Procedure: Pre-Trial Criminal Procedure

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Repository Citation
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Fourth Amendment Rights

The Attempt to Stop

*State v. Saia*¹ is a significant case in the developing standards regulating police encounters with individuals under circumstances where there is less than probable cause to arrest. Justice Dixon, speaking for the 4-3 majority, announced, "[t]he 'right to be let alone,' as Justice Brandeis phrased it, is of utmost importance in a free society. The police cannot interfere with the right unless specifically authorized by a judicial officer or under a narrowly drawn exception to the warrant requirement of the Fourth Amendment."²

In cases of "seizures" of the person not reaching the level of arrest, the Fourth Amendment "unreasonable" seizure proscription rather than probable cause has been adopted.³ *Saia's* import is that the court approaches the question of unreasonable governmental action in police encounter situations based upon the proposition that individuals have a "right to be let alone." In so doing, the decision does not rely strictly upon a fourth amendment "seizure" determination, but rather the prefatory language asserting "[t]he right of the people to be secure in their persons . . . ." Thus, the finding of a "seizure" of the person, as was found in *Terry v. Ohio*⁴ does not appear critical.

In *Saia*, the arresting officers were driving slowly past a residence that they "knew" from reports was an outlet for drugs. The defendant appeared to have just left the residence and was walking down the sidewalk. As the marked police car slowly followed her, she put her hand in the waistband of her

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¹ 302 So. 2d 869 (La. 1974).
² Id. at 873.
³ Sibron v. N.Y., 392 U.S. 40 (1968); *Terry v. Ohio*, 392 U.S. 1 (1968). See U.S. Const. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized"; *La. C. Crim. P.* art. 215.1.
⁴ 392 U.S. 1 (1968).
blue jeans, turned around and walked back toward the residence at a normal pace. After she turned around, the officers "sprang" from their car to overtake her. One officer testified that as he approached the defendant, he saw her take what he thought to be a glassine envelope containing heroin out of her trousers and raise her hand to her mouth. The officers then grabbed the defendant and placed her in custody.

The critical constitutional question is determining at what point governmental interference occurred. Reading the "right to be let alone" language literally, perhaps the officers had no right to observe the defendant as she walked by following her slowly in the car. The decision does suggest that, but notes that "the seizure . . . occurred when the police officers sprang from their car and overtook the defendant . . . ." The court did not consider the actions of the police in simply observing the defendant a governmental intrusion.

Some of the lack of clarity in the decision results from an attempt to determine when a "seizure" or stop took place. If the overtaking of the defendant was the first governmental intrusion, the majority position is difficult to sustain due to the intervening observation of the glassine envelope. The import of the majority position, read in its entirety, is that the governmental intrusion took place when the officers exited the car with the intent of overtaking the defendant. Justice Dixon makes that clear, "[t]he police cannot approach citizens under circumstances that make it seem that some form of detention is imminent unless they have probable cause to arrest the individual or reasonable grounds to detain the individual under Terry v. Ohio. . . ." The language indicates that a police officer cannot evidence an intent to stop an individual unless he has grounds to effect the stop.

This aspect of the decision is not as novel as it might first appear. In State v. Lawson the court, without reference to constitutional standards, recognized that when officers illegally stopped a person, causing that person to either abandon

5. 302 So. 2d at 873.
6. Justice Summers in dissent notes, "I cannot subscribe to the finding that a stop occurred here by merely driving alongside the defendant." Id. at 876. "In my view no stop occurred until the officer actually laid hands upon her and detained her, announcing that she was arrested." Id. at 877.
7. Id. at 874 (Sanders, C.J., dissenting).
8. Id. at 873 (emphasis added).
or accidentally drop contraband, the contraband, being a product of an illegal stop, could not be admitted as evidence. If in Lawson the contraband would have been discarded or abandoned prior to the actual physical stopping—during the attempt to stop—it is doubtful that the results would have differed. Courts have recognized that in “abandoned” property cases when property is abandoned because of illegal police activity prior to the actual arrest, the property is tainted and inadmissible.10

Finding a constitutionally protected interest under the fourth amendment, the court must then determine whether a stop would have been justified or reasonable. Saia does not purport to change the standard applied in effecting a stop and it has not been applied to do so.11 Terry posits the standard for reviewing the actions of police officers in actual seizures of the person less than an arrest in that the officer must point to specific and articulable facts enabling him “to conclude in light of his experience that criminal activity may be afoot. . . .”12 and “the facts available at the moment of the seizure must ‘warrant a man of reasonable caution in the belief that the action taken was appropriate’ . . . .”13 Justice Harlan’s concurring opinion, which, as Justice Dixon notes, the United States Supreme Court now apparently accepts,14 states that to justify a “stop” the police officer “must first have a right not to avoid him [defendant] but to be in his presence. That right must be more than the liberty . . . to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away.”15

12. 392 U.S. at 21.
13. Id. at 30.
15. 392 U.S. at 17. The majority opinion in Terry is instructive also as to the standards applicable in determining whether there is a fourth amendment seizure. “Obviously not all personal intercourse between policemen and citizens involves ‘seizures’ of persons. Only when the officer by means of physical force or show of authority has some way restrained the liberty of a citizen may we conclude a ‘seizure’ has occurred” (emphasis added). Id. at 19 n.16.
Applying these standards to the attempt to stop, when the officers sprang from the car with the apparent intent to stop Miss Saia, insufficient grounds existed to justify a legal stop. The only facts available to the officers upon exiting the car were that the defendant appeared to be leaving a house reputedly used as a drug outlet, and that, upon seeing the police, she put her hand into her waistband and walked in the direction from which she came.

Disagreement over whether those facts would support a stop would not be unreasonable. The dissenting opinions, however, appear to find probable cause to arrest because of the defendant's actions after the officers left the car. There is little doubt that these actions did constitute probable cause to arrest. The difficulty with the dissents' rationale is that the defendant's actions appear to have been impelled by the unauthorized actions of the police officers, who evinced an intent to effect an unjustified stop or arrest. The inquiry must be directed to determining if when the officers reasonably led the defendant to believe a stop was imminent, there were grounds to effect a stop.

If evidence is obtained during the unauthorized attempt, it is inadmissible at trial and cannot support probable cause. In the actual stop situation, Terry recognized that on the street police-citizen encounters must be limited to the "legitimate investigative sphere" and adopted the "taint-fruit" rationale. The prior "fruit of illegal stop" decisions have involved effected stops rather than, as in Saia, an attempt to stop. The rationale should not differ. There can be no meaningful constitutional distinction between completed seizures of the person by way of unreasonable stops or arrests and other police activity, short of stops or arrests. The latter, just as completed stops or arrests, might reasonably cause an individual to act in such a manner as to produce evidence.


