Pretrial Criminal Procedure

Richard C. Guerriero Jr.
STUDENT CONTRIBUTION
PRETRIAL CRIMINAL PROCEDURE

Richard C. Guerriero, Jr.*

THE Terry Doctrine

Since Terry v. Ohio, the United States Supreme Court has recognized that the fourth amendment allows a seizure which falls short of a full arrest to be justified by a reasonable suspicion which is less than probable cause. Recent Supreme Court cases dealt with the permissible extent of a Terry detention, the seizure of personal belongings under Terry, and the scope of the protective search which is allowed under Terry.

The decision in Florida v. Royer is disappointing in that there is no majority opinion. The defendant was approached in an airport because he fit a drug courier profile. Information volunteered by the defendant revealed that he was traveling under an assumed name. The detectives subsequently removed the defendant to a separate room in the airport and conducted a consensual search of his luggage. In an opinion by Justice White, the four members of the plurality agreed that, under the reasonable belief definition of a stop, Royer had been stopped, but that because he fit a drug courier profile and because he was discovered to be traveling under an assumed name, the stop was justified under Terry. The plurality held, however, that the justifiable scope of the detention was exceeded when, despite Royer's explanation for the discrepancy in names, the detectives, still acting on their initial suspicions, brought Royer to an interrogation room and retrieved his luggage without his consent. Thus, Royer's consent to search his luggage was invalid because at the time he consented he was being illegally detained. Justice Brennan concurred in the result reached by the plurality. In Justice Brennan's opinion, there was not sufficient justification for even the initial stop. He did state, however, that assuming the initial legality of the stop, the subsequent detention clearly exceeded that authorized by Terry. To this extent Royer is an indication of the permissible extent of a Terry detention.

Kolender v. Lawson is not a fourth amendment case, but it does

Copyright 1983, by LOUISIANA LAW REVIEW.

*Third-year law student, Louisiana State University.

3. Under this definition, an individual is said to have been stopped when a reasonable person would have believed that he was not free to leave. This was the definition given by Justice Stewart in United States v. Mendenhall, 446 U.S. 544, 554 (1980). In Royer, Justice Blackmun, dissenting, agreed with the four members of the plurality that Stewart's definition of a stop should be adopted, but differed from the plurality in his evaluation of the facts of Royer under that definition. 103 S. Ct. at 1332-35.
concern the protection of an individual's liberty interests after a valid *Terry* stop is made. A California statute made it a crime for an individual not to give "credible and reliable" identification to a police officer who, with a reasonable suspicion of criminal activity sufficient to justify a *Terry* stop, has detained the individual. The phrase *credible and reliable* had been defined by the California courts to mean "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." Lawson brought a civil action for declaratory and injunctive relief challenging the facial validity of the statute. Justice O'Connor, writing for a majority of the Court, found the statute unconstitutionally vague in violation of fourteenth amendment due process. Although the state required the initial detention to be justified under *Terry*, the state failed to provide sufficient objective standards for determining when the detainee had identified himself in compliance with the law. Thus, since full discretion was accorded to the detaining officer, the requirements of the law varied with the officer's moment to moment judgment. The statute failed, therefore, to meet the constitutional requirement of definiteness. Although Justice O'Connor relied on first amendment rights and the right to freedom of movement, rather than the fourth amendment, she pointed out that a major fault of the statute was that the individual's freedom after the stop was at the whim of the police officer. This criticism of the statute is consistent with the fourth amendment requirement that the permissible extent of a *Terry* stop be judged by an objective standard and be closely tailored to its justification.

In *United States v. Place*, a majority of the Court endorsed an expansion of the *Terry* rationale to allow temporary detention of personal belongings suspected of containing contraband. *Place* involved another instance of law enforcement officials trying to discover drug traffickers in an airport. The issue was whether officials violated the fourth amendment and *Terry* when they detained Place's luggage for ninety minutes in order to expose it to a "sniff test" by trained narcotics dogs. The Supreme Court stated that *Terry* allows limited intrusions on personal liberty on less than probable cause, and in the same manner allows a brief investigative detention of personal property reasonably suspected of containing contraband. Analogously to the detention of a person, the scope of the detention of personal property must be limited to the justification for the detention. Thus, the Court held that although the detention of personal property may be valid, the ninety-minute detention of Place's

---

7. 103 S. Ct. at 1859.
luggage was not so minimally intrusive as to be justified by reasonable suspicion alone.\textsuperscript{10}

Despite the extensive discussion by the \textit{Place} majority, it is arguable that the expansion of \textit{Terry} to personal property was unnecessary to the decision.\textsuperscript{11} The majority recognized that the practical effect of detaining a person's luggage in an airport is to detain the person.\textsuperscript{12} If this is true, then \textit{Place} may simply be a case where the detention of the person went beyond that allowed by \textit{Terry}, in that the ninety-minute detention exceeded its justification under the circumstances, and thereby became unreasonable. Nonetheless, given the discussion in the majority opinion, and the six votes in support of it, an expansion of \textit{Terry} has evidently taken place.

Another important aspect of the majority opinion in \textit{Place} should be considered dicta. The majority stated that a "sniff test" by trained narcotics dogs is not a search within the scope of the fourth amendment and does not require probable cause. Although the majority attempted to make this rule part of its holding,\textsuperscript{13} it should be read as dicta. Even under the majority's expanded interpretation of \textit{Terry}, the luggage was being illegally detained when the test was performed. It was unnecessary, then, to decide whether the test constituted a search. However, since six members of the Court stated that this principle was part of their holding, the fact that the principle is technically dicta does not mean that it will not be respected.

The area that may be searched in a protective search incident to a \textit{Terry} stop was expanded in \textit{Michigan v. Long}.\textsuperscript{14} At night, police had observed Long drive erratically along a rural road and eventually run off the road into a ditch. As the officers talked to the apparently intoxicated Long, he began to walk back towards the open door on the driver's side of the car. Upon seeing a large hunting knife on the floor of the car, the officers stopped Long and frisked him. Then, while Long and one officer stood near the rear of the car, the other officer searched the car for weapons and found marijuana in an open pouch on the front seat. The Michigan Supreme Court held that the fruits of the search were inadmissible because \"\textit{Terry} authorized only a limited pat-down search of...

