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PRETRIAL CRIMINAL PROCEDURE

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AUTOMOBILE SEARCHES

Two series of cases dealing with the "intolerably confusing"[1] fourth amendment issues raised by searches related to automobiles are noteworthy. In the first, the issue of the scope of a probable cause search of automobiles and containers therein is addressed. In the second, the courts examine the permissible scope of a search incident to the arrest of recent occupants of automobiles.

The probable cause search cases, for the time being, have culminated in *United States v. Ross*.[2] Having probable cause to search the vehicle for contraband, the police opened the trunk and found, then subsequently opened, a "lunch-type" paper bag which contained heroin. The police also unzipped a red leather pouch and found cash. On rehearing *en banc*, the District of Columbia Circuit held that the opening of both the pouch and the brown bag were constitutionally prohibited. The majority concluded that the pouch and the bag were entitled to the same protections afforded luggage in *Arkansas v. Sanders*.[3] The United States Supreme Court reversed and in so doing recognized that its decision was "inconsistent with the disposition in *Robbins v. California* and the portion of the opinion in *Arkansas v. Sanders* on which the plurality in *Robbins* relied."[4]

In *Ross*, the court concluded that the scope of a warrantless search of an automobile is "no broader and no narrower than a magistrate could legitimately authorize by warrant."[5] The *Carrol v. United States*[6] "automobile exception" was applied to the scope issue without reference to there being a factual basis for the reasons for the exception. Thus, even though there are no traditional mobility problems with containers inside a stopped automobile and even though there traditionally has not been a lesser expectation of privacy in containers (such as brief cases, envelopes, and suitcases), no warrant was deemed

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1. Robbins v. California, 453 U.S. 420, 430 (1981) (Powell, J., concurring).
2. 102 S. Ct. 2157 (1982).
3. 442 U.S. 753 (1979).
4. 102 S. Ct. at 2172.
5. *Id.*
6. 267 U.S. 132 (1925).

necessary to justify a further search of containers in the automobile, if it was otherwise within the reasonable scope of a probable cause search. The court concluded, "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."[7]

The Court distinguished *United States v. Chadwick*[8] and *Arkansas v. Sanders* by noting that "in neither . . . did the police have probable cause to search the *vehicle* or anything within it except the footlocker in the former case and the green suitcase in the latter."[9]

The *Ross* resolution was presaged by the Louisiana Supreme Court in *State v. (Jimmie Lee) Hernandez*.[10] Justice Lemmon, writing for the five member majority, found *Robbins v. California*[11] not to be controlling. In so doing, the court distinguished between "container cases" and "automobile cases." Justice Lemmon defines those terms in the following manner:

> In the "container cases" (those in which the officers have probable cause to search only a *particular* container, whether seized from a movable vehicle or elsewhere), the validity of the search of the container should be determined without reference to the coincidental fact that the container was seized while located in a movable vehicle. But in "automobile" cases (those in which the officers have probable cause to search the entire vehicle), the officers may search *any* portion of the automobile and *any* container, lawfully *seized* during the lawful search of the automobile, which is reasonably likely to contain contraband.[12]

In (*Jimmy Lee*) *Hernandez*, the search of a plastic box was determined to be an "automobile case" because the probable cause facts did not focus on any particular type of container.[13]

The *Hernandez-Ross* rationale appears to make the appropriateness of a warrantless search and seizure for contraband within an automobile turn on the nature of the probable cause. If the facts indicate that the contraband is in a particular container, a warrant appears to be required, absent exigent circumstances or consent. If the

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7. 102 S. Ct. at 2172.
8. 433 U.S. 1 (1977).
9. 102 S. Ct. at 2167 (emphasis added).
10. 408 So. 2d 911 (La. 1981), *cited in Ross*, 102 S. Ct. at 2161 n.4. *See* State v. Bible, 406 So. 2d 138, 141 (La. 1981) (Lemmon, J. dissenting).
11. 453 U.S. 420 (1981).
12. 408 So. 2d at 917.
13. *Id.*

facts indicate only that the contraband may be in the vehicle as a whole, an officer may search without a warrant any area where the contraband reasonably may be found. Thus, less precise information provides a greater ability to search without a warrant.

Defendants may find it difficult to prove that there was probable cause to search a container, but not the vehicle. The defendant is presented with the dilemma of demonstrating that the state had better information than the state itself contends. This problem does not arise with warrant applications, since the prior information is thereby preserved. While the United States Supreme Court directly stated that the scope issue is treated the same as in a warrant case, the Louisiana Supreme Court has not directly addressed that aspect of the problem. More stringent scope of search standards may be adopted in nonwarrant cases in light of both the anomalous factual position in which the defendant is placed and the usual burden on the state to prove a warrant exception.

