Procedure: Pretrial Criminal Procedure

Paul R. Baier
Louisiana State University Law Center

Repository Citation
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol35/iss2/25

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.
PRETRIAL CRIMINAL PROCEDURE

Paul R. Baier*

I. ARREST, SEARCH AND SEIZURE

A. Warrantless Arrest

(1) Authority of Louisiana State Police

May a state trooper arrest a motorist within city limits for driving while intoxicated, an offense against the state, or is enforcement of the law within incorporated municipalities exclusively the job of local police officers? And how can defense counsel raise this jurisdictional point anyway in light of the usual rule that an illegal arrest by itself, without an accompanying seizure of evidence, is no bar to the prosecution? State v. Swain settles the issue in favor of allowing state police officers to enforce the law within cities, provided the local police chief has formally requested general law enforcement assistance from the Department of Public Safety. What is more interesting about the case, however, is the way the merits were reached. No motion to suppress evidence under article 703 of the Code of Criminal Procedure was filed: there was no evidence to suppress in the case, and courts have refused to block the whole of the state's case on account of illegal arrests or unlawful searches and seizures. Nor could defense counsel file a motion to quash the prosecution under article 531 of the Code; an illegal arrest is no basis in law for quashing a subsequent valid indictment or information. Rather, the defense interposed an evidentiary objection at trial claiming that the arresting officer could not testify without the state first establishing the officer's authority to arrest within city limits. The trial court sustained this objection, effectively gutting the state's case. On writs,

* Assistant Professor of Law, Louisiana State University.
3. 292 So. 2d 495 (La. 1974).
4. The court relied on LA. R.S. 40:1391 (1950), which provides in pertinent part: "The department of public safety may, on request of any chief police officer of any local government unit in the state, assist such officer in the investigation of the circumstances of any crime and in the identification, apprehension, and conviction of the perpetrators thereof." The court rejected the contention that this statute contemplates state police aid only in cases of completed offenses.
5. See Frisbie v. Collins, 342 U.S. 519 (1952). In cases of unlawful searches and seizures, Mapp v. Ohio, 367 U.S. 643 (1961), calls for the exclusion of the unlawfully seized evidence or the fruits thereof; but Mapp is no bar to the prosecution's proceeding against defendant on the basis of other lawful evidence.
the Louisiana supreme court reversed and remanded for trial but without saying anything about the unique way in which defense counsel nudged the court to reach the merits in the case. No doubt it was important for the court to rule on the authority of state police to aid local law enforcement, and the holding in the case improves the effective administration of criminal justice in Louisiana. But the failure of the court to mention the procedural context in *Swain* is surprising. Surely good defense lawyers will argue that it is now open in Louisiana to contest the legality *vel non* of an arrest by interposing an objection at trial to the testimony of the arresting officer, and the supreme court will have to speak to this procedural point sooner or later. When it does, it will probably disallow such objections as contrary to law. Still, *State v. Swain* is a credit to the ingenuity of the defense bar and a lesson to aspiring criminal proceduralists. If there is no vehicle on the books for raising a particular point, never hesitate to fashion your own procedure toward forcing an adjudication on the merits; that, after all, is what procedure is for.\footnote{On occasion the supreme court itself has fashioned new procedures where the Code provided none. In *State v. Wilkerson*, 261 La. 342, 259 So. 2d 871 (1972), the court approved the practice of motions to suppress identification testimony even though nothing in the Code authorized such motions. The court relied in part on its general supervisory authority over Louisiana's criminal procedure spelled out in article 3 of the Code.}

(2) Stop and Frisk—Article 215.1

*Terry v. Ohio,*\footnote{392 U.S. 1 (1968).} decided in 1968, is the seminal stop-and-frisk opinion of the United States Supreme Court, and after six years it is easy enough to recite its essential holding: a police officer investigating crime in the field is permit\[ted\] a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.\footnote{Id. at 27.}

This *Terry* case spawned much legislation in the states, including article 215.1 of the Louisiana Code of Criminal Procedure,\footnote{Article 215.1 was added to the Code by La. Acts 1968, No. 305 (July 20, 1968).} authorizing the police to stop and frisk suspected criminals in certain limited...
circumstances. Most of the cases arising since 1968 have involved, as did *Terry*, evidence of crime discovered during “pat downs” of suspects, that is, on the “frisk” side of stop and frisk. But what about evidence encountered on the “stop” side? For instance, when the police stop a car for investigation on reasonable suspicion, may they order the occupants out and then look for evidence of crime in the automobile? How far, in other words, will “the governmental interest in investigating crime” carry the police—into the car? All *Terry* tells us in this regard is that a police officer may “in appropriate circumstances and in an appropriate manner” approach a person for purposes of criminal investigation even though there is no probable cause to make an arrest. Similarly the Court in *Terry* refers to “legitimate police investigative techniques” but never states what these legitimate techniques are.

During the 1972-73 term, the Louisiana supreme court skirted the problem of specifying the ways in which police may exercise their authority under article 215.1(A) of the Code. During the current term, however, the court with Justice Tate writing for the majority held (1) that police may stop a car for purposes of investigatory questioning of the occupants where “reasonable cause” for the detention exists; (2) that on stopping the car police may “identify the driver and shine their flashlight over the occupants and the interior of the car” and (3) that evidence of crime discovered in plain view during this flashlight look into the automobile is admissible against defendant at trial. Thus as a constitutional matter our supreme court considers an officer’s quick glance into a stopped car a legitimate investigative technique reasonably limited in scope by its merely investigatory purposes. This result, it is important to note,
carries the police beyond what is expressly authorized in article 215.1(A) of the Code, but it is unlikely the legislature intended subsection A to delimit the investigatory steps the police may take on reasonable suspicion. When article 215.1 was added to the Code in 1968, the law on this point was quite unclear. Now with State v. Jefferson in the jurisprudence, Louisiana has taken a forthright step forward toward balancing the state's interest in investigating crime and the people's interest in individual liberty.

The court's opinion in Jefferson is curious in two respects and cautious in another. Nowhere is article 215.1 directly cited in the opinion, and a natural question is why not? Perhaps the article is irrelevant on the facts; literally 215.1 deals only with suspects (on foot?) in public places, whereas the court extended its discussion to any suspect "whether that person be on foot, horseback or in an automobile." The opinion in Jefferson is also curious because it legitimates the police conduct in the case on a theory different from that used in the field by the stopping officer, i.e., "mere suspicion of speeding." While there is nothing unusual about this after-the-fact rationalization by an appellate court, there is a respectable view

---

20. LA. CODE CRIM. P. art. 215.1(A) allows a police officer to demand of the individual stopped "his name, address and an explanation of his actions"; but the article says nothing about stopping cars and looking inside of them as a proper investigative step. That the fourth amendment allows officers to stop cars and to investigate in a legitimate way on reasonable suspicion of crime is clear, however. See Adams v. Williams, 407 U.S. 143 (1972).

Attorney General Guste recently issued an opinion considering the effect on the authority of the police under article 215.1(A) of a suspect's failure to identify himself properly. The Attorney General expressed the view that an arrest based on the failure of a suspect to identify himself would be illegal and would probably subject the arresting officer to a suit for false arrest. LA. Op. ATTY. GEN. (Jan. 20, 1974).

22. Id. at 884.
23. Anthony Amsterdam made this point in his Oliver Wendell Holmes Lectures, delivered at the University of Minnesota Law School in January, 1974: "I can tell you that there is often little relationship between the grounds upon which the police take action and the grounds later put forward to justify their action in the courts. When a prosecuting attorney is assigned a case in which he must defend a particular police action, he hits the law books and determines the best legal grounds upon which the action can be sustained. He then advances such of those grounds as the record does or can be made to support, ordinarily without asking whether the police would or will generally act upon those grounds or did so in his particular case. He advances whatever considerations in support of a police practice seem to him to be likely to persuade the court to adopt a rule sustaining it, without regard to whether the police themselves view the considerations as important or even relevant." Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. LA. REV. 349, 420 (1974).
that courts should not overindulge the police on appellate review. Finally, the opinion is cautious in its emphasis of the limited scope of the investigatory act upheld in Jefferson. The police may keep their eyes open when investigating crime and they may even \textit{look} into a car for evidence of crime lying in plain view; but \textit{"a search incident to such inquiry would not be lawful"}—that is, it is unlikely the court would allow the police to enter a stopped car for closer investigatory scrutiny.