\textsuperscript{10} The Court said that the length of the seizure alone demonstrated that the seizure was unreasonable. \textit{Id.} at 2645. The Court added, however, that it declined to adopt any outside time limitation for a permissible \textit{Terry} stop. \textit{Id.} at 2646.
\textsuperscript{11} See \textit{id.} at 2651-53 (Blackmun, J., concurring).
\textsuperscript{12} \textit{Id.} at 2645.
\textsuperscript{13} \textit{Id.} at 2644. The majority stated: \"If this investigative procedure [the sniff test] is itself a search requiring probable cause, the initial seizure of respondent's luggage for the purpose of subjecting it to the sniff test—no matter how brief—could not be justified on less than probable cause.\" \textit{Id.} This reasoning overlooks the possibility that there might be a valid \textit{Terry} detention of the luggage which produces probable cause to search. A recent federal court of appeals decision states that the conclusion in \textit{Place} (that a sniff test is not a search) is dicta. United States v. Beale, No. 80-1652 (9th Cir. Oct. 24, 1983).
\textsuperscript{14} 103 S. Ct. 3469 (1983).
a person suspected of criminal activity rather than a search of an area.\textsuperscript{15}

The United States Supreme Court reversed noting that roadside encounters are particularly dangerous to police officers and that the \textit{Chimel v. California}\textsuperscript{16} search incident to arrest had been extended to the inside of the vehicle in \textit{New York v. Belton}.\textsuperscript{17} Justice O'Connor, writing for the majority, concluded that:

\begin{quote}
[T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.\textsuperscript{18}
\end{quote}

The search of a vehicle following a \textit{Terry} stop is not automatically permissible, however, and thus must be distinguished from the \textit{Chimel-Belton} search incident to arrest.\textsuperscript{19} Although the search following a \textit{Terry} stop and the search incident to arrest are both justified by the interest in protecting police officers, the need to locate and preserve evidence is an additional justification for the search incident to arrest. Since the interest in preserving evidence has not yet developed when a \textit{Terry} stop is made, there must in fact be a reasonable belief that weapons are accessible to the defendant in order to justify the search. According to Justice O'Connor, the facts did justify a reasonable belief that Long would pose a danger if he were allowed to re-enter his vehicle; therefore, the search was valid.

Whenever a \textit{Terry} stop is made of a driver, there is the possibility that the driver will re-enter his vehicle (since the police do not yet have probable cause to arrest). Thus, this aspect of the justification for searching the vehicle in \textit{Long} will always be present. The distinction between the \textit{Belton} search and the \textit{Long} search is important, however, because of the possibility in the latter of a valid \textit{Terry} stop when there is not a reasonable belief that the suspect is armed or has access to weapons.\textsuperscript{20}

Several recent Louisiana cases have also discussed the \textit{Terry} doctrine. \textit{State v. Williams}\textsuperscript{21} contains a survey of Louisiana cases determining what constitutes reasonable cause under article 215.1 of the Louisiana Code

\begin{footnotes}
18. 103 S. Ct. at 3480 (footnote omitted) (quoting \textit{Terry}, 392 U.S. at 21).
20. Some Louisiana cases had already reached results similar to that in \textit{Long}, without going quite as far. See \textit{State v. Williams}, 421 So. 2d 874 (La. 1982); \textit{State v. Reed}, 388 So. 2d 776 (La. 1980).
21. 421 So. 2d 874 (La. 1982).
\end{footnotes}
of Criminal Procedure, Louisiana's statutory equivalent of *Terry*. The survey is revealing in that it shows how difficult it may be for a police officer or a court to decide when there is reasonable cause. For example, whether the suspect walks away or runs away when he sees the police is an important distinction. It may also be important to determine whether the suspect was engaged in mere suspicious activity or in suspicious conduct in a "high crime area." This is not to suggest that such distinctions do not exist or that they are not important, but only to illustrate the great extent to which each case rests on its facts and how they are characterized.

In *Williams*, the officers saw three men talking to two other men who were in a parked car at midnight in a New Orleans housing project. The officers observed one of the three men reach inside the car. Suspecting a drug deal, the officers approached the men. The three men on foot attempted to leave, and one of them put his hand to his mouth and swallowed. The men in the car likewise attempted to leave. The Louisiana Supreme Court held that at this point there was reasonable cause to stop all five men.

In contrast to *Williams*, the court in *State v. Phipps*\(^2\) held there was not reasonable cause to stop the defendants when the only facts presented in support of the officer's belief that criminal activity was involved were that four young people were walking along the street at 1 A.M. on the Sunday before Mardi Gras.

More recently, the Louisiana Supreme Court adopted a three part analysis to be used in determining whether a permissible *Terry* stop has been made. In *State v. Flowers*,\(^2\) which involved a *Terry* stop of a car, the court thoroughly discussed the *Terry* jurisprudence and concluded:

Thus, there are at least three inquiries involved in determining whether a seizure was a valid investigatory stop: (a) whether the intrusion was an arrest or a stop; (b) whether the stop was of a type which is reasonable in view of the public interest served and the degree of invasion entailed; and (c) whether the particular stop was warranted by a reasonable suspicion, based on articulable facts and rational inferences from these facts.\(^2\)

The court also stated that an additional "implicit consideration" is the seriousness of the criminal conduct under investigation.\(^3\)

In deciding whether there was an arrest requiring probable cause or only a stop, the court indicated that the following facts would be relevant: whether the suspect was simply questioned on the scene or was taken

---

22. 429 So. 2d 445 (La. 1983).
24. *Id.* at 7.
25. *Id.* at 7 n.1.
to a police station, whether the suspect was told or given the impression that he was free to go (or would be shortly), whether he would have in fact been restrained if he had attempted to leave, whether the officer intended to make an arrest or a stop, the length of the stop, whether a search was made, and the amount of force used.

Determining whether a stop was of a reasonable type requires balancing the government's interest in investigating and preventing crime against the individual's privacy interest. The court's consideration of the seriousness of the offense being investigated is important here. The implication seems to be that an intrusion on privacy which would be prohibited, given a routine investigation of a non-violent crime, would not be prohibited if a serious violent crime were being investigated. This approach is subject to the criticism that it makes a person's constitutional right to freedom and privacy dependent on the seriousness of the crime of which he is suspected.