17. 392 U.S. at 15. "Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere . . . . Courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence. . . ." Id. (emphasis added).
That evidence is tainted as a fruit of the illegal police activity. To conclude otherwise is to let the police accomplish indirectly what they could not directly. Of course, there will be as in abandoned property cases, situations in which the defendant did not reasonably believe that detention or a stop was imminent. It is necessary to consider all relevant circumstances existing at the time of the police-individual encounter.

As a matter of trial practice, this case highlights a significant factual consideration. In an “attempt to stop” situation, facts reflecting the “circumstances that make it seem that some form of detention is imminent” must be carefully developed by counsel and examined by the court. In this respect, the record in Saia appears to be less than fully developed. Further testimony on the nature of the approach by the police officers, indicating whether their actions or subjective intent at that time would have led a reasonable person to conclude that the defendant would be stopped or arrested rather than merely asked for a voluntary identification, would have been helpful. In light of the nature of street encounters and their “low visibility” in the criminal justice system, courts should look critically at subjective testimony indicating that there was only an intent to ask for voluntary identification.

Search Warrants

Unidentified Informants

The Louisiana Supreme Court has again had to delineate the constitutional standards by which to test the sufficiency of a supporting affidavit for a search warrant relying upon information supplied by an informant. Last term in State v. Paciera Justice Tate extensively discussed the constitutional considerations. Perhaps because of the close nature of the case, the complex combination of hearsay and personal observation and the continuing nature of the criminal activity, Paciera lacks the clarity desired in delineating the appropriate standards for analyzing supporting affidavits that rely upon informants. In light of the number of times Paciera has

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19. 302 So. 2d at 873.
20. 290 So. 2d 681 (La. 1974).
been cited already,\textsuperscript{21} it is becoming the leading informant-probable cause case in Louisiana. This term in State v. Humble,\textsuperscript{22} the majority quotes the language of Paciera that the "underlying circumstances" or facts must be

\ldots sufficient to provide a substantial factual basis by which the magistrate might find RELIABLE both the INFORMANT and the INFORMATION given by him. Factors which support the CREDIBILITY of an unidentified informant include \ldots Factors which support the CREDITABILITY (sic) of the information reported include \ldots\textsuperscript{23}

This test is unnecessarily obscure. The shorthand word formula may obfuscate the real considerations. The less than strict use of such terms as "reliability" and "credibility" as shorthand references to distinct considerations leads to confusion. In addition, some of the confusion results from the use of these terms by the affiants themselves. Since determining probable cause based upon information supplied by an informant is not a simple task, that judgmental difficulty should not be compounded by ambiguity in the basic conceptual framework.

When an informant is not involved, the scheme of analysis is rather straightforward: the affiant either observes criminal activity or observes circumstances which would lead a reasonable person to infer criminal activity. The affiant is identified and made known to the magistrate.

In both the case of the affiant's personal observations and that when he relies upon an informant the magistrate, not the affiant, makes the determination of probable cause based upon facts, not conclusions, set forth in the affidavit.\textsuperscript{24} When the affiant obtains information from an informant, that information is hearsay and subjected to stricter restraints. When the magistrate is presented with hearsay, he must be

\begin{itemize}
  \item \textsuperscript{22} 309 So. 2d 138 (La. 1975).
  \item \textsuperscript{23} Id. at 139 (emphasis added).
  \item \textsuperscript{24} See, e.g., Nathanson v. United States, 290 U.S. 41 (1933); State v. Wells, 253 La. 925, 221 So. 2d 50 (1969); State v. Holmes, 254 La. 501, 225 So. 2d 1 (1969).
\end{itemize}
provided with a factual basis for crediting the hearsay information. *Aguillar v. Texas*\(^2\) first set forth the criterion and although its application has seemingly become more flexible in *Spinelli v. United States*\(^2\) and *United States v. Harris*,\(^2\) it has not been repudiated. *Aguillar* requires, as a mechanism for crediting hearsay, first, that the affiant articulate the basis for his belief that the informant is trustworthy and second, that the affidavit indicate the method by which the informant obtained the information. The latter requirement seeks to eliminate the possibility that the informant is relying on mere rumor, the former to reduce the possibility that the information is no more than an elaborate fabrication.

Unfortunately there is language in the leading decisions which provokes shorthand analysis of the above considerations by talking in terms of “underlying circumstances,” “reliable” or “credible” informants and “reliable” or “credible” information. When an informant is relied upon, the magistrate must be given facts indicating that the informant is a trustworthy individual plus facts indicating the manner in which the informant obtained his information. The two aspects should be considered separately in light of their individual and separate purposes. Facts indicating trustworthiness of the informant are typically prior dealings indicating accurate information or the personal corroboration of current information given. Facts reflecting that the information was obtained in a reliable manner are, at best, personal observations by the informant. However, hearsay (double hearsay to the affiant) may also meet the reliability in obtaining information requirement. In such circumstances it appears that the test applied to the initial informant should be reapplied if one is not to allow an informant to “boot strap” himself into the reliability requirement.\(^2\)

In *Humble* the affidavit clearly failed to set forth the manner in which the information was obtained.\(^2\) One dissent

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27. 403 U.S. 573 (1971).
28. Justice Tate noted in *Paciera*: “If the information came indirectly to the informant, [the affidavit must set forth] the reasons in sufficient factual detail for the magistrate to evaluate and credit the reliability [and credibility] both of the *indirect source* and of the *indirectly-obtained information.*” 290 So. 2d at 686 (emphasis added).
29. “The informer says he [Humble] sells marijuana out of his car to teenagers around Jonesville, La. Steve Humble has been suspected of using
asserts that from the detailed facts provided in the affidavit "[i]t is reasonably to be inferred, if not implicit, from an affirmative statement giving these detailed facts and information, when not qualified as in this case, that the statement is made from the informer's personal knowledge."\textsuperscript{30} The informant's mere statement of fact is not sufficient to allow the inference of personal knowledge in that there is an absence of sufficient detail to show that he "is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."\textsuperscript{31}

The most serious difficulty with the dissenting opinions is their willingness to assume that, if the affidavit demonstrates a trustworthy informant, the information given must have been obtained in a reliable manner. Justice Summers states:

[W]hen considered with the other specific circumstances recited here, this affidavit of veracity and indicia of trustworthiness should be considered by the magistrate in this determination of [the informant's] reliability and truthfulness.\textsuperscript{32}

Such rationale is directly contrary to the Aguillar-Spinelli rule and should be rejected. If accepted, the informer must only have given accurate information previously to raise a presumption that he reliably obtained information in the present case. Such a position would vitiate the limited protections\textsuperscript{33} already existing in the informant situation. While the courts have long held that a credible, identified person must state the manner in which he obtained his information,\textsuperscript{34} the dissents seem to be willing to allow an unidentified person to do less, i.e., establish only his credibility.

