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# Louisiana's Right to Counsel in Light of *Moran v. Burbine*

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## Louisiana's Right to Counsel in Light of *Moran v. Burbine*

The United States Supreme Court in *Moran v. Burbine*<sup>1</sup> held that an accused does not have to be told of the presence of his attorney because it does not affect the voluntary and knowing waiver of his *Miranda* rights.<sup>2</sup> In contrast, the Louisiana Supreme Court has found<sup>3</sup> that deception<sup>4</sup> as to the availability of an attorney renders a defendant's statements inadmissible. This note will consider whether Louisiana courts will choose to follow the rationale in *Moran* or whether they will strictly adhere to prior decisions on the basis of the Louisiana Constitution and statutes in order to remain unaffected by the *Moran* decision.

First, *Moran v. Burbine* will be analyzed, emphasizing the right to counsel aspect of the fifth<sup>5</sup> and sixth<sup>6</sup> amendments of the United States Constitution. Then, Louisiana's present provisions concerning the right to counsel under both the United States and Louisiana constitutions will be addressed. Finally, the possible responses of Louisiana courts to the *Moran* opinion will be investigated, giving emphasis to the Louisiana Constitution and certain statutory provisions.

### *Moran v. Burbine*

Brian Burbine was arrested by the Cranston, Rhode Island police in connection with a breaking and entering charge. A Cranston detective had learned two days earlier that a man named "Butch" (which was later discovered to be Burbine's nickname) was being sought for a murder in Providence, Rhode Island. Burbine's sister, without the defendant's knowledge, contacted the office of the public defender to ask for assistance by previously assigned counsel.<sup>7</sup> When this attorney could not be contacted, Ms. Munson, an assistant public defender, was informed

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1. 106 S. Ct. 1135 (1986).

2. *Id.* at 1137.

3. *State v. Matthews*, 408 So. 2d 1274 (La. 1982), and *State v. Trevathan*, 414 So. 2d 316 (La. 1982), are two examples of the Louisiana court's present position. Other opinions will be expounded on in this note.

4. The writer recognizes that deception is a broad term; however, for purposes of this note, deception will be limited to the relation touching on the attorney and client with regard to the client's fifth and sixth amendment right to counsel.

5. U.S. Const. amend. V.

6. U.S. Const. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

7. *Moran v. Burbine*, 106 S. Ct. 1135-39 (1986).

of the telephone call by the defendant's sister. Ms. Munson then called the Cranston police station and explained to someone in the detective division that Brian Burbine was being represented by an attorney and that, in the event that he was to be questioned or placed in a line-up, she would act as his legal counsel. An unidentified person told her that Burbine would not be questioned or put through a line-up and that they were through with him for the night.<sup>8</sup> That same night a signed confession was obtained from Burbine after he waived his *Miranda* rights.<sup>9</sup>

*United States Fifth Amendment Right to Counsel Claim*

The majority found that Burbine had validly waived his right to remain silent and his right to have counsel present, finding that the voluntariness of the waiver was not at issue.<sup>10</sup> The dissent forcefully disagreed, citing numerous state court opinions in support of its finding that "attorney communication to the police about the client is an event that has direct bearing on the knowing and intelligent waiver of constitutional rights."<sup>11</sup> The Court of Appeals for the First Circuit<sup>12</sup> had noted that intentional "or reckless misleading" of counsel who displays a legitimate and professional interest in his client and expresses to the police a willingness to be present at custodial interrogation of the accused, in addition to the lack of communication by the police of the attorney's desire to confer with the suspect, "is more than just one factor in the calculus of waiver. The combination of these situations clearly vitiates any claim that a waiver of counsel was knowing and voluntary."<sup>13</sup> The court of appeals had found that the police department's failure to inform the defendant of the telephone call from Munson constituted intentional "or reckless irresponsibility."<sup>14</sup> The *Burbine* majority recognized that police trickery could have voided the defendant's waiver; however, the Court found that the failure to inform Burbine of the telephone call was not the type of "trickery" that will vitiate a waiver's validity.<sup>15</sup> On the other hand, Justice Stevens stated in dissent that there can be no constitutional distinction between a deceptive misstatement and a concealment by the police of the critical fact that counsel secured by the defendant or his family has offered assistance,

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8. *Id.*

9. *Id.* at 1141.

10. *Id.*

11. *Id.* at 1159.

