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# Procedure: Pre-Trial Criminal Procedure

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# PRE-TRIAL CRIMINAL PROCEDURE†

*P. Raymond Lamonica**

## FOURTH AMENDMENT ARTICLE 1, SECTION 5 RIGHTS—SEARCH OF PERSON INCIDENT TO ARREST

The *Robinson-Gustafson*[1] rationale for search of the person incident to a full custody arrest was examined and applied in *State v. Breaux*.[2] The defendant was stopped by a policeman for speeding. The officer issued a summons and was awaiting routine confirmation of ownership of the vehicle by radio when another officer drove up. The second officer, without communicating with the first, opened the door to defendant's automobile and searched it. After finding an empty beer can, the second officer walked over to defendant and asked him how many beers he had drunk. The

† *Author's Note*: In the pre-trial criminal procedure area, because of the number of cases and issues and their often being closely tied to unique factual settings, it is impossible in a limited space to present a comprehensive or completely representative view of the activity of the court during the term. The cases are selected primarily because it is believed they present new questions or new treatments. Analysis is, of course, greatly abbreviated.

Because many of the decisions are by a close vote and because of the developing nature of the legal principles, emphasis is often placed on the "language" instead of the "holding." The reader is warned to note the same. Finally, since many of the pre-trial issues have traditionally been treated as United States Constitutional issues, it may be a distortion to examine state developments without reference to United States Supreme Court developments. Significant United States Supreme Court pre-trial procedure cases are listed for reference.

FOURTH AMENDMENT: South Dakota v. Opperman, 96 S. Ct. 3092 (1976) (auto search); United States v. Martinez-Fuente, 96 S. Ct. 3074 (border stop and search); Andresen v. Maryland, 96 S. Ct. 2737 (1976) (search warrant description); United States v. Santana, 96 S. Ct. 2406 (1976) (arrest); Texas v. White, 426 U.S. 67 (1976) (auto search); United States v. Watson, 423 U.S. 411 (1976) (arrest).

FIFTH AMENDMENT: Andresen v. Maryland, 96 S. Ct. 2737 (1976) (fourth amendment, fifth amendment relationship, seizure of papers); Doyle v. Ohio, 96 S. Ct. 2240 (1976) (*Miranda* silence as impeachment). United States v. Mandujano, 96 S. Ct. 1768 (1976) (*Miranda*, perjury); Beckwith v. United States, 96 S. Ct. 1612 (1976) (custodial interrogation); Ohio v. Gallagher, 96 S. Ct. 1438 (1976) (custodial interrogation).

DISCOVERY: United States v. Agurs, 96 S. Ct. 2392 (1976) (*Brady v. Maryland* amplified).

GUILTY PLEAS: Henderson v. Morgan, 96 S. Ct. 2253 (1976) (factual basis of guilt).

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1. Gustafson v. Florida, 414 U.S.260 (1973); United States v. Robinson, 414 U.S. 218 (1973). *See also* United States v. Edwards, 415 U.S. 800 (1974).

2. 329 So. 2d 696 (La. 1976).

defendant replied that he had drunk only one. The second officer then "put his hand on the right hand pocket of the blue jean pants worn by the defendant . . . squeezed, felt something soft and put his hand in and dragged out a small cellophane bag containing two marijuana cigarettes."[3]

The state maintained that the search and seizure was valid because it was "incident to a lawful arrest" and that defendant was arrested because he was lawfully detained.[4] Thus the court was presented, apparently for the first time, with the proposition that the stopping of a person for a traffic violation constitutes an arrest which authorizes a search of the person incident to that arrest.[5]

The court correctly rejected the state's contention and concluded that "not every authorized detention may constitute an 'arrest' which justifies incident to it a search of the person. The arrests contemplated which do justify a search of the person incident to it are full custody arrests *reasonably and lawfully made with the purpose of booking the person* . . . for the offense 'charged'."[6]

Since the first officer previously had issued the summons in this case the facts presented a rather simple situation: there had been objective actions which indicated a clear intent *not* to place the defendant in full custody arrest for the purpose of booking. As yet no Louisiana case has addressed the more difficult factual situations requiring a determination of what circumstances will authorize a full custody arrest to afford reliance upon the *Robinson-Gustafson* rationale. In misdemeanor cases the Code of Criminal Procedure appears to authorize an arrest and booking[7] but gives the officer discretion to issue a summons in lieu of booking "if he [the officer] has reasonable ground to believe that the person will appear upon a summons."[8]

In light of *Breaux* there is serious doubt that an officer who exercises

3. *Id.* at 698.

4. The state relied heavily upon the definition of arrest in LA. CODE CRIM. P. art. 201: "Arrest is the taking of one person into custody by another. . . . There must be an actual restraint of the person. The restraint may be imposed by force or may result from . . . submission . . . ."

5. Such a proposition is not dependent upon the existence of independent probable cause to search; neither is it predicated upon officer self-protection grounds. *See* Gustafson v. Florida, 414 U.S. 260 (1973); United States v. Robinson, 414 U.S. 218 (1973).

6. 329 So. 2d at 699 (Emphasis added).

7. *See* LA. CODE CRIM. P. art. 213(3).

