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## Procedure: Pretrial Criminal Procedure

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## PRETRIAL CRIMINAL PROCEDURE

*P. Raymond Lamonica\**

## ARTICLE I, SECTION 5—STANDING OR ATTENUATION?

Article I, section 5 of the 1974 Louisiana Constitution provides in part that any person "adversely affected" by an unauthorized seizure has "standing" to "raise its illegality." Two cases last term illustrate what the court has characterized as a new issue presented by the expanded concept of standing.

In *State v. Roach*<sup>1</sup> the "standing" issue was presented in the context of a search incident to arrest. The arrest of Miss Roach, however, was based upon evidence obtained through an unconstitutional seizure (arrest) of another. The other person from whom evidence was seized was the defendant in *State v. Saia*.<sup>2</sup> Immediately after Miss Saia's arrest and seizure (which was later determined to be unconstitutional) the police saw a man emerge from the same residence from which they claimed Saia had emerged. When the emerging man saw the police, he ran back into the residence. The officers pursued, kicked down the door and entered. Inside they saw Miss Roach wearing an open robe, panties and a bra. The officers then placed her under arrest for possession of the heroin seized outside from Miss Saia.

After the arrest, an officer noticed green tissue paper "protruding from the left cup of Miss Roach's bra"<sup>3</sup> and ordered her to remove the contents. She removed a package from each bra cup. The "padding" proved to be sixty-two glassine envelopes of heroin.

In moving to suppress the evidence, defendant argued that the officers relied upon the illegal arrest of Saia to establish probable cause for the arrest of Roach. Without the arrest of Saia, there would not have been probable cause to enter the residence and arrest Roach.<sup>4</sup> The court dis-

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1. 338 So. 2d 621 (La. 1976).

2. 302 So. 2d 869 (La. 1974). See *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Pre-trial Criminal Procedure*, 36 LA. L. REV. 575 (1976).

3. 338 So. 2d at 622.

4. The court was willing to find without discussion that the arrest of Miss Saia plus the ensuing events constituted probable cause to arrest Miss Roach. That probable cause did exist is not free from doubt.

poses of the seizure issue on the basis that the arrest took place prior to the effective date of the new constitution.

Had defendant's arrest occurred after the effective date of the 1974 Constitution her argument *would be correct*. Under the new state charter Judith Roach would have had standing to assert the illegality of the arrest, search and seizure of Saia because she was adversely affected by it . . . .<sup>5</sup>

Relief was denied based upon the conclusion "that defendant Roach had no standing to complain of the unlawful arrest of Charlene Saia or the illegal seizure of heroin from Saia's person."<sup>6</sup>

The quoted dictum in *Roach* clearly indicates that defendant's contentions "would be correct" under the 1974 constitution because she would have had "standing." A little over a month later the court was called upon to deal with the new standing issue. In *State v. Cullota*<sup>7</sup> the defendant challenged a search warrant affidavit because evidence relied upon in the affidavit was obtained by the unconstitutional arrest of persons other than the defendant. Because the arrest and seizures took place under the new constitution, article I, section 5 was applicable.

Officers had unconstitutionally arrested two persons as they drove into a parking lot. They also seized drugs as evidence. Subsequently, the two gave written statements indicating the drugs were purchased in an apartment occupied by the defendant. The trial court and the supreme court concluded that the evidence seized and the statements obtained *pursuant to the illegal arrest* were not admissible at trial, since they were products of unconstitutional activity.

The trial court, "not unreasonably,"<sup>8</sup> concluded that the search warrant affidavit was invalid because the unconstitutionally seized statement and evidence was a critical part of the affidavit. Thus, evidence seized in Cullota's apartment *pursuant to the search warrant* was ordered suppressed.

The supreme court reversed.<sup>9</sup> The opinion recognized that the evidence obtained unconstitutionally from the third parties could not be used against the defendant as evidence of guilt. It refused, however, to pro-

5. 338 So. 2d at 623 (emphasis added).

6. *Id.* at 624.

7. 343 So. 2d 977 (La. 1976).

8. *Id.* at 982.

9. The opinion was written by Justice Tate and joined in by Justices Calogero and Dixon. Justice Sanders concurred.

scribe the use of the unconstitutionally obtained evidence to provide a critical element in the search warrant application.