"Staleness" was an additional ground for invalidating the warrant in \textit{Humble}. The court noted that the affidavit did not present sufficient information from which the court could

\begin{enumerate}
\item \textit{Id.} at 142.
\item Spinelli v. United States, 393 U.S. 410 (1969).
\item 309 So. 2d at 142.
\item \textit{See} Rebel, \textit{The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards}, 81 YALE L.J. 703 (1972).
\item See cases noted in note 24, \textit{supra}.
\end{enumerate}
infer that the probable cause information was "recent enough."35 The court recognized the constitutional requirement that a finding of probable cause for a search warrant, unlike an arrest warrant, must include a finding that the facts set forth in the affidavit are closely related in time to justify a reasonable belief that conditions supporting probable cause to search still exist, i.e., that the things sought are still at the place to be searched.

Earlier in the term, in *State v. Boudreaux*,36 the court held that if a common sense reading of the affidavit indicates that the information contained in it is current, the affidavit is adequate. The peculiar facts of *Boudreaux* indicating that the defendant was only "temporarily"37 in the dormitory might justify that conclusion, but in light of the purpose of search warrants and the requirement of probable cause to believe the items sought are still at the place to be searched, liberal inferences are inappropriate.38

**Known Informants**

The determination of trustworthiness of a known informant was at issue in *State v. Devall*.39 The named informant had admitted participation in a robbery-murder. A search warrant was issued authorizing search of defendant's apartment for weapons used in the crime. The weapons found did not match those listed on the warrant. A second warrant was issued, based upon information from the same known informant, authorizing search of the same apartment for opium. The second search was successful.

Defendants challenged the second warrant on the grounds that the informer was not trustworthy, but the court found otherwise.40 Since the informant stated that he actu-

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35. 309 So. 2d at 140.
36. 304 So. 2d 343 (La. 1974).
37. *Id.* The "temporary" nature of the dormitory stay was inferred from the fact that the affidavit stated the regular dormitory room was not being used because of a malfunctioning air conditioner. *Id.*
39. 296 So. 2d 803 (La. 1974).
40. "Here, the informant is named and he gives a detailed factual basis for the reliability of the information concerning the opium. Thus, the search warrant and the affidavit does not offend Fourth Amendment standards. . . ." *Id.* at 804.
ally had seen the opium at a recent date and had smoked some of it, there was no problem with respect to the reliability of the manner in which the information was obtained. The sole issue was the trustworthiness of the known informer. The fact that he had made incriminating admissions, that prior information had been partially corroborated and partially found to be erroneous and that he was named in the affidavit are all probative of his credibility. In *Paciera*, the court noted, "[w]e are influenced to some extent by the circumstances that affiant specifically named the reliable informants (the policemen) . . . ."41 Unfortunately the court did not take the opportunity in this unique case to provide guidance with respect to factors relating to the trustworthiness of known informants. From the opinion one might infer that the mere naming of an informant is sufficient to establish credibility, or that credibility is not a consideration when the informant is known.42

The Husband Poisoning Exception?

*State v. Flood*43 demonstrates that the determination of the existence of probable cause is less than totally predictable even when a search warrant is not based on information supplied by informants. Mrs. Flood was accused of murdering her husband by poisoning him with arsenic. The search warrant recited that her husband had died of acute pulmonary edema, that a laboratory test indicated high concentrations of arsenic in the body organs and blood of the decedent, that after extensive investigation by the Houma police department and the Terrebonne Parish sheriff's office an affidavit was filed against Mrs. Flood charging her with murder, and that the affiant police officer had "reasonable grounds and probable cause" to believe that there was arsenic concealed in the mobile home.

Justice Dixon correctly noted in dissent44 that under the most flexible tests of probable cause, these recitations did not

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41. 290 So. 2d at 686.
42. In *United States v. Darenbourg*, 520 F.2d 985 (5th Cir. 1975), the court appears to accept such a position and even casts doubt on *Aquillar-Spinelli* requirements by distinguishing between "professional" and "nonprofessional" informants. See also *United States v. Burke*, 517 F.2d 377 (2d Cir. 1975).
43. 301 So. 2d 637 (La. 1974).
44. *Id.* at 652 (Dixon, J., dissenting).
constitute probable cause to believe that the evidence sought, “all or part of chemical substances containing arsenic,” was on the premises. The murder had taken place some eighty-three days prior to the search. Moreover, the affidavit failed to set forth facts, rather than the officers’ conclusion, supporting probable cause. The case might be characterized as the “husband poisoning” exception to the normal probable cause requirements. The court was apparently willing to assume that married men poisoned by arsenic are probably poisoned by their wives, with the poison kept in the house. “We must bear in mind that this is a prosecution of a wife for the murder of her husband by arsenic poisoning.”

Searches Involving Automobiles

The automobile continues to play a large role in the development and application of search and seizure principles. In State v. Navarro the defendant was stopped after running a stop sign. The officers ordered the occupants out of the car and asked the driver and passenger for identification. One officer walked over to the automobile and focused his flashlight inside the vehicle. He observed gleanings and seeds which he believed to be marijuana. He then seized the material and arrested the two occupants. After formal arrest the officer again focused his flashlight and saw a plastic bag above the driver’s sun visor. Upon examining its contents, he determined it contained marijuana. The officer then inquired whether the defendant and his companion had anything else. The companion produced marijuana that was concealed in his underwear.

Three packages of evidence were admitted over objection: the seeds which were the “gleanings” observed on the passenger seat, a clear plastic bag containing marijuana and packages of cigarette paper, and loose marijuana in an evidence bag. The record did not reflect which of the latter two were in the visor or in the companion’s underwear. Justice Barham determined that the seeds initially seized were law-

45. Id. at 642.
46. 312 So. 2d 848 (La. 1975).
47. Here there was no question of the legality of the initial stopping. While the determination of justification for stops based upon “articulable facts” has been dealt with in numerous cases, there still remains the question of whether a stop can be effected for regulatory purposes such as drivers’ license checks purportedly authorized by LA. R.S. 32:411(d) (1950). See United States v. Brignoni-Ponce, 422 U.S. 873, 883 n.8 (1975).
fully seized pursuant to a traditional application of the "plain view" exception.\textsuperscript{48} From that point on, however, the decision introduces new and questionable treatment of search and seizure.

The record reflected that the crime lab report indicated that the seeds were incapable of germination and thus did not fit within the statutory definition of marijuana. The court then correctly stated, "the trial court erred when it was shown that the crime laboratory could not identify them as marijuana."\textsuperscript{49} However, under statutory and prior case law, this was not a proper case for the suppression of evidence. Article 703 is posited in terms of unconstitutionally seized evidence. Since the evidence was constitutionally seized, it should not have been suppressed. The court had previously concluded that while "[a] motion may be used to suppress evidence taken by means of unconstitutional search and seizure . . . our procedure does not authorize the use of the Motion to Suppress to test the admissibility of evidence constitutionally seized."\textsuperscript{50} That admissibility question is one of relevancy and should be raised simply by a contemporaneous objection.