8. *Id.* art. 211. LA. R.S. 32:391 (as amended by Act 230 of the 1976 regular session) appears to diminish somewhat the officer's discretion to arrest and book for violations of Title 32, but upon failure to post bond, if required, a full custody arrest with booking appears to be authorized. *See also* LA. R.S. 32:411 (as amended by Acts 185 and 520 of the 1976 regular session).

his apparently unfettered discretion to arrest and book in misdemeanor cases will be able—without a further showing—to avail himself of the *Robinson-Gustafson* search of the person incident to arrest. The nature of the further showing is indicated by Justice Tate speaking for the majority, "we expressly do not hold . . . that an arbitrary or *non-customary* decision of an officer to arrest a person instead of to issue a summons for a misdemeanor will justify as reasonable any search incident to it."[9]

In both *Robinson* and *Gustafson* the authorization of full custody arrests by the facts or regulations was not challenged.[10] *Breaux* indicates that a "non-customary" or arbitrary full custody arrest will not support an incidental search of the person. In that connection the court did not consider the suggestion of Justice Stewart, concurring in *Gustafson*, that "a persuasive claim might have been made . . . that the custodial arrest . . . for a minor traffic offense violated his right under the Fourth and Fourteenth Amendment."[11]

*Breaux* clearly holds that if the officer has objectively indicated an intent not to book, a search is unauthorized; the dicta goes further and indicates that even if the officer has *not* decided against a custodial arrest, he cannot search if such an arrest and booking would be "non-customary." While the court did not consider whether full custody arrests for minor traffic violations would be *per se* unconstitutional as Justice Stewart suggested, the "non-customary" standard might make such a determination unnecessary since political realities doubtless would prevent customary full custody arrests for minor traffic offenses.

The court does not indicate upon whom the burden of showing a customary or non-customary full custody arrest situation rests. Since the search incident to a full custody arrest is an exception to the *per se* warrant requirement, a strong argument can be made in favor of requiring the state to show the customary nature of the full custody arrest.[12] However, until a holding on this question is obtained it is incumbent upon counsel for defendant to develop a record reflecting the customary or non-customary practice of effecting full custody arrests under the particular circumstances.[13]

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9. 329 So. 2d at 700 n.4.

10. *See, e.g.*, United States v. Robinson, 414 U.S. 218 (1973).

11. Gustafson v. Florida, 414 U.S. 260, 266 (1973).

12. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969); *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Pre-trial Criminal Procedure*, 36 LA. L. REV. 575, 592 (1976).

13. Justice Marcus' concurring opinion indicates a belief that if, under the facts of *Breaux*, the officer had not previously decided to issue a summons he could have

KNOWN INFORMANTS—CREDIBILITY

Last year's review of the cases dealing with the use of informers' hearsay to establish probable cause concluded that "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."[14] In *State v. Searle*,[15] the court moved closer to accepting the *per se* credibility of a known informant when the affiant is presenting a hearsay statement based upon that informant's assertions. The court noted,

> "Significantly, . . . [the officer's] informer was not a confidential, unnamed informer. He was, instead, a *named* and *non-professional* informer . . ."[16]

As a basis for that distinction the court relied upon *United States v. Darensbourg*,[17] in its distinction between professional and non-professional informers. The court notes,

> "The rule growing out of these cases [*Aguilar-Spinelli* and progeny] should not be applied as readily to an eyewitness such as . . . [here]. An ordinary citizen complaining of a burglary would not usually be familiar to the police, or have had occasion to inform in the past. As a consequence his credibility could not be vouched for by the officer."[18]

Thus, Louisiana may have accepted an "identified-non-professional" category of informants not controlled by the "two-prong" test of *Aguilar-*

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effected a full custody arrest and searched the person incident to it. He also suggests that a self-protective frisk would have justified the seizure. With respect to the former contention, neither *Gustafson* nor *Robinson* authorize an incident search where there are not good grounds for a full custody arrest. The latter contention could be supported under *Terry v. Ohio*, 392 U.S. 1 (1968), and *Adams v. Williams*, 407 U.S. 143 (1972), *if* the officer had reason to fear for his safety. First, he could have frisked and then *if* he had reason to believe a weapon was present he could have searched. Since in *Breaux* he felt soft matter, not indicating a weapon, it is difficult to support an ability to search after the frisk. Justice Marcus' literal reading of LA. CODE CRIM. P. art. 215.1 which appears to authorize such a search is believed to be unconstitutional under *Terry*. Neither *Adams* nor *Terry* authorize a general exploratory *search* for evidence in the "stop and frisk" situation.

14. *See The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Pre-trial Criminal Procedure*, 36 LA. L. REV. 575, 583 (1976).

15. 339 So. 2d 1194 (La. 1976).

16. *Id.* at 1197 (Emphasis added).

17. 520 F.2d 985 (5th Cir. 1975). *See also The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Pre-trial Criminal Procedure*, 36 LA. L. REV. 575, 584 n.42 (1976).

18. 339 So. 2d at 1198.

*Spinelli*.[19] While the application of that rationale in *Searle* is not objectionable, it should be recognized that "identified-non-professional" informants can vary with respect to credibility considerations as well as unnamed professionals. Since the ultimate question is the existence of probable cause, some consideration of credibility characteristics should always be given, even when the informant is identified and non-professional. It may not be unreasonable to assume that a victim of a crime is credible because he identifies himself and because of his relationship to the criminal activity, but it might well be unreasonable to assume that *every* identified and apparently non-professional informant is credible.[20] A *per se* credibility rule should be carefully considered before acceptance.[21] Even if such a rule were adopted, it should not lessen the requirement that there be a showing that the informant obtained his information in a reliable manner. The court appropriately might require a stronger showing of the reliability of the manner of obtaining the information when there is reliance upon the presumption of credibility in identified non-professional informer situations.