\textbf{B. Search and Seizure}

\textbf{(1) Warrantless Car Searches on Probable Cause}

The path of the law on car searches is no straight highway; it's more a country road—bumpy and unsure of itself (or so it seems to the traveller). And tracking the fourth amendment in the United States Supreme Court is more difficult these days because the Court's membership has changed so drastically in such a short period of time. From the cases, it appears this changing membership is determined to reverse the direction which criminal procedure took in the early sixties, and it seems fair to say we have a new Warren Court—Warren Burger's, that is. Similarly, our own Louisiana search and seizure cases, like those most recently down from the Burger Court,\footnote{27. \textit{Cardwell v. Lewis}, 94 S. Ct. 2464 (1974), is the latest case.} allow the police to search a car on probable cause, but without a warrant, even in situations where no real exigency confronts the police. When this happens the justices are usually divided and the division is over fundamental fourth amendment principles. \textit{State v. Tant}\footnote{28. 287 So. 2d 458 (La. 1973).} is such a case.

In \textit{Tant}, a police officer claimed to have reliable information from an informant that a certain car contained marijuana. On the basis of this information the officer believed he could have secured a search warrant for the car, but he didn't. Instead, the car was kept under surveillance for twenty-four hours in an effort to discover the source of the drug. During this period the car was parked outside defendant's residence. The next day when Tant finally got into the car, the police followed him on the interstate and stopped him within

---


\footnote{26. The court considered it important in \textit{Jefferson} that \textit{"[t]here is no indication but that, had nothing more suspicious been observed, the vehicle and its occupants would have been permitted to go on their way without further invasion of their privacy."} \textit{Id.} at 885.}
four miles of the parish line. The police searched the car and found a suitcase full of marijuana in the trunk. For the majority, it made no difference that the exigency in the case—the fact that the car was traveling on the interstate and about to leave the parish—arose after the police had had enough time to apply for a warrant. As Justice Calogero put it, "it is not necessary that the probable cause which gives rise to the search arise coincidentally with the occurrence of the exigent or unforeseeable circumstance."29 It is a credit to the prescience of the majority that six months later the Burger Court said exactly the same thing.30 Furthermore, the fact that the police allowed twenty-four hours to pass without attempting to secure a warrant did not preclude them from relying on the "exigent circumstances" exception to the warrant requirement. Nothing in the fourth amendment requires that a police officer immediately obtain a search warrant on gaining probable cause for its issuance; to the contrary, the majority said an officer may desist even indefinitely, provided the delay is not a pretext for avoiding the probable cause determination of an impartial magistrate. Thus, "it is permissible for police to exercise discretion in not immediately obtaining a search warrant in . . . the effort to uncover further violations of the law."31

To the writer, the opinion in Tant seems lopsided in favor of "the general aims and needs of law enforcement."32 But there are two sides to the meaning of the fourth amendment. "[T]he deepest values of our social order set limits upon how far the police may go, even in the indispensable work of investigating and apprehending criminal malefactors."33 One of the great lessons of the fourth amendment's history is that, unless absolutely necessary, the police should not be given the discretion to search or not to search on their own suspicion-charged judgments of probable cause. That is why the warrant requirement exists in the first place and why Justices Tate and Barham dissented in Tant. For them and for the writer, the majority's approach "undermine[s] the policy of the Fourth Amendment that

29. Id. at 460.
30. "Assuming that probable cause previously existed, we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment. Exigent circumstances with regard to vehicles are not limited to situations where probable cause is unforeseeable and arises only at the time of arrest." Cardwell v. Lewis, 94 S. Ct. 2464, 2472 (1974).
32. Id.
interposes judicial determination of probable cause between police activity and individual privacy."\(^3\)

Where one comes out in *Tant* depends inescapably on an exercise of judgment; simply reading the fourth amendment provides no answer. Surely the effort of the police in *Tant* to uncover further violations of the law by keeping the suspected car under surveillance makes good sense. But so does the fourth amendment's warrant requirement, and that is especially true in a case where the officer's belief ("I could have obtained a warrant") is largely subjective. The majority in *Tant* never stops to examine whether probable cause objectively existed in the case. The fact that "the officer believed that he had sufficient knowledge to establish probable cause to the satisfaction of a magistrate" is not enough under the controlling cases.\(^5\) The court must make its own independent determination of probable cause on the basis of objective facts. "Mere affirmance of belief or suspicion is not enough."\(^3\)

In light of the compelling interests on both sides in *Tant*, this writer would propose a different solution for similar cases in the future. Under article 163 of the Code of Criminal Procedure, the police are entitled to wait up to ten days before executing a search warrant. The article thus allows the police to continue their criminal investigation before executing the warrant in the hope of catching others. Yet this is precisely the reason the majority gives for not requiring the police to obtain a warrant—hardly a rational integration of our Code of Criminal Procedure into constitutional adjudication. A better rule would be to require the police to obtain a warrant in cases like *Tant* where there is enough time antecedent to any exigent circumstance to apply for one. The police need not, however, execute the warrant right away. Then if an exigent circumstance arises later, as it did in *Tant*, the police may stop the car and search it for the items specified in the warrant. Only next time when this happens the driver will have the constitutional protection due him: a neutral and detached magistrate, not a police officer, will have determined there is probable cause for the search.

In another car case, *State v. Smith*,\(^7\) the Louisiana supreme court again correctly anticipated what the Burger Court would later hold on similar facts.\(^3\) After defendants' arrest, police officers with-

---

37. 283 So. 2d 470 (La. 1973).
out a search warrant seized two cars parked at a motel and towed them to a police auto pound where they were later searched. Chief Justice Sanders in his opinion for the court upheld the warrantless seizure of the automobiles because at the time of the seizure the police had probable cause to believe evidence of crime would be found in the vehicles and "[i]t would certainly have been unreasonable to require the police, after having arrested the defendants, to guard the vehicle at the motel while the search warrant was being secured."39

But this statement is hard to appreciate—like a bump in a country road. Just why was posting a guard unreasonable? The cars were immobilized at the motel and the defendants were in custody. Moreover, a team of officers actually seized the cars, and so it was at least physically possible to post a guard at the motel while other officers secured a search warrant. Still, the law, especially Chambers v. Maroney,40 is with Chief Justice Sanders, and not with Justice Barham, who dissented in the case.

State v. Alderman41 is also worth mentioning because in it the court sustained the authority of agents of the Louisiana Wildlife and Fisheries Commission on routine patrol to conduct warrantless searches of cars provided probable cause exists to believe the car searched is involved in violations of the game laws. So far, the holding is pedestrian. What is really exciting about this car case, however, is to recognize the role the state legislature played in fashioning the particular exception to the warrant requirement at issue in Alderman—that is, a specific statute42 authorized the warrantless conduct upheld in the case. This amounts to constitutional rulemaking under the fourth amendment, a development of profound significance. For if the state legislature, or indeed police departments themselves, were to adopt written rules delimiting the circumstances in which an officer may search without a warrant, then the knotty problem of applying the fourth amendment in the field would no longer be the exclusive job of the cop on the beat, as it is now. Even self-imposed rules or statements of policy would do much to contain police discretion and to avoid the potential for abuse of law-enforcement powers in the field. This is the crucial issue as some fourth amendment buffs see it.43 Of course, the courts would retain

43. See ABA STANDARDS, URBAN POLICE FUNCTION §§ 7-9 (1973); K. DAVIS, DISCRETIONARY JUSTICE 88 (1969); Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 416-39 (1974); Caplan, The Case for Rulemaking by Law Enforce-
final responsibility to adjudicate the constitutional reasonableness of these departmental rules under the fourth amendment, but there is no good reason for not requiring police departments to fashion their own agency rules in the first instance. To wait until the courts declare in their ad hoc way what the rules of the field are may be too late—for the police as well as for the people.