12. *Burbine v. Moran*, 753 F.2d 178 (1st Cir. 1985).

13. *Id.* at 187.

14. *Id.* at 185.

15. *Moran*, 106 S. Ct. at 1142.

either by telephone or in person.<sup>16</sup> *Miranda* clearly condemns trickery or threats that would cause a defendant to make an unwise waiver of his rights, even when he fully understands those rights.<sup>17</sup>

The critical determination is whether the suspect's waiver of his rights can be induced or elicited by forces outside of the interrogation room. Justice O'Connor's majority opinion stated that events happening outside of the suspect's presence "and entirely unknown" to him have no effect on his ability to understand and knowingly relinquish a constitutional right.<sup>18</sup> Justice O'Connor did acknowledge that the additional information of the fact of the attorney's presence would have been useful to Burbine and even might have affected his decision to confess.<sup>19</sup> This would seem to contradict the majority's argument that Burbine's waiver was valid; however, Justice O'Connor justified the holding by saying that the Court has never read the "Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights."<sup>20</sup> In *Miranda v. Arizona*<sup>21</sup> the Court thought differently and required that an assessment of police conduct figure importantly in determining the validity of a suspect's decision to waive his fundamental constitutional rights. *Miranda* noted a close relationship between the right against self-incrimination and the methods of police interrogation.<sup>22</sup> The Court stated: "As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery."<sup>23</sup>

In addition, *Miranda* set out specific requirements for the police to follow, requiring a flow of information to the defendant to assist his decision whether to remain silent or to speak. Justice O'Connor's language in *Moran* appears to limit that flow of information, placing the accused's right to counsel in jeopardy and also confusing the police department's analysis of the quantity of information required to be given to an accused.

#### *United States Sixth Amendment Right to Counsel Claim*

The *Moran* majority dispelled the sixth amendment claim by finding that the confession and interrogation sessions took place before the

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16. *Id.* at 1158.

17. *Id.* at 1142.

18. *Id.* at 1141.

19. *Id.* at 1142.

20. *Id.*

21. 384 U.S. 436, 86 S. Ct. 1602 (1966).

22. *Id.* at 458, 86 S. Ct. at 1619.

23. *Id.* at 461, 86 S. Ct. at 1621.

initiation of "adversary judicial proceedings," and therefore that the right to counsel had not attached.<sup>24</sup> In *United States v. Gouveia*<sup>25</sup> the Court promoted this view by stating that the sixth amendment requires the existence of both a "criminal prosecution" and an "accused," and that the plain language of the amendment, coupled with its purpose of protecting the unaided layman during critical confrontations with his adversary, leads to the conclusion that the right to counsel attaches at the initiation of adversary judicial criminal proceedings.<sup>26</sup> The *Moran* court also dismissed the claim that the sixth amendment right can be triggered at earlier "critical" pretrial events that may have important consequences at trial.<sup>27</sup>

Even if the sixth amendment right to counsel did not extend to this situation, the defense argued that an attorney-client relationship had already been established between Burbine and his retained attorney, and that this pre-existing relationship gave Burbine the implicit right to communicate with an attorney seeking to assist him.<sup>28</sup> The defense stressed that this pre-existing relationship may have affected Burbine's decision to waive counsel: "[I]nforming the defendant of the attorney's call would have told him that his family was with him, and that the police were telling him one thing and the attorney another. This might have made a difference in his decision to waive counsel."<sup>29</sup>

The *Moran* dissent hinted at this attorney-client relationship, though in a different context. Justice Stevens stated that since Munson was already acting as Burbine's attorney, under principles of agency law the deliberate deception of the attorney was tantamount to deliberate de-

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24. *Moran*, 106 S. Ct. at 1145.

25. 467 U.S. 180, 104 S. Ct. 2292 (1984).

26. *Id.* at 188, 104 S. Ct. at 2298.