### SEARCH WARRANTS—VERACITY OF AFFIANT

Prior to *State v. Cox*,[22] *State v. Melson*[23] and *State v. Giordano*[24] appeared to have resolved the question of the circumstances in which a search warrant application purporting to rely upon an unidentified informant could be challenged. In *Melson* Justice Dixon's well-reasoned opinion concluded that the defendant had a right to traverse affiants' allegations about an unidentified informer in a search warrant affidavit concluding that this ability to traverse was necessary to protect against unwarranted privacy invasions, to protect the integrity of the judicial process and to insure the existence of probable cause.[25]

To prevent unwarranted attempts to controvert the affiant's statements, the court in *Giordano*, a companion case, held that in making allegations challenging the lack of veracity of the affiant, "the defendant must

19. Briefly, that test requires establishing (1) the credibility of the informant and (2) the reliability of the manner in which the informant gained his information in the warrant application. *See The Work of the Louisiana Appellate Courts for the 1974-75 Term—Pre-trial Criminal Procedure*, 36 LA. L. REV. 575, 579 (1976).

20. *See* United States v. Darensbourg, 520 F.2d 985, 989 (5th Cir. 1975) (Goldberg, J., dissenting).

21. A magistrate might be prudent in questionable instances to require production of the known informer in order to personally assess his credibility.

22. 330 So. 2d 284 (La. 1976).

23. 284 So. 2d 873 (La. 1973).

24. 284 So. 2d 880 (La. 1973).

25. 284 So. 2d at 874-75.

demonstrate a genuine issue to enable the court to regulate proof, and to allow the state an opportunity to produce the evidence relevant to the issue."[26]

In *Cox*, the defendant filed a motion to suppress alleging "that the information was not furnished to [the affiant] by any informer and that [the affiant] either intentionally or unintentionally misrepresented the facts in executing the oath in support of the search warrant." At the hearing addressed to this issue the defendant produced evidence that the only persons in the apartment within the time frame mentioned by the informant were three co-defendants and one other named person who denied being the informer.

After reversal upon rehearing, the majority opinion concluded, "the motion to suppress merely alleged that the information furnished by affiant in support of the issuance of the warrant was false . . . . No facts were *alleged* to support these conclusions."[27] Citing *Giordano* the court indicated further that a defendant cannot controvert the truthfulness of an affiant ". . . without demonstrating a genuine issue on (sic) the affiant's veracity *supported by convincing allegations of fact* which, if proven, would establish the falsity of the affidavit."[28]

In light of the facts of *Cox* the language creates substantial confusion. It appears that the court is refusing to allow the defendant to traverse the veracity of the affiant because of a pleading defect, *i.e.*, the failure to include in the motion to suppress allegations of the specific facts which support the claim of falsity. Such a position is certainly tenable and moreover appears to be required in light of *Giordano*. But, the specificity of pleading requirement addresses itself to the question of whether the court will allow testimony directed toward the issue of affiant veracity to be presented at all. The trial court in *Cox* did allow evidence directed to affiant's veracity to be adduced based upon the general and deficient pleading. At that point the evidence presented certainly must be seen as supplementing the general pleading or the defendant should be given an opportunity to expressly amend the pleading.[29]

There is no doubt in this writer's mind that the facts adduced clearly established, at a minimum, a "genuine issue of fact" with respect to the affiant's veracity. The testimony reflected that only one non-defendant was present, and the officer-affiant admitted that he was not the informer. The

26. 284 So. 2d at 881.
27. 330 So. 2d at 292 (La. 1976) (Emphasis added).
28. *Id.* (Emphasis added).
29. *See, e.g.*, LA. CODE CRIM. P. arts. 488, 1154.

majority suggests that all of this evidence did not establish a "genuine issue" because of the possibility that one of the co-defendants, who failed to appear and for whom a warrant was issued, might be the informant.

Clearly, that proprosition—as far-fetched as it might be—goes to the merits of the issue of affiant veracity rather than to the question of the right to traverse. It simply cannot reasonably be suggested that because of a *possibility* that one co-defendant informed on himself and others there was no "genuine issue" of affiant veracity.

*Cox* is unclear and will cause further confusion because it is difficult to determine whether the majority is finding (1) a failure of the defendant to properly plead (or to cure improper pleadings), (2) a failure to put on a prima facie case of affiant untruthfulness, or (3) a failure to meet proof standards.

In light of the evidence adduced, if the court is suggesting that the degree of specificity required to create a genuine issue of affiant veracity is greater than that found in *Cox*, the decision as a practical matter vitiates *Melson*. If the court is suggesting that there was an absence of a prima facie case, *Melson* is also rendered of little value. If the court rules as it did because it did not believe the defendants had met their burden of proof, the opinion gives no guidance to counsel or trial courts in determining the nature of that burden of proof. Burden of proof considerations should not obscure the *Melson-Giordano* rationale as to when a defendant should have an *opportunity* to traverse affiant veracity.