(2) Plain View and Consent Cases

Evidence of crime in plain view of the police may be seized without a warrant provided the police inadvertently come across the evidence in the course of some other lawful intrusion against the accused. This is the so-called "plain-view" exception to the warrant requirement, an exception well established in the cases. "State v. Hills" applies the doctrine in a case where the police, who are at the scene investigating a burglary, rush into an apartment through an unlocked door in response to a scream for help. Justice Tate's opinion for the court thoroughly reviews the criteria for application of the plain-view doctrine and concludes that the police are not unlawfully intruding when they instinctively rush into an apartment in response to a cry for help. This was not a case of the police themselves manufacturing the circumstances which allow a look around. Hence, once lawfully in the apartment, the police could seize the stolen property that was in plain view on the living room floor. State v. Pettle is to the same effect, where the evidence "was in plain view of a law enforcement officer who had a right to be at the location at which the view was obtained."

Two plain-view cases decided during this term of court are extremely important to the defense bar. In each case the Louisiana supreme court reversed a conviction for possession of marijuana, holding the crucial evidence inadmissible at trial. To anyone who reads the advance sheets regularly, these results are striking enough: there are few reversals on defense counsel's claim that evidence was unconstitutionally seized and used against defendant at trial. But there is something more to these two cases than just the fact of reversal. What is really significant is the way the court reversed. In both cases the court rejected the state's plain-view claim, notwith-

---

44. "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." Harris v. United States, 390 U.S. 234, 236 (1968).
45. 283 So. 2d 220 (La. 1973).
46. 286 So. 2d 625 (La. 1973).
47. Id. at 628-29.
standing the fact that these claims were supported in each instance by the record testimony of police officers. Ordinarily in this appellate posture one would expect the supreme court to affirm; the court rarely overrules a trial judge on an evidentiary point where police-officer testimony supports the lower court’s ruling. But twice this term the supreme court did just that, and it is important to know how and why.

*State v. Hargiss*48 is the first of these cases. In it the police claim to find marijuana in plain view in an open tape recorder case on the front floor of defendant’s car. If the arresting officers are believed, then there was no search because, as Chief Justice Sanders pointed out in his opinion for the court, the plain-view doctrine “is not a true exception to the search warrant requirement, for the theory is that such objects are taken without a search.”49 This was the conclusion reached by the trial judge in the case. On the other hand, if the arresting officers are engaged in an unlawful search at the time they discover the incriminating evidence, then the plain-view doctrine does not apply; and this later conclusion was the unanimous view of the supreme court in *Hargiss*. To put it bluntly, the supreme court just didn’t believe the arresting officers discovered the marijuana in plain view, regardless of the conclusion reached by the trial court. The Chief Justice pointed to several factors which convinced the court that the evidence was not in plain view: (1) the contraband was seized at night, and thus the physical environment was not conducive to plain view; (2) one of the arresting officers testified he previously drove defendant’s car during the day and saw nothing in it to attract his attention; (3) the other officer also inspected the car and discovered nothing unusual; (4) there was testimony from one of the officers that the police intended to search defendant’s automobile; and finally (5) the arresting officers’ testimony as to the details of finding the marijuana was contradictory.50 Viewing all these factors together, the record in *Hargiss* is unusual, and it is unlikely that a case exactly like this one will ever reach the court again. Still, the supreme court has now shown itself chary of plain-view claims where the record in the case viewed as a whole undermines the claim. That the court is willing to subject the record in these plain-view cases to the court’s own vigorous and independent scrutiny is a welcome development.

In the second case, *State v. Meichel*,51 a marshall removes a bottle of pills from defendant’s car and claims the bottle was in open

---

48. 288 So. 2d 633 (La. 1974).
49. Id. at 635.
50. Id.
51. 290 So. 2d 878 (La. 1974).
view on the front seat of the vehicle. The label on the bottle indicates the pills are habit-forming and that dispensing them without a prescription is prohibited. Once more the circumstances surrounding the seizure are controverted: the defendant claims the officer entered the automobile and searched it, finding the pills in a closed console between the bucket seats of the car. After retrieving the bottle, the police search the car and discover marijuana in the trunk. The admissibility of the marijuana at trial depends on the legality of the marshal’s taking the bottle of pills in the first place. If the bottle was lawfully seized, it gave the police probable cause to search the car for contraband and they could then seize the marijuana. This was the trial court’s conclusion in the case.

On appeal, the Louisiana supreme court—again making up its own mind about what the record showed—reversed the lower court’s plain-view ruling, although this time the court split 4-3. Writing for the majority, Justice Dixon emphasized that the word “evidence” in the plain-view formula is a word of limitation—that is, a policeman does not have the right to seize any object in his view in order to examine it and determine if it is evidence of crime. To the contrary, an object may be seized only when it is readily apparent to the police that the object is contraband or evidence; and as the majority read the record, the officer who seized the bottle of pills did not know the nature of the pills until after he picked up the bottle and examined it. The court said this kind of seizure does not fall within the plain-view exception to the warrant requirement, and thus seizure of the pills was unlawful and the subsequent seizure of the marijuana in the trunk of the car was tainted by the initial illegality. For the three dissenting justices, the record in the case read differently. They voted to apply the plain-view doctrine, apparently on the theory that the marshal knew the bottle contained contraband immediately on seeing it, without having to pick it up and examine it. It’s difficult to say which side is right in the case, however, because the town marshal’s testimony on the plain-view issue is not set out in either the majority or the dissenting opinions.

A second issue also divided the court in State v. Meichel: Did the defendant consent to the warrantless search of his car? At trial Meichel and a companion denied that they had given the police permission to search the car. But the arresting officers testified to the contrary.62 It appears from the report that the trial court believed the

62. The town marshal testified: “They told us to go ahead and search the car that they didn’t have anything to hide.” Another officer testified: “I believe Meichel there he said that they could and said there wasn’t anything in there.” One deputy sheriff testified: “They said, yes, sir, said ya’ll can search, said we don’t have anything in the car that we care for ya’ll seeing.” Id. at 881-82.
arresting officers and not the defendant, and in this situation what
the court said last term in State v. Pitts\textsuperscript{53} would seem relevant: "The
factual determination of the trial court regarding the validity of the
consent should be given great weight, and it will not be disturbed on
review unless clearly erroneous."\textsuperscript{54} In light of the record testimony of
the police officers in Meichel, one would guess the reviewing court
would affirm Meichel's conviction on account of his consent to an
otherwise unlawful search and seizure.

But a majority of the court in Meichel, overruling the trial court
again, held there was no valid consent. The majority did not say, as
it had on the plain-view issue in the case, that it disbelieved the
state's consent claim. Rather, the majority said all three of the arrest-
ing officers misconstrued what the defendant said to them. What the
defendant and his companion said to the police was "they didn't care
for us searching," which means, according to the majority's way of
hearing, "Don't search."\textsuperscript{55}

To this writer, the majority opinion in Meichel looks disingen-
uous. The one statement "they didn't care for us searching" is really
ambiguous in light of the patois of the arresting police officers. More-
over, anyone familiar with the appellate process knows how easy it is
on appeal to parse the trial testimony of a particular witness and then
to reach just about any conclusion desired, and this is what the ma-
jority seems to be doing in Meichel. Contrariwise, Chief Justice Sand-
ers recited the whole of the three arresting officers' testimony in his
dissenting opinion, and reading this fuller recitation leaves one fairly
convinced that, according to the police, defendant consented in the
case. Something else, it seems, must have been on the majority's
mind, but what? It could very well be that Justice Dixon, who wrote
the majority opinion, and Justices Tate, Barham, and Calogero are
inching towards a rule of law that would preclude the state altogether
from relying on consent as an exception to the warrant requirement
where the search is otherwise unlawful and where there is no good
reason other than "peaceful submission to a presumed lawful re-
quest"\textsuperscript{56} for thinking a suspect would allow the search knowing it will