The defendant should assure appellate examination of the entire record and create an opportunity for a verdict of acquittal, rather than reversal and remand, by moving for a directed verdict.\textsuperscript{51} His failure to move for a directed verdict would preclude review of the sufficiency of evidence.\textsuperscript{52} If the defendant is unsuccessful on appeal, his only other course of relief would be through collateral proceedings based upon due process considerations. It now appears well-settled that a conviction based upon a record lacking any relevant and ad-

\textsuperscript{49} State v. Garnier, 261 La. 802, 806, 261 So. 2d 221, 223 (La. 1972).
\textsuperscript{50} See LA. CODE CRIM. P. arts. 778, 851; State v. Douglas, 278 So. 2d 485 (La. 1973).
\textsuperscript{51} In light of La. Acts 1975, No. 527, which purports to limit the directed verdict to bench trials, State v. Dimopoullas, 260 La. 874, 257 So. 2d 644 (1972), is significant: "In absence of a motion for a directed verdict, how is the question of no evidence to be raised and preserved for review? Grounds for a new trial do not include no evidence. The motion in this case tracked provisions of LA. CODE CRIM. P. art. 851, and alleged that the verdict is contrary to the law and the evidence. This court has repeatedly held that this presents nothing for review in a motion for a new trial . . . ." State v. Dimopoullas, supra, at 647 n.1.
missible evidence as to a critical element of the offense charged violates due process. 53

With respect to the remaining two packages of evidence the court concluded that the marijuana from the companion's underwear could not form the basis for the defendant's prosecution since the state did not establish defendant's actual or constructive possession of or control over it. It could not, therefore, be introduced at trial. The court's conclusion again involved review of sufficiency of evidence rather than constitutional considerations and should have been treated similarly.

Particularly noteworthy is the court's application of State v. Meichel 54 to the plastic bag seizure. In Meichel, the court stated "[a]n object in open plain view may be seized only where it is readily apparent that the object is contraband or evidence . . . ." 55 Applying Meichel, the court determined "the plastic bag . . . was not clearly contraband since many legal items are contained in plastic bags." 56 The opinion does not consider whether the prior proper observation of sterilized marijuana seeds would support a reasonable conclusion that the plastic bag was other than a plastic bag which might contain "many legal items." But the prior finding of marijuana seeds followed by the sighting of a plastic bag might present a different situation than that contemplated in Meichel, in which there was no prior observation of what could reasonably have been contraband.

After rejecting the "plain view" contentions as to the plastic bag seizure, the court considered the automobile exception 57 to determine whether the search of the car without a search warrant was permissible. Justice Barham stated a stringent standard in determining whether exigent circumstances exist to justify a warrantless search of an automobile.

54. 290 So.2d 878 (La. 1974).
55. Id. at 880.
56. 312 So. 2d at 850-51. See also State v. Herron, 321 So. 2d 312 (La. 1975).
57. This writer suggests that some of the confusion resulting in automobile cases is created by considering the automobile as an "exception" to normal search and seizure considerations. The fact of the automobile and its mobility in each individual case is simply a set of circumstances indicating whether there is an exigent situation eliminating the need for a search warrant when there is probable cause. See Coolidge v. New Hampshire, 403 U.S. 443 (1971).
He recognized that the officers were "obligated" to protect the vehicle for the arrestees, but suggested that protection would entail only locking the automobile or placing it in a garage. The opinion rejects the contention that an immediate search of the auto was necessary to protect evidence from being destroyed or secreted. Justice Tate was apparently unwilling, correctly it is submitted, to find that there was probable cause to search a car simply because an officer found gleanings that resembled marijuana on the seat. Justice Tate's concurrence indicates an unwillingness to extend searches incident to traffic arrests.

Justice Marcus in dissent suggests that the rationale of United States v. Robinson and Gustafson v. Florida should be extended to a search of an automobile as well as of the arrestee's person incident to a full custodial arrest. That position would make the fourth amendment meaningless with respect to automobiles and expand the definition of "incident" to arrest drastically. While it is suggested that "...a search of an automobile is far less intrusive on the rights protected by the fourth amendment than the search of one's person . . .," that same contention can be made with respect to houses and offices. Certainly a search of the person is the most intrusive; that conclusion should not render the fourth amendment meaningless as to "houses," "papers" and "effects."

In State v. Thomas the defendant was arrested at a service station three blocks from the police station. Approaching the defendant's vehicle, the officers instructed the defendant and a companion to get out of the car. No search took place at that time. One officer drove the vehicle to the police station, parked it and left it unattended. After entering the

58. 312 So. 2d at 851, citing United States v. Davis, 423 F.2d 974 (5th Cir. 1970).
59. 312 So. 2d at 851.
60. Id. at 852. See State v. Massey, 310 So. 2d 557 (La. 1975).
61. "An American's vehicle, if not his castle, is an important component of his daily life in the mobile America of this day. A traffic offense does not end, for an American driver, the protections of the Fourth Amendment to the freedom of his effects from state rummaging by warrantless search." 312 So. 2d at 855.
64. 312 So. 2d at 854.
65. 310 So. 2d 517 (La. 1975).
station, one of the officers recalled that Thomas, when initially approached, had leaned forward as if to put something under the seat. Ten to fifteen minutes later he and another officer opened the unlocked car door and “immediately saw a pistol on the floorboard protruding from under the rear of the front seat.”

The court correctly concluded that the officer had probable cause to search the vehicle. The only question was whether a search warrant was required. The decision lacks clarity not because of the result, but because of the ambiguity as to the legal basis for reaching the result and the introduction of extraneous considerations. While recognizing the confusing state of the law, the decision appears to unnecessarily add to it.

The opinion suggests that the search of the car might fit within the United States v. Edwards exception, which includes searches when “the normal processes incident to arrest and custody [are] still in progress.” It further indicates that the “incident to arrest” rationale based upon self-protection and prevention of destruction of evidence was relevant, without explaining how. The court finally states that “certain exceptional circumstances—the limited ‘search,’ the inherent probable cause for search for weapons or evidence a (sic) vehicle occupied by those reasonably suspected of recent robbery-murders—have led us to believe the present search and seizure not constitutionally infirm . . . .”

The leading automobile search cases, Chambers v. Maroney and Coolidge v. New Hampshire, can present a basis for deciding cases like Thomas without introducing new considerations. In footnote 20, Coolidge sets forth the United States Supreme Court’s understanding of Chambers:

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66. Id. at 520.

67. “Nevertheless, but with some difficulty, we believe the present to concern a distinguishable situation in this shifting ‘quagmire’ area of constitutional interpretation . . . . With some diffidence, we suggest that the present warrantless search did not violate the constitutional prohibitions . . . .” Id. at 520. “We freely admit our decision is reconcilable with some but not other decisions of the United States Supreme Court in this shifting and uncertain area of law.” Id. at 522.