Persons lying within the judicial process should be of utmost concern to the court and should be given careful scrutiny.[30] *Melson-Giordano* was a significant step forward in allowing such scrutiny. *Cox* appears to raise serious doubts about the continuing validity of those decisions. If the court determines that the question of affiant veracity is not worthy of judicial supervision, it should say so directly; not, as in *Cox*, through obfuscation.

### "HOT PURSUIT" SEARCHES

*State v. Wyatt*[31] contains disturbing language with respect to the nature of the "hot pursuit" exception to the search warrant requirement. In *Wyatt*, two police officers were hailed by a loan company officer who had just been robbed. The victim pointed out the defendant who was entering a residence a short distance away. According to the majority opinion, when the officers arrived at the house they secured permission from "an occupant" sitting on

30. Permitting perjury in judicial proceedings was one of the primary considerations in not applying the *Miranda* rationale to impeachment. *See* United States v. Harris, 403 U.S. 573 (1971).

31. 327 So. 2d 401 (La. 1976).

the porch "to enter." [32] The defendant was found within and placed under arrest. Another officer searched inside a refrigerator and found a bag filled with money. In addition, an identifying shirt was found "in a pile of clothes" and a weapon on the mantel piece.

The question of whether there was a consent "to search" is not clearly treated in the opinion.[33] Of course, if there was proper consent to search, the consideration of "hot pursuit" is unnecessary dicta. The majority unfortunately does not make that clear but does conclude that, "the items here were constitutionally seized in the exigencies of hot pursuit."[34] Mere use of the term "hot pursuit" should not become an incantation authorizing *searching* for evidence. While the court relied upon *Warden v. Hayden*,[35] one of the broadest applications of the "hot pursuit exception," there was little factual analysis which would support such reliance. *Hayden* emphasized that the exception was authorized because the search was "part of an effort *to find* a suspected felon, armed, within the house into which he had run."[36]

Further, the allowance of the search in *Hayden* was predicated largely upon the consideration that to delay "would gravely endanger the lives of others. Speed . . . was essential, and only a thorough search of the house for *persons and weapons* could have insured that *Hayden* was the only man present and that the police had control of all weapons which could be used against them to effect an escape."[37]

The reported facts simply do not support a search inside a refrigerator based upon a hot pursuit exigency. The burden of proving an exception to the search warrant requirement is upon the state.[38] Mere invocation of the conclusion "hot pursuit" without a clear factual basis to support the exigency rationale upon which that "exception" is predicated should not be allowed.

## A STATE EXCLUSIONARY RULE

*State v. Mora*[39] raises, but certainly does not lay to rest, the question of

32. *Id.* at 402.

33. See, for example, the discrepancy between "to enter" at page 402 of the decision and "to enter" and "to search" at page 404 of the decision. The majority opinion appears to assume that the consent to enter included consent to search. *See also id.* at 405 (Tate & Calegero, JJ., dissenting).

34. *Id.* at 404.

35. 387 U.S. 294 (1967).

36. *Id.* at 299 (Emphasis added).

37. *Id.*

38. See note 12, *supra*.

39. 307 So. 2d 317 (La. 1975), *vacated*, 423 U.S. 809 (1975), 330 So. 2d 900 (La. 1976) (on remand), *cert. denied*, 97 S. Ct. 538 (1977).

whether Louisiana has an exclusionary rule independent of that in *Mapp v. Ohio*.[40] In light of the apparent trend in the United States Supreme Court toward diluting *Mapp*,[41] the problem may become of critical importance. The United States Supreme Court remanded *Mora* for clarification of whether the decision was predicated on state or federal law grounds.[42] Two possible federal questions were presented: whether the actions of a school official constituted "state action" under the fourteenth amendment and whether the search and seizure was unconstitutional. Both questions would be of no moment in the criminal proceeding if there were no exclusionary rule.

Justice Dennis writing for the majority indicated that the "state action" finding was based upon an analysis of state statutory law and that the search and seizure was unconstitutional under "both" Article 1, Section 7 of the 1921 Louisiana Constitution, and the fourth amendment of the United States Constitution. He concluded that "suppression of the seized marijuana was mandated under the exclusionary rule of *Mapp v. Ohio* . . ."[43]

Justice Dixon briefly—but perhaps very signficantly—concurred, "the exclusionary rule at the time of the search was embodied in C.Cr.P. 703 *and is now contained in Art. 1, Sec. 5, La.Const. 1974.*"[44]

Aside from Justice Dixon's concurrence, it is not clear whether the majority opinion reflects adherence to the view that there exists an exclusionary rule predicated upon state constitutional grounds. The reference to *Mapp v. Ohio* after reference to both the Louisiana and federal constitutions makes it unclear that the exclusionary rule would attach to state constitutional error alone. If, however, as Justice Dixon notes, there is a distinct exclusionary rule in Article 1, Section 5 of the Louisiana Constitution of 1974, the unclear reference is not critical. Article 1, Section 5 provides in part, "[a]ny person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court." Clearly, this provision expanded the *class* of persons having standing in search and seizure situations[45] and consequently ex-

40. 367 U.S. 643 (1961).

41. *See, e.g.*, Powell v. Stone, 96 S.Ct. 3037 (1976); United States v. Peltier, 422 U.S. 405 (1975).