27. *Moran*, 106 S. Ct. at 1147. To adopt a strict rule that the sixth amendment can not be triggered at critical pretrial events seems to jeopardize the intended function to assure that in any "criminal prosecution" the accused will not be left to his own devices in facing the "prosecutorial forces of organized society." *Id.* at 1146. Over the years the Court has shown confusion over whether the sixth amendment can attach before the onset of adversary judicial criminal proceedings. Justice Stewart's language in *Brewer v. Williams*, 430 U.S. 387, 399, 97 S. Ct. 1232, 1239-40 (1977), evidenced the Court's confusion: "proceedings had been initiated . . . [a] warrant had been issued for his arrest, he had been arraigned on that warrant before a judge and he had been committed by the court to confinement in jail." This statement sparked confusion over whether the Court was extending the attachment of the sixth amendment as far back as the issuance of the arrest warrant. Even though the Court has hinted in other cases that critical stages exist for the need of counsel, recent decisions such as *Gouveia*, 467 U.S. 180, 104 S. Ct. 2292, and *Maine v. Moulton*, 474 U.S. 159, 106 S. Ct. 477 (1985), lead to the conclusion that the Supreme Court intends to follow the rule that the sixth amendment attaches only after the onset of formal adversarial proceedings.

28. 38 Crim. L. Rep. (BNA) 4095, 4097.

29. *Id.*

ception of her client.<sup>30</sup> This is not the first time that principles of agency law have been applied. In *Brewer v. Williams*<sup>31</sup> the defendant had "asserted his right to counsel by having secured attorneys at both ends of the automobile trip, both of whom, *acting as his agents*, had made clear to the police that no interrogation was to occur during the journey."<sup>32</sup> Stevens stressed that the "character of the attorney-client relationship requires rejection of the Court's notion that counsel is some entirely distinct, completely severable entity and that deception of the attorney is irrelevant to the right of counsel in custodial interrogation."<sup>33</sup> This relationship between the attorney and his client is also a basis for cases holding that the client must accept the consequences of a mistake made by his attorney in the course of representing that client.<sup>34</sup>

Despite persuasive evidence that Burbine's right to counsel was violated, Justice O'Connor would contend nevertheless that this right to request counsel is personal to the client and can only be exercised by him.<sup>35</sup> This analysis may be justified in the present fact situation since Burbine was already represented by counsel and had been through this procedure before.<sup>36</sup> More troublesome are the consequences of the *Moran* rationale if extended to a first offender, or one who is not familiar with the adversarial process.

### *Present State of the Law in Regard to the Accused's Right to Counsel*

#### *Right to Counsel During Custodial Interrogation*

*Miranda v. Arizona* created strict requirements to assure that an accused's fifth amendment right to counsel was voluntarily, knowingly, and intelligently relinquished during police interrogations. The Supreme Court's aim in *Miranda* was to assure that the accused's constitutional right to "choose between silence and speech remains unfettered throughout the interrogation process."<sup>37</sup>

*Miranda* set out the requirements for a valid waiver of the right to counsel, that being the knowing and voluntary relinquishment of a constitutional right.<sup>38</sup> The voluntariness of the waiver is determined by

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30. *Moran*, 106 S. Ct. at 1163.

31. 430 U.S. 387, 97 S. Ct. 1232 (1977).

32. *Id.* at 405, 97 S. Ct. at 1242 (emphasis added).

33. *Moran*, 106 S. Ct. at 1163.

34. See, e.g., *Engle v. Isaac*, 456 U.S. 107, 134, 102 S. Ct. 1558, 1575 (1982).

35. *Moran*, 106 S. Ct. at 1140.

36. *Id.*

37. *Miranda v. Arizona*, 384 U.S. 436, 469; 86 S. Ct. 1602, 1625 (1966).

38. *Id.* at 444, 86 S. Ct. at 1612.

inquiring into any fraud, deception, duress or other inducements used to obtain it. The knowing aspect focuses on whether the accused has been adequately informed of his constitutional rights. In this regard, *Miranda* imposed several guidelines for police to follow in custodial interrogations.<sup>39</sup> The court held that the individual "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. . . ."<sup>40</sup> *Miranda* also recognized that modern interrogation is psychologically oriented and that "the blood of the accused is not the only hallmark of an unconstitutional inquisition."<sup>41</sup>

Louisiana law similarly contemplates the psychologically coercive nature of the in-custody interrogation process, and thus provides interrogated persons with protections under the Louisiana Constitution<sup>42</sup> and the Louisiana Revised Statutes 15:451 and 15:452. Section 15:452 states: "No person under arrest shall be subjected to any treatment designed by effect on body *or mind* to compel a confession of crime."<sup>43</sup> Section 15:451, of which section 15:452 is a corollary, provides: "Before what purposes to be a confession can be introduced in evidence, it must be affirmatively shown that it was free and voluntary, and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises."<sup>44</sup> These two statutes are designed to protect the constitutional rights of the defendant.<sup>45</sup>

39. *Miranda* employs procedural safeguards which police officers and interrogators must follow as guidelines. These measures provide that prior to questioning an accused, "the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.*

40. *Id.* at 471, 86 S. Ct. at 1626.