New York v. Belton[14] addressed the issue of a warrantless search of an automobile incident to the arrest of a recent occupant. In *Belton* the defendant was one of four persons in a vehicle stopped for speeding. The officers smelled marijuana and observed on the floor an envelope marked "Super Gold." All passengers were arrested for possession of marijuana. The envelope containing marijuana was opened. The officer then retrieved a leather jacket from the back seat and upon unzipping one of its pockets, found cocaine.

Even though there was not probable cause to search the jacket, because there was probable cause to arrest a recent occupant the Court upheld the search as incident to arrest, stating:

> We hold that when a policeman has made a (1) lawful custodial arrest of the occupant of an automobile, he may, (2) as a contemporaneous incident of the arrest, (3) search the passenger compartment of that automobile. . . . The police may also (4) examine the contents of any containers found within the passenger compartment . . . .[15]

The Court defined "container" as "any object capable of holding another object," including "closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing and the like", but not including the trunk.[16]

Significantly, the Court indicated that in order to establish a

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14. 453 U.S. 454 (1981).
15. *Id.* at 460 (citations omitted; parentheses and numbers added).
16. *Id.* at 460-61 n.4.

"workable rule,"[17] it would follow the approach adopted with respect to searches of the person: there need not "be litigated in each case the issue of whether or not there was present one of the *reasons* supporting the authority for a search."[18]

The Louisiana Supreme Court's treatment of nonprobable cause searches of automobiles and their contents has not followed the federal approach. In *State v. Crosby*,[19] decided after *Belton*, the court completely ignored the *Belton* decision and concluded that a search of the passenger compartment was not valid because of the state's failure to show a *factual necessity* to impound for an inventory search.[20] Justice Lemmon, in dissent, indicated that *Belton* was applicable.[21] In *State v. Blanchard*,[22] a pre-*Belton* decision, Justice Blanche, writing for the majority, rejected the *Belton* incident-to-arrest rationale and indicated the need for a factual justification of the reasons for the exception. After careful examination of the factual circumstances, he concluded that "[q]uite simply, the area which was searched was not within the defendant's immediate control from which he could have gained access to a weapon or destroyed evidence." Justice Blanche even suggested the state had a "simpler alternative. . . to ask the defendant to step away from the vehicle."[23]

This pre-*Belton* concern with factual justification has been continued after *Belton* in *State v. Zito*,[24] wherein the search was not deemed to be incident to arrest because the defendants had been handcuffed and removed to the police car. In *State v. (Michael) Hernandez*,[25] the court suggested that "the *Belton* rule can have no applications after an arrestee has been handcuffed and removed from the scene, foreclosing even the slightest possibilities that he could rearch for an article within the vehicle."[26] Justice Lemmon, joined by Justice Blanche, dissented based upon a determination that the facts would justify an inventory search. Justice Blanche, the author of *Blanchard*, suprisingly noted in regard to the *Belton* issue: "[W]hether the Louisiana Constitution is broader than the United States Constitution relative to Fourth Amendment principles is a question that the writer

17. *Id.* at 460.

18. *Id.* at 459 (emphasis added) (quoting United States v. Robinson, 414 U.S. 218, 235 (1973)). Apparently the Court is satisfied that there is a need if the search is "contemporaneous." The delay in time, of course, can also present disputed factual issues.

19. 403 So. 2d 1217 (La. 1981).

20. *Id.* at 1220.

21. *Id.* (Lemmon, J., dissenting).

22. 374 So. 2d 1248 (La. 1979).

23. *Id.* at 1250.

24. 406 So. 2d 167 (La. 1981).

25. 410 So. 2d 1381 (La. 1982).

26. *Id.* at 1385.

has not considered. . . . . [If it is] this writer feels that the Constitution is due for an amendatory change in the opposite direction."[27] Curiously, the majority had interpreted the Louisiana provision in the same manner as Justice Blanche in his earlier *Blanchard* decision. That is, the court simply looked at the record to see if the *actual facts* supported the reason for the incident to arrest exception. This willingness to look to the facts to determine if the reasons for the exception actually exist, rather than embracing the *Belton* per se fiction, is commendable because it assures that the reasons for the rule are factually present. Whether the court will continue this practice is uncertain.

