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PRETRIAL CRIMINAL PROCEDURE

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EXCLUSIONARY POLICY

*Fifth Circuit's Fourth***

In the last several years many of the rules of search and seizure (including arrest) have been refined, clarified and further developed.[1] At this critical point in the development of fourth amendment and Louisiana constitutional privacy protections, it is perhaps more appropriate to examine developments relating to the exclusionary sanction than simply to catalogue further the rules and interesting applications. While there continue to remain important questions about the scope and nature of the search and seizure protections, if the nature of the exclusionary sanction is altered, such questions, at least in criminal proceedings, may remain largely academic.

United States v. Williams[2] presents an example of the real and immediate vulnerability of the exclusionary sanction. Williams was arrested for violating post-conviction bail restrictions. Heroin was seized from her person and subsequently from her luggage after officers obtained a warrant. The arrest was challenged on the grounds that the agent was not authorized by the *statutory* scheme to effect

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**If the anticipated reorganization of the present fifth circuit to include Louisiana, Texas and Mississippi takes effect, the results should not differ. Eight judges of the new fifth circuit (Gee, Coleman, Brown, Ainsworth, C. Clark, Garza, Reavley, and S. Johnson) wrote or joined in Part II of the opinion purportedly modifying the exclusionary rule. Only four judges of the new fifth circuit (Rubin, Politz, Randall, and Tate) declined to take the opportunity to limit the exclusionary sanction. In the new eleventh circuit, however, only five judges wrote or joined in Part II of the opinion (Vance, Roney, Tjoflat, Hill, and Fay). Six judges joined Judge Rubin's concurring opinion (Godbold, Kravitch, Frank Johnson, Hatchett, Anderson, and Thomas Clark) and one judge joined only Judge Politz in Part I (Henderson).

1. *See, e.g.*, Payton v. New York, 100 S. Ct. 1371 (1980) (need for warrant to arrest in residence); United States v. Crews, 100 S. Ct. 1244 (1980) (presence of defendant as a fruit of unconstitutional arrest); Michigan v. DeFillipo, 443 U.S. 31 (1979) (unconstitutional statute can provide probable cause); Arkansas v. Sanders, 442 U.S. 753 (1979) (need for warrant for items connected with automobile); Rakas v. Illinois, 439 U.S. 128 (1978) (nature of interest to establish standing—scope of exclusionary policy); United States v. Ceccolini, 435 U.S. 268 (1978) (attenuation of unconstitutional seizure); United States v. Chadwick, 433 U.S. 1 (1977) (search of movable property).

2. 622 F.2d 830 (5th Cir. 1980).

the arrest. The district court found the arrest unlawful and suppressed the evidence. The *en banc* decision of the fifth circuit reversed the panel decision[3] which also held the arrest unauthorized. In the *en banc* decision no member of the court expressed doubts about the validity of the arrest.[4] If the arrest was illegal, the court of appeals would have been required to determine whether violation of a statutory, rather than constitutional, provision justified an exclusionary sanction. That sanction, if applied, traditionally would be pursuant to the court's supervisory authority.[5] The fourth amendment exclusionary policy properly would not have had to be reached. Additionally, with respect to the heroin found pursuant to the warrant, distinct exclusionary policy concerns are present.[6] After finding the arrest legal, it is indeed curious that a majority of the court felt compelled, or even that it was appropriate judicial craftsmanship, to go further. A majority of the *en banc* panel did go further in an unusually organized opinion.

The opinion is written in two parts. Part I was written by Judge Politz and concurred in by fifteen others. Part I holds the arrest to be legally authorized and directs "reversed" and "remanded."[7] Part II written by Judges Gee and Vance and concurred in by eleven others to constitute a majority of the twenty-four member panel concludes "reversed."[8] While indicating they "do not disagree with [Part I]"[9] since some had concurred, the Part II judges conclude "[i]t is our view, however, that the drugs suppressed as evidence by the trial judge and by our panel should not have been and that to suppress them was wrong *whether or not Williams' violation of a bond condition was such a crime as warranted her arrest . . . .*"[10]

The Part II judges emphasize,

> Sitting en banc, we now *hold* that evidence is not to be suppressed under the exclusionary rule where it is discovered by of-

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3. 594 F.2d 86 (5th Cir. 1979).

4. Judges Goldberg and Simpson, who wrote the three-panel majority, did not participate in the *en banc* decision. Judge Charles Clark, who dissented, joined Part II of the opinion.

5. *See, e.g.*, McNabb v. Mallory, 318 U.S. 332, 345 (1942) ("a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law"). *But see* United States v. Payner, 100 S. Ct. 2439 (1980) (Court refused to exclude evidence pursuant to its supervisory authority).

6. For example, whether the interposing of judicial authority should effectively attenuate the original illegality (as opposed to unconstitutionality).

