in *Thompson* and, without hearing, reversed the court in a unanimous *per curiam* which ignored the consent theory other than as an aspect of diminished expectancy of privacy. In rejecting the diminished expectancy of privacy, the court indicated that neither the length of time (two hours versus four days), the request for medical assistance, nor the unavailability of a person with authority over the premises justified the warrantless search.⁶⁷

Thompson also clarified a procedural issue raised in *State v. Landry*.⁶⁸ In *Landry* the court ruled that the state may not put on additional evidence in opposition to a motion to suppress after the motion to suppress is granted. The decision also indicated that the defendant is likewise prohibited from presenting new evidence supporting the motion to suppress once the trial court denies the motion. In *Thompson*, the defendant did not attempt to introduce new evidence but sought "reargument and reconsideration of his motion based upon the evidence previously introduced."⁶⁹ The court found the reconsideration to be in order but instructed that such reconsiderations "should be sparingly made and limited to instances when the trial judge firmly believes that his prior decision was legally infirm"⁷⁰ The reason given for such a rehearing was that "such reconsiderations do not hamper, but actually promote, judicial efficiency."⁷¹ Justice Blanche's appropriate reasoning on this procedural issue should also be employed in cases involving reasonable and non-dilatory attempts to produce additional evidence. The little additional time in appropriate cases could prove greatly efficient in eliminating state and federal collateral attacks on the suppression issue,⁷² as well as reducing attacks on the additional issue of competency of counsel likely to arise therefrom. As in civil proceedings, the issue should be resolved directly in terms of judicial efficiency and fairness.

65. *Id.* at 672 (Lemmon, J., concurring).

66. *Id.* at 673 (Dennis, J., dissenting). A closely related issue involving premises searched after fires was addressed in *Michigan v. Clifford*, 104 S. Ct. 641 (1984). The 5-4 plurality opinion reflects the difficulty of determining the types of emergency circumstances in which a person retains a reasonable expectation of privacy in his house.

67. *Thompson v. Louisiana*, 105 S. Ct. 409 (1984).

68. 339 So. 2d 8 (La. 1976).

69. 448 So. 2d at 669.

70. *Id.*

71. *Id.*

72. This is particularly relevant to the issue in *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037 (1976), of whether the state prescribed "an opportunity for a full and fair litigation of a Fourth Amendment claim" 428 U.S. at 482, 96 S. Ct. at 3046.

AIRPORT SEARCHES

In *State v. Ossey*⁷³ the Louisiana Supreme Court, in a 4-3 decision, addressed the continuing problem of airport searches and, in the process, announced their understanding of the leading United States Supreme Court plurality decision⁷⁴ involving airport searches. In *Ossey* the defendant, after (1) deplaning from a source city (Los Angeles), was (2) observed to be nervous, hesitant and looking over his shoulder, and (3) he then retrieved one small leather bag. He was approached by a plain-clothes narcotics agent who asked if the defendant would speak to him. He responded affirmatively and was asked to produce identification. He produced (4) a driver's license that was in a name other than that on his (5) one-way ticket which was (6) purchased with cash. His explanation for the "alias" was that a cousin had purchased the ticket. The numbered facts conformed to a "drug courier profile." The officers then advised the defendant that they were conducting a narcotics investigation and that they believed he was transporting narcotics. When asked if he would consent to a search, defendant asked to see a search warrant. The officers informed defendant they would obtain one if the defendant would accompany them to a third floor office. The agents testified that upon reaching the office the defendant consented to the search. Although the officers testified they thought the defendant had signed a consent to search form, he had not.