69. 310 So. 2d at 521, citing 415 U.S. 300.

70. 310 So. 2d at 520.

71. Id. at 521-22.


73. 403 U.S. 443 (1971).
The rationale of Chambers is that given a justified initial intrusion there is little difference between a search on the open highway and a later search at the station. Here we deal with the prior question of whether the initial intrusion is justified.\textsuperscript{74}

The Court also reconciled Cooper v. California.\textsuperscript{75}

In Cooper, the seizure of the petitioner's car was mandated by California's statute, and its legality was not questioned. The case stands for the proposition that given an unquestionably legal seizure, there are special circumstances that may validate a subsequent warrantless search. . . . The case certainly should not be read as holding that the police can do without a warrant at the police station what they are forbidden to do without a warrant at the place of seizure.\textsuperscript{76}

If the court had found the initial intrusion justified, the search in Thomas could be constitutionally justified. The analysis therefore should be directed toward considerations relevant to allowing the initial intrusion, i.e., the existence of "exigent circumstances." While that determination is neither always straightforward nor easy, attention to that central consideration avoids introduction of extraneous issues and allows a more rational scheme of analysis in light of the peculiar facts of each case. When the police have the opportunity to drive a car to the police station, as in Thomas, sufficient exigent circumstances to allow a warrantless search based upon probable cause should not ordinarily exist.

\textit{Law Officer Credibility and Search & Seizure: A Note}

Readers of opinions sometimes speculate that courts appear to "make law" to avoid challenging the credibility of law enforcement officers, even when the record casts considerable doubt upon that credibility.\textsuperscript{77} Especially in marijuana possession cases, much apparent confusion and inconsistency in legal principles and the expansion of these principles has

\textsuperscript{74} Id. at 463 n.20.
\textsuperscript{75} 386 U.S. 58 (1967).
\textsuperscript{76} 403 U.S. at 464 n.21.
resulted from courts' unwillingness to directly challenge the credibility of law enforcement officers. In *State v. Jones*, the 4-3 majority directly addressed the officer credibility problem. The primary issue was whether there were grounds to stop the defendant for a traffic violation when one officer admitted that they intended to stop the driver because he had just left a house under surveillance for drug activity. When they stopped the defendant, the now common scenario of finding marijuana gleanings in "plain view" took place. Justice Barham noted, "After careful review of the testimony taken at the hearing . . . we find that substantial portions of the officer's testimony was basically contradictory, highly incredible, and wholly unworthy of belief." He concluded that the supreme court is "required" to review "judge questions" of law and fact and to reverse when the court finds that the trial court has abused its discretion with respect to witness credibility.

On the same day, Justice Tate, writing for the court, in refusing to reverse based on credibility, with only Justice Barham concurring and no dissents, set forth what he deemed to be the standard of review:

... we are unable to say that the trial court's factual determination was so *clearly erroneous* as to justify disturbing it on appeal. The versions of the police officers are not so *completely improbable* as to justify our substitution of our evaluation of these police witnesses' credibility for that made by the trial court to which great weight must be given.

Article V, § 5(c) of the Louisiana Constitution limits the appellate jurisdiction of the supreme court in criminal cases to questions of law. In neither *Jones* nor *Santos* did the majority deem that this proscription prevented the court from reviewing the facts presented at a suppression hearing to determine if the trial court's factual determination was

78. 308 So. 2d 790 (La. 1975).
79. Id. at 792.
80. In *Jones*, if the supreme court had been unwilling to directly attack the credibility problem, *upon a proper record made by defense counsel*, it is unlikely it would have allowed the conviction to stand, as it should not. Instead, there would probably be an attempt to apply "law" to distorted or false facts in such a manner as to achieve a "just" result. That "law" probably would have been less than conceptually satisfactory.
“clearly erroneous” or exceeded the bounds of discretion. The constitutional prohibition against review of facts should not prevent the supreme court from reviewing testimony related to constitutional rights with an appropriate standard of review. The motion to suppress is unrelated to the issue of guilt and is tried to the judge alone.

As the court noted, the primary responsibility for assessing credibility lies with the trial courts. Aside from articulating the standard of review, however, the supreme court has given little or no guidance to trial courts to assist in determinations of credibility of law enforcement officers’ testimony in support of an exception to the search warrant requirement. Some of the difficulty in this area relates to burden of proof. Article 703(C) provides that in a motion to suppress “the burden of proof is on the defendant to prove the grounds of his motion . . . .” In warrantless search cases, the defendant must go forward with evidence, but the burden is met by showing that there was (1) no warrant and (2) a seizure. To conclude otherwise is to vitiate constitutional standards, as indicated in Chimel v. California, quoting United States v. Jeffers:

Clearly the general requirement that a search warrant be obtained is not lightly to be dispensed with and “the burden is on those seeking [an] exemption [from the requirement] to show the need for it . . . .”

In light of the constitutional standard, trial courts must carefully scrutinize law officers’ testimony in warrantless search and seizure cases. If an officer’s testimony seems improbable in light of common human experience, it should be rejected. Any independent contradiction of the officer’s test-


84. 395 U.S. at 762.

85. In consent cases, the Louisiana Supreme Court has adopted a “clear and convincing evidence” standard. See State v. Amphy, 259 La. 161, 249 So. 2d 560 (1971). There is no reason why this same standard should not apply in other warrant exceptions.
timony or independent corroboration of the defendant's testimony should prevail because of the stringent constitutional standard. While the suggested general standards do not make determinations of credibility mechanical or always easy, Justice Frankfurter's admonition is appropriate: "[T]here comes a point where the Court should not be ignorant as judges of what we know as men."87

PRETRIAL ACCESS TO PROSECUTOR'S EVIDENCE

Pretrial access to oral inculpatory statements is a long-standing problem. Article 703 limits the motion to suppress to "written confession(s) or written inculpatory statement(s)." The Louisiana Supreme Court has previously relaxed the writing requirement to include video taped statements, audio taped statements and line-ups.

The decisions this term reflect a continued refusal to relax the writing requirement by review on appeal and that, at the pre-conviction stage, the court is willing to order production and examination of oral statements. There is also an indication that in the future oral statements may be consid-

86. This tentatively suggested standard is adapted from People v. McMurty, 64 Misc. 2d 63, 314 N.Y.S. 2d 194 (Crim. Ct. of City of N.Y. 1970). See Comment, Police Perjury in Narcotic "Droopy" Cases: A New Credibility Gap, 60 GEORGETOWN L. REV. 507 (1971). By discussing only law officer credibility problems, it is not suggested that the fault lies solely with the law enforcement officer. There are many factors which give rise to the problem, including lack of training, training which does not lend toward belief in the spirit of the constitutional standards, competition for advancement based upon convictions, improper prosecutor supervision, failure of the trial courts to explain their rulings to the officers, etc. See also, Grano, A Dilemma for Defense Counsel: Spinelli-Harris Search Warrant, and the Possibility of Police Perjury, 1971 UNIV. OF ILL. LAW FOR. 405; LaFave & Remington, Controlling the Police: The Judge's Role in Making & Reviewing Law Enforcement Decisions, 83 MICH. L. REV. 987 (1964); Segal, Search & Seizure in Defense of Drug Cases, 17 THE PRACTICAL LAWYER No. 5 at 47 (May 1971); Police Perjury: An Interview with Martin Garbus, 8 CRIM. L. BULL. 368 (1972).