41. *Id.* at 448, 86 S. Ct. at 1614.

42. La. Const. Art. I § 13:

When any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully of the reason for his arrest or detention, his right to remain silent, his right against self-incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel. In a criminal prosecution, an accused shall be informed of the nature and cause of the accusation against him. At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment. The legislature shall provide for a uniform system for securing and compensating qualified counsel for indigents.

43. La. R.S. 14:452 (1981) (emphasis added).

44. La. R.S. 14:451 (1981).

45. *State v. Coleman*, 390 So. 2d 865, 868 (La. 1980). "By imposing an affirmative burden on the state to show that a defendant's confession was freely and voluntarily given," these articles safeguard "a defendant's Fifth Amendment protection against self-incrimination."

The timing of these statutes and of *Miranda* is an important consideration in the analysis of Louisiana's present policy towards the suspect's right of access to counsel. Sections 15:451 and 15:452 were enacted by the Louisiana legislature before the 1966 decision of *Miranda*.<sup>46</sup> Thus, the Louisiana legislature contemplated the effect of deception on the validity of an accused's confession prior to the United States Supreme Court's mandatory requirements of *Miranda*, and provided the *Miranda* safeguards before the decision through sections 15:451 and 15:452. It has also been noted<sup>47</sup> that the 1974 constitutional revision incorporated the *Miranda* safeguards in section 13 of article I of the Louisiana Constitution. However, *State v. Jackson*,<sup>48</sup> decided under the 1921 constitution, shows that the philosophy of *Miranda* was already incorporated into our judicial system.

*Jackson*, which is factually similar to *Moran*, held that although an accused does not know that her family has retained an attorney for her, governmental officials are not justified in ignoring her constitutional right to such counsel. In 1982 the Louisiana Supreme Court continued to adhere to the protections of Louisiana law in *State v. Matthews*.<sup>49</sup>

In *Matthews*, the defendant contacted his attorney prior to his arrest and was advised not to say anything to the authorities.<sup>50</sup> He was later arrested and charged with murder. Shortly after the arrest, his attorney called the station house and was informed that Matthews was being interviewed and that the attorney would not be allowed to speak with him. At this point the attorney requested that no one interview Matthews.<sup>51</sup> The attorney later went to the police station and was subsequently told that Matthews had given a statement.<sup>52</sup> The court emphasized that the policy of our state, both constitutional and statutory, favors an individual "having the assistance of counsel during in-custody interrogation and prohibits any interference with it by governmental authorities."<sup>53</sup> The court in *Matthews* required that the defendant be informed of his attorney's presence. Without this information, the subsequent questioning was made without the informed waiver of the accused's right to counsel and option to remain silent.<sup>54</sup> Further, by adoption of article I, section 13, Louisiana incorporated and enhanced

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46. 1928 La. Acts No. 2, § 1, art. 452.

47. Hargrave, Declaration of Rights of the La. Const. of 1974, 35 La. L. Rev. 1, 40 (1974).

48. 303 So. 2d 734 (La. 1974).

49. 408 So. 2d 1274 (La. 1982).

50. Id. at 1275.

51. Id. at 1275-76.

52. Id. at 1276.

53. Id. at 1277.

54. Id. at 1278.

the *Miranda* safeguards.<sup>55</sup> It is clear that the court's holding was based on the fact that without the knowledge of his attorney's call and later presence at the police station, the defendant could not knowingly and intelligently waive his right to counsel. "A suspect indifferent to an abstract offer to call a nameless lawyer may regard differently his opportunity to talk to an identified attorney actually available and willing to assist him during interrogation."<sup>56</sup>

As well as the constitutional mandate of assistance of counsel, *Matthews* points out Louisiana's statutory policy favoring the assistance of counsel during custodial interrogation. Article 230 of the Code of Criminal Procedure states: "The person arrested has, from *the moment of his arrest*, a right to procure and confer with counsel and to use a telephone or send a messenger for the purpose of communication with his friends or with counsel."<sup>57</sup> Based on this statute and on article I, section 13 of the Louisiana Constitution, *Matthews* indicates that Louisiana welcomes and encourages counsel to consult with his client in order for the client to make an intelligent exercise of his rights while in custodial interrogation.