The court addressed the problem as one of whether the defendant had "standing" to raise the unconstitutionality of the seizures from third parties. Of course, if there was an absence of standing, as in *Roach*, further inquiry is foreclosed. Looking to the language of article I, section 5, Cullota and his co-defendants would seem to fall within the "adversely affected" category: but for the unconstitutionally seized evidence being obtained from the third persons, the search warrant affidavit would have been deficient and the evidence would have been excluded. The court, however, concluded, "[w]e do not believe that the scope of the constitutional provision was necessarily intended to exclude from trial [1] evidence otherwise untainted, [2] secured through a search warrant, because [3] part of the showing made in the affidavit used to secure the warrant is based upon evidence illegally obtained from third persons and inadmissible, if objected to at trial, against either them or the accused. *If the sole basis of the affidavit was such illegally-secured evidence, our conclusion might well be different.*"<sup>10</sup> Later in the opinion the court concluded,

We therefore *hold* that Article 1, Section 5 does not require suppression . . . . *The present defendants were not "adversely affected," within the constitutional meaning, by the initial arrest and search of a third person because with regard to the present search warrant (a) the complained-of illegality is so attenuated in connection with the obtaining of the present evidence . . . , and (b) the means by which such present evidence was obtained are sufficiently distinguishable from the initial arrest and search of the third person.*<sup>11</sup>

This writer has no quarrel with the results. The conclusion that the defendants are not "adversely affected," causes some difficulty. The question of standing or whether a defendant has an interest to raise unconstitutional behavior under article I, section 5 should be interpreted straightforwardly. Certainly the defendants were "adversely affected" by the seizures. The opinion itself recognized this when it concluded that the fruits of the unconstitutional seizures of the third persons could not be used *as evidence* at the present defendants' trial. Yet we are told that when the relationship between the illegality and the seizure becomes attenuated then the defendant is not "adversely affected." This analysis is unnecessarily confusing and conceptually inconsistent. It is not unlike saying, in an

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10. 343 So. 2d at 982 (emphasis added).

11. *Id.* at 984 (emphasis added).

analogous civil context, that a plaintiff lacks a right of action because he has no cause of action. It would be better to view the question whether a person is "adversely affected" as one of bare causation-in-fact. If as a factual matter the defendant is adversely affected, then the question is whether exclusionary policy applies. To resolve the question of using the evidence seized from the third parties against the present defendants as evidence, the court should (and did) conclude that evidence which is a direct result of an unconstitutional seizure (thus a fruit) requires suppression.

Whether improperly seized evidence can be used as the basis for a search warrant should be resolved similarly. The defendants against whom the warrant was issued are in fact "adversely affected." But this only gives them standing to raise the objection; it does not necessarily mean their objection will be successful. Since in *Cullota* the warrant was not based wholly on the illegally obtained evidence, and since the less than well-articulated policy behind the exclusionary rule does not necessarily require automatic exclusion in every case, the evidence seized need not be deemed a suppressible fruit if the court finds the initial illegality had "become so attenuated as to dissipate the taint."<sup>12</sup>

There might well be reasonable disagreement on the complex attenuation issue:

We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means *sufficiently distinguishable* to be purged of the primary taint."<sup>13</sup>

One should remember that the attenuation issue is present, whether there is a broad (as is Louisiana's) or narrow (as is the federal)<sup>14</sup> view of standing. The attenuation issue of course is likely to arise more often when one expands the right to *raise* the issue of unconstitutional activity as Louisiana has done. The considerations of the right to raise the issue (standing—"adversely affected") and the

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12. *Nardone v. United States*, 308 U.S. 338, 341 (1939).

13. *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963), quoting J. M. GUIGRE, *EVIDENCE OF GUILT* 221 (emphasis added).

14. See, e.g., *Simmons v. United States*, 390 U.S. 377 (1968); *Jones v. United States*, 362 U.S. 257 (1960).

right to have evidence excluded (which requires, in part, the evidence be a fruit of the illegality) are distinct. In a restricted standing jurisdiction where one lacks the right to raise the issue of unconstitutional activity directed toward third persons, of course, the issue of attenuation is never reached. The attenuation issue need not be further complicated by attempts to determine whether a person is "adversely affected" or has standing. This latter question should be direct and rather easy to resolve. The attenuation issue remains complex and dependent on notions of exclusionary policy.<sup>15</sup>

#### WARRANTLESS ARRESTS

The "troublesome question"<sup>16</sup> whether law enforcement officers in non-exigent circumstances are required to obtain a warrant before entry into premises to arrest was raised, but not answered, in *State v. Ranker*.<sup>17</sup>

Justice Dennis, speaking for four members of the court,<sup>18</sup> strongly indicated that article 213(3) of the Code of Criminal Procedure,<sup>19</sup> which purports to authorize warrantless arrests whenever the officer has reasonable cause to believe the person has committed an offense, is of doubtful validity.