89. LA. CODE CRIM. P. art. 703.
ered included within article 703, whether the review is on appeal or otherwise.

Justice Dixon, in State v. Watson,\(^93\) points out that trial courts' reluctance to require production of oral statements is ""[p]robably for the reason that the management of a scheme requiring such production would be difficult and complicated . . . .""\(^94\) Unquestionably the required production of oral statements could present practical problems, but the extension of the motion to suppress to include oral statements would seem to provide a viable and reasonable means of making the statement known so that the defendant can properly address its admissibility prior to trial. At the hearing on a motion to suppress, the oral statement would be recounted and transcribed with full courtroom protections for the state and the defendant. It is suggested that this is a better alternative than the ""pure"" discovery mechanism of the recently amended Federal Rule of Criminal Procedure 16(a),\(^95\) which requires the government to produce the ""substance"" of oral statements. By extending the motion to suppress, the state only need be required to answer a bill of particulars or otherwise advise that it intends to use an oral statement. The defense then would have the opportunity to suppress the statement and, with appropriate safeguards, ""discover"" its substance.

In several cases before the court on supervisory writs prior to trial,\(^96\) the court has indicated that oral statements would be included within the scope of article 703. Concurring in the dismissal of a writ of certiorari, Justice Barham has stated, ""The majority of the Court are of the opinion that the hearing on the motion to suppress an oral confession complies

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93. 301 So. 2d 653 (La. 1974).
94. Id. at 655.
95. ""Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: . . . the substance of any oral statement which the government intends to offer in evidence at the trial made by defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent . . . ."" Fed. R. Crim. P. (16)(a) (emphasis added).
96. E.g., State v. Davis, 300 So. 2d 496 (La. 1974), concurrence not found reported, Docket No. 55-325, October 29, 1974. See also State v. Nelson, 306 So. 2d 745 (La. 1975); State v. Breston, 304 So. 2d 313 (La. 1974); State v. Jenkins, 302 So. 2d 20 (La. 1974), with only Justices Sanders and Summers dissenting.
fully with the intendment of the purpose of the Code of Criminal Procedure Article 703 . . . .”

The joint concurrence by Justices Barham and Tate in State v. Watson reflects that while the court appears willing to extend article 703 to oral confessions prior to verdict, it is less willing to do so on appeal, at least at present: “[W]e are not of the opinion that a conviction is at this time reversible in view of reliance upon past jurisprudence and lack of prejudice shown.” Probably the court at some future time will eliminate this distinction and extend article 703 to cover oral statements, abandoning its present unwillingness to reverse for failure to consider such statements through the motion to suppress.

Article 768 notice developments this term are also significant in determining whether article 703 should apply fully to oral statements. In State v. Sneed the state gave notice that it intended to introduce inculpatory statements, exculpatory statements, or confessions. The defendant objected that he had not been informed of any oral confession and that he had not been served with notice of the particular oral statement. While the court avoided reversal by finding “harmless error,” the well-written opinion by Justice Tate, tracing the history of the article 768 notice requirement, stated that the general notice complied with neither the functional intent nor the purpose of article 768. He concluded that “the state must give sufficient notice of each confession or inculpatory statement it intends to use, with sufficient specificity as to date or occasion and as to persons to whom given as to afford adequate notice sufficient to permit the defendant a fair opportunity to meet the issue.” That decision should result in less reluctance to use the motion to suppress to determine the admissibility of oral statements.

State v. Leblanc considered the related problem of the

97. 300 So. 2d at 496.
98. 301 So. 2d 653 (La. 1974).
99. Id. at 657 (emphasis added).
100. LA. CODE CRIM. P. art. 768 requires: “If the state intends to introduce a confession or inculpatory statement in evidence, it shall so advise the defendant in writing prior to beginning the state’s opening statement. If it fails to do so a confession or inculpatory statement shall not be admissible in evidence.”
101. 316 So. 2d 372 (La. 1975).
102. Id. at 376.
103. 305 So. 2d 416 (La. 1974).
determination of whether an oral statement is "inculpatory." The court defined an inculpatory statement as an "out-of-court admission of incriminating facts made by a defendant after the crime has been committed ...." The application of this restrictive interpretation presented serious difficulty and will continue to do so. The language of *Miranda v. Arizona* might be helpful in approaching the problem: "No distinction may be drawn between inculpatory statements and statements alleged to be 'exculpatory'. If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecutor."

The most significant case this term dealing with pretrial inspection of physical evidence came from the United States Court of Appeals for the Fifth Circuit. While its coming could hardly be called surprising, its impact on existing state decisions should be significant. In *Barnard v. Henderson*, the Fifth Circuit effectively reversed the ruling of the Louisiana Supreme Court in *State v. Barnard*. Prior to trial the defendant had moved to allow his own expert to inspect a murder weapon and bullet. The trial court denied the motion. The Louisiana Supreme Court denied relief because there was no showing under *Brady v. Maryland* that an independent inspection would have been favorable to the defendant. The Fifth Circuit cryptically rejected their treatment: "[D]ue process cannot be sidestepped by such a facile distinction." It noted further, "[F]undamental fairness is violated when a criminal defendant . . . is denied the opportunity to have an expert of his choosing."

The decision in *Barnard* is limited to circumstances involving "critical evidence" for which expert testimony is necessary. The rationale, however, predicated on *Brady*,

104. *Id.* at 419.
107. *See State v. Breston*, 304 So. 2d 313 (La. 1974). "The rulings denying pre-trial discovery are technically correct under existing jurisprudence. Nevertheless, the requirements of fair trial and of federal due process rulings are harbingers of change that conscientious prosecutors might well note." *Id.* at 317 (Tate, J., concurring).
108. 514 F.2d 744 (5th Cir. 1975).
111. 514 F.2d at 746.
112. *Id.* at 746 (emphasis added).
suggests that the defendant, at least in expert witness circumstances, must be afforded the opportunity to develop favorable evidence. That rationale seems consistent with *State v. Woodruff*,¹¹³ in which the court held that it was error to deny information about a weapon found on the victim when a defendant asserted a claim of self-defense. But in *State v. Collins*,¹¹⁴ a unanimous opinion, the court reiterated its position that *Woodruff* was limited to self-defense claims.