\textsuperscript{53} 263 La. 38, 267 So. 2d 186 (La. 1972).
\textsuperscript{54}  Id. at 41-42, 267 So. 2d at 187-88.
\textsuperscript{55} "Whether the officers were under the impression that they had consent to
search is not determinative. The testimony of the officers shows that the basis for such
impression was erroneous. The statement attributed to the defendant does not consti-
tute consent. The defendant denied consent and misconstruction of the statement by
the police does not change the character of the denial." State v. Meichel, 290 So. 2d
878, 881 (La. 1974).
\textsuperscript{56} State v. Amphy, 259 La. 161, 174, 249 So. 2d 560, 565 (1971).
turn up incriminating evidence. A few cases\textsuperscript{57} outside of Louisiana would support this bold new position, and so would the writer for the reason that

the very idea that any defendant would consent to an otherwise unlawful search seems to defy human experience. An obvious fact of life cuts the other way. Unless coerced, a suspect with red hands will always try to keep them in his pockets.\textsuperscript{58}

It could very well be that the majority in \textit{Meichel} thought it incredible that a suspect who denied his guilt would have consented to a search which he knew would disclose contraband or evidence of crime. Moreover, a statement tacked onto the end of the majority opinion in \textit{Meichel} supports all this speculation. The court said it rejected the state's consent claim because "[a]n analysis of the evidence of the circumstances, nature and quality of the contended consent?"\textsuperscript{59} showed there was no consent to search the car. What circumstances was the court talking about? Maybe what was bothering the court was the realization that, generally speaking, suspects with red hands will always try to keep them in their pockets. If this idea were rigorously applied in the cases, then most consent claims would have to be rejected as inherently incredible; and the court may well be moving in that direction. Whether there is any rule like this beneath the surface of the majority opinion in \textit{Meichel} is for the future.

(3) Search Warrants

A basic constitutional rule in the area of search and seizure is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are \textit{per se} unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."\textsuperscript{60} Article 162 of the Code provides in part:

A search warrant may issue only upon probable cause established to the satisfaction of the judge, by the affidavit of a credible person, reciting facts establishing the cause for issuance of the warrant.

\textsuperscript{57} See, e.g., \textit{Judd v. United States}, 190 F.2d 649 (D.C. Cir. 1951). And in \textit{United States v. Shropshire}, 271 F. Supp. 521 (E.D. La. 1967), the court declared it incredible that a suspect who denied his guilt would have consented to a search which he knew would disclose incriminating evidence.


\textsuperscript{59} \textit{State v. Meichel}, 290 So. 2d 878, 882 (La. 1974).

\textsuperscript{60} \textit{Katz v. United States}, 389 U.S. 347, 357 (1967).
During the 1973-74 term the Louisiana supreme court decided several important search warrant cases involving all three of the essential requirements under article 162: (1) probable cause for the search, (2) facts establishing cause for issuing the warrant recited in the affidavit, and (3) a credible affiant.

*State v. Kuhlman* condemned a search warrant for failure to meet the probable cause requirement. All the police knew in the case was that a drug pusher, who was arrested for selling some cocaine in a restaurant, had stopped at defendant's house for about three minutes just before the sale. But to justify the search of a home, "more is needed than the possibility or suspicion that a seller of contraband had picked it up from a residence he had visited en route to the place of the sale, at least without further indication that the source of the contraband was the home rather than possession prior to the visit."  

The majority opinion in *State v. Linkletter* reviews the constitutional requirement that there must be a sufficient factual basis under "oath or affirmation" to support the magistrate's finding of probable cause. "Mere affirmation of belief or suspicion is not enough," and that's all the affidavit in *Linkletter* contained, as the majority saw it. Without a recitation of the underlying facts explaining the belief that Linkletter possessed stolen property, the magistrate could not make his own independent determination of probable cause, which is what the constitution requires. The majority opinion goes on to point out that article 162 of the Code mirrors the constitutional requirement of a sufficient factual basis for determining probable cause, but whether the supporting facts must be entirely contained in the affidavit in writing or whether oral statements under oath are good enough are questions the majority expressly reserved for later decision.

---

61. 293 So. 2d 159 (La. 1974). The unlawful search and seizure in *Kuhlman* is particularly egregious, and reading the case reminds one of the importance of the fourth amendment's warrant requirement.

62. *Id.* at 162.

63. 286 So. 2d 321 (La. 1973).

64. The quoted language is that of the fourth amendment. By contrast, the plain language of article 162 seems to require that an affidavit be used to set forth the facts supporting issuance of the search warrant; merely having the officer recite the supporting facts under oath would not be enough.


66. Justice Summers dissented in *Linkletter*. He was of the view that an affidavit under article 162 of the Code may be supplemented by additional information furnished to the magistrate at the time the warrant was issued. Since the judge who issued the warrant testified at the suppression hearing that there were such additional facts supporting probable cause, Justice Summers would have sustained the search warrant in the case. *See* 286 So. 2d at 328 (Summers, J., dissenting).
Sometimes it is extremely difficult to decide whether a particular affidavit demonstrates probable cause, and this is especially true when the affidavit relies on an informer's tip to establish probable cause. Under Aguilar v. Texas, two types of evidence must be presented to the magistrate when the affidavit relies on an informer. First, the affidavit must indicate the underlying circumstances that lead the informer to conclude evidence is present or crimes are being committed. Second, the affidavit must show that the informer is reliable. Clearly State v. Devall meets the two-pronged Aguilar test: the affidavit recites a detailed factual basis for the informer's conclusion that opium was in the defendant's apartment and there is also information from which the magistrate could conclude that the informer was telling the police the truth about the location of the opium.

By contrast, State v. Paciera is a much more difficult case—or at least Justice Tate's majority opinion makes it seem that way. In this case the affidavit recites that two New Orleans police officers, following up on a tip from a confidential informer, learned that a stolen lawn-hedger was at Paciera's premises. Nothing in the affidavit, however, tells how these two police officers learned that the stolen property was at Paciera's residence; there are no facts setting forth the underlying circumstances for the officers' conclusion that evidence was present at defendant's house. So far, there would seem to be a violation of the factual-basis requirement of the Aguilar case and of article 162 of the Code, and this was the conclusion reached by Justice Dixon in his short, one-sentence dissenting opinion. However the majority looked to other recitals in the affidavit and found them sufficient to satisfy the legal requirements. First, the same in-

---

68. 296 So. 2d 802 (La. 1974).
69. The affidavit states that an informer told the affiant, a captain with the East Baton Rouge Parish sheriff's office, that he had been in Devall's apartment and had seen one-half pound of pure opium wrapped in tin foil in an air vent in the ceiling. The informer knew the substance was opium because he had smoked some of it at the time he was in Devall's apartment. State v. Devall, 296 So. 2d 802, 804 (La. 1974).
70. The informer was named in the affidavit, and the informer incriminated himself by the statements he gave to the affiant. "Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support finding of probable cause to search." United States v. Harris, 403 U.S. 573, 583 (1971) (plurality opinion). Also, the informer had given the police other information which, when checked, proved true.
71. 290 So. 2d 681 (La. 1974).
72. "The affidavit does not disclose source of the information that the stolen goods were in defendant's premises." State v. Paciera, 290 So. 2d 681, 688 (La. 1974) (Dixon, J., dissenting).
former told the police that Paciera was a fence for stolen property. The affidavit shows that the informer was reliable because he previously gave the police information which helped them solve fifteen other burglaries. Moreover, on the basis of information provided by this same informer, the two officers recovered all the items stolen in the burglary under investigation except the lawn-hedger. There is one more material recital in the affidavit: a known burglar was seen going into the Paciera residence during a seven-hour surveillance of the house. The majority conceded that, by itself, what the affiant personally observed—that he saw a known burglar visiting the Paciera house—was not probable cause to justify searching the house. But still Justice Tate went on in a dizzying, six-page opinion to the conclusion that the affidavit was sufficient under the fourth amendment, although he said the issue was close.

Several factors influenced the majority, and among them the most important seems to be the fact that the affiant’s informants were identified by name as two New Orleans policemen. These officers had recovered other items of the property stolen in the burglary under investigation, and there was a substantial factual basis in the affidavit for believing the officers’ conclusion that the last piece of property was at Paciera’s residence. Moreover, as Justice Tate reviewed the controlling precedents on probable cause affidavits, including the latest expression of the United States Supreme Court in point, United States v. Harris, an affidavit is sufficient if

it . . . set[s] forth underlying circumstances and details sufficient to provide a substantial factual basis by which the magistrate might find reliable both the informant and the information given by him.