The *Ross* and *Belton* lines of cases can coalesce factually and create issues not yet resolved. Rarely will a defendant carrying a container for which there is probable cause to search for contraband not also be subject to arrest based upon the same facts. If he is stopped in a vehicle and the officers have probable cause to search the container only, *Ross* and *(Jimmie Lee) Hernandez* would suggest a search warrant is necessary. However, if the search is deemed to be incident to an arrest and the container is in the passenger compartment, *Belton* would suggest a warrant is not necessary. The *(Michael) Hernandez, Zito,* and *Blanchard* cases would suggest a warrant is necessary unless the defendant was actually in a position to destroy evidence or obtain a weapon from the container.

United States v. Chadwick, contrary to *Belton*'s per se rule, indicated that an examination of the actual facts of each case was appropriate in container cases, even when associated with vehicles.

> Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.[28]

Application of the *Chadwick-(Michael) Hernandez* factual reality test, as opposed to the *Belton* fiction, provides a more satisfactory resolution in automobile cases. If this approach is followed, when there is a probable cause arrest of a recent occupant of a vehicle *and* probable cause to search only a container within the vehicle, a warrant is required unless there is a factual necessity to search incident to arrest.

If there is probable cause to arrest, but a full custody arrest does not take place prior to searching, the results appear even less cer-

27. *Id.* at 1387 (Blanche, J., dissenting).
28. 433 U.S. at 15.

tain. *Cupp v. Murphy*[29] indicates only a limited factually justified search is available absent a "formal arrest."[30] In *Cupp* the Court noted, "[W]e do not hold that a full *Chimel* search would have been justified in this case without a formal arrest and without a warrant."[31] A formal arrest or a warrant may be required to assure that the relevant probable cause facts are "frozen" at some specific point in time, so that realistic judicial supervision may take place.

Finally, there may be a need to distinguish searches incident to arrest in light of the nature of the items to be searched. If the arrest involves the possession of contraband in a container in the passenger compartment of a car, there should at least be a factual justification for the search to eliminate the issue of the arrest being a pretext for a warrantless search.

No doubt further developments in automobile related searches will continue to add confusion and inconsistencies. It may be that "bright lines" cannot be substituted for fundamental evaluation of individual and governmental interests in light of the facts of each case. A judicial system which allows parties fully to litigate the facts of "pain and suffering" resulting from an intersectional automobile collision should not be niggardly with realistic fact evaluation in connection with individual privacy protections.

WARRANTLESS ENTRY INTO HOME TO ARREST: STANDING

The United States Supreme Court in *Payton v. New York*[32] held that the fourth amendment requires an arrest warrant for a nonconsensual entry into an arrestee's home to make a routine felony arrest.[33] Subsequently, in *Steagald v. United States*,[34] agents entered the home of a person not the subject of their arrest warrant without consent or exigent circumstances. The Court held a search warrant was required by the Constitution.

Several interesting Louisiana cases have applied the *Payton-Steagald* doctrines. In *State v. Smith*[35] the Louisiana Supreme Court acknowledged the application of *Payton* and the parallel Louisiana Con-

29. 412 U.S. 291 (1973).

30. *Id.* at 296. A concern is to assure that the officer really had probable cause to arrest at the time of the search and that the probable cause to arrest is not a pretext to authorize a search.

31. *Id.* at 296.

32. 445 U.S. 573 (1980).

33. *See* State v. Brown, 387 So. 2d 567 (La. 1980), in which the Louisiana Supreme Court applied the *Payton* rationale in interpreting article 1, section 5 of the Louisiana Constitution.

34. 451 U.S. 204 (1981). *See* State v. Wolfe, 398 So. 2d 1117 (La. 1981).

35. 392 So. 2d 454 (La. 1981).

stitution doctrine but found the exigent circumstances exception applicable, stating: "[T]he present case presented the officers with exigent circumstances necessitating a prompt entry to secure the arrest of a dangerous felon."[36] *Smith* is particularly noteworthy because of language indicating that the court was not required to consider the retroactivity of *Payton*, since the defendant was not in his own home and would lack standing under the fourth amendment of the United States Constitution. The court went on to determine that *State v. Brown*,[37] which adopted the *Payton* rationale for the Louisiana Constitution, would not be applied retroactively.[38] However, the decision expressly noted that, with respect to the state constitution, "Smith had the right to raise the validity of Kelly's arrest only under Louisiana Constitution Article 1, Section 5 (1974)."[39]