An expansion of the *Brady* rationale may have significant impact with respect to confessions, admissions and pretrial discovery generally.¹¹⁵ In *State v. Swendsen*¹¹⁶ the court, after granting supervisory writs, dismissed the writ after state compliance with a request to produce physical evidence. Justice Barham in a concurrence to the dismissal noted, "[T]his court intended to expand the rule in *State v. Migliore*... I am of the belief that a majority of this court are now of the opinion that pre-trial production of physical evidence for examination... is required."¹¹⁷

The concurrence contemplates only those types of evidence which require expert evaluation and does not suggest that all physical evidence is subject to inspection, indicating no present intent to go beyond the Fifth Circuit's opinion in *Barnard*. It might be difficult, however, to find any physical evidence to be introduced at trial that might not be subject to expert evaluation.

In *State v. Boothe*¹¹⁸ the court was confronted with another *Brady*-related problem. In response to a bill of particulars the state responded that it had no confession, admission or other adverse statement made by the defendant. Immediately prior to the bench trial, it gave a gratuitous 768 notice.¹¹⁹ The court determined that the trial court erred in allowing the oral statement to be admitted after the state negligently advised the defendant that no statement was available. Significantly, the court avoided the question of whether the bill of particulars was a proper means of discovering the existence of an oral statement, basing its decision

¹¹³ 281 So. 2d 95 (La. 1973).
¹¹⁴ 308 So. 2d 263 (La. 1975).
¹¹⁵ *But see* State v. Williams, 310 So. 2d 528 (La. 1975).
¹¹⁶ 316 So. 2d 394 (La. 1975).
¹¹⁷ *Id.* at 395.
¹¹⁸ 310 So. 2d 826 (La. 1975).
on principles of fundamental fairness.\textsuperscript{120} It rejected the state's contention that the error had been waived by defendant's failure to request a continuance to adjust his trial tactics on the grounds that to do so would encourage willful or negligent pretrial dealings with the defendant.

While under present case law the defendant's right to discover the existence of oral statements is questionable, if the state does respond that no such statements exist, it is bound by its response. This strict due process rule could have the ironic effect of discouraging prosecutors from giving such information at all. Of course, if oral statements were handled through the bill of particulars and motion to suppress procedures suggested, the problem of negligence would not be eliminated. If the state must disclose the existence of an oral statement through a bill of particulars, it is suggested that in cases of good faith prosecutor error a continuance should be available or required upon request. Since the bill of particulars amplifies the bill of information,\textsuperscript{121} it should be treated as an amendment and a right of continuance should accrue under article 489. Official Comment (A) states, "The purpose of the continuance ... is to protect the defendant from surprise and prejudice which may result from amendment of the indictment or bill of particulars."\textsuperscript{122} In light of the fundamental fairness due process considerations, strict adherence to the formalistic written and verified motion for the continuance\textsuperscript{123} should be relaxed, especially when the negligence of the prosecution creates the grounds for continuance.\textsuperscript{124}

CONFESSIONS AND BURDEN OF PROOF

Several cases this term aid in clarifying the burden of proof standard for determining voluntariness of confessions pursuant to Louisiana R.S. 15:451, 15:452 and Louisiana Code of Criminal Procedure article 703(C). In State v. Monroe,\textsuperscript{125} the defendant and several witnesses testified to physical abuse, prolonged questioning and promises of immunity prior to the defendant's confession. The six police officers who testified stated that no improper conduct took place in their presence.

\textsuperscript{120} 310 So. 2d at 830.
\textsuperscript{121} State v. Hayman, 256 La. 18, 235 So. 2d 78 (1970).
\textsuperscript{122} LA. CODE CRIM. P. art. 489, comment (a).
\textsuperscript{123} LA. CODE CRIM. P. art. 707.
\textsuperscript{124} See Flanagan v. Henderson, 496 F.2d 1274 (5th Cir. 1974).
\textsuperscript{125} 305 So. 2d 902 (La. 1974).
Significantly, the accused and his witnesses testified that the coercive police conduct took place outside the presence of the six testifying officers. The state offered no rebuttal testimony. The court reversed, in light of the stringent burden of proof on the state, noting, "[T]he state is required to rebut specific testimony introduced on behalf of the defendant concerning factual circumstances which indicate coercive measures or intimidation."\(^{127}\)

Subsequently, in *State v. Sims*,\(^{128}\) police officers' testimony on direct examination appeared to directly contradict defendant's testimony. The state did not recall the officers to testify on rebuttal. The court found that the state had met its burden of proof, stating that "it would be superfluous to require the officers to take the stand to repeat what they testified to in the state's affirmative showing."\(^{129}\) The court distinguished *Monroe* because in *Sims* state witnesses "specifically testified on direct examination that there was no force or violence used."\(^{130}\) In suggesting that "only when the defendant presents evidence which is not directly contradicted by the officer's original testimony is the state required to present evidence to rebut the defendant's evidence,"\(^{131}\) the court correctly rejected a ritualistic "last to testify" rule.

*State v. Peters*\(^{132}\) also involved a situation in which the police testified that they did not physically abuse the defendant. The defendant testified that the police did abuse him by breaking a tooth, which he displayed, and bruising his lip. Other defense witnesses testified that the lip and tooth were not injured prior to arrest. The court found that the state failed to meet its burden of proof by not rebutting the defendant's evidence of physical injury. It indicated that the failure resulted "because . . . [the state] failed to rebut specifically the testimony of defendant's witnesses when it presumably could have."\(^{133}\) It further indicated that the burden

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126. Part of that burden of proof is that "the State is obliged to call its witnesses first and to go forward with its proof at the hearing on the motion to suppress." *State v. Peters*, 315 So. 2d 678, 683 (La. 1974).
128. 310 So. 2d 587 (La. 1975).
129. *Id.* at 589.
130. *Id.* at 590.
131. *Id.* at 590.
132. 315 So. 2d 678 (La. 1975).
133. *Id.* at 683 (emphasis added).
was upon the state not only to contradict the specific claim of physical injury evidenced by objective symptoms but in addition to "explain how he incurred his injuries." 134

While these cases, as well as earlier cases, are closely wed to their unique facts and lack universally applicable standards, they contain several general guidelines. It is helpful to distinguish cases in which additional testimony from persons already testifying is needed from cases in which additional witnesses are needed. When the state adduces general testimony regarding the absence of wrongdoing and the defense offers detailed testimony of specific wrongdoing, the state must adduce specific rebuttal testimony. 135 If the evidence produced by the defendant is not within the scope of knowledge of state witnesses who have previously testified, the state must produce additional witnesses. 136 When the state has witnesses who are alleged to be involved in the wrongdoing or who witnessed it and they are available, the state has a duty to produce the additional witnesses to meet its burden of proof. 137 If the defense does not present evidence going beyond that produced by the state in terms of scope or specificity, the state need not recall its witnesses to take the stand on rebuttal. 138 Undoubtedly other situations may arise. The requirement of rebuttal testimony should not become ritualistic; neither, however, should the requirement of proof of voluntariness beyond a reasonable doubt become less than a most stringent standard.