In *State v. Serrato*,<sup>58</sup> the court faced a similar issue. In *Serrato*, the defendant was arrested for the murder of his wife.<sup>59</sup> At some point during the interrogation, Serrato asked to be provided with or recommended to an attorney. After fruitless efforts to contact an attorney, a detective was instructed to contact the Indigent Defender Board. Serrato continued to be questioned on a rotating basis and was not informed that an attorney had been contacted. The director of the Indigent Defender Board had been called and told that the defendant wished to confer with counsel before talking to the police.<sup>60</sup> An attorney was located by the Board and sent to the station, but was detained for over one-half of an hour before being directed to the detective's annex. At the annex, he was again detained and was not allowed to see the defendant.<sup>61</sup> The court held that the police officers failed to honor scrupulously the defendant's right to counsel, and that once counsel had been obtained the defendant had the right to be informed that an attorney was available and willing to assist him.<sup>62</sup>

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55. *Id.* at 1277.

56. *Id.* at 1278.

57. La. Code Crim. Proc. art. 230 (emphasis added). See also *Powell v. Alabama*, 287 U.S. 45, 69, 53 S. Ct. 55, 64 (1932).

58. 424 So. 2d 214 (La. 1982).

59. *Id.* at 216.

60. *Id.* at 219.

61. *Id.* At the annex the attorney was detained and asked by three officers if he had been drinking. The officers refused to allow the attorney to confer with his client, alleging that he was too intoxicated.

62. *Id.* at 220.

The *Serrato* court continued by finding no constitutional or statutory provision in Louisiana that would allow the police arbitrarily to prevent or block communication between a prisoner and an attorney who has been asked to represent the accused.<sup>63</sup> The court went on to note that:

Only the defendant has the right to reject or waive the assistance of counsel. The police must allow counsel a private consultation with the accused, provided that the time is reasonable. When a person in custody is interrogated by police officers, the time is always reasonable for counsel to have free access to meet in private with his client.<sup>64</sup>

The terminology expressed in articles 230 and 511 was in place before the constitutional revision of 1974. Both the language of these articles and that of the *Miranda* decision seemed to influence the drafting of article I, section 13 during the 1974 revision. As Professor Hargrave, coordinator of legal research for the Louisiana Constitutional Convention, reasons, the incorporation of *Miranda* into section 13 clearly contemplates the right to the appointment of counsel during police questioning, and, even absent questioning, the right to an attorney who is able to utilize the available legal mechanism to ensure that the accused may realize the rights guaranteed by law—among them the right to a preliminary hearing and the right to bail.<sup>65</sup> Hence, it follows that counsel should be made available immediately after arrest for the timely assertion of those rights. Hargrave noted that this “conclusion seems especially warranted since such has traditionally been the case with respect to communicating with retained counsel,” and further that “the committee comments referred to ‘the early assistance of counsel.’”<sup>66</sup>

*Jackson*, *Matthews*, and *Serrato* all support the earliest possible representation by counsel in order to insure that the accused makes a knowing and voluntary waiver. Similarly, the American Bar Association National Advisory Commission urges that representation begin when “the individual either is arrested or is requested to participate in an investigation that has focused upon him as a likely suspect.”<sup>67</sup> In addition, counsel’s early presence in the case can sometimes serve to convince the prosecutor to dismiss unfounded charges, to charge the accused with less serious offenses, or to divert the entire case from the criminal courts.

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63. *Id.* at 221.

64. *Id.*, citing La. Code Crim. Proc. art. 511.

65. Hargrave, *supra* note 47, at 40.

66. *Id.* at 47.

67. Standards for Criminal Justice § 5.1 (1986).

*Deception of the Accused or Attorney Which Leads to Waiver of Counsel*

It is evident from Louisiana Revised Statutes 15:451 and 15:452 that the police can not elicit a confession from the accused by the use of deception or trickery. The Louisiana courts also have implied that a confession will be inadmissible when the deception is directed toward the accused's attorney when it would have a bearing on the validity of the defendant's exercise of his constitutional rights.