But this formulation, if given wide application in future cases, would seriously undermine the root fourth amendment requirement and the central idea of article 162 of the Code that a magistrate must reach his own independent determination of probable cause, regardless of the reliability of a police officer’s ultimate conclusion that evidence is present at a particular place. Without knowing the circumstances of the follow-up investigation in Paciera, without knowing how the officers came to their ultimate conclusion that the lawn-hedger was at Paciera’s, all the magistrate can do in order to issue a warrant is to trust the officer’s conclusion. But that kind of confidence in the

74. 403 U.S. 573 (1971).
75. State v. Paciera, 290 So. 2d 681, 685-86 (La. 1974).
police is not allowed, at least as this writer appreciates the fourth amendment. The majority opinion in *Paciera* seems to have twisted, if not to have snapped off, *Aguilar*'s first prong; and, so far as this writer knows, nothing in United States Supreme Court cases, not even Burger Court cases, supports this result.\textsuperscript{76}

In addition to the requirement of probable cause, the fourth amendment and article 162 require a particular description of the things to be seized under the warrant. The purpose of this specificity requirement is to limit the discretion of the police regarding the items to be seized and to prevent the police from generally rummaging around in search of incriminating evidence. Thus a good affidavit for a search warrant in Louisiana will show probable cause for each item named in the warrant.\textsuperscript{77} That was not the case last term in *State v. Bastida*\textsuperscript{78} where the list of items capturable under the warrant included not only automatic pistols, for which there was probable cause, but also stolen credit cards, for which nothing in the affidavit showed probable cause. This term in *State v. Sanchez*,\textsuperscript{79} which was an appeal by Bastida's co-defendant, the Louisiana supreme court clarified its earlier ruling in *Bastida* and held that a leather holster and twelve .32 caliber bullets were properly admitted as evidence at trial. These were the only items introduced by the state and they were items "which clearly were within the scope of the affidavit and as to which items the search warrant was clearly supported by probable cause."\textsuperscript{80} The fact that the list of items named in the warrant exceeded the scope of the supporting affidavit's showing of probable cause did not render the warrant wholly invalid, and the majority concluded that "the existence of surplusage in the warrant caused the defendant no prejudice."\textsuperscript{81} Justice Barham disagreed with the court's conclusion, and in his dissent he made the point that what was ad-

\textsuperscript{76} Justice Tate's reliance on *United States v. Harris* seems misplaced. There is nothing in *Harris* that suggests that the factual basis requirement regarding how an informer came to his conclusion that evidence of crime is at a specific place has been weakened in any way. *Harris* concerned the reliability of the informer. Although it is true that regarding informer reliability the *Harris* case may have weakened *Aguilar*'s second prong [see *The Supreme Court, 1970 Term*, 85 Harv. L. Rev. 53-64 (1971)], *Aguilar*'s factual basis prong seems intact. Nor should *Ventresca*'s preference for warrants, [see *United States v. Ventresca*, 380 U.S. 102 (1965)], be stretched so far as to save the warrant in *Paciera*.


\textsuperscript{78} 271 So. 2d 854 (La. 1973).

\textsuperscript{79} 284 So. 2d 918 (La. 1973).

\textsuperscript{80} Id. at 920.

\textsuperscript{81} Id.
mitted at trial, a holster and bullets, was not named in either the affidavit or the warrant. Moreover, for Justice Barham the warrant was constitutionally invalid because the list of items in the warrant exceeded the scope of the affidavit's showing of probable cause, and so the holster and the bullets should not have been admitted at trial.82

Generally speaking, the scope of a remedy afforded by the law—the exclusionary rule is an example—is determined by the nature and extent of the constitutional violation.83 It would seem, therefore, that the court is right in cases like Sanchez not to apply the exclusionary remedy to items which are particularly described in the warrant and for which probable cause is shown in the supporting affidavit. Also, the majority's dictum to the effect that, when the warrant lists items beyond the scope of the affidavit's probable cause, those items are to be suppressed at trial84 is consistent with the general remedial idea that the nature of the wrong determines the scope of the remedy applied. Finally, although the warrant did not list either a holster or ammunition for an automatic pistol as things to be seized, those items are intimately related to automatic pistols, an item which was listed in the warrant and which was supported by the affidavit's probable cause.85 So long as the warrant listed pistols, allowing the police to seize a holster and ammunition for an automatic pistol would not seem to leave them at large to rummage around freely, looking for whatever incriminating evidence they could find.

In one final respect during 1973-74, our supreme court outdistanced even the Burger Court on an important question of search warrant law: Is it open to a defendant on a motion to suppress to challenge the veracity of the affiant—usually a police officer—who swore out the warrant, and may a defendant traverse the accuracy of the factual averments in the affidavit upon which the search warrant was issued? The United States Supreme Court has avoided confronting this issue,86 but during the current term the Louisiana supreme
court reached the question of collateral attack on an affidavit and held impeachment of either the affiant or of the factual averments contained in the affidavit is available in Louisiana to a limited extent.

The affidavit trilogy in Louisiana begins with State v. Anselmo. In that case, the only essential question was whether the veracity of a confidential informer who supplies information relied on in the affidavit is subject to attack at the hearing on defendant's motion to suppress evidence seized with the warrant. The court held impeachment of the facts supplied by a confidential informer is unavailable because of the informer's privilege; but the court went on in broad dicta to the conclusions that probable cause for issuing a warrant is to be judged from the face of the affidavit itself, and that no collateral attack on either the affiant's veracity or on any of the factual statements contained in the affidavit, regardless of their source, is permissible. However, last term in State v. George a majority of the court signaled their readiness to restrict Anselmo's non-impeachment rule to cases involving attacks on informer veracity only, and Justice Dixon hinted that in the future defense counsel would be allowed to attack the veracity of affiants other than confidential informers. Finally, in companion cases this year Justice Dixon for a 4-3 majority held that a defendant is entitled to a hearing on well-pleaded allegations of affiant's misrepresentation in the application for a search warrant.

In State v. Melson, the affiant police officer averred in his application for a warrant that two eyewitnesses to a shooting had identified defendant as the perpetrator of the crime, and a warrant issued to search defendant's apartment based on the officer's affidavit. The police found incriminating evidence, but the defendant moved to

squarely presented here. 'The time is right for decision on this question, for the courts are in conflict and the question is important for the proper administration of criminal justice.' 94 S. Ct. at 3182 (White, J., dissenting).

88. Generally speaking, the identity of a police informer need not be disclosed to defendant on a motion to suppress evidence seized on the basis of information provided by the informer. McCray v. Illinois, 386 U.S. 300 (1967), is the leading case. The Louisiana supreme court reaffirmed the informer's privilege in at least two cases this term. See State v. Howard, 283 So. 2d 197 (La. 1973); State v. Howard, 283 So. 2d 199 (La. 1973).
90. 273 So. 2d 34 (La. 1973).
92. 284 So. 2d 873 (La. 1973).
suppress, alleging that the affiant police officer knowingly falsified the facts in his application for a warrant. In support of these allegations, defendant alleged the state had stipulated at a prior hearing that there were no eye-witness identifications in the case. These allegations were sufficient, Justice Dixon said, to require an evidentiary hearing on whether the affiant officer was telling the truth in his application for a warrant to search defendant's apartment. Several reasons support this result, albeit the court has now adopted what is a minority position among the states.\(^3\) If the affidavit is inaccurate, probable cause for the warrant may not exist, and to permit an affiant to execute an affidavit that is inaccurate is to allow the affiant rather than the magistrate to make the determination of probable cause. Requests for search warrants are ex parte and are frequently made under circumstances not conducive to a considered determination of probable cause; therefore these initial findings of cause should not be beyond the review of a district judge on a motion to suppress. Finally, to secure the people's right of privacy and to protect judicial integrity, untrue allegations of an affiant must be subject to judicial examination.\(^4\) In *Melson*'s companion case, the court made it clear, however, that defendant is not entitled to a hearing contesting the affiant's veracity in every case as a routine matter. The defendant must specify the particular averments in the affidavit which are claimed to be false, and there must be at least a minimal offer of proof indicating some good reason for doubting the truthfulness of the affidavit.\(^5\)