42. 423 U.S. 809 (1975).

43. 330 So. 2d at 901.

44. *Id.* at 902 (Emphasis added).

45. *See* Simmons v. United States, 390 U.S. 377 (1968); Jones v. United States, 362 U.S. 257 (1960). *See also* Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 23 (1974).

panded the scope of the exclusionary rule. Thus, by expanding standing Louisiana created an exclusionary rule which would not be available under *Mapp*. It thus does not appear reasonable to assume that absent the *Mapp* exclusionary rule there would be no Louisiana exclusionary rule. Louisiana, through the quoted sentence, now has an exclusionary rule not wed to *Mapp* for persons who would not have standing to raise *Mapp* exclusion. While the question has not been directly addressed in light of having an exclusionary rule *beyond Mapp*, it is difficult indeed to argue that Louisiana does not have an independent exclusionary rule for persons presently included *within Mapp* exclusionary policy.[46]

In light of the changing attitude of the United States Supreme Court to exclusionary policy, California[47] and Hawaii[48] have already adopted state exclusionary policy beyond that of the United States Supreme Court. Article 1, Section 5 of the 1974 Constitution appears to mandate that Louisiana do the same.

### VOLUNTARINESS OF CONFESSIONS

The statutory burden of proof requirements in determining the voluntariness of statements were considered in *State v. Whatley*.[49] Although the mother of the defendant testified that her son had bruises and had complained of being beaten, the defendant did not testify.[50] Law enforcement personnel present at the interrogation testified that no beatings or coercion took place in their presence. Defendant argued that the failure of the state to call officers who could testify regarding maltreatment during the entire lockup period did not satisfy the burden of proof requirements. The court rejected this contention on the ground that the defendant himself failed to testify to such maltreatment. Such a position appears correct since the state should not be required to negative coercion at every custodial state with specific testimony when the defendant fails to specify when and how the coercion took place. Simple considerations of "fair notice" including specificity should prevail.[51]

The decision also indicates that when the court finds the confession admissible the defendant should be allowed to put on "*evidence* going to the

46. 330 So. 2d at 904.

47. People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975).

48. State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974).

49. 320 So. 2d 123 (La. 1975).

50. Of course, such testimony could not have been used at the trial on the merits. Jones v. United States, 362 U.S. 257 (1960).

51. *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Pretrial Criminal Procedure*, 36 LA. L. REV. 575, 598 (1976).

*weight* of the confession *contemporaneously*''[52] with the state's evidence introduced as a foundation for its admissibility. The contemplated procedure would allow the defense to present evidence relating to weight—in addition to cross-examination—at the time the state is laying the foundation for admissibility to the jury.

Such an approach eliminates staleness problems when the state's case in chief is lengthy and might more accurately reflect the weight to be given the confession at the outset. Since a confession is so qualitatively different as evidence, it should be given distinct consideration in terms of impact and probative value in the jurors' minds. The only articulated bases for this somewhat novel procedure are ''practical efficiency and fairness'' and that it is the current practice of some trial judges.[53]

*State v. Callihan*[54] reflects a stringent interpretation of the requirements of *Miranda v. Arizona*[55] in determining whether a statement is ''voluntary.'' Defendant was given the warnings required by *Miranda* only *after* he informed the deputies he would make a statement. His court-appointed attorney gave the warnings. The 4-3 majority relied upon *Westover v. United States*,[56] a companion case to *Miranda*, where state officials failed to give warnings but turned the defendant over to federal officials who did. The United States Supreme Court concluded in part, ''[d]espite the fact that the FBI agents gave warnings at the outset of their interview, from Westover's point of view the warnings came at the end of the interrogation process.''[57]

Justice Dixon concluded that *Callihan* was like *Westover* and rejected a distinction based upon the fact that an attorney had intervened. ''The fact that a lawyer was called at this point to advise the defendant that he did not have to make statements cannot serve to render the statements admissible.''[58]

Then significantly, Justice Dixon cited cases relying upon LA. R.S. 15:451, LA. R.S. 15:452 and LA. CODE CRIM. P. art 703 relating to the

52. 320 So. 2d at 128 (Emphasis added).
53. *Id.*
54. 320 So. 2d 155 (La. 1975).
55. 384 U.S. 436 (1966).
56. *Id.* at 494.
57. *Id.*
58. The decision fails to deal directly with the standards applied for purging the defect of failure to give *Miranda* warnings at the outset of interrogation, when they are subsequently given. Certainly at some point *under Miranda* this defect should be considered vitiated by intervening acts. *See, e.g.*, Michigan v. Mosley, 423 U.S. 96 (1976). *Cf.* Michigan v. Tucker, 417 U.S. 433 (1974); Wong Sun v. United States, 371 U.S. 471 (1963).

burden of proof requirements for establishing *voluntariness* of statements and concluded, "[o]ne of those legal requirements [of voluntariness] is that the defendant be given the 'Miranda' warnings before custodial interrogation begins."[59]

This treatment is noteworthy for it has apparently introduced a *per se* requirement of giving *Miranda* warnings as a foundation for establishing a *voluntary* statement. If the Supreme Court retreats from its position of exclusion under the "prophylactic" procedures of *Miranda*, Louisiana may still require the *Miranda* warnings under the "free and voluntary" standard.