Finally, the Flowers court noted that for a particular stop to be reasonable, the detaining officer must "have knowledge of specific, articulable facts which, taken together with rational inferences from those facts, reasonably warrant the 'stop.'" Such facts may come from personal observation or from an informant, but the test for reasonable cause will vary depending on the source of the information.

**Random Vessel Stops**

The rule of *Delaware v. Prouse* that the police cannot randomly stop vehicles to check license and registration does not apply to vessels. Justice Rehnquist, who dissented in *Prouse*, wrote for the majority in *United States v. Villamonte-Marquez*, which held that pursuant to a federal customs statute officials could stop and board a vessel which had access to the open sea even though there was no prior suspicion of criminal activity and the boarding was not pursuant to any system of spot checks. Justice Rehnquist based his holding on the factual distinctions between vessels and automobiles. Fixed checkpoints, or spot checks, according to Justice Rehnquist, are not practical for vessels since they do not travel on "established avenues," they are difficult to spot, and ready access to the open sea would allow vessels to avoid the checkpoints. In addition, Justice Rehnquist noted that the registration of vessels is more difficult to check by visual observation than that of vehicles. As historical support for his argument, Justice Rehnquist pointed out that a similar statute had

26. *Id.* at 9.
27. *Id.* at 10.
30. This point is contradicted somewhat by the fact that the vessel in *Villamonte-Marquez* was located in a ship channel which was the only channel leading to the open sea. *Id.* at 2576.
been passed in 1790 by the same Congress which promulgated the fourth amendment. For these reasons, and because the government’s interests are especially great where vessels are involved, the situation is distinguishable from that in Prouse. Thus, random stops of vessels which have access to the open sea are not unreasonable or in violation of the fourth amendment.

BEEPERS

A “beeper” is a small, easily hidden radio transmitter which emits periodic signals allowing it to be located with a radio receiver. In United States v. Knotts, a majority of the Supreme Court held that the use of a beeper to track a person traveling on public highways was not a search under the fourth amendment. With the permission of a chemical supply company, state narcotics officers placed a beeper in a drum of chloroform, which was then sold to Knotts’ co-conspirator. By monitoring the beeper the officials were eventually able to locate the drum at Knotts’ cabin. Through visual surveillance the officers were then able to obtain enough information for a search warrant and to eventually discover that Knotts was manufacturing illegal drugs. Justice Rehnquist, writing for the majority, found that use of the beeper did not involve a search because the destiny of the drum could have been discovered by visual surveillance of the co-conspirators’ travels on public highways. Since there is not a reasonable expectation of privacy in the information conveyed by such movements in public, there was no violation of the fourth amendment when a beeper was used to obtain the same information. The Court made several broad statements, including: “Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth . . . .” and “scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise.”

There are two important limitations to the holding in Knotts. First, the beeper in Knotts was used only to track movements of the drum in public. The beeper was not relied on to reveal movements or conduct occurring inside the cabin where there would be a reasonable expectation of privacy. Secondly, the warrantless installation of the beeper in the drum was not challenged by Knotts because it was believed he had no standing.

31. Vessel documentation involves a number of important government interests such as regulation of fishing, enforcement of environmental laws, and preventing the entry of illegal aliens and drugs. Id. at 2581.
32. 103 S. Ct. 1081 (1983).
34. 103 S. Ct. at 1087.
Louisiana court, the defendant clearly would have standing to challenge the warrantless installation under article I, section 5 of the Louisiana Constitution. Moreover, immediately following Knotts, the federal Fifth Circuit held that "a warrant based upon probable cause is required to install and maintain an electronic tracking device within the interior of a vehicle or other conveyance for an extended period of time." Due to these limitations, the extent to which police may permissibly use beepers is still uncertain.

Plain View

Although twelve years have passed since the plurality decision in Coolidge v. New Hampshire, the United States Supreme Court is still unable to agree on when evidence or contraband is properly seized because it is in plain view. In Coolidge, four members of the Court agreed that in order for a seizure of contraband or evidence to be valid, three prerequisites must be met: (1) there must be a prior valid intrusion or a lawful right to be in the place from which the plain view occurred, (2) the discovery must be unanticipated and inadvertent, and (3) it must be immediately apparent that the items observed are contraband or evidence of a crime.

In the recent case of Texas v. Brown, the only point of agreement was on what "immediately apparent" does not mean. Brown was stopped one night at a routine driver’s license checkpoint. The police officer shined his light into Brown’s car and saw "an opaque, green party balloon, knotted about one half inch from the tip." Brown opened the glove compartment to get his license, and the officer observed more balloons and some loose white powder. The green balloon was seized and later discovered to contain heroin. The officer testified that he knew balloons were frequently used to package narcotics. The state appellate court held that in order for the evidence to be "immediately apparent," the officer

35. Id. at 1084.
36. United States v. Butts, 710 F.2d 1139, 1150 (5th Cir. 1983). The holding of Butts is only applicable where the beeper is installed in the interior of the vehicle. Previously, the Fifth Circuit had held that the warrantless installation of a beeper to the exterior of a vehicle based only on reasonable suspicion did not violate the fourth amendment. United States v. Michael, 645 F.2d 252 (5th Cir. 1981) (en banc), cert. denied, 454 U.S. 950 (1982). After Butts, the problem of distinguishing the exterior of a vehicle from its interior is bound to arise. Consider, for example, beepers installed under the hood or in the trunk. In addition, the Butts court itself stated that there may be exceptions to the warrant requirement for the interior of the car. 710 F.2d at 1150 n.16. All of these possibilities simply add to the confusion.
38. Id. at 465-74.
40. Id. at 1538.
had to know that it was contraband. The implication was that the officer had to actually see the contraband or be as certain as if he had seen it. The Supreme Court reversed, with all of the Justices agreeing that the state court had interpreted *Coolidge* too strictly and that the contraband did not have to be visible. 41

Although all nine of the Justices concurred in the judgment, the Court split seriously on the general analysis of the case. Justice Rehnquist and the plurality emphasized that *Coolidge* was only a plurality case and implied that the three-part test was subject to serious question. Justice Rehnquist also stated that plain view should not be considered as an independent exception to the warrant requirement of the fourth amendment. In response, Justice Powell, for himself and Justice Blackmun, said that plain view was an exception and that it was unnecessary to criticize *Coolidge* after it had been generally accepted for more than a decade. Justice Stevens, by contrast, felt it was necessary to discuss the case in light of the "container" jurisprudence and the particular problems posed when a plain view case involves a container. Thus, *Texas v. Brown* may result in a renewal of the uncertainty of the plain view doctrine.