ARGERSINGER—RETROACTIVE APPLICATION

State v. Coody 139 set the stage for dealing with the retroactive application of Argersinger v. Hamlin 140 by announc-

134. Id. at 682.
135. See, e.g., State v. Peters, 315 So. 2d 678 (La. 1975) (where there is specific testimony of physical injury the court may well require an explanation of how the defendant was injured or at least specific rebuttal of when the injury took place); State v. Simien, 248 La. 323, 178 So. 2d 266 (1965); State v. Robinson, 215 La. 974, 41 So. 2d 898 (1949).
139. 275 So. 2d 773 (La. 1973).
141. "The minutes of the court must show either that the defendant was
ing that the Code of Criminal Procedure requires that court minutes affirmatively reflect presence of counsel or waiver. *City of Monroe v. Coleman* affirmed this strict application. In both cases the court strictly applied the affirmative record requirement without reference to the question of defendant's indigency at the time of the conviction. In *State v. Guillotte* the court held, prior to the United States Supreme Court's similar decision in *Berry v. City of Cincinnati*, that *Argersinger* applied retroactively and applied its rule to a prior uncounseled conviction resulting in imprisonment. The court thus prohibited the use of a prior DWI conviction resulting in imprisonment to enhance a pending charge.

The most troublesome question was whether *Argersinger* applied retroactively to convictions that did not result in imprisonment. The Louisiana Supreme Court rejected the somewhat strained rationale of the United States Court of Appeals for the Fifth Circuit in *Cottle v. Wainwright*, which held that *Argersinger* applied retroactively to convictions for which persons were incarcerated, and thus prevented references to those convictions, but did not apply retroactively to convictions for which persons were not incarcerated. In *City of Monroe v. Fincher* the court held that the prior uncounseled DWI convictions could not be used to subject an accused to prosecution as a repeat DWI offender regardless of whether the prior conviction resulted in imprisonment.

While *Argersinger* does not appear to mandate such a result, the decision in *Fincher* is sound in avoiding the anomalous result of *Cottle*. Moreover, *Fincher* accords with Article 1, § 13 of the 1974 Louisiana Constitution, extending the right to counsel to crimes punishable by imprisonment. It thus avoids the necessity of distinguishing *Argersinger* applications prior to the new constitution and subsequent.

represented by counsel or that he was informed by the court of the defendant's right to court-appointed counsel." LA. CODE CRIM. P. art. 514.

142. 304 So. 2d 332 (La. 1974).
143. 297 So. 2d 423 (La. 1974).
145. 477 F.2d 269 (5th Cir. 1973), remanded on other grounds, 414 U.S. 895 (1973).
RIGHT TO COUNSEL AT INTERROGATION

In light of the continuing increase in size of the Louisiana bar, the seemingly greater geographical mobility of defense counsel in the state, and the often necessary practice of lawyers giving instructions over the telephone, *State v. Jackson* is a significant case. Defendant was arrested for kidnapping. Two days later, defense counsel who, unknown to defendant, had been retained by her parents to represent her, called from New Orleans to Vidalia, the place of detention. Unable to reach the district attorney's office, he called the sheriff's office, identified himself, informed them that he had been retained to represent the defendant, and requested that she not be subjected to further interrogation until he could confer with her within twenty-four hours. About thirty minutes later deputies began interrogating the defendant after giving her the *Miranda* warnings. She was asked a series of specific questions regarding whether she had counsel or had heard of the caller. After answering negatively to each of the questions, the interrogation continued, resulting in an inculpatory statement.

The trial court apparently allowed the statement to be admitted because the defense counsel had not been enrolled as counsel and thus could not be considered to be representing the prisoner. The supreme court correctly dismissed this contention outright. There is no provision or mechanism for "enrolling" as counsel at such early stages of a prosecution. Such a mechanistic approach is wholly unrealistic and would probably be constitutionally infirm. The more difficult questions relate to the duty the police owed to defendant and defense counsel under such circumstances to withhold interrogation. Implicit in this question is a determination of the effect of the preliminary questions regarding the existence of counsel addressed to the defendant and her responses.

The court clearly imposed a duty upon the sheriff, and perhaps the district attorney, to check the information given by telephone by defense counsel and cease interrogation until the representation could be verified. However,
the deputies did not "totally ignore" the attorney's claim of representation, but rather went through a long dialogue with defendant with respect to the claim. The fatal error appears to be the officers' failure to affirmatively advise the defendant of the claimed representation in order to effect an informed waiver of her right to counsel. The opinion indicates that for an informed waiver, the defendant should have been advised of the nature of the telephone call and the request of her purported counsel that she not be interrogated until after he could confer with her.

The opinion goes further in indicating a much more stringent requirement that once the lawyer requests that the police cease interrogation, the state may not "ignore his [the lawyer's] request that he be allowed to confer with his client prior to, if not during, the interrogation." If defendant had been advised of the nature of the telephone call and had then "consented" to the interrogation despite the lawyer's request, would the statements be admissible? The court's language makes admissibility suspect even in those circumstances. While it does not appear that the court resolved this question, the ABA standards suggest that "no waiver should be accepted unless [the defendant] has at least once conferred with a lawyer."

CHARGING CRIMES

In State v. James, the indictment charged that the defendant "... while armed with a dangerous weapon ... robbed the Pioneer Natural Gas Company ... ." Under prior jurisprudence the indictment was defective because armed robbery is a crime committed against a person, not a building or corporation. The prior decisions had held that even when no objection had been made, the court on its own motion was required to dismiss since the prosecution was founded on a defective indictment. In a well-written opinion explaining the historical origin of strict charging rules and their partial in-

representation until after such a time as the interrogation has been completed," Id. at 737.

152. Id.
153. ABA STANDARDS, Providing Defense Services § 7.3 (1968).
154. 305 So. 2d 514 (La. 1974).
applicability today, James reverses prior cases to the extent that they permitted *post-verdict* questioning of the indictment even though there was actual notice of the offense charged and no actual prejudice. The decision does not change prior rulings as they affect pre-trial and trial remedies available to a defendant charged in a defective indictment.\footnote{156. This inapplicability today is based primarily on the presence of full records as now required by LA. CONST. art. I, § 19. See also State v. Michelli, 301 So. 2d 577 (La. 1974).}

The court correctly noted that the position it took was analogous to that of the federal courts. In light of the existence of the considerable federal experience and jurisprudence,\footnote{157. "Thus, if the defective indictment is questioned prior to or during trial and if correction is refused, we do not mean that such error may not be urged upon appeal in the same manner as in the past." 305 So. 2d at 518.} the development of state standards for determining whether there is "actual notice" or "no actual prejudice" in post-verdict challenges should not prove difficult.\footnote{158. See FED. R. CRIM. P. 7(a)-(b); C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 123 (3d ed. 1969).}