Moreover, Article 1, Section 13 of the 1974 Constitution[60] essentially requires that the *Miranda* warnings be given when a person has been "detained in connection with the investigation . . . of any offense." That article does not have an express exclusionary rule, nor does it clearly equate the detention language to *Miranda's* "custodial interrogation." The position announced in *Whatley* may allow avoidance of both of these questions. Insofar as Article 1, Section 13 goes beyond *Miranda* the questions of independent exclusion and when the rights arise will, of course, have to be addressed.

### PRE-TRIAL ACCESS TO PROSECUTOR'S EVIDENCE

Last year this writer suggested that *Barnard v. Henderson* [61] might well lead to the pre-trial inspection of any "critical" physical evidence subject to expert evaluation.[62] It appears that conclusion was wrong, at least for the present time. In several cases this term the court has taken a very restrictive view of the due process requirements for pre-trial inspection of physical evidence.

In *State v. White*,[63] the defendant had requested, in a second degree murder trial, "to examine all gun pellets that may have been recovered . . . ." The court cryptically distinguished *Barnard* on the grounds that unlike *Barnard* where the pellets had been seriously damaged, "in the

59. 320 So. 2d at 158.

60. LA. CONST. art. I, § 13 provides: "When any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully of the reason for his arrest or detention, his right to remain silent, his right against self incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel."

61. 514 F.2d 744 (1975).

62. *The Work of the Louisiana Appellate Courts for the 1974-75 Term—Pre-trial Criminal Procedure*, 36 LA. L. REV. 575, 597 (1976).

63. 321 So. 2d 491, 493 (La. 1975).

present case, the bullets were not badly damaged, permitting a quick comparison under a dual microscope at trial."[64]

The defendant in *State v. Brumfield*[65] sought access to all physical evidence in order that it could be "properly inspected and examined by an expert." Included in the list was a pistol, the spent cartridges and slugs. The court again rejected an application of *Barnard*. This time the conclusion was that "the *controverted question* was not whether the gun and cartridges were used in killing the victim; the real question was which of three persons did the shooting."[66] The ease of making comparisons during trial, "with the aid of a dual microscope"[67] again was noted.

Finally, *State v. Roberts*,[68] in upholding the denial of pre-trial access to a pistol and bullets, concluded that "the ballistic testing is *not shown to have been useful* for the accused's defense. The accused's defense did not deny that the pistol found . . . had fired the fatal shot."[69] The court emphasized, "such ballistic testing is not shown to have been *relevant* to any issue of the accused's defense."[70]

These cases suggest that unless the issue as to which examination is requested *prior to trial* is shown to be of significance *at trial* then there is no right to inspect. Such a test is adequate for questions of reversible error, but gives no real guidance at the pre-trial stage since at that stage the question of the nature of defense may not be fully known. It is suggested that these strained and facile distinctions[71] should be questioned and that judicial or legislative guidelines be adopted to inform the trial court and the parties of the nature of pre-trial inspections of physical evidence without reference to what actually happened at trial. The matter cannot be dealt with properly in terms of reversible error. Meaningful and sensible guidelines would greatly enhance judicial efficiency as well as fairness to the parties.

The continued reluctance to judicially approve pre-trial discovery was evidenced in *State v. Ball*.[72] The court, relying upon past decisions which

64. *Id.* at 494.
65. 329 So. 2d 181 (La. 1976).
66. *Id.* at 185 (Emphasis added).
67. *Id.*
68. 331 So. 2d 11 (La. 1976).
69. *Id.* at 14 (Emphasis added).
70. *Id.* (Emphasis added).
71. It is suggested that it is unrealistic to assume that the question of whether a particular weapon or bullet was used in the crime is *not relevant*. The state introduces the weapon to show how the crime took place at the instance *of the defendant*. The defendant should have the opportunity to cross-examine fully with respect to the state's introduction of such evidence.
72. 328 So. 2d 81 (La. 1976).

are concisely summarized in *State v. Collins*,[73] denied pre-trial discovery of lab reports, a copy of a line-up photograph and copies of witness statements. While under present jurisprudence there is no quarrel with the court's decision to refuse to grant the right of discovery, the additional reason advanced that such discovery was precluded by LA. R.S. 44:1 *et seq.* (Public Records Law) is not well founded.

As Justice Tate points out in his concurring opinion, the dicta's reliance upon the Public Records Act is misplaced. That act is designed to recognize the right of the *public* to certain records *without* judicial intervention. Justice Tate properly concludes "the act does not and was not intended to create a privilege from production of such records for valid judicial purposes."[74] Justice Dixon also properly concludes, "The Public Records Act is misinterpreted by the majority and is irrelevant to the issues of this case."[75]

There are enough legitimate issues involved in the question of judicial determination of proper pre-trial criminal discovery without adding a misconception of the nature of a Public Records Act, which is designed solely to afford public access to enumerated records without the necessity of judicial intervention. The Public Records Act is simply irrelevant to questions of judicially supervised pre-trial discovery.