7. 622 F.2d at 839.

8. 622 F.2d at 847.

9. *Id.* at 840.

10. *Id.* (emphasis added).

> ficers in the course of actions that are taken in *good faith* and in the *reasonable*, though *mistaken, belief that they are authorized.* We do so because the exclusionary rule exists to deter *willful* or *flagrant* actions by police, not reasonable good faith ones.[11]

Judge Rubin, with whom nine other judges joined, including Judge Politz, specially concurs, and challenges Part II of the opinion:

> [M]any of my brethren have seized the occasion to discuss what they consider an alternative ground for decision, but what is to me purely a hypothetical: whether the evidence would have been admissible had the search been unconstitutional. Judicial self-restraint should command us to defer until another day the discussion of issues that might have been material had the arrest been improper.[12]

To Judge Rubin's rather traditional suggestion, Judges Hill and Fay say in a specially concurring opinion they are "intrigued but not pursuaded" by the "new approach" and state, "[i]f we find evidence admissible without regard to the constitutional question, we should decline to reach and decide the latter."[13] They apparently reject that consideration of the exclusionary sanction is a constitutional question or that Part I did exactly what they suggest.

Something appears awry. Consider a court finding a legal (as well as constitutional) arrest, going further and saying that if the arrest were illegal (as well as unconstitutional) then it would not exclude evidence, while rejecting the opinion of those who suggest that since the arrest was found legal no further inquiry is necessary.[14]

Apparently the discontent with the perception of the exclusionary rule among the Part II judges was so great as to cause them to deviate from the traditional judicial decision-writing process. Reassessment of exclusionary policy is much needed. A rational demarcation of the nature and scope of exclusionary policy is of ut-

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11. *Id.* (emphasis added).

12. 622 F.2d at 848 (Rubin, J., concurring) (emphasis added).

13. 622 F.2d at 847 (Fay & Hill, J.J., concurring).

14. In an introductory law school text the author feels no need to cite authority for the axiomatic proposition:

> A basic premise of our legal system is that courts should decide only the case presented to them. That courts create law for future cases is only incidental to their resolution of particular disputes. Therefore, if in deciding a particular dispute a court indicates what its decision would be if the facts or questions were other than those presented, a future court in the same jurisdiction would not be bound to decide a future case in accordance with the "dictum," that is language not necessary to the court's resolution of the problem.

ROMBAUER, LEGAL PROBLEM SOLVING 19 (1970).

most concern to all involved in the judicial and governmental systems. *United States v. Williams*, however, in addition to being technically unorthodox and lacking in traditional judicial restraint, provides no substantial guidance. What, for example, is its impact on warrant cases? Is not reliance on a warrant always reasonable? Is *Williams* reconcilable with the recent decision in *Payton v. New York*,[15] where the exclusionary sanction was applied when officers in good faith relied upon a statute authorizing a warrantless entry to effect an arrest? Who has the burden of showing good faith reasonableness and what is the nature of that burden? Why is it necessary to have subjective good faith and objective reasonableness to achieve the posited limited purpose of the exclusionary rule? Is subjective good faith a workable and realistic standard in this context? Is it ever necessary for a court to determine whether there is a fourth amendment protection, or is an evaluation of good faith and reasonableness upon an *arguendo* assumption of such a protection sufficient? If an *arguendo* assumption is sufficient for good faith cases, how will the further development of the fourth amendment be affected when only bad faith cases are considered? Will the further delineation of fourth amendment protections more likely be developed in non-criminal cases, and is that appropriate?

It is unfortunate that the decision which was obviously intended to restructure the nature of fourth amendment protections gives neither real guidance nor an adequate rationale upon which future cases may be evaluated. It undoubtedly will cause much discussion and litigation. It is hoped that *Williams* might serve as a vehicle to cause a higher level of evaluation of exclusionary policy. The purpose of the exclusionary rule must be more than "to deter willful or flagrant actions by police . . . ."[16] Such a posited purpose indeed sets up a "strawman" which is easily demolished. Perhaps the problem is of such complexity and importance that the merit of traditional judicial decision making, in which the court, with the assistance of counsel, addresses the complex but limited issues presented on a case-by-case basis to develop a fundamentally sound rule of law, ought to be reconsidered.