**Electronic Surveillance**

On original hearing in *State v. Reeves*, 42 the Louisiana Supreme Court held that the warrantless electronic surveillance of conversations between an undercover agent of the state, who consented to the surveillance, and the defendant, who was unaware of the surveillance, violated the defendant's right to privacy in his communications under article I, section 5 of the Louisiana Constitution. On rehearing the court reversed its original holding and held that warrantless one-party consensual electronic surveillance of conversations does not violate the Louisiana Constitution. This holding is in accord with the federal rule set forth in *United States v. White*. 43

In *White* a plurality of the United States Supreme Court found that the fourth amendment was not violated by warrantless consensual surveillance, because a party to a conversation accepts the risk that his listener may betray his confidences to the police, and because there is no constitutionally recognizable difference between an electronically equip-

41. There was no agreement as to what level of knowledge is required before the contraband nature of the item is immediately apparent. Justice Rehnquist said that probable cause to associate the item with criminal activity was the standard. *Id.* at 1542-43 (citing *Colorado v. Bannister*, 449 U.S. I (1980) (per curiam); *Payton v. New York*, 445 U.S. 573, 588 (1980)). Justice Rehnquist also stated, however, that probable cause might not be required in all cases. *Id.* at 1542 n.7. Justice Powell said only that if probable cause was required it had been shown. *Id.* at 1545.

42. 427 So. 2d 403 (La. 1982).

oped and an unequipped agent of the police. Justice Blanche, in his rehear-
ing opinion in Reeves, agreed with the strict holding of White but chose
to vary from its reasoning, relying instead on the two-part test of Katz
v. United States to find that the defendant did not have a recognizable
expectation of privacy under the Louisiana Constitution.

Justice Blanche's opinion on rehearing drew only four votes; there
were four rehearing opinions, with two very strong dissents. The holding
of Reeves has been reaffirmed, however, in the recent case of State v.
Terracina.

INVENTORY SEARCHES OF CONTAINERS

The idea of an inventory search is usually relied on to allow the police
to search lawfully impounded cars. Neither a warrant nor probable cause
is required for an inventory search. The inventory of a vehicle's contents
by the police is said to be a reasonable search under the fourth amend-
ment because of the need to protect the owner from theft, to protect
the police from claims for lost property, and to protect the police from
danger.

Inventory searches are not limited to vehicles. In Illinois v. Lafayette, the
defendant was arrested for disturbing the peace and taken to the police
station. In the booking room, the defendant's person and a shoulder bag
he had brought with him were searched. Illegal drugs were found in the
bag. Defendant challenged the search of the bag, and the state contended
that it was an inventory search. The United States Supreme Court agreed
with the state, holding that "it is not 'unreasonable' for police, as part
of the routine procedure incident to incarcerating an arrested person, to
search any container or article in his possession, in accordance with
established inventory procedures." The Court found that the search was
justified by the same need for protection from theft, property claims, and
dangerous instrumentalities which justifies inventory searches of impounded
vehicles. The Court also held that although the same interests could have
easily been protected by less intrusive measures (such as locking the bag
in a locker), the fourth amendment does not require that the government

44. 389 U.S. 347 (1967). Justice Harlan, who concurred with the Katz majority, stated
the test as follows: "My understanding of the rule that has emerged from prior decisions
is that there is a twofold requirement, first that a person have exhibited an actual (subjective)
expectation of privacy and, second, that the expectation be one that society is prepared
to recognize as 'reasonable.'" Id. at 361.
45. 430 So. 2d 64 (La. 1983).
46. See generally South Dakota v. Opperman, 428 U.S. 364 (1976); Cady v. Dom-
browski, 413 U.S. 433 (1973); Cooper v. California, 386 U.S. 58 (1967).
47. 103 S. Ct. 2605 (1983).
48. Id. at 2611.
choose the least intrusive alternative. It would be too great a burden on the police to require that the search be anything other than "reasonable."

INVENTORY SEARCHES OF VEHICLES

To show that a valid inventory search of a vehicle has been made, the Louisiana jurisprudence has required the state to establish that the impoundment of the vehicle was necessary and that the inventory of the vehicle's contents was also necessary and reasonable in its scope. Whether the impoundment-inventory procedure was necessary depends in part on whether the vehicle could have been safely left where it was stopped and whether the defendant was willing to waive the inventory and any claims for loss. Three recent cases bear on these points.

In *State v. Osbon*, the defendant was arrested for driving while intoxicated. At the time of the arrest the defendant had parked his car in a department store parking lot. The police told the defendant that if someone did not come for the vehicle it would be impounded. Although the defendant insisted that he wanted the car to remain where it was, the police impounded and inventoried the vehicle, finding marijuana. The Louisiana Second Circuit Court of Appeal set aside the defendant's conviction, finding that the marijuana should have been suppressed because the inventory search was not necessary. The court said that there was no indication that the car could not have been left where it was with reasonable safety and without interfering with traffic. The court also noted that the defendant was not given an opportunity to waive the inventory even though his request for the car to be left where it was amounted to a waiver of any claim for loss.

*State v. Sims* presented a somewhat similar situation to the Louisiana Supreme Court. Again, the defendant who was arrested for driving while intoxicated had asked that his car not be moved but (apparently) was not given an opportunity to waive impoundment and inventory. The defendant's car was parked on the shoulder of a highway. The court found that the inventory and impoundment were valid, emphasizing that the car could not be safely left where it was. The court also stated that although the officer had done no more than tell the defendant that his car would be inventoried, the officer's failure to ask the defendant whether someone could come for the car did not invalidate the search since the officer's true purpose was merely to inventory the vehicle, not to search for evidence. Presumably, the court considered the officer's failure to ask

---

50. See cases cited *supra* note 49.
51. 426 So. 2d 323 (La. App. 2d Cir. 1983).
52. 426 So. 2d 148 (La. 1983).
the defendant whether he wanted to waive the inventory to be inconsequential as well.