### BILL OF PARTICULARS

*State v. Miller*[76] is significant for its delineation of the elements of a bill of particulars required sufficiently to apprise a defendant of the nature of the crime charged. The defendant was accused of "a series of thefts of lawful U.S. currency in excess of $500, the property of the First Circuit Court of Appeal, State of Louisiana."[77] After moving to quash on the ground of vagueness, the defendant filed a motion for a bill of particulars asking, *inter alia*, (1) the number of alleged acts of misappropriation and (2) the place of each alleged act of misappropriation. The state refused to answer these two questions and the trial court refused to order answers.

In a well-written opinion, Justice Calogero speaking for the 4-3 majority reversed the conviction. His analysis of the purpose of the bill of particulars properly indicates that the extent to which the bill should be

73. 308 So. 2d 263 (La. 1975).
74. 328 So. 2d at 85 (Tate, J., concurring).
75. *Id.* Justice Calogero also concurred without reasons.
76. 319 So. 2d 339 (La. 1975).
77. *Id.* at 341.

granted depends upon the complexity of the case and whether the case is predicated upon a single event or a series of events. It was recognized that "there is no exact formula . . . which can be applied to every charge to determine in a particular case whether a defendant has all the information to which he is constitutionally entitled."[78] The constitutional standard is that the defendant "shall be informed of the nature and cause of the accusation against him."[79]

The court rejected the state's contention that answering the bill of particulars as to the number of acts of misappropriation and the place of misappropriation would require disclosure of *evidence* and thus was not required by way of a bill of particulars. In disposing of this contention the court noted, "to the extent that information is properly elicited to give defendant notice of the nature and cause of the charge against him, the state is required to respond to a bill of particulars *even though the answers will disclose facts which the state intends to establish through evidence*."[80]

*Miller* provides a classic example of the proper use of the bill of particulars to apprise the defendant adequately of the nature of the charge. It clearly and importantly recognizes that the trial court may not assume that the defendant knows anything about the crime of which he is accused except what is contained in the indictment as amplified by a bill of particulars. In light of an apparent willingness of trial courts in the past to assume the defendant "knows what he's charged with" *Miller* is significant. Its significance is amplified as long as pre-trial discovery is limited.

## NEW COURT-CREATED PROCEDURES

### *Remand for a New Motion to Suppress*

A new procedural device, a remand for a new motion to suppress, was created in *State v. Simmons*.[81] The court determined that the trial court had improperly handled the question of burden of proof with respect to voluntariness of confessions. Instead of reversing and remanding for a new trial, the court concluded,

> Since we find no trial error except that on the motion to suppress, it is not necessary at this time to reverse the convictions and order a new trial, because the error might be eliminated upon another trial of the motion to suppress . . . . We reserve to the trial judge the power to

78. *Id.* at 343.

79. LA. CONST. art. 1, § 13. La. Const. art. 1, § 10 (1921). *See also* State v. Clark, 288 So. 2d 612 (La. 1974).

80. 319 So. 2d at 343 (Emphasis added).

81. 328 So. 2d 149 (La. 1976).

> grant a new trial should he determine the confession inadmissible . . . . If on the other hand, the trial judge determines, after a hearing on the motion to suppress, that the confession is admissible, the right to appeal from such ruling is reserved to the defendant.[82]

This new approach promotes judicial efficiency. Instead of requiring a new trial at which the evidence might again be presented after an error-free suppression hearing, the remand for a new hearing eliminates the unnecessary trial when the evidence is properly determined to be admissible while at the same time affording the same review procedures to the state and defendant.

*Co-Conspiracy Hearings*

There appears to be an increasing use of LA. R.S. 15:455 which allows introduction into evidence of certain statements by co-conspirators which have an incriminating effect. *State v. Carter* [83] requires that the issue of the existence of a conspiracy must be determined outside the presence of the jury. Justice Dixon in a well-reasoned opinion concludes,

> Where the State seeks to introduce evidence of the acts of declarations of one conspirator against another, the existence of a conspiracy between them is a mixed question of law and fact. *The trial court must determine whether a prima facie showing has been made* in order to determine whether a defendant will be charged with responsibility for the acts and declaration of another. *After* such initial determination, the existence of the conspiracy becomes a question of fact for the jury . . . ."[84]

Since a separate hearing outside the presence of the jury must be held, such a hearing should be held before trial whenever possible. This of course would create a pre-trial device similar to the motion to suppress. Judicial efficiency and fair notice alone mandate such a procedure. Moreover, the state has as much interest as the defendant in knowing in advance of trial whether a co-conspirator's statement will be admitted. In the event discovery of such statements becomes either legislatively or jurisprudentially

82. *Id.* at 153. Only Justice Marcus questioned the procedure; Justice Sanders dissented without reason.

83. 326 So. 2d 848 (La. 1975).

84. *Id.* at 852 (Emphasis added). With respect to the merits of the hearsay, the court further recognized that when the showing "that two people committed a crime is showing that defendant either committed or conspired to commit the criminal act, no prima facie case of conspiracy has been established . . . the fact, alone, that two or more have committed the crime charged is not sufficient to establish a prima facie case of conspiracy."

required, a pre-trial co-conspiracy hearing procedure should be adopted to prevent the inefficiency and inconvenience which results from moving the jury in and out of the courtroom and delaying the trial.