Louisiana Exclusionary Policy

In 1971[17] the Louisiana Supreme Court rejected defense counsel's contention that an arrest ought to be declared illegal and evidence suppressed because of the failure of the officers to comply

15. 100 S. Ct. 1371 (1980).
16. United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980).
17. State v. Square, 257 La. 743, 244 So. 2d 200 (1971).

with articles 228, 229, and 230 of the Code of Criminal Procedure relating to booking and informing of rights. Defense counsel had urged that "unless the arrest is nullified and the evidence seized in connection therewith suppressed . . . there will be widespread disregard of these provisions which are vital safeguards against secret arrests and improper police tactics."[18] With no justice dissenting on this issue, Justice Summers wrote for the court, "[t]he answer to his contention is that a penalty for failure to comply with these requirements is provided by law. A peace officer who fails to book his prisoner promptly . . . or the booking officer who fails to give the prisoner information required . . . will be guilty of malfeasance in office . . . ."[19] An exclusionary sanction was rejected because the statutes had "no bearing upon the legality of an arrest which is otherwise lawfully made on reasonable belief or probable cause. A departure from acceptable concepts of judicial restraint would occur if this Court were to superimpose an exclusionary rule over [the] . . . legislative plan . . . ."[20]

While one might suggest that the threatened malfeasance prosecution is to blink at reality, the decision made clear that there was no automatic exclusionary sanction for statutory violations and that, if there were a sanction at all, statutory violations would be considered in light of statutory purpose and exclusionary impact.

The Louisiana Supreme Court's attitude toward the exclusionary sanction is reflected further in recent cases in which the exclusionary sanction was found appropriate for statutory nonconstitutional violations. In *State v. Longlois*,[21] a unanimous opinion, the defendant was arrested by an agent of the Department of Wildlife and Fisheries and charged with and subsequently convicted of possession of marijuana. The court examined the statutory authority of wildlife agents and concluded they "were never meant to have the power to make arrests for possession of marijuana."[22] The court also determined that "the arrest was also illegal as an arrest by a private citizen,"[23] being a misdemeanor.[24] While indicating private action might not be covered by article I, section 5 of the Louisiana Constitution, the court avoided the issue by correctly finding state action.[25]

18. 257 La. at 783, 244 So. 2d at 214.
19. *Id.*
20. 257 La. at 786, 244 So. 2d at 215.
21. 374 So. 2d 1208 (La. 1979).
22. *Id.* at 1210.
23. *Id.*
24. LA. CODE CRIM. P. art. 214. LA. R.S. 40:966 (D) (Supp. 1970).
25. 374 So. 2d at 1211. *See* State v. Nelson, 354 So. 2d 540 (La. 1978). *See also The*

Recognizing that whether evidence should be suppressed by a person acting under color of law but outside the scope of his statutory authority had never been decided, the court nevertheless, without extended discussion, concluded that the exclusionary policy was "necessary to discourage police officers, both regular and special, from *unreasonably* exceeding their lawful authority."[26]

In *State v. Patton*,[27] another unanimous opinion, a district attorney's investigator observed defendant's serious wreckless driving and caused him to stop by using his lights and siren. He took note of the name and other information from the driver's license and released defendant but later caused an arrest warrant to issue.

As in *Longlois*, the court determined that the investigator lacked statutory authority to arrest or to detain. The court then considered whether the "identification testimony must be suppressed if it is a fruit of an illegal arrest or detention."[28] The court expressly rejected cases which had held that identification of a defendant was not the fruit of an illegal arrest. The distinction between testimonial and tangible evidence was described as "irrational and untenable."[29] Without expressly considering the distinction between a constitutional violation and the extant statutory violation, the court applied the exclusionary sanction.

Longlois and *Patton* both reflect an exclusionary policy broader than that previously established.[30] Previously, violation of a state statute had not resulted in an exclusionary sanction. While an exclusionary sanction might in some instances be appropriate for violation of statutes (or state constitutional rights), more guidance on the purpose of the sanction is needed. A question which immediately arises and needs resolving is whether the failure to comply with the Louisiana Constitution, article I, section 13 right (restated in article 218.1 of the Code of Criminal Procedure that an arrested or retained person "be advised fully of the reason for his arrest or detention") should result in an exclusionary sanction.

Work of the Louisiana Appellate Courts for the 1977-78 Term—Pretrial Criminal Procedure, 39 LA. L. REV. 917, 924 (1979).

26. 374 So. 2d at 1211 (emphasis added).

27. 374 So. 2d 1211 (La. 1979).

28. *Id.* at 1213.

29. *Id.*

30. *State v. Case*, 363 So. 2d 486, 491 (La. 1978), which was decided on several grounds, including absence of an affidavit and lack of specific descriptions, and thus not as persuasive as *Longlois* or *Patton* on the statutory exclusionary rule question, previously indicated that a warrant issued by a city judge for an area outside his territorial jurisdiction was invalid and thus grounds for exclusion. In the same case the court declined to look at the objection to the warrant being executed on Sunday without express authorization.

