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Procedure: Criminal Procedure I

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longed to marketing cooperative associations violated the equal protection clauses of the federal and state constitutions. Although the plaintiff's indignation at having to bear the entire tax burden for advertising which benefits all sweet potato farmers is understandable, the court's conclusion that there was a reasonable basis for the classification between shippers and growers and that the legislation was therefore constitutional should not have surprised anyone in view of previous decisions in the area of classification.[32]

PROCEDURE

CRIMINAL PROCEDURE I

*Cheney C. Joseph, Jr.**

MOTION TO SUPPRESS

In *State v. Wilkerson*,[1] the supreme court held that the motion to suppress can be used to provide a pretrial determination of the admissibility of identification testimony resulting from a lineup. The court recognized that

> "although a literal reading of Article 703 of the Code of Criminal Procedure would seem to confine that motion to search and seizure evidence and evidence of written confessions and inculpatory statements, the motion is well attuned to the relief sought in this case, we have sanctioned it, and Article 3 of the Code provides authorization for the position we have taken."[2]

Article 3 authorizes courts to adopt procedures, although not specifically created by legislation, which are "consistent with the spirit of this Code."[3]

In sustaining the use of the motion in cases involving identification evidence, it is submitted that the court did not require that objections to identification procedures necessarily be raised by pretrial motion to suppress. It merely sanctioned the use of the motion in such instances. In *State v. Walker*,[4] the defense

32. Ohio Oil Co. v. Conway, 281 U.S. 146 (1930); State Dept. of Agric. v. Sibille, 207 La. 877, 22 So.2d 202 (1945); State v. Arthur Duvic's Sons, 185 La. 647, 170 So. 23 (1936).

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1. 261 La. 342, 259 So.2d 871 (1972).
2. *Id.* at 350, 259 So.2d at 873.
3. LA. CODE CRIM. P. art. 3.
4. 261 La. 545, 260 So.2d 618 (1972).

contended that the trial judge erred in refusing to hear a motion relative to the suppression of identification evidence. The error complained of in *Walker* occurred prior to the decision in *Wilkerson*. The court did not decide whether it was or was not error for the trial court to refuse to hear the motion to suppress in advance of trial. Due to the facts of the case, the court simply said "[i]f error was committed in not hearing the evidence as to identification on the motion to suppress instead of at the trial, such error was harmless and not cause for reversal."[5]

The same reasons for requiring that search and seizure and written confession questions be decided prior to trial exist as well in the case of identification evidence. As the court said in *State v. Lawrence*,[6] the reasons for requiring that defendant test by pretrial motion the constitutionality of a search and seizure are

> "to eliminate from the trial before the jury all disputes over police conduct unrelated to the guilt or innocence of the accused; to avoid unwarranted delay of the trial and confusion of the jury; to spare the State as well as the defense the expense of a useless trial in cases where a purely legal determination by the judge alone is required; to avoid the necessity of a mistrial because the jury has been exposed to unconstitutional evidence, with resulting repetitive litigation; and to afford the State and the accused advance knowledge of the rules of evidence which must be followed during the course of the trial."[7]

Trial judges should be encouraged to employ the pretrial motion to suppress to eliminate the need to litigate identification issues during trial. Nevertheless, it is submitted that the supreme court *should not require* that objections be raised by pretrial motion absent legislative amendment to article 703.

The supreme court also dealt with the issues involved in the motion to suppress in *State v. Garnier*.[8] The central question was the validity of the seizure of a large sum of currency in connection with the execution of a search warrant on an alleged gambling operation. Gambling paraphernalia and currency in

5. *Id.* at 547, 260 So.2d at 619.
6. 260 La. 169, 255 So.2d 729 (1971).
7. *Id.* at 178-79, 255 So.2d at 732.
8. 261 La. 802, 261 So.2d 221 (1972).

the amount of $10,971.75 were seized. The validity of the search warrant was not attacked.[9] The trial court however sustained the motion. The defendant argued that police were only authorized to seize gambling equipment and money actually used in gambling operations. The money sought to be suppressed and returned was found in a safe on the premises.[10] The supreme court found that the trial court erred in concluding that because the money seized would not be relevant, and hence inadmissable in the gambling prosecution, the funds could not be subject to lawful seizure as "evidence tending to prove commission of an offense."[11] The court said that "our procedure does not authorize the use of the motion to suppress to test the admissibility of evidence constitutionally seized."[12] The provisions of R.S. 15:41[13] were said not to "authorize the release of property lawfully seized which the state intends to offer as evidence at the trial . . . ."[14] The court concluded that "questions of admissibility, relevance, weight, and connexity are properly resolved at . . . trial on the merits" and "not by pretrial motion for the property's return."[15]

While the relevance of evidence certainly should not normally be decided by pretrial motion, it is submitted that the court's opinion sweeps too broadly. Article 161 does provide authorization for the seizure of "evidence tending to prove the commission of an offense"[16] as well as for the seizure of things which are used or intended for use as means of committing offenses. Thus, by its terms, that article does not authorize the seizure of a thing (not the subject of a theft) which would not be evidence tending to prove the commission of an offense and which could not be used or intended for use as a means of committing an

9. The search warrant authorized state police to search certain described premises and seize gambling equipment (dice tables, dice, gambling sticks, records, chips, money, roulette wheel and table, blackjack table, cards) and various gambling paraphernalia being used in violation of LA. R.S. 14:90.