The case demonstrates the significance of the factual-legal determination of when a "seizure" takes place. Justice Dixon, writing in dissent, while stating his willingness to accept "the officers' version of the events,"⁷⁵ recognized the case as "one which lies somewhere between *Mendenhall* and *Royer*"⁷⁶ insofar as the critical determination of when a seizure, based upon sufficient information, properly may take place. A significant disagreement between the dissent and majority related to the extent one considers that question purely one of fact. Justice Marcus, writing a rather cryptic opinion for the majority, was not willing to second-guess the trial judge's conclusion that "the defendant voluntarily accompanied the agents in a spirit of apparent cooperation."⁷⁷ That finding is apparently the basis for his conclusion that in light of the "surrounding circumstances"⁷⁸ the defendant "was not being illegally detained"⁷⁹ at the time he consented to the search.

73. *State v. Ossey*, 446 So. 2d 280 (La. 1984).

74. *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319 (1983). See also *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, reh'g denied, 448 U.S. 908 (1980).

75. 446 So. 2d at 289.

76. *Id.* at 291.

77. *Id.* at 286.

78. *Id.*

79. *Id.* at 286-87.

Justice Dixon stated that "Ossey, like Royer, was justified in believing he was not free to leave . . . and, as a practical matter . . . was probably under arrest" ⁸⁰ Justice Dixon concluded that "[a]s a matter of law, any consent given . . . ought to be held to be impermissibly tainted by his illegal detention."⁸¹

The critical issue in such cases is whether a defendant "voluntarily accompanies" the officer. That question is complex because the individual-government confrontation often begins as a consensual questioning in a public place and escalates into a limited seizure when one no longer reasonably feels free to walk away and often escalates into a more significant seizure (arrest) when the limits of the *Terry*-stop seizure have been reached. The defendant can, of course, consent to each seizure, even if not legally justified. The essential question in *Ossey* is whether the defendant consented to the continued custody. If so, there simply is no illegality—as the majority accepted and with which the dissent disagrees. Without clear guidelines as to the manner of obtaining consent during the different degrees of seizure, a "totality of circumstances" test will continue to present difficult fact-finding situations, and it enhances the need to cause a complete record to be produced.

OPEN FIELDS

Former Chief Justice Sanders in a well-reasoned, unanimous opinion concluded: "[Plain view] does not apply if the view is from a place that officers have no right to be The point of observation (trespassing on a fenced and posted 640 acre tract) was a place that the officers had no right to be without a search warrant."⁸² The decision was clearly predicated upon the proposition that the officers, by being in a place they had no right and no legal justification to be, were violating the constitutional privacy expectations of the defendants who had property interests and had taken steps to assure their privacy.

In a potentially very significant decision, the Supreme Court has announced that persons lack a Fourth Amendment protected interest in "open fields" even when "no trespassing" signs are posted and the area is secluded.⁸³ Looking at James Madison's original proposal for the Fourth Amendment, and the rejection of his term "property" in favor of "effects," the Court determined the term "effects" to be less inclusive than "property."⁸⁴ Perhaps of more significance is the Court's

80. *Id.* at 292 (Dixon, J., dissenting).

81. *Id.* (citations omitted).

82. *State v. Byers*, 359 So. 2d 84 (La. 1978), discussed in Lamonica, *The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Pretrial Criminal Procedure*, 39 La. L. Rev. 917, 921 (1979).

83. *Oliver v. United States*, 104 S. Ct. 1735 (1984).

84. *Id.* at 1740.

treatment of the *Katz*⁸⁵ approach to ascertaining Fourth Amendment protections, *i.e.*, "reasonable expectations of privacy." The Court re-embraced the pre-*Katz* rule of *Hester v. United States*⁸⁶ and explained that it "may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home."⁸⁷ In reaffirming this old position, the Court found that "open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance."⁸⁸ The asserted expectation of privacy in open fields is not an expectation that society currently recognizes as reasonable.⁸⁹ Thus, the *Katz* formulation was used to restrict privacy interests rather than expand them.