Patton's language indicating the "untenability" of a distinction between testimonial and tangible evidence as it is used to resolve the identification issue is also noteworthy. In *United States v. Crews*,[31] a woman was robbed in the ladies room of the Washington Monument. The victim gave a detailed description of the robber. Several days later defendant was detained illegally and a photograph was taken. The victim identified defendant in the photo and subsequent lineup identifications. Justice Brennan set forth a new approach to analyzing the tainted identification problem:

> A victim's in-court identification of the accused has three distinct elements. First, the victim is present at trial to testify as to what transpired . . . and to identify the defendant. . . . Second, the victim possesses knowledge of and the ability to reconstruct the prior criminal occurrence and to identify the defendant from her observations of him at the time of the crime. And third, the defendant is also physically present in the courtroom, so that the victim can observe him and compare his appearance to that of the offender.[32]

Justice Brennan found that factually neither the presence of the victim at the defendant's trial nor her ability to give accurate information was the product of the unlawful arrest. Significantly, however, a majority of the court (not including Justice Brennan) held that the third element, defendant's presence, can *never* be the fruit of a prior illegality. Thus, a defendant may be brought to court for trial (and identification) even though illegally arrested.

In *State v. Brown*,[33] the defendant was arrested in his home without a warrant. In *dicta* the court accepted the *Payton v. New York*[34] holding and independently concluded that "[s]uch a warrantless arrest in a home is also prohibited by article I, section 5 of the Louisiana Constitution of 1974."[35] However, finding the arrest to violate the federal and state constitutions, citing *United States v. Crews*[36] as authority, it did not suppress, "[a]lthough the line-up was the product of illegal arrest, [because] the victim's in-court identification had a source independent from the arrest and was clearly not affected by the line-up."[37] *State v. Patton*'s treatment of the identification issue was not discussed. The *Patton* identification might still fail the *Crews-Brown* test because it is not clear that the officer

31. 100 S. Ct. 1244 (1980).
32. *Id.* at 1250.
33. 387 So. 2d 567 (La. 1980).
34. 100 S. Ct. 1371 (1980).
35. 387 So. 2d at 569.
36. 100 S. Ct. 1244 (1980).
37. 387 So. 2d at 569.

in the victimless crime would be able to identify the defendant absent the illegality.

These cases are not presented in an attempt to reflect fully the attitude of the Louisiana Supreme Court toward the exclusionary sanction. It is not yet possible to accurately characterize that attitude because of the absence of extensive discussion by the court. One should not, however, conclude that the court is generally applying the exclusionary sanction more expansively than it has previously.

State v. Grogan[38] is an interesting example. A fourth amendment, article I, section 5, attenuation problem was presented. The constitutional attenuation issue is, of course, simply a particularized inquiry regarding the scope of exclusionary policy. *Grogan*, thus, is reflective of the court's attitude toward constitutional exclusionary policy. The defendant was illegally arrested and jailed for resisting an officer. The next day while still in jail and after having been given his *Miranda* warnings on at least three occasions, the defendant confessed to a burglary. The voluntariness of the statement was not challenged. The sole issue was whether the statement was a fruit of the unconstitutional arrest.

The plurality opinion by Justice Marcus indicates that the "primary, if not exclusive, purpose of the exclusionary rule is to deter future unlawful police misconduct . . . ."[39] After finding that the custodial arrest was *"at most a minor violation of the fourth amendment"*[40] and that the confession was voluntary, he determined that the illegality had been attenuated. The confession was obtained less than twenty-four hours after arrest, while the defendant was still in custody and after he was advised that he failed a lie detector test given while in custody. Additionally, the "police officers acted in good faith, believing that defendant's conduct in fleeing . . . warranted such an arrest."[41]

Again in *State v. Singleton*,[42] a limited exclusionary policy was implemented. The court refused to extend the fifth amendment/article I, section 13 exclusionary sanction of *In re Dino*[43] to the broad

38. 373 So. 2d 1300 (La. 1979).
39. *Id.* at 1303.
40. *Id.* (emphasis added).
41. *Id.* at 1304.
42. 376 So. 2d 143 (La. 1979).
43. 359 So. 2d 586 (La. 1978). *See The Work of the Louisiana Appellate Courts for the 1977-78 Term—Pretrial Criminal Procedure*, 39 LA. L. REV. 918, 930 (1979); Note, *A Cautious Step Forward*, 39 LA. L. REV. 278 (1978).

standing rights of article I, section 5[44] of the Louisiana Constitution. A statement was obtained from a juvenile in violation of *Dino*. The statement was then used to obtain a search warrant. The court refused to order suppression of the evidence obtained pursuant to the warrant because defendant lacked "standing" to challenge the violation of the juvenile's *Dino* rights. Only Justice Dennis dissented, citing the expanded notion of standing, and thus exclusionary policy, as reflected in article I, section 5. The opinion appears to indicate the broader exclusionary sanction is unavailable in search cases if the defect is not based directly upon article I, section 5. Article I, section 13 rights, insofar as expanded standing is concerned, apparently will be treated in the traditional, more limited manner.[45] The dicta of Justice Dennis in *State v. Bouffanie*[46] is rendered suspect:

> If the detention of a person for questioning without being advised of his rights and the reason for his arrest, as required by Article I, § 13, or the compulsion of him to give evidence against himself in contravention of Article I, §§ 13 and 16, constitutes an unreasonable seizure of his person, anyone adversely affected by the seizure has standing to raise its illegality.[47]

While the court does not directly address Justice Dennis' statement in *Bouffanie*, it appears the court is unwilling to hold that a seizure of the person is unreasonable for failure to comply with article I, section 13 protections.