10. The closet in which the safe was located had a large quantity of dice, playing cards and poker chips.

11. 261 La. 802, 807, 261 So.2d 221, 223 (1972); LA. CODE CRIM. P. art 161 (3).

12. 261 La. 802, 807, 261 So.2d 221, 223 (1972).

13. The article deals with disposition of property seized in connection with criminal proceedings.

14. 261 La. 802, 807, 261 So.2d 221, 223 (1972).

15. *Id.*

16. LA. CODE CRIM. P. art 161 (3).

offense. It is submitted that although the relevance of the thing should not be, as the court said, the issue at a motion to suppress, some relevance must be shown to justify the seizure.[17]

DISCOVERY

Although standing by its steadfast refusal to extend full pretrial discovery to defendants in criminal cases, the supreme court ordered a trial court to permit the defense to conduct an independent examination of alleged narcotics. In *State v. Migliore*,[18] writs were granted in which the district court was ordered to specify "the time, place, and manner of making the examination permitted and presenting such terms and conditions as are just."[19]

Despite the supreme court's refusal to "adjudicate generally —to the extent that prior jurisprudence would be overruled . . . ,"[20] it clearly recognized the possibility that a constitutional issue might be raised. Citing *Jackson v. State*[21] and *Clack v. Reid*,[22] the court nevertheless refused to embrace the proposition that denial of the right to conduct independent analysis might deprive the defendant of due process of law. The court said "since we see fit to grant defendant's motion for an Independent Examination of Evidence, there is no necessity for us to discuss the constitutional issues submitted."[23]

It is submitted that the result reached by the majority is both fair and reasonable. Provided that there is a sufficient quantity of the alleged narcotic substance, there is no reason why an accused, upon order and direction of the trial court, should not have a bona fide defense expert examine the evidence.[24] The fundamental issue may be whether or not the matter in question is a controlled dangerous substance. Courts

17. For example, in a homicide investigation, had officers secured a search warrant to look for and seize a murder weapon (pistol or knife) and blood stained clothing; and had officers, while looking for these items, seen and seized a diamond ring, such a seizure would not have been proper unless the ring was in some respects relevant to the homicide investigations.

18. 261 La. 722, 260 So.2d 682 (1972).

19. *Id.* at 743, 260 So.2d at 689.

20. *Id.* at 742, 260 So.2d at 689.

21. 243 So.2d 396 (Miss. 1971).

22. 441 F.2d 801 (5th Cir. 1971).

23. 261 La. 722, 743, 260 So.2d 682, 689 (1972).

24. Certainly controlled dangerous substances should not be returned to the accused himself.

also should have the right to examine the credentials of the expert, to approve the location and type of examination to be conducted, and to determine the quantity of the substance to be examined by the expert.[25]

When the examination of other physical evidence could not impair the State's presentation, trial courts should not be hesitant to authorize reasonable requests for examination by defense experts. No one questions the right of a defendant to produce expert testimony at his trial. The independent examination implements that right without creating a substantial risk of destruction of or tampering with state evidence.[26] The allowance of examination by experts employed by the defendant under court controlled conditions does not upset the "vital considerations related to fair balance in criminal procedure and the protection of the public against the ravages of crime."[27]

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25. As the supreme court in *Migliore*, 261 La. 722, 260 So.2d 682 (1972), indicates, the quantity of narcotics held by the state is a relevant factor in deciding whether or not and under what circumstances and conditions the defense expert can study the questioned substance. For example, cases might present themselves in which the defense expert would be required to conduct the examination at the police laboratory.

26. Trial courts could reasonably require defense experts to wait until state experts had completed their tests and study of physical evidence. Courts could also require that the defense experts conduct their examination (for example of handwriting or finger prints or firearms) at the nearest police crime laboratory. Many steps could be taken to protect the state's evidence from being lost or tampered with.

27. State v. Hunter, 250 La. 295, 195 So.2d 273 (1967). This language is cited in *State v. Migliore*, 261 La. 722, 724, 260 So.2d 682, 690 (1972). However, in *State v. Jones & McManus*, No. 51,755 (Supreme Court of Louisiana, 4 Oct. 1972), the Court affirmed the trial court's denial of a defense motion for production of physical evidence. The Court said: "This case does not involve, as in *State v. Miglore*, 261 La. 722, 260 So.2d 682 (1972), the possession of a substance which is criminal merely by virtue of its chemical composition."

Dissenting, Justice Barham said: "Bill of Exceptions No. 2 was reserved when defendant was denied access to physical evidence including handprints and fingerprints, which he sought in order that he might have experts of his own choosing examine it in preparation for testifying. The majority does not even meet the issue raised by this bill as presented and argued by both the defense and the State. I am of the opinion that *State v. Migliore*, 261 La. 722, 260 So.2d 682, permits examination of physical evidence under orders and guidance of the court for protection and preservation of that evidence. There is no reason why Migliore should be restricted to narcotics. Examination of physical evidence is not discovery. Handwriting, ballistics, and fingerprint experts differ as do most expert witnesses, and the only means by which the defendant can defend against expert testimony by the State is to offer expert testimony of his own. I am of the opinion that Bill No. 2 is good insofar as it addresses itself to denial of access to the defendant for examination of physical evidence."