We have grave doubts about whether the provision may be constitutionally applied where an officer, although having probable cause to arrest, makes an unauthorized entry of a dwelling to effect the arrest under non-exigent circumstances.<sup>20</sup>

The issue was avoided because the court found there was no probable cause to arrest under the facts. Significantly, however, it appears that the four-justice majority is providing a gentle warning that the court may hold that absent exigent circumstances a warrantless arrest within the home is unconstitutional.

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15. See *State v. Jenkins*, 340 So. 2d 157 (La. 1976), for an excellent discussion of the attenuation issue with respect to changing notions of exclusionary policy in the United States Supreme Court. See also *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Peltier*, 422 U.S. 532 (1976). Cf. *State v. Welch*, 337 So. 2d 1114 (La. 1976); *State v. Davis*, 336 So. 2d 805 (La. 1976).

16. *State v. Ranker*, 343 So. 2d 189, 190 (La. 1977).

17. 343 So. 2d 189 (La. 1977).

18. Chief Justice Sanders and Justices Marcus and Summers dissented.

19. A peace officer may, without a warrant, arrest a person when . . . (3) The peace officer has reasonable cause to believe that the person to be arrested has committed an offense although not in the presence of the officer . . . ." LA. CODE CRIM. P. art. 212(3).

20. 343 So. 2d at 190-91.

[W]e are aware that a significant number of federal and state courts have found the protections of the Fourth Amendment . . . extend to arrests within the home and that warrantless arrests within the home are per se unreasonable absent exigent circumstances.<sup>21</sup>

Members of the United States Supreme Court have previously recognized the apparent anomaly of extending less protection to seizures of the person than to seizures of property in the warrant requirements.<sup>22</sup> It appears the Louisiana Supreme Court may soon be willing to deal with this anomaly. *Ranker* suggests that the most vulnerable facet of the historical position with respect to arrests without warrants will be when the arrest takes place in the arrestee's home. The court may well require an arrest warrant absent exigent circumstances.

The court will also have to determine, in light of fourth amendment and article I, section 5 policies, whether absent exigent circumstances a warrantless arrest may take place in private places other than the arrestee's home and whether a search warrant in addition to an arrest warrant will be required in either or both circumstances.

The traditional assumption that arrests are lawful without the necessity of a warrant should be and is apparently being reevaluated.<sup>23</sup>

#### SEARCH WARRANT—PROBABLE CAUSE

The question of when an unidentified informant is "credible" or "reliable" under the *Aguillar-Spinelli-Paciera*<sup>24</sup> test for probable cause was presented in *State v. Tassin*.<sup>25</sup> When an unidentified informant is relied upon to establish probable cause, the facts presented must demonstrate grounds to believe the informant is credible or "reliable" and that he obtained the information in a reliable manner. *Tassin* addresses the issue of informant credibility or reliability.<sup>26</sup>

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21. *Id.* at 192.

22. *See, e.g.*, *United States v. Watson*, 423 U.S. 411 (1976) (note particularly the opinions of Justices Stewart and Powell and the dissenting opinions of Justices Marshall and Brennan). *See also* *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

23. *See* the extensive listing of cases in the opinion. 343 So. 2d at 192. The court did not discuss the article 212(3) authorization of arrests for misdemeanors not committed in the presence of the officer, whether in public or private places. The rationale of *Watson* which relies upon prior common law treatment to establish the constitutional standards renders such procedure suspect.

24. *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguillar v. Texas*, 378 U.S. 108 (1964); *State v. Paciera*, 290 So. 2d 681 (La. 1974).

25. 343 So. 2d 681 (La. 1977).

26. This writer has suggested that much of the confusion in unidentified infor-

In *Tassin* the police officer, in attempting to meet the credibility criterion, signed an affidavit stating (1) that previously the informant had purchased illegal drugs under the direct surveillance of the affiant officer, and (2) that he had provided the officer in the past with unspecified information which was corroborated by other "reliable" informants.

The 4-3 majority on rehearing found the information insufficient to meet the credibility criterion. Justice Tate, speaking for the majority on rehearing, first noted that "the reliability and veracity of an anonymous informer is not, in our opinion, pertinently reflected by his willingness to buy illegal drugs under the surveillance of a police officer for whom he works."<sup>27</sup> The court thus was unwilling to find that an informant's propensity for telling the truth was established by such activities.