In *State v. Roubion*,[48] a unanimous court held that the unintentional failure of an affiant to sign an affidavit for a warrant when the affiant was sworn and known to the magistrate did not merit the exclusionary sanction. Interestingly, the court looked to the legislative scheme and concluded, "we find no *legislative* intention to exclude evidence derived from a search warrant because of the very limited imperfection . . . ."[49] Aside from the new electronic surveillance act,[50] this writer is unaware of any Louisiana legislation which addresses the exclusionary issue.

These cases reflect the absence of a fully developed rationale for

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44. "[A]ny person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality . . . ." LA. CONST. art. I, § 5.

45. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128 (1978); United States v. Alderman, 394 U.S. 165 (1969); State v. Mitchell, 278 So. 2d 48 (La. 1973).

46. 364 So. 2d 971 (La. 1978).

47. *Id.* at 976.

48. 378 So. 2d 411 (La. 1979).

49. *Id.* at 414 (emphasis added).

50. 1980 La. Acts, No. 241, *adding* LA. R.S. 15:1307.

the exclusionary sanction. Until such is developed the level of predictability must be less than great. An effective and fair system of law need not, and perhaps should not, have a simplistic automatic exclusionary rule, whether it relate to statutory, federal or state constitutional rights. It is imperative, however, that the underlying reasons for exclusionary policy be directly, frankly, and carefully addressed if a rational exclusionary policy is to be developed.

ANONYMOUS TIPS AND SEIZURES

In *Adams v. Williams*,[51] the most expansive treatment by the Supreme Court of the *Terry*[52] limited seizure rationale, Justice Rhenquist, writing for the 6-3 majority upholding a seizure based upon an informant's tip, carefully noted, "[t]he informant was known to him personally and had provided him with information in the past. This is a stronger case than obtains in the case of an anonymous telephone tip."[53]

The Louisiana Supreme Court has now been called upon to determine the validity of a seizure (stop) based upon such an anonymous telephone tip. *State v. Jernigan*[54] presents a situation where the police received a telephone call from an unidentified caller who said that a black male wearing a yellow shirt and blue pants and armed with a hand gun was sitting at a named bar. An officer was notified by radio and proceeded to the bar where he observed only one person who met the description. The officer then "directed him to stand up, and immediately conducted a frisk."[55] He felt a gun and removed it.

The court recognized that the question previously had not been addressed by it. With a rather brief discussion, the seizure was upheld. The court noted, "our research reveals that most of the federal circuit courts of appeal and state appellate courts, including that of the District of Columbia, which have had occasion to consider the propriety of investigatory police action based upon information from an anonymous source have approved the actions of the law enforcement officers" and concluded, "[w]e likewise hold that an anonymous tip can provide the basis for an investigatory stop."[56]

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51. 407 U.S. 143 (1972).

52. Terry v. Ohio, 392 U.S. 1 (1968). *See* State v. Saia, 302 So. 2d 869 (1974); *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Pretrial Criminal Procedure*, 36 LA. L. REV. 575 (1976). *See also* Ybarra v. Illinois, 100 S. Ct. 338 (1979).

53. 407 U.S. at 146.

54. 377 So. 2d 1222 (La. 1979).

55. *Id.* at 1224.

56. *Id.* at 1225. One might question whether some of the cases do support the broad holding in *Jernigan*. The salient factors in these cases briefly are noted here.

Jernigan's significance is that it established that an anonymous tip may be the basis for a stop and immediate frisk. No information other than the unremarkable corroboration that a black man was in a bar wearing a yellow shirt and blue pants was present. There was an absence of information indicating that the information given was