The subject of deceptive practices by the police to obtain a confession was addressed in *State v. Reed*.<sup>68</sup> Here the defendant was taken into custody on a Saturday and told that he would be charged with arson. He was further informed that he would not be in jail for longer than seventy-two hours, and that he would be in court on Monday morning. His father obtained an attorney for him who went to court on Monday, but the defendant was not produced in court until Wednesday, after his attorney was told erroneously that he would be in court on four other occasions.<sup>69</sup> The court drew the reasonable inference that the suspect was kept at the jail for further, more successful interrogations. These interrogations ended with three oral confessions and two recorded statements.<sup>70</sup> The court held that when the government interferes with the defendant's sixth amendment right to counsel by giving erroneous information to the suspect's attorney, the prosecution cannot take advantage of any incriminating statements made during time gained by that ploy.<sup>71</sup>

In *State v. Trevathan*,<sup>72</sup> the court continued its antipathy toward deception of a defendant's attorney to elicit a statement from his client. In *Trevathan* the attorney arrived at the sheriff's office forty-five minutes after the client's arrest and indicated that he had been retained to represent the defendant. Thereafter, the attorney left and told officers that the defendant was not to be interrogated further out of the attorney's presence or to be taken to the supposed location of the body.<sup>73</sup> The defendant was later taken to the location of the body, where he asked to speak to a detective with whom he had developed a good rapport in a previous case. This detective knew that the defendant's counsel had requested that the defendant not be interrogated.<sup>74</sup> The court found that the defendant's right to the assistance of counsel had been violated.<sup>75</sup>

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68. 390 So. 2d 1314 (La. 1980).

69. Id. at 1315.

70. Id. at 1316.

71. Id.

72. 414 So. 2d 316 (La. 1982).

73. Id. at 318.

74. Id.

75. Id. at 319.

This view found support in *State v. West*,<sup>76</sup> where the detectives knew that the defendant had been advised by his attorney not to make any statements to the police. The police, however, later obtained a statement from him.<sup>77</sup> The Louisiana Supreme Court held that police initiation of interrogation contrary to defense counsel's advice violates the defendant's right to counsel. "A defendant has not knowingly and intelligently waived his right to counsel when, contrary to counsel's advice, he makes statements in response to further police inquiry."<sup>78</sup> The court in both *Trevathan* and *West* implied that the defendant and his attorney are each entitled to deal with the police as a single entity.<sup>79</sup> It may also be true that the attorney and client form another single entity, and that deception of the attorney may be equated with deception of the accused.

#### *Louisiana's Response to Moran v. Burbine*

The Louisiana Supreme Court in *Matthews* based its holding on the right to counsel as guaranteed by the Louisiana Constitution and ordered the defendant's statement suppressed.<sup>80</sup> This same outcome was advanced in *Trevathan*, where the decision was based on the United States Constitution. Will the *Moran* decision change either, both, or have no effect on these decisions? The *Matthews* decision indicates that the rights guaranteed under article I, section 13 of the Louisiana Constitution are completely separate from and extend further than those found in the United States Constitution. However, it is not yet possible to accurately characterize the Louisiana Supreme Court's present stance. The clear implications of the *Moran* rule reverse prior, contrary state court holdings based on fifth and sixth amendment rights. The only response contrary to *Moran*, still available to state courts, will be based on state constitutions and statutes.

#### *Louisiana Constitutional Violations*

The decisions in *Matthews* and *Serrato* were based on the rights of the accused guaranteed under article I, section 13 of the Louisiana Constitution. Under a literal reading, it is apparent that this article encompasses much more than the federal constitutional grant on which it was based. One clear expansion is the onset of these rights, which begin at the point of arrest or detainment. It is evident by the redactors'

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76. 408 So. 2d 1114 (La. 1982).

77. *Id.* at 1117.

78. *Id.* at 1121.

79. *Trevathan*, 414 So. 2d at 319; *West*, 408 So. 2d at 1121.