The court was also unwilling to rely upon the "verification" of information by other unidentified informants of non-established credibility because the affidavit "establishes neither the informer's reliability (credibility) nor the reliability of the information shared by him with other unknown individuals in their unverified cover associations."<sup>28</sup>

If the question whether drug purchases under direct surveillance are probative of probable truthfulness were directly addressed, there should be little room for serious debate. Nothing in the surveillance purchase situation appears probative of probable truthfulness or credibility. The least trustworthy person would be expected to do as the informant in *Tassin* did.

If the question whether asserted verification of unspecified information by other unidentified informants of undetermined credibility establishes the truthfulness of the informer were directly addressed, there should again be little room for serious debate. Few would suggest that

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mant cases results from the less than precise use of shorthand terms and word formulas. See *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Pre-trial Criminal Procedure*, 36 LA. L. REV. 575, 579 (1976). The criterion that *Tassin* addresses is whether the magistrate can conclude from the facts that there are reasonable grounds for believing the informer to be telling the truth. One of the most common factual bases for considering a person worthy of belief is that he has provided truthful information in the past. It is suggested that this is a characteristic of "credibility." The courts often talk in terms of "reliability" to characterize the same trait of veracity or probable truthfulness of the informant. Reliability should be used to refer to the manner in which information is gained, e.g., hearsay or direct observation; thus the unnecessary confusion.

27. 343 So. 2d at 690.

28. *Id.*

such information is of significant probative value in establishing probable truthfulness.

Justice Sanders, speaking for the court on original hearing and dissenting on rehearing, disposed of defendant's contentions with the conclusion that

there is no jurisprudential requirement that information provided by reliable informants in the past must have resulted in *convictions* in order to establish probable cause for the issuance of a search warrant

. . . .<sup>29</sup>

This statement is unquestionably correct but highlights the nature of the false focus on issues in informant cases. The issue is not whether the information led to arrests or convictions; the issue is simply whether information previously supplied has been verified or determined to be truthful. If so, one may reasonably conclude that the person who previously gave the verified information is truthful now.

The fact that information previously given resulted in arrests is not probative of truthfulness. That information given has resulted in a conviction is probative of truthfulness only if the information supplied was part of the state's case (or one is willing to make that assumption). Facts relating to credibility should be assessed straightforwardly in terms of whether past information has proved to be true. Shorthand word formulas should not detract from or be a substitute for the central issue of probable truthfulness based upon past performance or other probative evidence.<sup>30</sup>

*Tassin* also demonstrates the appropriate use of the *Giordano-Melson*<sup>31</sup> rationale to challenge or clarify assertions made by the affiant in search warrant affidavits. The affiant stated he was "well acquainted with [the defendant] as a user and dealer in controlled dangerous substances."

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29. *Id.* at 683 (emphasis added).

30. That there continues to be less than strict adherence to this standard is reflected by a sampling of recent cases. In *State v. Roach*, 322 So. 2d 222, 225 (La. 1975), the majority found informant credibility (reliability) based on "sixteen arrests during the previous five months." In *State v. Martin*, 318 So. 2d 25, 26 (La. 1975), the basis was that the prior information "resulted in arrests and convictions." In *State v. Humble*, 309 So. 2d 138, 139 (La. 1975), the informant had supplied "reliable information on one prior occasion." Finally, in *State v. Boudreaux*, 304 So. 2d 343, 345 (La. 1974) the court relied upon the general background and reputation of the informant "together with independent corroboration" by a person other than the affiant.

31. *State v. Giordano*, 284 So. 2d 880 (La. 1973); *State v. Melson*, 284 So. 2d 873 (La. 1973).

This might have been construed to be based upon personal knowledge. By the *Giordano-Melson* challenge the defendant was able to show that this was not an assertion based upon personal knowledge but rather "generalized underworld gossip by faceless informers."<sup>32</sup>

#### VOLUNTARINESS AND SANITY

*State v. Glover*<sup>33</sup> presents an examination of the relationship between the presumption of sanity<sup>34</sup> and the state's obligation to prove that statements are voluntarily given.<sup>35</sup>

The defendant, who had a "borderline degree of mental retardation with some organic brain changes,"<sup>36</sup> and suffered from undifferentiated schizophrenia, after being questioned extensively<sup>37</sup> admitted that he had raped and beaten the victim.

A sanity commission found that the defendant lacked the mental capacity to stand trial and committed him. Approximately two years later the defendant was found synthetically sane and able to assist in his defense.

On original hearing the court, reversing the trial court's granting of a motion to suppress, held that in order to overcome the statutory presumption of sanity<sup>38</sup> the defendant had "the burden of proving by a preponderance of the evidence his insanity at the time he made a confession or inculpatory statement."<sup>39</sup>

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32. 343 So. 2d at 691.