In *State v. Barrett*[40] the court was faced directly with the expanded standing provision of article 1, section 5 of the Louisiana Constitution in a *Payton-Steagald* context. Officers with reliable knowledge of the existence of an arrest warrant entered the home of a third person without a search warrant as *Steagald* requires. Under the fourth amendment, the defendant lacked standing to object.[41] Under article 1, section 5, the court was presented with the question of whether the defendant was "adversely affected" by the unconstitutional entry. The court concluded, "[W]e are not prepared to say that, within the *meaning* and *purpose* of our constitutional provision, defendant was 'adversely affected' " by the illegal entry . . . so as to require suppression of the evidence seized from his *person*."[42]

Chief Justice Dixon dissented, relying upon the article 1, section 5 "adversely affected" language. Justice Dennis, who did not participate in the original hearing, dissented from the denial of rehearing on the same grounds as Justice Dixon in his dissent. Justice Lemmon concurred in the denial of rehearing, finding a reasonable exception to *Payton-Steagald* due to exigent circumstances created by the absence of probable cause to obtain a search warrant and the good faith attempt to verify the reliability of the information given by the informant. Interestingly, Justice Lemmon made no reference to his opinion in *State v. Smith*,[43] which assumes, in the *Payton* context, article 1, section 5 application.

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36. *Id.* at 457.
37. 387 So. 2d 567 (La. 1980).
38. *See also* United States v. Johnson, 50 U.S.L.W. 4742 (U.S. June 22, 1982).
39. 392 So. 2d at 458 n.4.
40. 408 So. 2d 903 (La. 1981).
41. *See* Rakas v. Illinois, 439 U.S. 128 (1978); United States v. Salvucci, 448 U.S. 83 (1980).
42. 408 So. 2d at 905 (emphasis added).
43. See text at notes 35-36, *supra*.

The standing question is not new.[44] The Louisiana Supreme Court has addressed it previously in the fourth amendment attenuation context.[45] It again seems, however, that the court's analysis may be easily misconstrued. To suggest that the defendant was not "adversely affected" by the unconstitutional search is unrealistic. Finding, however, that he was adversely affected does not require application of the exclusionary sanction. The court properly noted that the *defendant*'s privacy rights were not factually affected; there was a valid arrest warrant and a valid search incident to arrest; the arrest warrant would have authorized entry into the defendant's own home and search of his *person* incident to arrest. Additionally, while the third party's rights were violated, the nature of the violation *in this case* does not require the harsh exclusionary sanction, since the officers did not know who had leased the residence and there was no evidence of an unreasonable manner of entry.

If, however, the officers lacked an arrest warrant as well as a search warrant and without consent or exigent circumstances entered the home of a third party to effect the arrest, an exclusionary sanction would be more appropriate. In both instances the defendant is "adversely affected," but direct evaluation of the exclusionary remedy and its purpose should produce different analysis and result.

Article 1, section 5 standing analysis ought to be addressed in light of the purpose of the exclusionary sanction, which is the real issue. If the conduct in question is such that an exclusionary sanction will not promote privacy, nor deter unreasonable police conduct, nor sustain the integrity of the judicial process itself, then it should not be applied. The exclusionary sanction need not be applied automatically, even though a person is given the right to raise the issue and develop facts relating to the nature of the search, which is usually at least indirectly relevant to exclusionary policy. This approach, of course, does not make the analysis easier; it does require direct focusing on the reason for the rule or sanction.

In the *Steagald* context, the article 1, section 5 analysis will be even more complex than in the attenuation issue previously addressed by the court.[46] One might reasonably suggest that the exclusionary sanction should not apply when a defendant is arrested with an arrest warrant in the home of a third party, but without a search warrant, with respect to items found on his person. The issue becomes more difficult when other evidence is found. If evidence is seen in the home while the officers are effecting an arrest, competing prin-

44. *See* Lamonica, *Work of the Louisiana Appellate Courts for the 1976-77 Term—Pretrial Criminal Procedure*, 38 LA. L. REV. 516 (1978).

45. *See* State v. Culotta, 343 So. 2d 977 (La. 1976).