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See id. at 1225 n.3. *See, e.g.*, United States v. Legato, 480 F.2d 408 (5th Cir. 1978); (anonymous caller informs of man with bomb in orange shopping bag; after announcement of bomb threat *unusual behavior* with bag is noticed and there is an *attempted escape* with the bag; suspect was flying under a false name; suspects denied knowing each other; one of the two person consented to the search and the other denied any connection therewith); United States v. Gorin, 564 F.2d 199 (4th Cir. 1977) (*informant present* when police responded to call and confirmed description; detective identified self and asked defendant to get out of car; *saw gun before seizing the weapon*); United States v. Hernandez, 486 F.2d 614 (7th Cir. 1973) (police radio bulletin informed that *particularly described car* carried *illegal aliens*; officer *stopped car* and asked for license and then the persons in the back of the car were in plain view); United States v. Unverzagt, 424 F.2d 396 (8th Cir. 1970) (caller *identified himself* and informed that particularly described man was selling postal money orders at certain bar; inspector stopped the defendant and the defendant *displayed his gun before the officer searched*); People v. Lopez, 123 Cal. Rptr. 855 (1975) (anonymous informer told police that described individual was selling marijuana at a designated place; *defendant invited police into his apartment* where officers smelled and saw marijuana; defendant *consented* to the search); United States v. Walker, 294 A.2d 376 (D.C. App. 1972) (anonymous informer told that a certain named man with an artificial leg had a gun; officers found that certain individual fitting the description was in the designated location and confirmed that he had an artificial leg; officers frisked for weapons and found the gun); State v. Hetland, 366 So. 2d 831 (Fla. App. 1979) (police informed by car radio that *named individual* was proceeding to shoot someone; defendant confirmed that his name is the one given to the officers; officers asked defendant to stand and the *gun was seen before the search occurred*); State v. Hobson, 95 Idaho 920, 523 P.2d 523 (1974) (anonymous informant told that certain individual possesses illegal drugs; police stopped *car* and saw pharmaceutical bottles and also that defendant was attempting to hide them; defendant voluntarily gave the drugs over to the police); People v. McElroy, 44 Ill. App. 3d 1047, 358 N.E.2d 1180 (1976) (radio informed police that a particularly described woman was carrying a gun; officers asked if they could search her purse; defendant became hostile and was arrested; defendant admitted that she possessed a gun before the police searched); Commonwealth v. Anderson, 366 Mass. 394, 318 N.E.2d 834 (1974) (officer received note that informant *personally observed* an armed man; defendant fit description and *acted suspiciously* and attempted to do away with the bag; officer stopped the defendant and the bag fell and the contents fell out); People v. Tooks, 403 Mich. 568, 271 N.W.2d 503 (1978) (informant told the police in person that *he had observed* defendant with a gun; officer frisked the defendant and seized the gun); State *ex rel* H.B., 75 N.J. 243, 381 A.2d 759 (1977) (radio dispatch that a described individual possessed a gun; defendant was the only one in fifteen persons at the designated place that fit the description; officer frisked for gun and seized it); People v. Kinlock, 43 N.Y.2d 832, 373 N.E.2d 372 (1977) (anonymous call informed that certain *named individual* was carrying a gun; defendant confirmed this was his name; officer frisked and seized the gun); State v. Chatmon, 9 Wash. App. 741, 515 P.2d 530 (1973) (the evidence was *suppressed*; informant *personally* entered police station and told officer that he had observed individual with marijuana under his hat; officer was informed by police station that there was sufficient cause to stop the vehicle; the marijuana was then in plain view.

based upon personal knowledge rather than rumor or unreliable hearsay. *Terry*[57] required that "the police officer . . . be able to point to specific and articulable facts which, taken together with rational inference from those facts reasonably warrant that intrusion." That requirement appears to be relaxed.

Apparently of critical significance was that the informant's tip described a crime (possession of a concealed weapon) which the court considered "presented an immediate danger to the public, a *danger aggravated by its occurence in an occupied alcholic beverage outlet*."[58] It appears that the *Jernigan* rationale is limited to seizures involving dangerous weapons in bars. It may be that is is limited to neighborhood bars rather than restaurant-bars where violent conduct is less frequent. These questions, however, remain.

In *State v. Bolden*,[59] again a seizure (stop) was upheld based upon information given by an informant. While the informant might be characterized as anonymous because his name was not acquired, unlike the informant in *Jernigan* the informant here accompanied the police in their investigation. The informant personally advised police that the defendant was at a bar with a sawed-off shotgun stuck in the front of his pants. He was described in more detail, including the information that he was wearing a black full-length leather coat, a black hat, a vest, and tan or gold pants. The informant advised that the shotgun was in the right side of his trousers. When the officer arrived at the bar it was closed, but one officer knew that the bar's patrons usually went to a café after the bar's closing. They waited five minutes before defendant arrived, got out of a car and walked away from the cafe. The defendant was stopped and frisked. Upon pushing the unbuttoned coat aside, the butt of the shotgun could be seen. Justice Watson, writing for the court, acknowledged *State v. Jernigan* but emphasized that "[i]nformant's tips vary greatly, however, in their value and reliability, rendering impossible one rule to cover every situation."[60]

Bolden appears to be more limited and more appropriate than *Jernigan*. Unlike *Jernigan*, the informant personally was willing to come forward and to accompany the officers. A person who is willing to come forward is usually considered more likely to be credible than an anonymous tipster.[61] Also, the distinctive apparel made it

57. 392 U.S. at 21.