II. PRETRIAL IDENTIFICATION

Due process of law forbids the prosecution from using pretrial identification procedures that are unnecessarily suggestive and conducive to irreparable misidentification;\(^6\) and in determining whether a particular procedure is conducive to mistaken identification a reviewing court under the fourteenth amendment must look to all the

---

\(^3\) Justice Summers' dissenting opinion in the *Melson* case thoroughly discusses all the cases from other jurisdictions which support the majority rule against allowing collateral attack on search warrant affidavits. See State v. Melson, 284 So. 2d 873, 877-79 (La. 1973) (Summers, J., dissenting). For a list of those jurisdictions outside Louisiana allowing collateral attack on the affidavit, see *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Criminal Procedure I*, 34 LA. L. REV. 396, 409 n.46 (1974).


surrounding circumstances—or at least to some of them. The absence of a lawyer representing the accused at the pretrial identification is not fatal, provided the lineup identification takes place before any indictment or information is filed against the accused. What controlled in State v. Newman, however, was that the identification confrontation between the witness and the accused was a one-on-one showup, with the accused behind one-way glass, and there is a general prohibition against this kind of identification procedure, subject to a few, limited exceptions. In Newman there was no exigency requiring a showup. The accused was in custody at the police station, and there was no good reason why the police could not have conducted a full-fledged lineup. All the necessary facilities to do so were available at the police station, and in this situation the risk of misidentification inherent in a one-on-one confrontation can easily be avoided by using a lineup procedure instead. Finally, the court considered one more feature of the case unduly suggestive: the witness' mother kept pointing the accused out to the witness saying "that's the man." However in these identification cases, the fact that the court condemns the pretrial identification procedures used as unnecessarily suggestive and conducive to misidentification is not an end to the case. An eyewitness can still identify the defendant at trial as the perpetrator of the offense if the prosecution can show by clear and convincing evidence that the witness' in-court identification is based upon observations of the suspect other than the tainted pretrial confrontation. This is the so-called "independent source" test, and in Newman the court applied the test and concluded that the witness' in-court identification was not independent of the tainted showup at the police station. Newman's conviction was consequently reversed and the case was remanded for new trial.

100. One exception permits a one-on-one confrontation between the accused in custody and a witness where the accused is apprehended within a relatively short time and is returned to the scene of the crime for on-the-spot identification. See State v. Bland, 260 La. 153, 255 So. 2d 723 (1971).
In *State v. Moseley*, the court affirmed defendant’s conviction for armed robbery because the victim’s trial identification had an independent source. But for Justice Barham, who alone dissented, the one-on-one showup in the case was so egregiously prejudicial “that I can not countenance the in-court identification as being based upon any extraneous independent recognition factors.” Apparently Justice Barham would have the court adopt a strict rule of reversal in order to deter unnecessarily suggestive identification confrontations, regardless of whether the witness independently recognizes the defendant at trial. While this may be going too far, other members of the court should follow Justice Barham’s lead and at least give some attention to the problem of enforcing due process requirements regarding fair identification procedures. Saying in case after case that there is evidence of independent source and affirming defendant’s conviction on that ground leaves the police wholly free to use whatever identification procedures they like, however suggestive and however conducive to misidentification these procedures are. Surely some judicial control in cases of flagrant abuse of identification techniques is necessary. What the court could do in such cases is to skew application of the independent source test—that is, the court could reverse the conviction, saying there is no evidence of independent source when there really is, as a means of condemning the prejudicial identification procedures employed in a particular case. A better approach would be to acknowledge the problem of remedy forthrightly and to try to devise some enforcement mechanism for assuring the due process requirement of fair identification procedures. One way the court might begin is to announce its willingness to exclude all identification testimony—extra-judicial and in-court—as a prophylactic, should the police continue to exploit the kind of unfair identification procedures evident in *Moseley*.

Justice Barham did carry a majority of the supreme court with him in *State v. Wallace*, in which the court sustained defendant’s

---

United States Supreme Court has also listed such factors in *United States v. Wade*, 388 U.S. 218, 241 (1967), and one of these factors, the failure of the witness to identify the defendant on a prior occasion, proved important in a case after Newman. See *State v. Wallace*, 285 So. 2d 796 (La. 1973).

104. 284 So. 2d 749 (La. 1973).

105. *Id.* at 753 (Barham, J., dissenting).

106. The confrontation was one-to-one in *Moseley*, and at the time defendant was identified he was in his jail cell. Two of the robbery victims were told the police had captured the robber, and they were then asked to come to the police station to identify him. No good reason appears in the case why the police could not have used a full-fledged lineup. *Cf.* *State v. Newman*, 283 So. 2d 756 (La. 1973).

due process objection that his photographic identification by the victim of the robbery was fundamentally unfair and conducive to misidentification. Three days before the trial in Wallace, the district attorney subpoenaed the victim and asked him to pick out the men who robbed him from two photographic arrays, each of which contained five pictures. At the time the victim was told "that the accused was on there and I picked out who I thought it was." In the supreme court's view, this identification was not part of the investigatory stage: the defendants had already been arrested when the victim was shown the photographic arrays. Moreover, "[w]hile the prosecution has a right to 'prepare witnesses,' it does not have the right to 'prompt witnesses.'" Justice Barham noted the danger of misidentification when photographs are used to identify a suspect, the possibility of abuse of photographic identification procedures, and the fact that photographic identification is far inferior to a fairly conducted lineup; he also said that after a suspect is in police custody, there is seldom any justification for using photo-identification.

III. POLICE INTERROGATION AND CONFESSIONS

The court this term in State v. Levy had the chance to apply the rule that on-the-scene police questioning as to facts surrounding a crime is not affected by the Miranda decision. The police asked a woman sitting in a car what her name was and whether she was the wife of a man who had just been shot in a restaurant-bar. She replied, "Yes, that's my husband, and I shot the son of a bitch." These questions were investigatory in nature—to determine whether the woman was indeed the suspect sought—and no Miranda warnings were required before the police could ask them. Moreover, the incriminating response was admissible against the defendant at trial. Also, as soon as the defendant said she shot her husband, the officer in order to

108. Id. at 798.
109. Id. at 801, citing Sobel, Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pre-Trial Criminal Identification Methods, 38 BROOKLYN L. REV. 261, 297 (1971).
110. 285 So. 2d at 800-01. The court also found no independent source for the in-court identification.

In both Newman and Wallace the prosecution, without any indication that there was a pretrial identification, asked the witness at trial to identify the defendant as the perpetrator. This fairly common practice seems to place defense counsel at a disadvantage. What is almost imperative then is to ask the witness on cross-examination whether there was any pretrial identification and, if so, to explore the possibility of taint owing to an unfair showup or photographic identification.
111. 292 So. 2d 220 (La. 1974).
protect himself asked her where the gun was. The officer retrieved the
gun from defendant’s purse after being told where it was by the
defendant. The court ruled that the gun was admissible at trial be-
because the officer’s question about the location of the gun “was not so
much custodial interrogation, as rather being in aid of a limited pro-
tective search by an investigating officer founded on substantial rea-

IV. BAIL

Bail in criminal cases in Louisiana has always been considered
a fundamental right, protected by the state constitution,113 and all
offenses regardless of their nature are bailable, with but one excep-
tion. According to Article I, §18 of the Louisiana Constitution and
article 313 of the Code of Criminal Procedure, if the offense charged
is “capital” then the accused is not entitled to bail so long as the
proof is evident and the presumption great that the accused is guilty
as charged. Under Louisiana law a “capital” offense is one that may
be punished by death.114 For a while in Louisiana right after Furman
v. Georgia,115 which struck down the death penalty as then adminis-
tered in most states, imposition of the death penalty was impossible,
save a legislative attempt to narrow the circumstances of the pen-
alty’s imposition. But under the “classification of crimes” standard
of State v. Holmes116 and State v. Flood,117 bail in Louisiana remained
unavailable for all offenses classified as capital in the Criminal Code
regardless of the fact that the death penalty could no longer be im-
posed as the law then stood. However, during 1973 the Louisiana
legislature amended title 14 of the Revised Statutes and redefined
murder by degrees, providing death as the penalty for first degree
murder.118 This term in State v. Rhymes,119 an aggravated rape case,
the Louisiana supreme court, reaffirming the Holmes and Flood