This approach to the Fourth Amendment gives new life to determinations of what activity is within the "curtilage." Even then, it appears that activity within the curtilage must meet the additional test of being conducted in such a manner as to create a reasonable expectation of privacy to avoid the "plain view" aspect of Fourth Amendment protections. Unquestionably, *Oliver* has significantly limited the class of cases to which Fourth Amendment protections apply and causes greater emphasis on the express language of the Fourth Amendment—"persons, houses, papers, effects." In a footnote, we are told, "[t]he Framers would have understood the term 'effects' to be limited to personal, rather than real, property."⁹⁰

Justice Marshall, in dissent, pointed out that "[w]e are not told . . . whether the curtilage is a 'house' or an 'effect'—or why, if the curtilage can be incorporated . . . a field cannot"⁹¹ in light of the literal approach to the issue. If this literal approach is taken, enclosures outside of the "curtilage" but on large tracts of property will lack any privacy protections,—e.g., sheds and barns not located near the home or simply materials (hay stacks, supplies) covered with non-transparent material and located outside of the traditional "curtilage."

The Louisiana Constitution's framers may have fared better than James Madison in this respect. Article I, section 5 expressly provides greater privacy protection which, in addition to "persons, houses, and effects," includes "property and communications." The results reached in *Byers*, while not predicated on the express language, is consistent with the language and need not be altered by *Oliver*.

85. *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507 (1967).

86. 265 U.S. 57, 44 S. Ct. 445 (1924).

87. 104 S. Ct. at 1741.

88. *Id.*

89. *Id.* at 1741.

90. *Id.* at 1740 n7.

91. *Id.* at 1745 (Marshall, J., dissenting).

WARRANTLESS ARRESTS IN THE HOME

The *Payton v. New York*⁹² holding that, absent probable cause and exigent circumstances, warrantless arrests in the home violate the Fourth Amendment was amplified in *Welsh v. Wisconsin*.⁹³ The Court was presented with the question of whether "the Fourth Amendment prohibits the police from making a warrantless night entry of a person's home in order to arrest him for violation of a nonjailable traffic offense."⁹⁴ While the holding that the Fourth Amendment prohibition of such conduct is necessarily narrow, the *dictum* is broad in explaining the meaning of the *Payton* exigent circumstances standard. After recounting the traditional exigent circumstances justifying warrantless arrests, Justice Brennan, writing for the majority, added a newly articulated consideration: "Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is especially appropriate when the underlying offense for which there is probable cause to arrest is relatively minor."⁹⁵

The Court then

hold[s] that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made A home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed.⁹⁶

Of significance in the driving-while-intoxicated context, was the Court's unwillingness to find a continuous or "hot" pursuit or a continuing threat to public safety. The justification of preserving evidence, however, was more narrowly treated. Justice Brennan looked at the "expression of the state's interest"⁹⁷ in the particular crime by the leniency of the sanction. In light of this lesser interest, he concluded that "a warrantless home [entry] arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant."⁹⁸ It is not clear that the same position with respect to preservation of evidence will prevail when a state, such as Louisiana, has expressed a stronger interest by enacting more stringent penalties.

92. 445 U.S. 573, 100 S. Ct. 1371 (1980).

93. 104 S. Ct. 2091 (1984).

94. *Id.* at 2093.

95. *Id.* at 2098.

96. *Id.* at 2099.

97. *Id.* at 2100.

98. *Id.* (citation omitted).

CONFESSIONS

While reiterating traditional confession-voluntariness standards, *State v. Wilms*⁹⁹ presents a troubling application. The defendant was arrested as he fled toward his van after an armed robbery. His wife, who was in the van, was also arrested. Unrebutted testimony reflected that an officer hit the wife in the stomach and kicked her as she was climbing into the police van. Another officer conducting the interrogation was told of the battery and that the wife was bleeding. A female guard also told the interrogating officer of the need for medical attention. When the wife was finally examined some eight hours after the arrest she was found to be "spotting" and bleeding. A miscarriage occurred eight days later.

Chief Justice Dixon, writing for the majority, found that "[t]here is no doubt based on the present record that [the wife] was inexcusably struck in the stomach."¹⁰⁰ He rejected the involuntariness of confession claim because "[n]either Wilms or his wife testified . . . that they were afraid of further misconduct . . . Wilms fear was that [his wife] would not receive medical attention."¹⁰¹ There was no doubt that this fear was expressed to the interrogating officer who knew of the wife's condition.