58. 377 So. 2d at 1225 (emphasis added).

59. 380 So. 2d 40 (1980). *See* Note, *State v. Bolden: Louisiana's Anomalous Reliance on the Anonymous Informant*, 41 LA. L. REV. ___ (1981).

60. *Id.* at 42.

61. See note 72, *infra*.

unlikely that the wrong person would be confronted by police. Finally, in *Bolden* the officer is more reasonably assured that the information is first-hand, although better practice would be affirmatively to establish first-hand knowledge.

The court, however, did not express a distinction from *Jernigan* based on these features. Some might suggest that the protections in *Bolden* were less than the protections in *Jernigan*, even though the informant in *Bolden* was willing to come forward. The fact that in *Jernigan* a disinterested party, the officer accepting the information by telephone, was initially involved, rather than as in *Bolden* where the person initially involved conducted the seizure, might be considered more protective. It appears to this writer, however, that in terms of individual privacy protections, a person who comes forward and is willing personally to inform a police officer is more likely to tell the truth than one who simply makes such an allegation over the telephone. It is also more likely that the person will have first-hand information rather than report based upon rumor. The concern that the officer on the street will fabricate a *Bolden*-type informant is valid, but the problem of the officer fabricating facts is not, as a practical matter, well-controlled in any of the informant probable cause situations.[62]

In both cases it is clear that the intrusion is limited to circumstances involving dangerous weapons (or a "particularly" dangerous weapon as in *Bolden*) and a public setting involving bars. Obviously, the court is aware of the serious danger of firearms in bars and must have considered that as a significant factor in finding the justification for the intrusion. The *Jernigan-Bolden* rationales, however, properly should neither be expanded into other possessory offenses nor expanded to constitute probable cause.[63]

ELECTRONIC SURVEILLANCE WARRANTS

The 1980 Regular Legislative Session enacted for the first time legislation authorizing limited electronic surveillance.[64] Since 1968, with the enactment by Congress of the Omnibus Crime Control and Safe Streets Act,[65] states were required to enact legislation before

62. *See, e.g.*, State v. Cox, 330 So. 2d 284 (La. 1976); State v. Giordano, 284 So. 2d 880 (La. 1973); State v. Melson, 284 So. 2d 873 (La. 1973). *See also The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Pretrial Criminal Procedure*, 37 LA. L. REV. 535, 539 (1977).

63. This case should not be construed as changing the requirements of probable cause in warrant or more serious intrustion ("arrest") cases. *See, e.g.*, State v. Normand, 380 So. 2d 1207 (1980) (unanimous *per curiam*).

64. 1980 La. Acts, No. 241, *adding* LA. R.S. 15:1301-12.

65. 18 U.S.C. §§ 2510-20 (1976).

state courts could authorize electronic surveillance.[66] Unauthorized interceptions carried federal criminal sanctions.[67] Because the federal statute requires substantial conformity with it,[68] the state statute is patterned in large part after the federal. While the state act parallels the federal act in many ways, the state provision is much more restrictive and protective of privacy interests. It is appropriate here briefly to indicate the distinctive features of the state act, particularly as they relate to warrant applications.

Investigative and law enforcement officers are narrowly defined in the Act to mean employees of the Department of Public Safety who in the normal course of their duties are investigating the enumerated drug offenses and attorneys authorized to participate in prosecutions of such offenses.[69] A warrant application may be made only when the district attorney and attorney general concur.[70] The application is presented to a district judge who must be the senior judge or a judge designated in advance by majority vote of the court to consider applications for electronic surveillance warrants.[71] This limitation is designed to eliminate "judge-shopping" and to encourage the development of expertise in the new and detailed procedure by the authorized judges.

Perhaps the most significant deviation from the federal statute relates to the probable cause requirement itself. While the statute includes the detailed probable cause statement and warrant procedure of the federal act,[72] it goes further to attempt to eliminate possible abuses by the use of informants. If statements of an identified or unidentified informant are relied upon to establish probable cause for the offense, the application must set forth the factual basis for the applicant's belief that the informant is credible and facts indicating that the information was obtained by him in a reliable manner. This appears to add nothing to present requirements for the unidentified informant but more clearly requires a statement relating to credibility of the identified informant; it may be that a person's willingness to be identified is sufficient to establish such credibility.[73] Facts relating to how the person obtained the informa-