33. 343 So. 2d 118 (La. 1977).

34. See LA. R.S. 15:432 (1950).

35. See, e.g., LA. CODE CRIM. P. art. 703(c); LA. R.S. 15:451 (1950).

36. 343 So. 2d at 126.

37. See *id.* at 125.

38. LA. R.S. 15:432 (1950):

A legal presumption relieves him in whose favor it exists from the necessity of any proof; but may none the less be destroyed by rebutting evidence; such is the presumption attaching to the regularity of judicial proceedings; that the grand jury was legally constituted; that public officers have done their duty; that a relation or subject matter once established, continues, but not that it pre-existed; that the defendant intended the natural and probable consequence of his act; that the defendant is innocent; that the defendant is sane and responsible for his actions; that the person in the unexplained possession of property recently stolen is the thief; that evidence under the control of a party and not produced by him was not produced because it would not have aided him; that the witnesses have told the truth.

39. 343 So. 2d at 121.

The original hearing majority, relying upon past authorities,<sup>40</sup> also refused to find an inability to waive his article I, section 13/*Miranda*<sup>41</sup> rights because he was "illiterate and possessed a mentality that bordered on mental retardation."<sup>42</sup> It concluded "[t]hese factors do not preclude a knowing and intelligent waiver of the privilege against self-incrimination."<sup>43</sup>

On rehearing the court carefully avoided the waiver issue<sup>44</sup> and went directly to the issue of voluntariness. The rehearing majority stated the nature of the court's prior error:

We now recognize that . . . this Court on original hearing misapprehended the ultimate issue as being whether the defendant was 'sane' at the time of his utterances rather than whether the statements were voluntarily made.<sup>45</sup>

The court then rejected the view of its original hearing that the defendant had the burden of proving insanity if that was the basis for urging lack of voluntariness, noting that

a claim of mental illness as introduction of evidence thereof does not shift the ultimate burden of proof of voluntariness from the State. If the defendant fails to prove the existence of a mental illness or defect or fails to prove that such a disorder prevented his confession from being voluntary, the State is not required to negate the defendant's abnormality, but the State must in all other respects prove beyond a reasonable doubt that the confession was voluntary.<sup>46</sup>

Potentially more significant is the court's analysis of the voluntariness test. In recent years concentration on *Miranda*-waiver considerations has usually, although not necessarily, precluded direct voluntariness analysis. Justice Dennis, speaking for the court in a well-written opinion, examined several theories of voluntariness and concluded:

Under the theory that the real trial, for all practical purposes, occurs when the confession is obtained and, therefore, should take place under *conditions compatible with court proceedings*, Glover's state-

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40. See, e.g., *State v. Neal*, 321 So. 2d 497 (La. 1975); *State v. Nicholas*, 319 So. 2d 361 (La. 1975).

41. *Miranda v. Arizona*, 384 U.S. 436 (1966); See LA. CONST. art. I, § 13.

42. 343 So. 2d at 123.

43. *Id.* (Citations omitted).

44. See *id.* at 131 n.\*

45. *Id.* at 127.

46. *Id.* at 128.

ments would be clearly inadmissible. However, because it is a newly emerging and, at present, ill defined theory we prefer to rest our decisions upon more traditional grounds. Therefore, we will discuss only two questions . . . *Do the statements constitute trustworthy and reliable evidence? And were they products of Glover's free and rational choice?*<sup>47</sup>

With respect to the first question, which Justice Dennis recognized has not been given great attention of late, he concludes "*probable testimonial trustworthiness of a confession still is and ought to be established as a necessary antecedent to its introduction in evidence.*"<sup>48</sup> He emphasizes,

[I]f confessions obtained by coercive methods are inadmissible because they are *apt* to be unreliable, the confessions which are *proven* to be untrustworthy, for whatever purpose, should not be introduced in evidence.<sup>49</sup>

The last quoted statement seems to indicate that if defendant can show that a statement is untrustworthy, it becomes inadmissible. Of course the larger question presented was one of constitutional voluntariness. It appears the court is incorporating traditional legal relevancy<sup>50</sup> considerations into the question of voluntariness and concluding that if evidence is shown to be untrustworthy it is legally irrelevant and therefore constitutionally inadmissible. In the confession context this is certainly justified due to the uniquely prejudicial effect.

The significance of the approach should be further considered in light of the failure of the defendant to demonstrate that the statements were actually untrustworthy. The defendant prevailed by demonstrating the *probability*, based on expert testimony<sup>51</sup> that the statements were untrustworthy.

