Louisiana Law Review

Volume 53 | Number 3
Review of Recent Developments: 1991-1992
January 1993

Criminal Law and Procedure: 1991-92 in Review

Eulis Simien Jr.

Criminal Law and Procedure: 1991-92 in Review

*Eulis Simien, Jr.**

I. CRIMINAL LAW

A. Entrapment

One of the Supreme Court decisions of the last term that has generated much publicity is *Jacobson v. United States*.[1] The defendant had raised an entrapment defense, which required the government to prove that he was predisposed to commit the offense of receiving child pornography through the mails.[2] The jury had been instructed on entrapment but rejected the defendant's claim.[3] The Supreme Court reversed the conviction and held that the prosecution had failed, as a matter of law, to adduce evidence to support the jury verdict that the defendant "was independently predisposed to commit the crime."[4]

The prosecution of Jacobson was based upon his ordering, through a government sting operation, a magazine depicting young boys engaged in sexual activities.[5] The government had acquired the defendant's name from the mailing list of a bookstore which had sold him two magazines containing photographs of nude preteen and teenage boys.[6] After the government acquired his name, it made him the target of twenty-six months of repeated mailings and communications before he ordered the child pornography which was the subject of the prosecution. The mailings

---

* Associate Professor of Law, Louisiana State University, Paul M. Hebert Law Center; J.D., LSU (1981); LL.M. Columbia University School of Law (1986).

1. 112 S. Ct. 1535 (1992). As an example of some of the publicity generated by the opinion, see New York Times, April 7, 1992, p. A1.

2. Although in the nature of an affirmative defense, when the entrapment defense is tendered, the prosecution must prove beyond a reasonable doubt that the defendant was predisposed, independent of the government's actions, to commit the criminal act. *See Jacobson*, 112 S. Ct. at 1540-47.

3. *Id.* at 1540 n.1.

4. *Id.* at 1537.

5. *Id.* Jacobson was charged with a violation of 18 U.S.C. § 2252(a)(2)(A), "Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (Act), which criminalizes the knowing receipt through the mails of a 'visual depiction [that] involves the use of a minor engaging in sexually explicit conduct. . . .'" (alterations in original). *Id.*

6. At the time of this earlier ordering, the purchase of these materials was legal. *Id.* at 1538.

represented that the fictitious organizations were founded to protect and promote sexual freedom and freedom of choice and that they promoted lobbying efforts to protect free speech through catalog sales.[7]

One must be careful not to read too much into the *Jacobson* opinion. Justice O'Connor cautions that the opinion might be misread by lower courts as requiring the government to have "sufficient evidence" of the defendant's predisposition before it makes contact with him.[8] This concern may, in part, have been based on comments made by the Court in footnote two of the opinion. There, the Court discussed the internal guidelines that the government had imposed upon itself to regulate undercover investigations. Those guidelines required that no inducement should be given unless there is a "reasonable indication" or "reason for believing" that the subject was predisposed.[9]

However, at no point did the Court indicate that this "reasonable indication" or "reason for believing" was in any other way a requirement before the government could begin an undercover sting operation. In fact, all indications in the opinion are to the contrary.[10] The Court discussed in substantial detail the pervasive governmental efforts to entice the defendant into ordering the magazines. What appeared to be of particular significance to the Court was the fact that some of the five fictitous organizations represented that they promoted sexual freedom and freedom of choice and would promote anti-censorship lobbying through sales revenues.[11]

The dissent argued that the entrapment defense as defined by the majority was an expansion on the Court's earlier cases. Justice O'Connor, writing in dissent, noted that there were at least two changes in the Court's present analysis:

> (1) The government must prove predisposition existed prior to the government's contact (not merely prior to solicitation); and
> (2) Predisposition must be to knowingly commit a crime and not just to engage in illegal conduct.[12]

---

7. *Id.*

8. *Id.* at 1545 (O'Connor, J., dissenting).

9. *Id.* at 1540 n.2.

10. *See, e.g.*:

> Had the agents in this case simply offered [the defendant] the opportunity to order child pornography through the mails, and [he]—who must be presumed to know the law—had promptly availed himself of this criminal opportunity, it is unlikely that his entrapment defense would have warranted a jury instruction.

Id. at 1541 (citing Mathews v. United States, 485 U.S. 58, 66, 108 S. Ct. 883, 886 (1988)).

11. The Court found that "by waving the banner of individual rights and disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials, the government not only excited [the defendant's] interest . . . but also exerted substantial pressure" on him to order the magazines. *Id.* at 1542.

12. *Id.* at 1544-47 (O'Connor, J., dissenting).

As to Justice O'Connor's first claim, it is true that in reaching its conclusion the Court reasoned that a defendant not only must be predisposed at the time of the solicitation but he also must be "predisposed to commit the criminal act prior to first being approached by government agents."[13] The majority disagreed, however, with the expansion characterization, contending that its reasoning was consistent with that employed in *Sorrells v. United States*.[14] It would appear that the fairest thing to say about this dispute between the majority and the dissent is that the *Sorrells* case was not a definitive resolution of this issue.[15] However, if the underlying rationale for the entrapment defense is that a person should not be prosecuted for criminal activity instigated by the government,[16] it should not matter whether the activity of the government which caused the disposition came before or after the solicitation.