46. *See* Lamonica, *supra* note 44.

ciples arise. Traditionally, if an officer has the right to be in a place, his observations do not constitute a search. If circumstances make obtaining a warrant impractical, the seizure is valid.[47] In the *Steagald*-article 1, section 5 context, this raises difficult policy issues. The evidence found on the premises cannot be used against the third party in light of *Steagald*. If Louisiana courts find that the exclusionary sanction is inappropriate under article 1, section 5 in circumstances like those in *Barrett*, it need not also allow use of the evidence found on the *premises* of the third party against the subject of the arrest warrant. At this point, acknowledging that the person is in fact adversely affected, the court's analysis should be turned to the propriety of the exclusionary sanction. After thorough consideration, with the assistance of adversary counsel, the court may determine that the evidence should be excluded, since the reasons for requiring a search warrant are more clearly present than in the case where a search of the person pursuant to an arrest warrant takes place.

Again, courts should not suggest that in one case the person is "adversely affected" and in the other he is not. Rather, the court should articulate why in one case exclusionary policy is appropriate and in the other it is not. This direct analysis should promote a reasonable and understandable protection of privacy interests.

DETENTION OF OCCUPANTS WHILE EXECUTING SEARCH WARRANT

The ability to detain an occupant of a residence while executing a search warrant for contraband was considered in *Michigan v. Summers*.[48] The United States Supreme Court initially determined that "[t]he detention of one of the residents while the premises were searched, although admittedly a significant restraint on liberty, was surely less intrusive than the search itself . . . [and] 'substantially less intrusive' than an arrest."[49] The court then concluded that "it is constitutionally reasonable to require [a] citizen to remain while officers execute a valid warrant to search his home."[50] The holding is limited to the detention of occupants of the premises during *warrant-authorized* searches for *contraband*. The Court specifically disclaims an indication of whether such a detention would be justified in searches for evidence other than contraband.[51] It also does not indicate a willingness to relax the requirement announced in other contexts that detention of a person be justifiable by articulable facts.[52]

47. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971).
48. 452 U.S. 692 (1981).
49. *Id.* at 701-02 (footnote omitted).
50. *Id.* at 705 (footnote omitted).
51. *Id.* at 705 n.20.
52. *Id.* at 699 n. 9; *see also id.* at 695-96 n.4.

The Court appears to suggest that when there is a warrant to search a residence for contraband, the limited seizure of a resident during a reasonable search is itself reasonable. Stated more traditionally, one could suggest that the articulable fact that the person is an occupant of a residence in which there is a prior judicial determination of probable cause to believe contraband is located, is sufficient to justify a temporary detention or seizure of the person.

The Court did not flush out the limits of its decision.[53] One question not reached in *Summers*, "whether a search warrant for premises includes the right to search persons found there,"[54] was addressed by the Louisiana Supreme Court in *State v. Beals*.[55] Beals was the sole resident of the premises. The court, speaking through *ad hoc* Justice Hall, reached a narrow result:

> [W]here a warrant to search a residence for *contraband* is issued on probable cause based on information that the *occupant* of the residence participated in the sale of drugs at the residence three days prior to the issuance of the warrant, the reasonable scope of the warrant extends to a *search* of the *pockets* of the *outer clothing* of the *resident*.[56]

Justice Lemmon, concurring, properly noted that there was probable cause to arrest the defendant and thus to search incident to arrest. However, Beals apparently was not arrested but simply "detained."[57] In *State v. McDonald*[58] the court approved the limited search of outer clothing when the warrant particularly identified the person who was the object of the search.

These cases appear to authorize searches of the person incident to execution of a search warrant—not a traditional exception to the

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53. The Court did not consider whether the same result would be reached in a case involving a true "visitor," an administrative warrant, a nonresidential setting, or noncontraband evidence. In Ybarra v. Illinois, 444 U.S. 85 (1979), the Court developed a "special connection with the premises" limitation in connection with a *search* warrant for a public tavern.

54. 452 U.S. at 695.

55. 410 So. 2d 745 (La. 1982).

56. *Id.* at 748-49 (emphasis added).

57. Justice Lemmon cited Cupp v. Murphy, 412 U.S. 291 (1972), which recognized a limited right to search when there was probable cause to arrest even though an actual full custody arrest did not take place. The *Cupp* Court was unwilling to say that anytime there was probable cause to arrest, a search "incident to arrest" could take place even though no actual full custody arrest was effected. A similar concern that there will be an after-the-fact determination of probable cause or that there will be a search "incident to arrest" even though there is no arrest prior to the search is found in the *Beals* situation, even where there is probable cause to arrest. See discussion in text at note 29, *supra*.

58. 390 So. 2d 1276 (La. 1980).

warrant requirement. In both instances there appeared to be probable cause to arrest due to the nature of the search for contraband, but no actual arrest was made until after the *limited* search of the pockets of the person's outer clothing. In neither case, however, did the court determine that probable cause to arrest existed or was necessary to justify the limited search of the persons on the premises while executing a valid warrant. This, therefore, appears to be a new authorization for search of the person.