The majority opinion found it significant that the interrogating officer affirmatively "did not predicate medical service on the giving of a statement"¹⁰² even though there was an inordinate delay. While recognizing that the defendant "was no doubt concerned about his wife and experienced psychological pressure,"¹⁰³ the court found he "was no doubt also feeling pressure as a result of being apprehended in front of a restaurant as a suspect in an armed robbery."¹⁰⁴

The decision does not appear to implement the long-standing rule that "the state is required to rebut specific testimony introduced on behalf of the defendant concerning factual circumstances which indicates coercive measure or intimidation."¹⁰⁵ It is also difficult to reconcile with Louisiana Revised Statutes 15:451, which has long required the state to affirmatively show that a confession was "free and voluntary and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises," by proof beyond a reasonable doubt.¹⁰⁶

99. 449 So. 2d 442 (La. 1982).

100. Id. at 444.

101. Id.

102. Id. at 445.

103. Id.

104. Id.

105. *State v. Monroe*, 305 So. 2d 902, 912 (La. 1974). See also *State v. Peters*, 315 So. 2d 678 (La. 1975).

106. See, e.g., *State v. Joseph*, 217 La. 175, 46 So. 2d 118 (1950); *State v. Lanthier*, 201 La. 844, 10 So. 2d 638 (1942).

Since the trial judge assigned neither written nor oral reasons for his decision, it is difficult to reconcile the supreme court's action with an appropriate deference to the trial court's findings. Moreover, the record appears devoid of information relating to whether the trial judge applied the appropriate legal standard. *Wilms* thus appears to be a significant deviation from prior Louisiana cases. Justice Lemmon, in dissent, warns that the court's decision "not only encourages such abusive conduct, but also departs from any commonsense view of 'voluntariness.'" ¹⁰⁷

In *Crosby*¹⁰⁸ guilty-plea cases, such as *Wilms*, the state will not be unduly prejudiced by a remand to the district court for further hearing, findings or both to assure that the long-standing protections associated with the manner of obtaining confessions are not rendered illusory.

MIRANDA DEVELOPMENTS

*New York v. Quarles*¹⁰⁹ presents the question of whether there is a Miranda violation when officers, prior to the required warning, asked an arrestee "where the gun was."¹¹⁰ The reply resulted in locating the gun and introducing it into evidence along with the reply. The majority appeared eager to find a clear *Miranda* application even though two substantial *Miranda* application questions arose: (1) whether the questioning was investigatory; and (2) whether *Miranda* was applicable to non-testimonial (physical) evidence. In an uncharacteristically cryptic expansion of federal constitutional rights, Justice Rehnquist, writing for five members of the Court, concluded the lower court "was undoubtedly correct in deciding that the facts of this case came within the ambit of the *Miranda* decision as we have subsequently interpreted it."¹¹¹ The majority opinion then proceeded to create a "public safety" exception to *Miranda*: "We hold that on these facts there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence, and that the availability of that exception does not depend upon the motivation of the individual officers involved."¹¹² The majority opinion emphasizes the limited nature of the factual inquiry, "the application of the exception . . . should not be made to depend on *post hoc* findings at a suppression hearing concerning the subjective motivation of the arresting officer."¹¹³

107. 449 So. 2d at 445 (Lemmon, J., dissenting).

108. *State v. Crosby*, 338 So. 2d 584 (La. 1976), allows the acceptance of a guilty plea with reservation of the right to appeal the denial of a motion to suppress.

109. 104 S. Ct. 2626 (1984).

110. *Id.* at 2630. The court also did not address the "inevitable discovery" issue. *Id.* at 2634 n.9.

111. *Id.* at 2631.

112. *Id.* at 2632.