Following Sims, the second circuit had another opportunity to discuss the law of inventory searches. In State v. Moak,\footnote{427 So. 2d 1233 (La. App. 2d Cir. 1983).} the defendant’s vehicle was parked at a gas station. He asked that his sister be allowed to come for the vehicle, but the police denied the request because the sister lived twenty miles away. The defendant was not asked if he desired to waive the inventory. The second circuit held that the vehicle could not be left safely where it was because valuables could be seen inside the vehicle and because the vehicle might interfere with operation of the gas station the next day. The court also found that it would have been unreasonable to make the police wait for the defendant’s sister to come from twenty miles away. Finally, the second circuit held that the failure to give the defendant an opportunity to waive the inventory did not invalidate the search because the officer’s purpose in making the inventory was to protect the defendant and the public. The court relied on the implication in Sims that an inventory conducted in good faith may overcome a failure to give the defendant an opportunity to waive the inventory.\footnote{Id. at 1236.}

**Probable Cause for a Search Warrant and Confidential Informants**

After nearly twenty years of viability, the two-pronged test of Aguilar v. Texas\footnote{378 U.S. 108 (1964).} and Spinelli v. United States\footnote{393 U.S. 410 (1969).} has been abandoned by the United States Supreme Court in favor of a totality of the circumstances test. The Aguilar-Spinelli test was used to decide when information supplied by a confidential informant and presented to the magistrate by a police officer-affiant was sufficient to constitute probable cause for a search warrant. The two-pronged test required (1) that the basis of the informant’s knowledge be set forth, and (2) that the informant’s credibility or the reliability of his information be demonstrated. In Illinois v. Gates,\footnote{103 S. Ct. 2317 (1983).} the Court abandoned the Aguilar-Spinelli test.\footnote{The Court had been expected to rule on the much discussed issue of whether there should be a good faith exception to the exclusionary rule. The Court decided, however, that the issue was not properly before the Court. Justice White, who thought that the issue had been properly raised, argued in favor of adopting the good faith exception in his concurrence. Id. at 2336-51.} Probable cause from an informant may now be found, without adherence to any strict rules, simply by looking at the totality of the circumstances surrounding the information given.

In Gates the police received an anonymous letter which gave the names
and address of the husband and wife defendants, stated that they dealt in drugs brought up from Florida, and explained their method of operation. Allegedly the wife would drive the car to Florida with the husband following by plane. After the drugs were bought, the husband would bring them back in the car and the wife would fly back. The letter also predicted that the couple would go to Florida to buy drugs on a certain date.

Upon investigating the information contained in the letter, the police learned that the defendants did live at the stated address. On approximately the day predicted, the police confirmed the husband's plane trip to Florida and learned that he had checked into a hotel room registered in his wife's name. The next day the couple left the motel together in the car, apparently heading back to Illinois. An affidavit setting forth this information and a copy of the anonymous letter were presented to a judge who issued a search warrant for the defendants' house and car.

The Illinois Supreme Court affirmed the trial court's suppression of the marijuana and other contraband seized pursuant to the warrant, finding that probable cause had not been established under the Aguilar-Spinelli test. The court specifically found that neither prong of the test had been satisfied, even considering the corroborating information in conjunction with the letter.

In an opinion by Justice Rehnquist, the United States Supreme Court reversed the state court, stating:

[A]n informant's "veracity," "reliability" and "basis of knowledge" are all highly relevant in determining the value of his report. We do not agree, however, that these elements should be understood as entirely separate and independent requirements to be rigidly exacted in every case . . . . [T]hey should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular place.60

Thus, an informant's tip is now to be evaluated by examining the "totality of the circumstances" surrounding the tip.

Justice Rehnquist gave a number of reasons for adopting the totality of the circumstances approach. The new approach, according to Justice Rehnquist, is more consistent with the "practical," "commonsense" definition the Court has given to probable cause and with the idea that probable cause is a matter of probability, not certainty. In addition, the two-pronged test was an inaccurate measure of probable cause since it would not allow a particularly strong finding under one prong to compensate

60. 103 S. Ct. at 2327-28.
for a deficiency under the other prong. The Court also noted that imposing highly technical requirements for affidavits was inappropriate since they were usually drafted by nonlawyers in the haste of a criminal investigation. Finally, Justice Rehnquist stated that the two-pronged test seriously impeded law enforcement.

Applying the new standard to the facts of the case, Justice Rehnquist found that there was probable cause for the search. Even without the anonymous letter, he stated, the couple’s activities suggested that they might be involved in the transportation and sale of illegal drugs. Moreover, it was proper for the magistrate to rely on the anonymous letter. The letter had been corroborated sufficiently to show that the informant was somewhat reliable, even if he would not have been considered reliable under Aguilar. "It is enough, for purposes of assessing probable cause, that ‘corroboration through other sources of information reduced the chances of a reckless or prevaricating tale,’ thus providing ‘a substantial basis for crediting the hearsay.’"61 Furthermore, the details and accurate predictions established a fair probability that the informant had a sufficient basis of knowledge, even if it would have been inadequate under Aguilar. Thus, there was a substantial basis for concluding that there was probable cause to search.

Gates is a radical change in the law relative to search warrants and confidential informants. The traditional two-pronged test has been replaced by a rather indefinite "totality of the circumstances test." Yet, Gates does not merely provide a less technical method for finding probable cause. The case seems to change the meaning of "probable cause" by reducing the level of justification that is required for the issuance of a search warrant. Notably, the circumstances in Gates did not warrant a finding that either of the Aguilar-Spinelli prongs had been met. If the Court really is lowering the standard for probable cause, it has failed to give an explanation for why there should be a lesser standard. One fears that the dissent is correct in stating that "[w]ords such as ‘practical,’ ‘nontechnical,’ and ‘commonsense,’ as used in the Court’s opinion, are but code words for an overly permissive attitude towards police practices in derogation of the rights secured by the fourth amendment."62

Presumably, the Louisiana Supreme Court will follow the change in Gates without finding that the 1974 Louisiana Constitution incorporated the Aguilar-Spinelli test by implication. In State v. Lingle,63 the Loui-

---

61. Id. at 2335 (quoting Jones v. United States, 362 U.S. 257, 269, 271 (1960)).
62. Id. at 2359 (Brennan, J., dissenting).
63. 436 So. 2d 456, 460 (La. 1983); see also State v. Rodrigue, 437 So. 2d 830 (La. 1983); State v. Roffin, 434 So. 2d 1246 (La. App. 1st Cir. 1983). Rodrigue also restated the proposition of State v. Haynie, 395 So. 2d 669, 672 (La. 1981), that information not included in the warrant but conveyed orally to the judge may be used to support a finding
siana Supreme Court cited Gates with approval, making particular reference to the "commonsense" interpretation of probable cause.