Justice O'Connor was also correct in concluding that the majority's opinion in *Jacobson* requires not only predisposition to do the act but predisposition to do an act which is criminal.[17] In rejecting the argument that Jacobson's earlier ordering of similar materials proved predisposition, the Court stated: "Evidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal, for there is a common understanding that most people obey the law even when they disapprove of it."[18] Thus, a defendant's

---

13. *Id.* at 1540.

14. 287 U.S. 435, 53 S. Ct. 210 (1932).

15. The majority's quotation from *Sorrells*, in which the Court stated,

> the Government may not punish an individual "for an alleged offense which is the product of the creative activity of its own officials" and that in such a case the Government "is in no position to object to evidence of the activities of its representatives in relation to the accused,"

does not definitely state at which point predisposition must exist. Jacobson v. United States, 112 S. Ct. 1535, 1541 n.2 (1992) (quoting *Sorrells*, 287 U.S. at 451, 53 S. Ct. at 216).

16. In *Sorrells*, the Court stated:

> [I]t is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.

Sorrells, 287 U.S. at 444-45, 53 S. Ct. at 214.

17. Once again, one must question whether this is truly a change in the law. In *Sorrells*, there was evidence that the defendant had engaged in similar activity prior to prohibition. Then after prohibition and following what the Court found to be improper solicitation, the *Sorrells* defendant engaged in the activity again, this time after it was made illegal by prohibition laws. Despite this prior activity, the Court concluded that the defendant was not predisposed within the meaning of the entrapment doctrine. *Id.* at 441, 53 S. Ct. at 212.

18. *Jacobson*, 112 S. Ct. at 1542.

predisposition to do an act when it was legal is not sufficient evidence of predisposition;[19] predisposition to do a criminal act is required.

B. *Feticide or Murder?*

In *State v. Keller*,[20] the defendant had filed a motion to quash an indictment charging him with first degree murder. The charge was based on the defendant's alleged killing of a mother and fetus. The defendant contended that since the fetus was not a human being,[21] he could only be charged with second degree murder.[22] In both *Gyles* and *Brown*, the issue involved whether a fetus, which is not born alive, is a human being within the meaning of the Louisiana homicide statute. Relying on the presumption that the legislature intends criminal statutes to have their common law meaning (unless sufficient evidence of legislative intent to the contrary is manifested), the supreme court held that such a fetus was not a human being and could not be the victim of a murder as defined by the Louisiana legislature.[23]

The court of appeal in *Keller* distinguished the Louisiana Supreme Court cases relied upon by the defendant. The court of appeal found itself constrained to conclude that a fetus is not a human being for purposes of the homicide statutes.[24] It noted, however, that first degree

---

19. The presumption of knowledge of the law employed in the Court's analysis, *see* 112 S. Ct. at 1540, is somewhat inconsistent with the Court's reasoning that "most people obey the law" because of a disinclination to violate the law. *See* 112 S. Ct. at 1542. Since the presumed knowledge of the law is merely a legal fiction, it cannot act as the incentive which leads most to obey the law. As such, the way one acts prior to the passage of a law is indicative of the way he would act after the passage of a law which he is merely presumed to know. Of course, in the *Jacobson* case it appears that some of the mailings to the defendant made it fairly evident that his actions would have been in violation of the law, so this comment might not hold true in that case.

20. 592 So. 2d 1365 (La. App. 1st Cir. 1991), *writ denied*, 594 So. 2d 878 (La. 1992) (allowing defendant to raise issue again following a conviction).

21. *See* State v. Brown, 378 So. 2d 916 (La. 1979) and State v. Gyles, 313 So. 2d 799 (La. 1975).

22. As relevant for that case, the difference between first and second degree murder is that the former requires intent to kill or inflict great bodily harm on more than one person, and the latter only requires such intent as to one person. *Compare* La. R.S. 14:30 *and* 30.1 (1986 & Supp. 1992).

23. *Brown*, 378 So. 2d at 918; *Gyles*, 313 So. 2d at 802. Subsequent to these decisions, the Louisiana legislature has provided for the crime of feticide. *See* La. R.S. 14:32.5-32.8 (Supp. 1992).