The opinion, of course, is not necessarily limited to sanity problems. It appears that if the theory of voluntariness-admissibility is accepted it must also apply to other cases. If this proves true, defendants should be able to prove probable untrustworthiness by any relevant evidence—including that someone else committed the offense.

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47. *Id.* at 131 (emphasis added).

48. *Id.* (Emphasis added).

49. *Id.* (Emphasis in the original).

50. *See, e.g.*, C. McCORMICK, EVIDENCE 431, 441 n.38 (2d ed. 1972).

51. 343 So. 2d at 134.

ARTICLE I, SECTION 13 AND *MIRANDA*

Several interesting cases present issues under article I, section 13 and *Miranda*.<sup>52</sup> In *State v. Welch*,<sup>53</sup> the court examined the Louisiana and federal constitutional "procedural safeguards"<sup>54</sup> necessary for the interrogation of a mentally retarded defendant. The police, having been informed by the defendant's father that the defendant "wasn't too smart" and "not in complete control of his faculties,"<sup>55</sup> secured an inculpatory statement at an initial interrogation. The officers testified that the defendant was "advised of his rights."<sup>56</sup> Uncontradicted testimony by the defendant's father indicated that the defendant was not specifically advised of his right to counsel. Other evidence indicated a high pressure interrogation.<sup>57</sup>

The court found that the state had not met its "heavy burden" to prove that the defendant had knowingly and intelligently waived his right to counsel.<sup>58</sup> The court also noted that "the refusal by the police to honor the request of the parent of a mentally retarded semi-literate defendant to confer with a lawyer . . . was in violation of Article 1, Section 13 and *Miranda* even though the defendant was a major."<sup>59</sup>

A second confession was obtained about one hour after the first. Prior to the second interrogation defendant was advised specifically of his right to counsel. The court found the "second confession was simply not sufficiently removed from the preceding statement in time or circumstances to eliminate the taint"<sup>60</sup> of the first confession. Relevant factors in this determination of failure to remove taint appear to be (1) the absence of the warning in the first interrogation (rather than an ineffective waiver), (2) the prior denial of counsel at the request of the father, (3) continued arrest, (4) the same officer conducting the examination by asking the defendant to repeat the statement and (5) the lapse of only a short period of time. Whether fewer of these factors would have supported a finding of an absence of taint and thus admissibility of the second statement after a prior illegally obtained statement is not clear.<sup>61</sup>

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52. *Miranda v. Arizona*, 384 U.S. 436 (1966); LA. CONST. art. I, § 13.

53. 337 So. 2d 1114 (La. 1976).

54. *Id.* at 1115.

55. *Id.* at 1116.

56. *Id.* at 1117.

57. *See generally id.* at 1117-18.

58. *Id.* at 1119.

59. *Id.* at 1119-20.

60. *Id.* at 1120.

61. *State v. Young*, 344 So. 2d 983 (La. 1977), presents the taint removal issue

In *State v. Davis*,<sup>62</sup> a second inculpatory statement was given one day after the first, which proved defective because the police had failed to advise the defendant he was entitled to appointed counsel. Both confessions were admitted in evidence. The court found the first statement inadmissible but found the second admissible because it was not tainted by the prior illegality. Factors which appear to have controlled the taint determination were (1) the one day delay, (2) the fact that the interrogations were "entirely independent"<sup>63</sup> by different officers and different departments and (3) the existence of facts which indicated that prior to the statements in question the defendant voluntarily admitted guilt.

Having found the first statement inadmissible and the second admissible the court had to determine the effect on the judgment of guilt. In doing so it appears the court adopted a "harmless constitutional error" rule for *Miranda* situations. Reversible error was not found because the defective statement was not the only statement and there was an absence of *actual* or *presumed* prejudice.

We are not faced with a situation where the sole confession or admission introduced into evidence against an accused was taken in violation of *Miranda*, nor by a situation where actual prejudice is *shown* or may be *presumed* to have resulted to him because of the admission of the technically invalid first confession.<sup>64</sup>

In a footnote the court indicated the reasons for finding an absence of actual prejudice. The second confession did not "contain any less admission of guilt"; it also was corroborated by several eyewitnesses.<sup>65</sup> When prejudice may be "presumed" and need not be shown is not discussed.