**Warrants Based on Incorrect or Tainted Information**

In order for a search warrant to be validly issued, it must be based on probable cause established by "the affidavit of a credible person, reciting facts establishing the cause for issuance of the warrant." A warrant is not necessarily invalid, however, if the information contained in the affidavit is false or was obtained illegally. *State v. Patterson* illustrates the treatment of affidavits containing misstatements or material omissions. A prerequisite to validation of such a warrant is that the misstatements or omissions were made without an intent to deceive. If that requirement is met, the court which is determining the validity of the warrant is to treat the affidavit as if the misstatements had been excluded and the material omissions included. Reading the affidavit in this manner, if the court nonetheless finds probable cause, then the warrant is valid.

Another possibility is that the evidence contained in the affidavit was obtained through an illegal search or seizure. In this case, the warrant may still be valid if the same information was obtained from an independent source unconnected with the illegality, or if the connection between the illegality and the information is "so attenuated as to dissipate the taint." In *State v. Roubique*, the court relied primarily on the independent source doctrine. A sheriff’s officer obtained information from an illegal search of the defendant’s property. The same officer had, however, later received much of the same information from a confidential informant. The affidavit was written so that it appeared that the affiant was basing his conclusions largely on the information given by the informant. Since information establishing probable cause had been obtained from an independent source, the court held that the warrant was valid. It should be noted that the court found there was no intentional misrepresentation by the officer.

---

of probable cause for an arrest warrant. That rule does not apply to search warrants. See *State v. Klar*, 400 So. 2d 610 (La. 1981); *State v. Daniel*, 373 So. 2d 149 (La. 1979); *L.A. Const.* art. I, § 5; *L.A. Code Crim.* P. art. 162.

64. *L.A. Code Crim.* P. art. 162.
65. 422 So. 2d 1131 (La. 1982).
68. 421 So. 2d 859 (La. 1982).
SEARCH OF A CONTAINER AFTER CONTROLLED DELIVERY

*Illinois v. Andreas* involved a rather specialized type of search. When a common carrier or a customs official lawfully discovers contraband in a container, the container is sometimes resealed and delivered to its destination so that police can identify the individual(s) responsible for the transportation of the contraband. After such a "controlled delivery" is made, the container must be searched a second time in order to link the individual with the contraband. The issue in *Andreas* was whether the warrantless second search of a container after its controlled delivery to the defendant violated the fourth amendment.

Analogizing to the plain view doctrine, Chief Justice Burger found for a majority of the Court that "[n]o protected privacy interest remains in contraband in a container once government officers lawfully have opened that container and identified its contents as illegal." Thus, so long as the police know that there is contraband in the container, there are no fourth amendment privacy interests which may be violated. However, because the police will temporarily lose contact with the container when executing the controlled delivery, certainty that the contraband is still in the container at the time of the second search is impossible. The question becomes, then, at what point is the probability that the container still contains the contraband so diminished that privacy interests reattach to the container. In answer to this question, the Supreme Court held that a legitimate expectation of privacy does not return with respect to the container until there is a "substantial likelihood that the contents have been changed." The Court found that such a substantial likelihood was not present under the facts in *Andreas* because the container was of an unusual size and had a specialized purpose, and because police had only lost sight of the container for forty-five minutes.

ADMISSIBILITY OF CONFESSIONS AFTER ILLEGAL ARREST

When a person is arrested without probable cause, his subsequent confession will be inadmissible unless the state can show that the connection between the arrest and the confession is so attenuated that the confession could not logically be considered the fruit of the illegal arrest. Some of the factors which should be considered in deciding whether there is

---

69. 103 S. Ct. 3319 (1983).
70. *Id.* at 3322-23.
72. 103 S. Ct. at 3323.
73. *Id.* at 3325.
attenuation are the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and flagrancy of any official misconduct. Several recent Louisiana cases bear on the issue of what is necessary to establish sufficient attenuation.

In *State v. Serrato*, the Louisiana Supreme Court found that the defendant's confession was sufficiently attenuated from the illegal arrest. The court based its decision on the facts that over twenty-one hours had passed between the arrest and the confession, that the defendant had been given his *Miranda* rights a number of times, and that the defendant twice signed an interrogation agreement. The court also emphasized that there was a lack of any flagrant official misconduct and that the defendant freely submitted to the interrogation, knowingly and intelligently waiving his rights.

Insufficient attenuation was found, however, in *State v. Arceneaux*. After finding that the arrest was illegal, Justice Marcus, writing for the majority, held that the defendant's inculpatory statement was not sufficiently attenuated from the arrest. Justice Marcus pointed out that the confession was made only two hours after the arrest and that the "defendant was arrested without probable cause in the 'hope that something might turn up.'" This latter point is particularly important in that it demonstrates the weight given to the official misconduct factor.

**Voluntariness of Confessions**

The claim that a confession was not voluntary may be based on the fact that the defendant was drugged or intoxicated or affected by some other adverse mental or physical condition at the time of the confession. Although such claims met with little success in the past year, the cases illustrate the rules and factors applicable when the defendant asserts that his confession was made involuntarily. The burden is on the state to prove that a confession was made voluntarily. However, the mere fact that the defendant had ingested drugs or alcohol, that he had fought with the police, or that he had mental problems will not establish the involun-

---

76. 424 So. 2d 214 (La. 1982).
78. 425 So. 2d 740 (La. 1983).
79. Id. at 744 (quoting Taylor v. Alabama, 457 U.S. 687, 691 (1982)). In *State v. Walker*, 430 So. 2d 1327 (La. App. 3d Cir. 1983), the state attempted to use a second statement made by Arceneaux six hours after the arrest against a codefendant. The court of appeal suppressed the second statement, relying largely on the supreme court's decision in *Arceneaux*.
81. LA. CODE CRIM. P. art. 703(D); LA. R.S. 15:451 (1981).
tariness of the confession. Factors to be considered in determining whether
the defendant's confession was voluntary are as follows: whether he ap-
appeared rational and coherent at the time, the clarity and detail of his
statements, the certainty with which he waived his rights, and whether
there are witnesses to the defendant's condition at or near the time of
the confession other than police officers. Finally, it should be noted that
considerable deference is given to the trial court's determinations, especially
in matters of credibility.