66. 18 U.S.C. § 2516(2) (1976).
67. 18 U.S.C. §§ 2511-12 (1976).
68. 18 U.S.C. § 2516(2) (1976).
69. LA. R.S. 15:1302(5) (Supp. 1980).
70. LA. R.S. 15:1308 (Supp. 1980).
71. LA. R.S. 15:1302(7) (Supp. 1980).
72. 18 U.S.C. § 2518 (1976).
73. *See, e.g.*, State v. Searle, 339 So. 2d 1194 (La. 1976); State v. Devall, 296 So. 2d 802 (La. 1974); State v. Paciera, 290 So. 2d 681 (La. 1974); *The Work of The Louisiana Appellate Courts for the 1974-1975 Term—Pretrial Criminal Procedure*, 36 LA. L.

tion are, of course, necessary whether the informant be identified or not.[74]

The identified or unidentified informant must then be presented to the judge and sworn and examined by the judge to determine if the written statements are true.[75] This procedure, while requiring the judge to personally examine the informant, maintains the "four-corners" warrant doctrine.[76] The provision also clearly establishes that the privileged character of the identity of an informant is not affected. Thus, to the extent a privilege for the disclosure of an unidentified informant exists, this provision does not change it.[77]

Perhaps the most difficult warrant problem presented by the Act relates to the apparent legislative abhorrence of "hearsay statements." While hearsay concerns are to some extent alleviated by requiring the informant to appear before the court, the legislation also limits the use of "hearsay statements" to establish critical facts relating to probable cause. Facts relating to the offense itself, that a particular communication will be intercepted, and that the particular facilities will be used, must all be established exclusive of "hearsay statements."[78] "Hearsay statements" are not defined; the legislation is thus unclear on whether it should be construed literally or construed to mean inadmissible or unreliable hearsay. Since much hearsay is admissible at the trial itself, it may not be appropriate to strictly construe the term. On the other hand, the legislature has expressed a strong concern about the use of informants and hearsay.

The legislature also expressed a strong concern about intercepting lawyers' communications. The Act provides that the judge must find that the interception "is not reasonably expected to intercept privileged communications."[79] It thus may be impossible to lawfully intercept a practicing attorney's office communications where it reasonably can be anticipated that privileged communications will result.

Limiting the use of electronic surveillance to Department of Public Safety personnel and the crimes to drug offenses may present some difficult problems when, while engaged in an authorized

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REV. 575, 579-83 (1976); *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Pretrial Criminal Procedure*, 37 LA. L. REV. 535, 538 (1977).

74. *See, e.g.*, State v. Wells, 253 La. 925, 221 So. 2d 50 (1969); Nathanson v. United States, 290 U.S. 41 (1933).

75. LA. R.S. 15:1310B(1) (Supp. 1980).

76. *See, e.g.*, LA. CODE CRIM. P. art. 162; State v. Case, 363 So. 2d 486 (1978).

77. *See, e.g.*, State v. Melson, 284 So. 2d 873 (La. 1973).

78. See LA. R.S. 15:1310A(2); 15:1310C(1), C(2), C(4) (Supp. 1980).

79. LA. R.S. 15:1310C(5) (Supp. 1980).

intercept, other offenses are discovered. The Act does present limited guidance. *Disclosure* of information acquired by interception is restricted to that obtained which "relates directly to the offense for which the order was granted."[80] However, an officer may *use* such information "to the extent such use is appropriate to the proper performance of his official duties."[81] Additionally, he is authorized to *disclose* information while giving testimony in any criminal proceeding.[82] However, the interception may be "used" (i.e. "disclosed")[83] through testimony apparently only when authorized or approved by a judge in whose district the interception took place when the judge finds that the contents were "otherwise" (but for the crime toward which the intercept was directed) intercepted in accordance with the chapter.[84] Thus, when evidence of offenses other than the enumerated drug offenses is obtained through electronic surveillance, the Act severely limits disclosures and requires careful treatment to avoid exclusion.

Significant civil[85] and criminal[86] sanctions are provided for violation of the Act. From an evidentiary and criminal procedure perspective it is most noteworthy that the Act provides the broadest exclusionary sanction known to Louisiana law. If the disclosure violates the Act, the contents of the communication and evidence "derived therefrom" may not be received in evidence in any "trial, hearing or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof . . . ."[87] The legislature has thus mandated an exclusionary sanction which goes beyond that of the fourth amendment by applying it to grand jury, civil, legislative, and administrative proceedings.

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80. LA. R.S. 15:1309A (Supp. 1980).
81. LA. R.S. 15:1309B (Supp. 1980).
82. LA. R.S. 15:1309C (Supp. 1980).
83. Although the term "used" is employed, in context it appears to mean used by testimony which is equivalent to disclosure.
84. LA. R.S. 15:1309E (Supp. 1980).
85. LA. R.S. 15:1312 (Supp. 1980).
86. LA. R.S. 15:1303A(4) (Supp. 1980); LA. R.S. 15:1304A (Supp. 1980).
87. LA. R.S. 15:1307 (Supp. 1980).