#### WAIVER AFTER COUNSEL ADMONITIONS

Two cases this term highlight the difficulty of dealing with waiver when counsel admonitions are present. In *State v. Cotton*<sup>66</sup> counsel

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in a situation where the first statement of guilt in the shooting of defendant's husband was made immediately upon arrival of the police at the scene of a shooting. The trial court found the defendant to be so "emotionally distraught and hysterical" as to be unable to have voluntarily made the statement. *Id.* at 986. A second statement was obtained two hours later. The trial court's finding of an absence of the emotional conditions was later held to support the conclusion that the second statement was voluntary and given in compliance with article I, section 13 and *Miranda*. *Cf. Michigan v. Mosely*, 423 U.S. 96 (1975).

62. 336 So. 2d 805 (La. 1976).

63. *Id.* at 807.

64. *Id.* at 808 (footnote omitted, emphasis added).

65. *Id.* at 808 n.1.

66. 341 So. 2d 355 (La. 1977).

admonished the defendant not to make any statements. This was overheard by an officer nearby. After some unspecified delay the defendant sent a message that he wanted to speak to the officer. Being aware of the admonition, the officer ignored the initial request and several subsequent requests but finally went to talk to the defendant. The officer advised the defendant he would not talk with him until after he was again given *Miranda* warnings and waived his rights. This ensued. During the interview, incriminating statements were given and shortly thereafter affirmed by the defendant to an assistant district attorney. At the suppression hearing defendant acknowledged an understanding of the *Miranda* warning and the effect of waiver.

The 4-3 majority applying traditional waiver standards found waiver effective and the statement voluntary in spite of counsel's admonition.

In *State v. Weedon*,<sup>67</sup> the lawyer advised the defendant-client to answer only questions relating to his personal identification (name, age, etc.). The detectives who had custody of defendant agreed to ask only questions relating to personal identification. Relying upon this agreement, the lawyer did not accompany the defendant to jail for booking.

During the booking process another officer, apparently innocently and without knowledge of the agreement, asked the defendant a routine question indicated on the arrest register form. That question elicited the time and date of the offense. Defendant supplied the information which, over objection, was admitted in evidence as an incuplatory statement. The court in a 4-3 decision held that Weedon's statement was inadmissible.

In *Cotton* the majority treated the issue as a traditional waiver problem, found waiver effective and the statement voluntary. The effect of counsel's admonition was not extensively considered. In *Weedon* the majority also dealt with the issue primarily as one of waiver, and concluded that under the circumstances the waiver of presence of counsel *and* the privilege against self-incrimination was not "knowing." However, the somewhat cryptic opinion further reasons,

The accused's constitutional rights against self-incrimination and to effective assistance of counsel cannot be prejudiced by the *state's failure to honor its agreement* . . . .<sup>68</sup>

The role of counsel admonitions in the waiver question should be examined more critically. If it is simply another fact from which the court

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67. 342 So. 2d 642 (La. 1977).

68. *Id.* at 645.

must determine knowing waiver, a result such as in *Weedon* is suspect. In *Weedon* the defendant appeared to know and intelligently waive his rights except for the reliance upon an agreement which led him to believe his answers were not incriminating. Knowledge that an answer is incriminating has not been considered an essential element of waiver. It appears then that the issue of honoring agreements was critical.

This writer suggests that when counsel admonitions are present, more is involved than traditional waiver notions. The nature of a civilized adversary system composed of professionals should also be considered. Certainly, as in *Weedon*, breach of agreement should not be allowed. In *Cotton* the question becomes more difficult because there was no agreement with the state (although it was aware of the admonition) and because the statements on the reported facts were clearly defendant initiated.

Justice Tate in *Cotton* suggests in his forceful dissent,

To permit the prosecutor or law enforcement authorities to interrogate a suspect held in jail, without notice to counsel retained or appointed to represent him, marks a real erosion on the constitutional right to effective representation of counsel. It also violates the Louisiana Code of Professional Responsibility and its attempt, in accord with recognized national standards, of ethical regulation in the interest of civilized order: Adverse counsel is prohibited from communicating or causing another to communicate with a client represented by an attorney.<sup>69</sup>

In a civil matter, if plaintiff's counsel instructed defense insurance counsel not to interview plaintiff or cause him to be interviewed through an investigator, no responsible defense lawyer would violate or allow an investigator to violate such instruction even with plaintiff's consent (waiver) until plaintiff's counsel had at least been notified. No lesser standard of professional conduct should be allowed in criminal matters when the state is a party. Finding no lesser standard, however, does not mean exclusionary policy automatically follows. The question should however be addressed directly rather than simply as a question of waiver of constitutional rights.<sup>70</sup>

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69. 341 So. 2d at 360.