RIGHT TO COUNSEL DURING INTERROGATION

The nature of waiver of counsel has been amplified in two recent Louisiana cases.[59] In *State v. Matthews*,[60] the court, relying upon article 1, section 13 of the Louisiana Constitution, stated that waiver of counsel for interrogation was ineffective when (1) unknown to the defendant, (2) an identified attorney is actually available and (3) seeking an opportunity to assist (4) but the police do not inform the defendant of that fact. The court continued to emphasize that it did not "hold that an arrested person, *not yet indicted or formally charged* with the crime, cannot voluntarily and after proper warnings waive consultation with counsel and make voluntary statements which will be admissible against him."[61]

Justice Marcus, speaking for a unanimous court in *State v. Trevathan*,[62] cited *Matthews* with approval and found that the state had violated the defendant's right to counsel under the sixth amendment of the United States Constitution. The defendant, who had just turned seventeen years of age, upon being arrested for murder, retained counsel who advised officers not to interrogate his client or take him to the scene of the crime. Counsel's instructions were not followed. Significantly, the court did not find it necessary to determine whether the officer ignoring the instructions had knowledge of them or acted in good faith, since "a defendant is entitled to deal with the police as a single entity."[63] These cases commendably enhance the requirement that law enforcement officers act in a professional manner in adhering to the reasonable requests and expectations of counsel with respect to interrogation of a client. The statement in *Trevathan* that the police may be dealt with as a single entity places a strict duty on law enforcement officers to assure that reasonable requests of counsel are respected.[64]

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59. *See also*, United States v. Henry, 447 U.S. 264 (1980).
60. 408 So. 2d 1274 (La. 1982).
61. *Id.* at 1278.
62. 414 So. 2d 316 (La. 1982).
63. *Id.* at 319 (citations omitted).
64. *See* Lamonica, *supra* note 44, at 528.

In the related area of *Massiah*[65]-sixth amendment counsel rights arising after formal initation of proceedings, the United States Court of Appeals for the Fifth Circuit has continued to adhere to a stringent standard. In *Snead v. Stringer*,[66] the mayor of a city was under indictment and had retained counsel. However, he continued to serve as mayor. Over the telephone, he made an inculpatory response to the district attorney, which was used at trial. The state courts rejected *Massiah*-based error because they found that the statement was volunteered.[67] The Fifth Circuit, in an unpublished opinion, affirmed the decision of the district court. The district court had granted habeas corpus relief because "the securing of an incriminating statement from a defendant who was represented by counsel after indictment in the absence of presence of defense counsel or a waiver thereof is a deprivation of such a defendant's right to counsel as described in *Massiah v. United States*."[68]

The dissent of three justices of the United States Supreme Court on application for certiorari by the state may indicate a changing attitude toward *Massiah*. The dissenters considered the fact that the statement was *volunteered* to be critical and an elimination of *Massiah* error. There was no articulated concern with whether, under the sixth amendment, it is appropriate for the state to communicate with a defendant under circumstances where it is reasonable to expect to illicit a response without an affirmative waiver of counsel. The dissenting justices appear to be willing to assume that a "volunteered" statement implicitly involves a waiver of counsel and are willing to look at all of the factual circumstances to determine if waiver has taken place.[69] This line of thought may effect a dramatic change in the *Massiah* doctrine. It is noteworthy that the justices who have advocated "bright line" tests in other areas feel very uncomfortable with such a test in the right to counsel context.[70]

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65. Massiah v. United States, 377 U.S. 201 (1964).

66. 454 U.S. 988 (1982) (mem.) (three justices dissenting), *denying cert. to* 640 F.2d 383 (5th Cir. 1981).

67. Stringer v. State, 372 So. 2d 378, 382 (Ala. Crim. App. 1979).

68. 454 U.S. at 992 (quoting the opinion of the United States District Court for the Northern District of Alabama).

69. *See* State v. Huntley, 418 So.2d 538 (La. 1982). Much emphasis was placed on the noncoercive voluntary nature of the interrogation, contrary to prior *Massiah*-based case analysis.

70. *See, e.g.*, Robbins v. California, 453 U.S. 420 (1981); New York v. Belton, 453 U.S. 454 (1981); Rosales-Lopez v. United States, 451 U.S. 182 (1981); Rakas v. Illinois, 439 U.S. 128 (1978).