113. *Id.*

Justice Rehnquist acknowledged that "undoubtedly most police officers . . . would act out of a host of different, instinctive, and *largely unverifiable motives*—their own safety, safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect."¹¹⁴ Motivation becomes irrelevant because the majority concluded that "the doctrinal underpinnings of *Miranda* [do not] require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for public safety."¹¹⁵

This approach to the issue, while at first glance appearing to expand *Miranda* application, has the effect of avoiding picking up any of the aspects of *Miranda* baggage which may concern subjective intent. One may assume custody, assume interrogation, assume application to non-testimonial evidence and simply ask whether the questioning was, by an objective standard acknowledging a police officer's instinct as central, "reasonably prompted by a concern for the public safety [including his own]."¹¹⁶

Justice O'Connor dissented in part and concurred in part to emphasize that the court did not need to reach the non-testimonial evidence issue. She emphasized the need for careful examination before one should be willing to assume that the Fifth Amendment *Miranda* protections apply to non-testimonial evidence.¹¹⁷

The Louisiana position in *State v. Levy*,¹¹⁸ announced by former Justice Tate, while reaching the same result as *Quarles*, is not predicated upon the assumption that *Miranda* applies to such inquiries, thus creating a need for an "exception." Looking to the purpose of *Miranda*, the court determined that under certain narrow circumstances—(1) a limited threshold inquiry (2) at the scene (3) immediately after a violent crime was committed—the question "Where is the gun?" (motivated primarily by the officers desire to protect himself from harm) did not require *Miranda* warnings.¹¹⁹ Significantly, the Louisiana approach is narrowly limited and would still allow inquiry into motivation. *Quarles* defers much more to the officer's judgment—"[w]e think police officers can and will distinguish almost *instinctively*"¹²⁰ between public safety questioning and interrogation—yet disallows questioning regarding motivation.

In *Berkemer v. McCarty*¹²¹ the Court resolved the "confusion in the federal and state courts regarding the applicability of . . . *Miranda* to interrogations involving minor offenses . . . and to questioning of

114. *Id.* (emphasis added).

115. *Id.*

116. *Id.*

117. *Id.* at 2634 (O'Connor, J., concurring in part, dissenting in part).

118. 292 So. 2d 220 (La. 1974).

119. 292 So. 2d at 221.

120. 104 S. Ct. at 2633 (emphasis added).

121. 104 S. Ct. 3138 (1984).

motorists detained pursuant to traffic stops.”¹²² Justice Marshall, writing for the Court, with all other justices joining in the opinion except Justice Stevens who concurred, concluded that a person subjected to custodial interrogation is entitled to the protections of *Miranda* regardless of the nature or severity of the offense for which he is arrested or of which he is suspected. The Court, however, refused to interpret the language of *Miranda* literally (“or otherwise deprived of his freedom of action in any significant way”)¹²³ to hold that every detained motorist must be advised of his rights before being questioned. The Court found such a detention to be “presumptively temporary and brief”¹²⁴ and “not such that the motorist feels completely at the mercy of the police.”¹²⁵

Of at least equal significance is the Court’s *dictum* indicating that *Miranda* is not applicable to *Terry* stops. “The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*.”¹²⁶ Thus *Terry* stops are not deemed to be custodial for the purposes of *Miranda*. Only when a non-traffic detention exceeds that of a forcible stop does *Miranda* become applicable. In traffic stops, even though they are often more intensive seizures than *Terry* stops, *Miranda* does not apply because of the presumptively temporary and brief nature of the encounter. We are told, however, that when a motorist “is subjected to treatment that renders him ‘in custody’ for practical purposes, he will be entitled to the full panoply of”¹²⁷ *Miranda* protections. Presumptively, the same standard would apply to *Terry* stops to provide *Miranda* protections at the point the detainee’s freedom of action is curtailed to a degree associated with formal arrest.¹²⁸ The often difficult factual distinction between a “forcible” stop and a “formal arrest” becomes even more important.¹²⁹ The distinction is often more difficult to ascertain in the “low visibility” of the street encounters of non-traffic related forcible stops.