---

112. Id. at 222.
114. LA. CODE CRIM. P. art. 933(2).
115. 408 U.S. 238 (1972).
116. 263 La. 685, 269 So. 2d 207 (1972).
117. 263 La. 700, 269 So. 2d 212 (1972). The “classification of crimes” standard
holds that murder, for instance, is still a “capital” crime even after Furman v. Georgia,
408 U.S. 238 (1972); only the penalty has changed. “True, the penalty is what made
murder a capital offense, and it is not actually a capital offense in Louisiana today.
But the nature of the offense has not changed—only the punishment.” State v. Flood,
263 La. 700, 705, 269 So. 2d 212, 214 (1972).
119. 284 So. 2d 923 (La. 1973).
cases, said: "The actions of the legislature since those two decisions show no intention to abandon the classification system there recognized, but rather a legislative intent to maintain the division of offenses into capital and non-capital crimes." Thus, so long as the offense is classified "capital" in the Criminal Code, as is aggravated rape, bail is unavailable in Louisiana.

V. PRELIMINARY HEARING

Most states permitting felony prosecutions by information require a bindover at a preliminary hearing as a jurisdictional prerequisite to the filing of the information with the trial court. But Louisiana permits an information to be filed directly by the district attorney without a preliminary hearing, and it used to be the law in Louisiana that a defendant is not entitled of right to a preliminary hearing once the district attorney files his bill of information in the trial court charging the defendant with crime. But there are indications that Louisiana's preliminary hearing practice is changing, and the change is in the direction of ordering preliminary examinations of right in all felony cases if the defendant wants a probable cause hearing, regardless of whether the district attorney files a bill of information in the case and regardless of when the bill is filed. This would be a significant change in the law because article 292 of the Code cuts off the right to a preliminary hearing in a felony case when an information is filed; the matter of ordering a preliminary examination is then left up to the discretion of the trial judge. Some of the orders for preliminary hearings entered by the court this term on supervisory writs indicate that a majority of the court is willing to order a preliminary hearing in a felony case as of right, regardless of the filing of an information, but there are some writ refusals the other way that

120. Id. at 925.
121. See Hall, Kamisar, LaFave & Israel, Modern Criminal Procedure 977 (4th ed. 1974).
122. State v. Pesson, 256 La. 201, 235 So. 2d 568 (1970), is the leading case to this effect.
123. "After the finding of an indictment or the filing of an information an order for a preliminary examination in felony cases may be granted by the court at any time either on its own motion or on request of the state or of the defendant." La. Code Crim. P. art. 292 (emphasis added).
124. See State v. Smith, 293 So. 2d 181 (La. 1974); State v. Jackson, 282 So. 2d 526 (La. 1973). In State v. Coleman, 290 So. 2d 906 (La. 1974), the court ordered a preliminary hearing on a felony charge, but the court expressly noted that "the trial court judge was correct in denying a preliminary hearing on the two misdemeanor charges which are now supported by bills of information." The Constitution of 1974 also expressly limits the right to a preliminary examination to felony cases. See La.
seem to adhere to the former practice of denying probable cause hearings where an information has been filed. Nothing really dispositive on this issue has emerged to date from the Louisiana supreme court; the court seems to be sitting still, waiting for something to happen. But what?

There is a view that the fourth and fourteenth amendments require that arrestees held for trial upon informations filed by the district attorney must be afforded preliminary hearings before a judicial officer without unnecessary delay in order to determine whether probable cause exists for holding them. The district attorney is not a judicial officer—or so the argument goes—and some protective judicial screen analogous to the grand jury is necessary between the district attorney and the decision to hold a particular individual to prevent the detention from being constitutionally unreasonable and violative of due process of law. Justice Barham acknowledged this view in one case decided this term and intimated that article 292 of the Code may be unconstitutional in cutting off a probable cause hearing simply because the district attorney files his information. Justice Barham was referring, of course, to developments in the Fifth Circuit—specifically, to Pugh v. Rainwater, a case decided in 1973, which holds that an arrestee who is held for trial only on the basis of an information filed by the prosecution is constitutionally entitled to a preliminary hearing before a judicial officer without unnecessary delay. This Pugh case is currently before the United States Supreme Court, and probably our own supreme court is waiting for Pugh to happen there, before it acts dispositively here, in Louisiana. All that can be said with any certainty, however, is that Louisiana’s new constitution will moot at least part of the problem for Louisiana after it goes into effect. For under the constitution of 1974: “The right to a preliminary examination shall not be denied in felony cases except


126. Cf. Coolidge v. New Hampshire, 403 U.S. 443 (1971) (accepting the argument that a state attorney general may not constitutionally issue search warrants because he is not the neutral and detached magistrate required by the fourth and fourteenth amendments).


when the accused is indicted by a grand jury.’’

As a matter of state constitutional law, this new provision rejects the former practice, and no longer should it be true that filing an information obviates holding a preliminary hearing in felony cases if the accused wants one.

VI. CHARGING THE CRIME

The law on charging the crime in Louisiana is changing too, although the court is more blunt about what it is doing and why. What the court is doing is sustaining indictments or informations which under the old rules probably would have been adjudged constitutionally deficient for failure to state every essential fact of the offense charged in the indictment. In State v. Clark, for example, the prosecution, relying on the short-form indictment authorized by article 465 of the Code, charged that ‘‘Clark . . . did violate R.S. 14:62 in that he committed simple burglary of the movable belonging to Cathy A. Staff, located at 2286 Highland Road, Baton Rouge, Louisiana.’’ What was burglarized in the case was an automobile; however, the charge against Clark only used the generic term ‘‘movable’’ to allege what was burglarized. For two members of the court, Justices Barham and Summers, the indictment’s failure to specify exactly what was burglarized was fatal under the requirement of Article I, §10 of the 1921 Louisiana Constitution that the indictment must state every essential fact of the offense charged.

That the law on charging the crime is changing, however, is evident first from the fact that the majority affirmed Clark’s conviction; the court upheld the indictment as sufficient, although the majority opinion in the case intimates that the ‘‘extremely technical line of jurisprudence’’ of past cases would have required a reversal because Article I, §10 ‘‘has until now been interpreted as requiring the indictment or information to state every essential fact of the offense with which charged.’’ Second, it is probably significant that Justice Tate wrote the Clark majority opinion. During 1972-73, Justice Tate suggested that the court should re-examine charging law in Louisiana, and he proposed that, if the court were willing to overrule the older, ultratechnical jurisprudence regarding the validity of indictments, it should adopt a new and better waiver approach to reviewing the sufficiency of indictments on appeal. If the defendant actually

130. 288 So. 2d 612 (La. 1974).
131. Id. at 615.
132. Id.
133. See State v. Smith, 275 So. 2d 733, 734-37 (La. 1973) (Tate, J., dissenting).
knew what the crime charged was and if the defense was not prejudiced or surprised in any way by the indictment's flaw, then Justice Tate suggested that defendant's failure to challenge the indictment's defect at trial should waive it on appeal, and the majority opinion in Clark seems to have applied this waiver test in reaching the conclusion that the indictment in the case was sufficient. Furthermore, in a separate concurring opinion, Justice Tate assigned additional reasons for affirming Clark's conviction, reasons which were quite blunt and which cut beyond the particular situation involved in the Clark case. After noting that in practically no modern American jurisdiction except Louisiana has the constitutional requirement of notice of the nature and cause of the accusation been interpreted so rigidly, Justice Tate continued:

There is simply no functional reason for such interpretation under modern-day legal procedures and in the context of today's courts and conditions.

The defendant's right to know in advance of the trial sufficient particulars as to enable him to defend himself intelligently can be adequately protected by the bill of particulars and other discovery devices authorized and to be authorized.

... Under the ordinary meaning of the language, it [Article I, §10] should not be restricted to meaning that the defendant must by indictment be informed of the nature and cause of the accusation against him—it should be sufficient, in the absence of surprise or prejudice, that he be so informed by means in addition to the indictment.