### PRELIMINARY EXAMINATIONS

The nature of the Louisiana preliminary examination was discussed in *State v. Jenkins*.[85] The majority announced that the hearing is to be "full blown and adversary . . . one in which the defendant is entitled to confront witnesses against him and to have full cross-examination of them."[86] Justice Dennis, who wrote for the majority and who was a delegate to the constitutional convention,[87] indicated that the state constitutional right to a preliminary examination was signficiantly different from the federal constitutional right to a preliminary hearing described in *Gerstein v. Pugh*.[88]

> The convention in drafting this article [Art. 1, Sec. 14] contemplated the type of *formal, adversary proceeding provided for by our Code, including the right to subpoena and cross-examine witnesses* . . . The elevation of the right to a preliminary examination reflects a recognition by the people of Louisiana of the importance of according an accused a prompt and *thorough* determination that there is sufficient cause to deprive him of his liberty.[89]

This interpretation of legislative intent is supported by the fact that prior preliminary examination practice in Louisiana involved a full-blown, adversary proceeding and that *Pugh v. Rainwater*,[90] as decided by the Fifth Circuit, also contemplated such a preliminary examination. It should not be forgotten that at the time of the constitutional convention the delegates were considering the prior practice and the Fifth Circuit's opinion, not that of the subsequently decided *Gerstein v. Pugh* reflecting a lesser federal constitutional standard.[91]

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85. 338 So. 2d 276 (La. 1976).

86. *Id.* at 279.

87. Justice Tate who did not write a separate opinion also was a delegate.

88. 420 U.S. 103, 111 *et seq.* (1975).

89. 338 So. 2d at 279 (Emphasis added).

90. 483 F.2d 778 (5th Cir. 1973), *aff'd in part, rev'd in part sub nom.* Gerstein v. Pugh, 420 U.S. 103 (1975), *on remand*, 511 F.2d 528 (5th Cir. 1975).

91. That there was no express legislative intent to change prior evidentiary practices is reflected by the comments of Delegate Burson". . . it is certainly not the intent of the framers of this amendment to restrict any rights that you have under the present law. It is only to expand the rights of the defendant in the limited instances where he is charged by means of a Bill of Information." *Documents of the Louisiana Constitutional Convention of 1973 Relative to the Administration of Criminal Justice* 717 (47th Day's Proceedings, September 14, 1973). *See also id.* at 716 (discussion of Delegate Roy).

Having announced the "full blown and adversary" nature of the preliminary hearing, *Jenkins* does not completely eliminate the use of hearsay evidence, a point which has been of considerable dispute.[92] Rather, the opinion suggests that, "[t]hese provisions . . . generally comport with the more recent A.L.I. Model Code of Pre-Arraignment Procedure 330.4(4), which would apply all the rules of evidence from trials in criminal cases to the preliminary examination, with *some limited exceptions* to the rule against admitting hearsay evidence."[93]

Because the court does not include the relied upon portion of the A.L.I. Model Code of Pre-Arraignment procedure, it is set forth here.

> (4) *Rules of Evidence*. The rules of evidence for trial of criminal cases shall apply at ths preliminary hearing, except that hearsay evidence that would not be admissible at trial shall be admitted if the court determines that it would impose an unreasonable burden on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing, and if the witness furnishes information bearing on the informant's reliability and, as far as possible, the means by which the information was obtained. When hearsay evidence is admitted, the court, in determining the existence of reasonable cause, shall consider
>
> (a) the extent to which the hearsay quality of the evidence affects the weight it should be given, and
>
> (b) the likelihood of evidence other than hearsay being available at trial to provide the information furnished by hearsay at the preliminary hearing.

This writer feels that 330.4(4) of the A.L.I. Code or Rule 344(f) of the Uniform Rules of Criminal Procedure (1974)[94] present a balanced approach

92. See Justice Barham's vigorous dissent in denial of writs in *State v. Perkins*, 316 So. 2d 385 (La. 1975).

93. 338 So. 2d at 279 (Emphasis added). The "generally comport" language appears to be a normative conclusion that the new A.L.I. provisions are appropriate. Strict statutory analysis does not support such a conclusion in light of the failure of the earlier A.L.I. Model Code to deal with the questions.

94. (f) Evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the detention hearing. Hearsay evidence may be received, if there is a substantial basis for believing:

(1) That the source of the hearsay is credible;

(2) That there is a factual basis for the information furnished; and

(3) If the evidence concerns whether there is probable cause to believe that an offense has been committed and that the defendant committed it, that it would impose an *unreasonable burden* on one of *the parties or on a witness to require that the primary source of the evidence be produced at the hearing*. UNIFORM RULES OF CRIM. P., rule 334(b) (1974) (Emphasis added).

to the hearsay evidence admissibility question. They do not make hearsay admissible unless (1) an *unreasonable* burden in producing the primary source is shown *and* (2) the testifying party furnishes information bearing upon the declarant's credibility and (3) when possible, the reliability of the manner in which the information is obtained.[95] Even when these tests are met the court must weigh the hearsay evidence and determine the likelihood that admissible evidence will be presented at trial. If *Jenkins* reflects the court's future position, it would be error to say that, as a routine matter, hearsay is admissible at a preliminary examination. Rather, it appears there is a new "hearsay exception" for which, as in all exceptions, a proper foundation [Section 330.4(4) considerations] must be laid.

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95. This second requirement is analogous to the crediting of hearsay in *Aguilar-Spinelli*. *See The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Pre-trial Criminal Procedure*, 36 LA. L. REV. 575, 579 (1976).