The consciously express and seemingly clear language of Article I, Section 13 of the Louisiana Constitution, making the *Miranda*-type warning apply to an arrest “or detention,” has thus far been restrictively interpreted to require a “significant detention”¹³⁰ in light of the “totality

122. Id. at 3144 (citations omitted).

123. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966).

124. *Berkmer*, 104 S. Ct. at 3149.

125. Id. at 3150.

126. Id. at 3151.

127. Id.

128. Id. (citations omitted).

129. Justice Marshall recognized that “[a]dmittedly, our adherence to the doctrine just recounted will mean that the police and lower courts will continue occasionally to have difficulty deciding exactly when a suspect has been taken into custody.” Id. at 3151.

130. See Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1, 41 (1974).

of circumstances.”¹³¹ It is not clear whether the Louisiana standard and federal standard will be held to be the same. The express language of Article I, Section 13 would seem to require a more expansive Louisiana interpretation. However, even if Louisiana does adopt a more expansive interpretation, that does not mean that an exclusionary sanction would apply automatically.

INEVITABLE DISCOVERY

When *Brewer v. Williams*¹³² was announced in 1977 addressing the Sixth Amendment right to assistance of counsel which was violated as a result of the “Christian burial” speech by an officer, the Court in a footnote instructed, “evidence of where the body was found and of its conditions might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams.”¹³³ On retrial, the state court recognized the “inevitable discovery” exception to the exclusionary rule, and Williams was again convicted.¹³⁴ In *Nix v. Williams*,¹³⁵ the Supreme Court adopted “the so-called ultimate or inevitable discovery exception to the Exclusionary Rule.”¹³⁶ The Court concluded that “[e]xclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial.”¹³⁷ In so deciding, the Court avoided addressing whether the Fourth Amendment rationale of *Stone v. Powell*¹³⁸ should be extended to bar federal *habeas corpus* review of Sixth Amendment claims.¹³⁹

Significantly, the Court announced that the burden of proof to establish inevitable discovery was “no greater burden than proof by a preponderance of the evidence”¹⁴⁰ and that the clear and convincing evidence standard was inappropriate because “inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment . . .”¹⁴¹ Justice Stevens, concurring, further explained, “an extraordinary burden of proof is not needed in order to preserve the defendant’s ability to subject

131. *State v. Menne*, 380 So. 2d 14 (La. 1980). See also *State v. Thompson*, 399 So. 2d 1161 (La. 1981) and Justice Dennis’ dissent in *Thompson*, 400 So. 2d 1080 (La. 1981).

132. 430 U.S. 387, 97 S. Ct. 1232, reh’g denied, 431 U.S. 925, 97 S. Ct. 2200 (1977).

133. *Id.* at 407 n.12, 97 S. Ct. at 1243 n.12.

134. The Supreme Court of Iowa affirmed. *State v. Williams*, 285 N.W.2d 248 (1979), cert. denied, 446 U.S. 921 (1980).

135. 104 S. Ct. 2501 (1984).

136. *Id.* at 2507.

137. *Id.* at 2510.

138. 428 U.S. 465, 96 S. Ct. 3037 (1976).

139. *Nix*, 104 S. Ct. at 2512 n.7.

140. *Id.* at 2509 n.5 (quoting *United States v. Matlock*, 415 U.S. 164, 178 n.14 (1974)).

141. *Id.* at 2510 n.5.

the prosecutions's case to the meaningful adversarial testing required by the Sixth Amendment."¹⁴²

One can expect that *Nix* will encourage the state in Fourth,¹⁴³ Fifth (including *Miranda*), and Sixth Amendment cases to rely more often on the now clearly accepted "inevitable discovery" doctrine. In light of the minimal burden of proof, the fact-finding process will require great care.

142. *Id.* at 2516 n.8 (Stevens, J., concurring).

143. It appears that *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037 (1976), would prevent most federal collateral review of the Fourth Amendment "inevitable discovery" decisions of state courts.