THE Edwards v. Arizona INITIATION STANDARD

The United States Supreme Court in Edwards v. Arizona82 held:

[When an accused has invoked his right to have counsel present
during custodial interrogation, a valid waiver of that right can-
not be established by showing only that he responded to further
police-initiated custodial interrogation even if he has been advised
of his rights. . . . [and] that an accused . . . having expressed
his desire to deal with the police only through counsel, is not
subject to further interrogation by the authorities until counsel
has been made available to him, unless the accused himself ini-
tiates further communication, exchanges, or conversations with
the police.83

Recent United States Supreme Court and Louisiana Supreme Court cases
have treated the issue of what constitutes an Edwards "initiation."

In Oregon v. Bradshaw,84 the United States Supreme Court decision
was split four-one-four, with the result that no majority holding was pro-
duced. The defendant had been arrested and questioned until he requested
counsel, at which point questioning ceased. Later, as he was being moved
to a different jail, the defendant asked, "Well, what is going to happen
to me now?"85 Although the police officer told the defendant that he
was under no obligation to talk, a conversation ensued in which the police
officer suggested that the defendant take a polygraph test. The defendant
later waived his Miranda rights and took the test, after which he con-
fessed to the crime.

Writing for the four member plurality, Justice Rehnquist stated that
under Edwards, an "initiation" is not equivalent to a waiver of the right
to have counsel present during questioning. Thus, Edwards requires a two-
part analysis. The court must determine, first, whether the defendant has
initiated a conversation with the police, and, second, whether, even if

83. Id. at 484-85 (emphasis added).
84. 103 S. Ct. 2830 (1983).
85. Id. at 2833.
initiation is shown, the defendant has knowingly and intelligently waived his right to have counsel present during questioning. According to Justice Rehnquist and the plurality, the defendant's question did initiate further conversation with the police. The plurality stated that "initiate" should be interpreted in the ordinary dictionary sense of the word, but did not go so far as to say that any statement would qualify as an initiation. A routine inquiry such as asking for a drink of water or to use the telephone would not be an initiation under the plurality's standards. With respect to the second part of the analysis, the plurality found that, given the totality of the circumstances, the defendant had waived his rights. Thus, the plurality considered the statements to be validly obtained under the rules set forth in Edwards. Justice Powell, who evidently still disagrees with the rationale of Edwards, concurred with the judgment of the plurality because the circumstances showed a valid waiver of the right to have counsel present during questioning.87

In an opinion by Justice Marshall, the four dissenters agreed with the plurality that Edwards requires a two-step analysis and that the issue of waiver should be decided by examining the totality of the circumstances.88 Therefore, Bradshaw at least establishes these two general principles. The dissenters disagreed, however, on the definition of initiation. In their view "initiation" refers to a communication about the subject matter of the criminal investigation. Since the context of Bradshaw's statement indicates that he only wanted to know where the police were taking him, the dissenters found that there had not been an initiation. In an earlier per curiam decision, Wyrick v. Fields,89 the issue raised was whether, after the defendant had clearly initiated further discussion, he had waived his right to have counsel present during questioning. The defendant argued that although he had agreed to take a polygraph test and had waived his right to have counsel present at the test, his waiver did not extend to post-test questioning which sought an explanation for deceit shown by the test. The Court held that in view of the totality of the circumstances, the waiver was intended to extend to the entire interrogation, including the post-test questioning. The Court added that it would have been unreasonable for the defendant and his attorneys to assume that the defendant would not be asked to explain any unfavorable results of the test.

The Louisiana Supreme Court also had occasion to apply Edwards. In State v. Germain,90 questioning of the defendant, who was suspected

86. Id. at 2835.
87. Id. at 2836 (Powell, J., concurring).
88. Id. at 2840 n.2 (Marshall, J., dissenting).
89. 103 S. Ct. 394 (1983).
90. 433 So. 2d 110 (La. 1983).
of beating his stepchild to death, ceased when he asked for a lawyer. Shortly thereafter, however, the defendant said, "I was in the hospital for three weeks and I told them I needed help, but they laughed at me." Although he was then told that he did not have to say anything, the defendant asked, "I want to know if I caused this; is this because of me?" The court found that the defendant did initiate the conversation and that the statements were therefore admissible. Although it is somewhat unclear, the court apparently also found that the defendant had waived his right to have counsel present during questioning.

In contrast to Germain, there was a clear Edwards violation in State v. Arceneaux. There the court found that Edwards was violated where, following the defendant's request for an attorney, he was interrogated without benefit of counsel and without having initiated the conversation himself.

The Louisiana Supreme Court has recently ruled on the retroactivity of Edwards v. Arizona. In State v. Shea and State v. McCarty, the court stated that it would not apply Edwards retroactively because the rule established in Edwards was a "clear break with the past." Edwards will be applied only prospectively from the date of the decision, May 18, 1981.

OTHER ASPECTS OF Miranda

In addition to the Edwards initiation cases, recent Louisiana cases addressed other aspects of the fifth amendment and Miranda v. Arizona. Miranda requires that before an accused person in police custody may be questioned, he must be warned of his rights. Among other things, the accused must be told that he has a right to remain silent and that anything he says may be used against him. In State v. Mitchell, the defendant had shot his wife and fled to Arkansas. The Arkansas authorities were unaware of the shooting, but the defendant was stopped by an Arkansas police officer for traffic violations.

[The officer] ordered the defendant out of the car, and the defendant surrendered reluctantly as he exited the vehicle with a whiskey bottle in hand. As [the officer] handcuffed the defendant, he

91. Id. at 114. The court evidently believed the police officer and not the defendant with respect to who spoke first.
92. Id.
93. 425 So. 2d 740 (La. 1983).
94. 421 So. 2d 200 (La. 1982).
95. 421 So. 2d 213 (La. 1982). The United States Supreme Court recently decided to consider the issue of whether Edwards v. Arizona applies retroactively. Stumes v. Solem, 671 F.2d 1150 (8th Cir. 1982), cert. granted, 103 S. Ct. 3568 (1983).
97. 437 So. 2d 264 (La. 1983).
noticed dried blood on the defendant's head, neck, and back. [The officer] asked, "What happened?" to which the defendant replied, "My wife shot me." [The officer] then asked the defendant whether he had also shot his wife, to which the defendant replied, "Yeah." When asked where he had last seen his wife, the defendant responded that he had last seen her "lying on the kitchen floor coughing." 