80. *State v. Matthews*, 408 So. 2d 1274 (La. 1982).

use of "detain" that these rights attach much earlier than rights under the United States Constitution. "Advising one of such rights would be a hollow formality if the rights did not exist; the necessary implication is that they do exist and that they can be exercised at that point. Thus, the right to counsel can be exercised at the point of arrest or detention."<sup>81</sup>

Another expansion in the language of article I, section 13 of the Louisiana Constitution is the requirement that counsel be granted "at each stage of the proceedings." This requires an analysis of what constitutes each separate stage of the proceedings. As Professor Hargrave notes: "[T]he language 'each stage' may be contrasted with the 'critical stage' analysis of the federal standard and with the narrower statement of the right in article I, section 9 of the 1921 constitution, which did not include that language."<sup>82</sup> The United States Supreme Court has not been clear as to what qualifies as a critical stage.<sup>83</sup> However, the Louisiana Constitution requires that the right to counsel attach at an early stage. In addition, a comparison of article I, section 13 to article I, section 9<sup>84</sup> of the 1921 constitution evidences an intent by the redactors of the 1974 constitution to expand the rights of those accused of criminal activity.

The court's language in *Matthews* and *Serrato* hints at the early attachment of the right to counsel under article I, section 13. The court stated that the rights guaranteed by this section included "the right of defendant to have counsel present during any *post arrest* interrogation."<sup>85</sup> Cases based on the United States Constitution draw a fine line between the right to counsel under the fifth amendment and under the sixth amendment. However, since article I, section 13 encompasses both the fifth and sixth amendment right to counsel, that distinction becomes nonexistent. A question that may be posed is whether, since this line disappears and the right under the sixth amendment is thought to be stronger,<sup>86</sup> is the right to counsel at arrest or detainment the same as that at formal adversary proceedings?

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81. Hargrave, *supra* note 47, at 42.

82. *Id.* at 46.

83. See *supra* note 27.

84. Art. I § 9 of the 1921 constitution provided:

In all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury; . . . as provided elsewhere in this Constitution; . . .

The accused in every instance shall have the right to be confronted with the witnesses against him; he shall have the right to defend himself, to have the assistance of counsel, and to have compulsory process for obtaining witnesses in his favor.

85. *State v. Serrato*, 424 So. 2d 214, 220 (La. 1982) (emphasis added).

86. It is thought to be stronger because it attaches at judicial proceedings—closer to the accused's potential loss of freedom.

*State v. Weedon*<sup>87</sup> indicates an affirmative answer. While Weedon was present, his lawyer instructed the detectives not to question the defendant as to any part of his case. The detectives then obtained the lawyer's permission to allow questioning for the arrest register with the assurance that they would only seek personal data. During the questioning the detectives deviated from the personal matters and extracted incriminating statements. The court excluded the statements and said that the defendant's "rights against self-incrimination and to the effective assistance of counsel cannot be prejudiced by the state's failure to honor its agreement not to question the accused about the crime unless his attorneys are present."<sup>88</sup>

It is apparent from *Weedon* and the construction of article I, section 13 that once the suspect is arrested he is clothed with all the constitutional guarantees granted under article I, section 13. This is in contrast to his federal constitutional rights, which protect him with the fifth amendment protections upon arrest but with sixth amendment protections only upon the onset of formal judicial proceedings.

It is evident from these Louisiana cases that the courts have no qualms about using the exclusionary rule more extensively than required by the United States Constitution. As Hargrave notes:

It is not surprising that this section [article I, section 13] does not state the means of enforcing its requirements, as the entire declaration of rights catalogues numerous guarantees without providing specific means of enforcement for any of them. However, the convention's virtual incorporation of *Miranda* in the constitution assumes continuation of the exclusionary rule for enforcement of its provision.<sup>89</sup>

A different inquiry results when the defendant asserts that the exclusionary rule should apply to violations of statutory provisions such as article 230 of the Code of Criminal Procedure.

#### *Louisiana Statutory Violations*

*State v. Thomas*<sup>90</sup> dealt with a defendant whose statutory right under Code of Criminal Procedure article 230 had been violated. Justice Lemon for the majority stated that the court "need not apply a per se exclusionary rule in this case, which does not involve a violation of defendant's constitutional right to counsel," and that the exclusion of reliable evidence was too great a price to impose in the absence of bad

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87. 342 So. 2d 642 (La. 1977).