70. The court in *State v. Jackson*, 303 So. 2d 734 (La. 1974), previously addressed a closely related problem involving failure of law enforcement officers to communicate to a client the telephonic instructions of counsel. See *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Pre-trial Criminal Procedure*, 36 LA. L. REV. 575, 602 (1976). In *Brewer v. Williams*, 430 U.S. 387, 406 (1977), the court, again in terms of constitutional waiver, concluded, "The Court of Appeals

## LINE-UP—PERSONS ON BAIL

Can a person who is released on bail be required to participate in a line-up? The court, upon writs, appears unanimously to have agreed that an accused on bail cannot be required to participate in a line-up without a court order.<sup>71</sup> "This interposes between him [the defendant] and potentially arbitrary police action the impartial decision of a judicial officer."<sup>72</sup>

The nature of the showing which the state must make to secure such an order was outlined: (1) the need for the order, (2) whether the order is in connection with the original arrest and (3) grounds indicating it was "just and reasonable."<sup>73</sup>

The court does not indicate whether the trial court in granting bail could make such "cooperation" with the state a condition of bail, but it appears that in light of the nature of the showing, this prior determination is inappropriate. While the brief opinion also is silent with respect to handwriting or voice exemplars and other physical tests, no distinction is apparent.

## CO-CONSPIRACY HEARING?

Last year's discussion of *State v. Carter*<sup>74</sup> indicates that the decision may require the determination of the existence of a conspiracy outside the presence of the jury to satisfy the requirement of Louisiana's co-conspirator exception to the hearsay rule.<sup>75</sup> The writer overstated the

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did not hold, nor do we, that under the circumstances of this case Williams *could not*, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments." (citation omitted). See also *Michigan v. Mosely*, 423 U.S. 96, 110 n.2 (1975) (White, J., concurring), cited with approval in *Brewer*, 430 U.S. at 405 n.10, in which is expressed a more rigid requirement for interrogation resumption when counsel has been requested. Once counsel is present there appears to be no reason to relax this requirement.

71. *State v. Bell*, 334 So. 2d 385 (La. 1976).

72. *Id.* at 388.

73. *Id.*

74. 326 So. 2d 848 (La. 1976); see *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Pre-trial Criminal Procedure*, 37 LA. L. REV. 535, 550 (1977).

75. LA. R.S. 15:455 (1950) provides:

Each coconspirator is deemed to assent to or to commend whatever is said or done in furtherance of the common enterprise, and it is therefore of no moment that such act was done or such declaration was made out of the presence of the conspirator sought to be bound thereby, or whether the conspirator doing such act or making such declaration be or be not on trial with

court's position. The brief comment relied too heavily on language<sup>76</sup> in the plurality opinion which may not prove to be controlling. The court first alluded to "the *rule* requiring a prima facie showing of conspiracy prerequisite to *admitting* evidence of the acts or declarations of one co-conspirator against another"<sup>77</sup> and further concluded "the *effect* of conspiratorial *acts* and *statements* is never properly *before* the jury unless the trial court is satisfied that a prima facie showing of conspiracy has been made."<sup>78</sup>

From the quoted language, it is arguable that before evidence of acts and statements can be *admitted* into evidence, a prima facie case of conspiracy must be found. If the "effect"<sup>79</sup> of conspiratorial acts and statements is never properly "before" the jury until a prima facie case is found, the writer submits that where acts and statements of the defendant are necessary to establish a prima facie case of conspiracy, they should not be developed in the presence of the jury. However, *Carter* did *not* hold this, and it may not be required.

In order to prevent possible prejudice and mistrial, it would be better practice, at least in cases requiring a complex conspiracy foundation involving acts and statements of the defendant, to decide the foundation question outside the presence of the jury, as is done with confessions. The Criminal Discovery Act<sup>80</sup> facilitates and encourages this practice by allowing discovery of the state's intent to rely upon the statutory co-conspirator hearsay exception.<sup>81</sup>

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his codefendant. But to have this effect a prima facie case of conspiracy must have been established.

76. See *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Pre-trial Criminal Procedure*, 37 LA. L. REV. 535, 550-51 (1977).

77. 326 So. 2d at 854 (emphasis added).

78. *Id.* at 851-52 (emphasis added).

79. Despite the language quoted in the text it is not clear that the "effect" refers to admissibility rather than to a jury instruction based upon LA. R.S. 15:455 (1950).

80. LA. CODE CRIM. P. art. 721.

81. See Comment, *The Co-conspirator Exception to the Hearsay Rule: The Limits of Its Logic*, 37 LA. L. REV. 1101 (1977), for a survey of the confused status of Louisiana law. Much of its confusion results from LA. R.S. 15:455 itself and from attempts to make this 1928 concept function fairly today.