Then Justice Tate specifically suggested that the court should overrule State v. Straughan, which held unconstitutional legislation designed to permit charging by name and article number of the offense, in order to allow the state legislature to provide for a simpler and less technical indictment system. State v. Russell takes another step towards making the law on charging the crime in Louisiana more rational. The bill of informa-

134. Id. at 736.
137. 229 La. 1036, 87 So. 2d 523 (1956).
138. State v. Clark, 288 So. 2d 612, 618 (La. 1974) (Tate, J., concurring).
139. 292 So. 2d 681 (La. 1974).
tion charged that Russell "'did violate L.R.S. 14:42 in that he attempted to rape'" the victim.\textsuperscript{140} What the prosecution intended to charge, however, was attempted \textit{aggravated} rape, as the reference to section 14:42 of the Revised Statutes defining \textit{aggravated} rape shows. But under the \textit{Straughan} case, reference in the indictment to the Revised Statutes cannot be considered in determining whether the indictment sufficiently states all the essential facts as required by the state constitution, and so Russell argued that the information in his case was fatally defective. But the court, with Justice Tate again writing the majority opinion, concluded that the charge was sufficient. True, the charge was not a correct short-form indictment for \textit{aggravated} rape.\textsuperscript{141} But had the language of section 14:42 been incorporated in full in the information, instead of by reference, the information would have satisfied the constitutional requirement of stating every essential fact in the charge. Therefore the court could see no logical or practical reason why the incorporation by reference instead of a verbatim recitation should have a different legal effect—at least in the absence of misleading reference. What particularly impressed the court was the right of the accused to secure further amplification of the charge by a bill of particulars. And, despite any technical defect, the court was unwilling to hold the information a complete nullity where no objection was raised at trial, where defendant actually knew what the charge was, and where the defendant was fully able to prepare his defense. Finally, Justice Tate accomplished in \textit{Russell} what he has urged for some time now: the court expressly overruled \textit{State v. Straughan} "to the extent that the holding or language . . . is inconsistent with our holding today . . . ."\textsuperscript{142}

\section*{VII. Pretrial Discovery}

The court rocked along as usual on pretrial discovery during 1973-74. What looked like a significant advance came early in the term in \textit{State v. Woodruff},\textsuperscript{143} in which the court held that defendant was entitled to know before trial on his motion for a bill of particulars whether any dangerous weapon was found on or near the victim of

\textsuperscript{140} \textit{Id.} at 682.

\textsuperscript{141} \textit{La. Code Crim. P.} art. 465 provides the following correct short form: "\textit{Aggravated Rape—A.B. committed aggravated rape upon C.D.}"

\textsuperscript{142} \textit{State v. Russell}, 292 So. 2d 681, 685 (La. 1974). Exactly where the court stands now on charging flaws is unclear in light of the gentle way in which the court overruled the \textit{Straughan} case. But it seems likely that the court will use \textit{Russell} as a springboard toward much more relaxed scrutiny of indictments and informations in future cases.

\textsuperscript{143} 281 So. 2d 95 (La. 1973).
the shooting and, if so, the make, model, serial number, and caliber of gun found at the scene. Defendant claimed self-defense in the case, and the information requested might have facilitated proof of defendant's claim. The pretrial disclosure required in Woodruff is analogous to that ordered in the Migliore case, in which the Louisiana supreme court held that a defendant who is charged with possession or sale of prohibited drugs is entitled to have a small sample of the drug for independent, pretrial inspection by his own experts. But Justice Barham's opinion for the court in Woodruff never expressly mentions the Migliore case, probably for the reason that defendant did not actually request to inspect any evidence at all; all defendant wanted in Woodruff was information.

However six months later, in State v. Barnard, the defendant wanted his own experts before trial to examine the murder weapon and a cartridge removed from the head of the victim, evidence known to be in the prosecution's possession and the principal tie between the defendant and the crime. Distinguishing Woodruff, three justices of the court, including one justice sitting ad hoc for Justice Marcus, reiterated the general rule that there is no pretrial discovery of evidence in Louisiana criminal cases:

"Essentially, we are requested here to extend pre-trial discovery procedures to criminal cases, something which the Federal Courts have not required, and which our Louisiana Legislature has deliberately chosen not to do. If such procedures are to be adopted, it is the function of the legislature, not the courts, to adopt comprehensive rules for pre-trial discovery in criminal cases not only by the accused, but by the prosecution."

Implementation of the narrow right of discovery recognized in State v. Migliore was at issue in two indigency cases decided this term. In State v. Glass, a prosecution for distributing heroin, the defendant alleged his indigency and requested that a qualified chemist be employed at state expense to independently analyze the alleged heroin. The trial court turned defendant down and the Louisiana supreme court affirmed, saying "the defendant in the instant

---

145. 287 So. 2d 770 (La. 1973).
146. Id. at 774. At the last regular session the legislature failed to approve a comprehensive two-way discovery statute for criminal cases developed by the Louisiana State Law Institute. H.B. No. 175, 37th Reg. Sess. (1974), introduced by Representatives Bagert and Simoneaux.
case has failed to make an adequate showing that independent expert assistance should have been furnished him at the State's expense.\textsuperscript{149}

The court did not decide, however, that a defendant would never have a constitutional right to have independent expert assistance at the State's expense.

Finally, the supreme court rejected a spate of discovery demands all based on the rule of \textit{Brady v. Maryland}\textsuperscript{190} that suppression by the prosecution of material evidence favorable to an accused upon request violates due process of law. The real problem here—and it has never been adequately solved—is how to implement \textit{Brady}'s holding.

Is the accused to have a look at all the evidence in the state's possession to determine whether any is favorable? Or is the state's response "We have nothing exculpatory in our file" sufficient? Usually the law requires the defendant to take the state's word for it, unless the defendant can show the contrary, which is almost an impossible task.\textsuperscript{101} \textit{State v. Baker}\textsuperscript{152} is typical in this regard. Moreover, in \textit{State v. Thomas}\textsuperscript{153} the court rejected the argument that the defendant, not the prosecutor, is in the best position to judge whether evidence is exculpatory or not. This may well be true, but "under the prevailing judicial interpretations, defendant may not require pre-trial discovery of the nature sought";\textsuperscript{154} and so the problem of implementing \textit{Brady v. Maryland} remains: How is defendant to discover favorable evidence in the hands of the prosecution without a look at the state's files?

Perhaps the trial judge could take his own look at the state's files. That was exactly the procedure employed in \textit{State v. Odom}\textsuperscript{155} this term, and there was apparently no objection from the district attorney. The Louisiana supreme court said that defendant was entitled to no more than this, however. He could not inspect the prosecution's files himself. Still, what the court did not say in \textit{Odom} is equally important. The court did not say that what the trial judge did was either wrong or an abuse of discretion, and so it might be a good idea for defense counsel in future cases to ask for the trial court's

\textsuperscript{149} \textit{Id.} at 697.

\textsuperscript{150} 373 U.S. 83 (1963).

\textsuperscript{151} Professor Pugh has pointed out that it is difficult for an accused to show that evidence favorable to him is being withheld, without access to it. \textit{See The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Evidence}, 33 \textit{La. L. Rev.} 306, 322 (1973).

\textsuperscript{152} 288 So. 2d 52 (La. 1973).

\textsuperscript{153} 290 So. 2d 317 (La. 1974).

\textsuperscript{154} \textit{Id.} at 318.

\textsuperscript{155} 292 So. 2d 189 (La. 1974).
help in determining whether any exculpatory evidence exists in the hands of the prosecution. Moreover, and on a broader front, the trial bench should be encouraged to exercise the wide discretion which may be theirs\textsuperscript{156} to allow pretrial discovery in cases of particularized, demonstrable need—toward the noble end of serving the truth at criminal trial.\textsuperscript{157}

---

\textsuperscript{156} See \textsc{La. Code Crim. P.} art. 3.

\textsuperscript{157} Ordinarily, appeals in these cases are taken from the trial court's refusal to order any discovery. But the scope of appellate review may well be different were a determined trial judge to order pretrial discovery in the first instance in an especially worthy case.