At no point during this questioning was the defendant informed of his Miranda rights.

The Louisiana Supreme Court found the statements admissible because the questioning did not constitute custodial interrogation within the meaning of Miranda. The court based its conclusion on two related considerations. First, the court said that the possibility that the defendant or a third party had been seriously wounded justified the questioning. No cases are cited on this point, nor is the implication that there may be an emergency exception to Miranda discussed. Second, the court said that at the time of the questioning, the defendant was not under investigation for shooting his wife. Since the defendant was not the focus of an investigation of the particular crime to which his statements pertained, the officer's questions did not involve custodial interrogation such that Miranda was applicable. The court indicated that police investigations of potential criminal activity would be greatly inhibited if the police had to give Miranda warnings to everyone they questioned during a general investigation. The court was unwilling to impose that burden on the police, especially where there was apparently an emergency justifying the general investigation.

The arguments made by the court in Mitchell break new ground. To the writer's knowledge, the Louisiana jurisprudence has not previously recognized an emergency exception to Miranda. Moreover, the cases which permit questioning of an unwarned defendant during a general investigation are all cases where the defendant was not in custody. Perhaps in
recognition of the novelty of its reasoning, the court added that even if
the questioning was prohibited under Miranda, admission of the statements
was harmless error since there were other admissible statements to the
same effect.

Another principle of Miranda is that a person in custody has a right
to "cut off questioning" by indicating that he wishes to remain silent. This right must be "scrupulously honored" by the police. In State v. Loyd, the issue was whether the defendant’s right to cut off question-
ing had been properly honored. The defendant, who was in custody, was
suspected of kidnapping a three-year old girl the day before. The girl
had not yet been found and the police believed she might still be alive.
After the defendant invoked his right to remain silent, police questioning
ceased. The defendant’s mother, however, asked to talk to him. The police
allowed her to see her son and asked her to get her son to reveal the
girl’s location. After a second visit, the defendant’s mother told the police
her son had agreed to talk to them. The police then resumed questioning
of the defendant and were eventually led to the girl’s body. The court
found that the defendant’s right to cut off questioning had been
scrupulously honored because there was no police questioning until the
defendant agreed to talk. The court emphasized that the questioning by
the defendant’s mother did not invoke Miranda since she was not a police
officer. Miranda is concerned with the combined effect of police custody
and police interrogation. Custody alone is not so intimidating as to pre-
vent a finding that the police scrupulously honored the defendant’s rights.
Thus, since there was no police interrogation until the defendant indicated
that he wanted to talk, the defendant’s right to cut off questioning was
scrupulously honored.

STANDING: THE LIMITS OF LOUISIANA’S BROAD RULE

Article 1, section 5 of the Louisiana Constitution provides in part:

Any person adversely affected by a search or seizure conducted
in violation of this Section shall have standing to raise its illegal-
ity in the appropriate court.

103. 425 So. 2d 710 (La. 1982).
104. The requirement that the police scrupulously honor the rights of an accused who
has invoked his right to silence should be contrasted with the higher standard of Edwards,
supra text accompanying notes 82-93, which applies when a defendant invokes his right
to have counsel present during questioning.
105. Emphasis added.
This provision gives defendants much broader standing than they would have under federal law, but it has now been held to apply only where the illegality complained of is a wrongful search or seizure. In State v. Burdges, the defendant sought to prevent the involuntary statements of a codefendant from being used against him. The supreme court stated that the defendant had no standing to object to the codefendant’s statement, even though the statement may have been obtained without proper compliance with the procedural requirements of Miranda or otherwise in violation of the fifth or sixth amendments. The court stated that the framers of the Louisiana Constitution did not intend to give expanded standing to defendants except as provided in article I, section 5. The court did, however, reserve judgment on the “question of whether gross police misconduct against third parties in the overly zealous pursuit of criminal convictions might lead to limited standing.”

State v. Walker illustrates the limits of Louisiana’s broad standing quite clearly. The prosecution sought to use the statements of a codefendant against the defendant. The statements were obtained in violation of the codefendant’s fifth amendment right to have counsel present during interrogation. However, the statements were also obtained pursuant to an illegal seizure since the codefendant had been arrested without probable cause. The third circuit held that the defendant had no standing to assert the inadmissibility of the statements against him on the first ground, but that the defendant did have standing to attack the statements as the fruit of an illegal seizure in violation of section 5. The third circuit’s holding is consistent with the supreme court’s ruling in Burdges.

CHOICE OF LAW

Choice of law is a seldom discussed and unclear area of the law as is evident from two decisions in the past year. In State v. Rivers, the court stated: “Since this search occurred in Alabama, we are not concerned with the provisions of the Louisiana Constitution.” No reasons were given in support of this conclusion. Then, in State v. Smith, in which the search occurred in Texas, the court cited federal, Louisiana, and Texas authorities in support of its decision. Which law was actually applied is unclear.

107. 434 So. 2d 1062 (La. 1983).
108. Id. at 1064.
109. Id. at 1065.
110. Id.
111. 430 So. 2d 1327 (La. App. 3d Cir. 1983).
112. 420 So. 2d 1128 (La. 1982).
113. Id. at 1132.
114. 433 So. 2d 688 (La. 1983).
115. Id. at 692.
Admittedly, the tendency of the states to adopt federal search and seizure law as their own law detracts from the significance of the problem. Nonetheless, there are important variations of the law among the states. A prime example of this is the expanded standing a defendant has under article I, section 5 of the Louisiana Constitution. In fact, the applicability of that provision was at issue in Rivers. Since choice of law problems are bound to arise again, it would be best if a specific rule or approach were adopted. It is interesting to note that many of the principles in the Restatement (Second) of Conflict of Laws may be applicable to criminal cases.116

116. Restatement (Second) of Conflict of Laws § 2, comment c (1971); J. Hall, Search and Seizure § 23:8 (1982).