88. Id. at 645.

89. Hargrave, *supra* note 47, at 44.

90. 406 So. 2d 1325 (La. 1981).

faith on the part of the police.<sup>91</sup> A penalty for failure to comply with statutory requirements is provided by law.<sup>92</sup>

*State v. Square*<sup>93</sup> reasoned that the statutory provisions of Code of Criminal Procedure articles 228, 229, and 230 are "administrative or ministerial functions," and that "[a] departure from acceptable concepts of judicial restraint would occur if this Court were to superimpose an exclusionary rule over this legislative plan, a rule which would in all probability only benefit the guilty accused and which would not be likely to deter the negligent or culpable official."<sup>94</sup> The *Square* decision made clear that there was no automatic exclusionary penalty for statutory violations and that, if there were a penalty, statutory violations would be considered in light of their statutory purpose and exclusionary impact.<sup>95</sup>

The greatest impact of statutory provisions of the Code of Criminal Procedure and Louisiana Revised Statutes 15:451 and 15:452 is to show the legislature's intent with regard to the rights of the accused. For example, the similar phrasing of article 230 and article I, section 13 indicates that the redactors in enacting article 230 meant to emphasize the rights of the accused. The importance of the statutory rights can not be dismissed just because a violation does not require automatic exclusion.<sup>96</sup> One commentator notes that an effective and fair scheme of law should not provide for a "simplistic automatic exclusionary rule" whether it relates to statutory, federal or state constitutional rights; rather, it is crucial that the foundation for implementing the exclusionary rule be "directly, frankly, and carefully addressed if a rational exclusionary policy is to be developed."<sup>97</sup>

91. *Id.* at 1328.

92. *Id.* at 1329. La. R.S. 14:134 (1986) provides:

Malfesance in office is committed when any public officer or public employee shall:

- (1) Intentionally refuse or fail to perform any duty lawfully required of him, as such officer or employee; or
- (2) Intentionally perform any such duty in an unlawful manner; or
- (3) Knowingly permit any other public officer or public employee, under his authority, to intentionally refuse or fail to perform any duty lawfully required of him, or to perform any such duty in an unlawful manner.

....

Whoever commits the crime of malfesance in office shall be imprisoned for not more than five years with or without hard labor or shall be fined not more than five thousand dollars or both.

93. 257 La. 743, 244 So. 2d 200 (1971).

94. *Id.* at 215.

95. *Id.*

96. Lamonica, *Developments in the Law, 1979-1980—Pretrial Criminal Procedure*, 41 La. L. Rev. 643 (1981).

97. *Id.* at 652.

*Conclusion*

It is evident by the language in *Moran* that the Supreme Court is moving toward a narrow interpretation of *Miranda*, which will result in a further diminution of the rights of the accused. *Moran* will restrict the instances in which a court will determine that a waiver of the right to counsel is invalid. Future decisions based on the fifth and sixth amendment right to counsel will be held to this narrower standard, and the court will not allow state courts freedom to interpret these federal rights differently.<sup>98</sup> It is apparent that the court has established a rule in *Moran* that will be strictly applied. The best avenue for the accused may be to look more closely at the Louisiana Constitution, particularly article I, section 13, and other statutory rights,<sup>99</sup> since the *Moran* majority was interpreting only the United States Constitution, and, as Justice O'Connor stated, "[n]othing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law."<sup>100</sup>

The Louisiana Constitution grants the accused a broader right to counsel than the United States Constitution. If Louisiana courts continue to follow the *Matthews* and *Serrato* line of cases, the *Moran* decision will have no effect in Louisiana. It is apparent by the Louisiana Constitution, statutes and case law that Louisiana favors the attachment of the right to counsel at the earliest stage and imposes high standards on the prosecution to show a waiver of these rights. Furthermore, *Matthews* and *Trevathan* indicate that courts "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."<sup>101</sup> *Trevathan* also places "a strict duty on law enforcement officers to assure that reasonable requests of counsel are respected."<sup>102</sup>

*Tamera A. Rudd*

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98. See, e.g., *State v. Beck*, 687 S.W.2d 155, 159 (Mo. 1985); *Lodowski v. Maryland*, 302 Md. 691, 490 A.2d 1228 (1985); *Lewis v. State*, 695 P.2d 528 (Okla. Crim. App. 1984); *Weber v. State*, 457 A.2d 674 (Del. 1983).

99. La. Civ. Code arts. 228-230; La. R.S. 15:451 and 452 (1981).

100. *Moran v. Burbine*, 106 S. Ct. 1135, 1145 (1986).

101. Lamonica, *Developments in the Law, 1981-1982—Pretrial Criminal Procedure*, 43 La. L. Rev. 543, 553 (1982).

102. *Id.*

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