24. *Keller*, 592 So. 2d at 1366. The indictment in question had alleged the "first degree murder *of one* Andrea Simmons *and of* the unborn fetus (sic) being carried by [her]." *Id.* at n.1. To this extent, the indictment could have been read as alleging the murder of the fetus. The court of appeal rejected any claim that such an allegation rendered the indictment invalid. The court relied upon the earlier Louisiana Supreme Court opinion in State v. James, 339 So. 2d 741 (La. 1976). When faced with an almost

murder does not require the killing of more than one human being but only the killing of a single human being with "the specific intent to kill or to inflict great bodily harm on more than one *person*."[25] The court held that it does not matter that one of the persons is not a human being (one born alive) but a fetus. To support this conclusion, the court of appeal relied upon the definition of first degree murder and of "person," which is provided in Louisiana Revised Statutes 14:2(7).[26]

Since the supreme court denial of review specifically disclaimed any attempt to either criticize or approve of the court of appeal's ruling,[27] the answer to the issue presented in *Keller* will have to await another day. The court of appeal is correct when it points out that the first degree murder statute employs the word "person." However, the supreme court's decision in *Brown* is, in part, based on the notion that the legislature is prohibited from making an implicit amendment to Louisiana's murder provisions.[28] Although the amendment recognized by the court of appeal in *Keller* would be less implicit than that argued for by the State in *Brown*, it would still be based on implication. The 1976 amendment was not an amendment to the homicide statute but only an amendment to the definitional statute (Louisiana Revised Statutes 14:2), which amendment might have had other effects.[29] Only time will tell if this implicit amendment is sufficiently clear to withstand the

---

identical indictment in *James*, the Louisiana Supreme Court had held that the surplus allegation (which was not based in law) did not prejudice the defendant who had only been convicted of the murder of the mother.

25. *Keller*, 592 So. 2d at 1367 n.1 (emphasis added). *See* La. R.S. 14:30 (1986 & Supp. 1992).

26. "'Person' includes a human being from the moment of fertilization and implantation. . . ." La. R.S. 14:2(7) (1986 and Supp. 1992). The amendment to the definition of "person" was adopted in 1976 (1976 La. Acts No. 256, § 1), in what some contend was an apparent attempt to overrule the Louisiana Supreme Court's 1975 decision in *Gyles*, 313 So. 2d 799. *See, e.g.*, *Brown*, 378 So. 2d at 918 (Marcus, J., dissenting).

27. *Keller*, 594 So. 2d 878.

28. In *Brown*, the court rejected the argument that the 1976 amendment to La. R.S. 14:2(7) was designed to overrule *Gyles*. It stated:

> Other jurisdictions that have proscribed the killing of a fetus as homicide have done so by separate enactments. The Louisiana legislature has not, as other legislatures have, clearly addressed the question of feticide as a category of homicide.
>
> . . . Therefore, . . . feticide [cannot] be made a crime by implication.
>
> . . . If the homicide statutes are to be amended to include feticide it must be done with greater clarity and less confusion than the amendment of the definition of the word "person" reflects . . . .

Brown, 378 So. 2d at 917-18.

29. For example, the amendment to the definition of "person" could have affected the definition of battery. *See* La. R.S. 14:33-35. Accordingly, even under the facts of *Keller*, the purported amendment to the homicide provisions might have been attempted by merely amending the definition of "person," which approach was rejected in *Brown*. *See supra* note 28.

prohibition discussed in *Brown*. The question must also be raised as to whether the legislature's adoption of the feticide statutes is an indication that the legislature intended that the killing of a fetus be regulated by these specific statutes rather than the general murder provisions.[30]

II. SEARCH AND SEIZURE

A. Seizure of the Person

In *California v. Hodari D.*,[31] the Supreme Court of the United States addressed the heretofore elusive question of what constitutes a seizure of the person within the meaning of the Fourth Amendment.[32] This issue arose because the defendant threw down a packet containing crack cocaine while being chased by the police. The defendant contended that the chase by the police was an unlawful seizure and that the evidence he threw down was the fruit of that unlawful seizure. The State of California contended that the chase was not a seizure and, therefore, that the abandonment of the evidence[33] was not the result of any Fourth Amendment regulated conduct.[34]

---

30. *See* State v. Fruge, 204 So. 2d 287, 291 (La. 1967) (explaining that where conduct falls within the terms of a general provision but is more specifically covered by another provision, any doubt as to whether the conduct is regulated by the general provision should be resolved in the negative).

31. 111 S. Ct. 1547 (1991).

32. *See, e.g.*, Michigan v. Chesternut, 486 U.S. 567, 108 S. Ct. 1975 (1988); INS v. Delgado, 466 U.S. 210, 104 S. Ct. 1758 (1984); United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870 (1980).

33. It will not always be clear whether an abandonment had taken place when the suspect throws away evidence. *See, e.g.*, United States v. Morgan, 936 F.2d 1561 (10th Cir. 1991). In *Morgan*, the court held that a robbery suspect had abandoned a nylon gym bag when he threw it onto the porch of an acquaintance's house after he was unable to gain entry to the house during his pursuit by police. Circuit Judge Seymour, however, dissented, concluding there was no abandonment. *Id.* at 1576.

34. The Supreme Court was not called upon to address the question of whether the police possessed sufficient suspicion to justify an investigatory detention. The State of California had conceded that there was no reasonable suspicion. *Hodari D.*, 111 S. Ct. at 1549 n.1. Justice Scalia, writing for the majority and quoting from chapter 28 of Proverbs, verse 1 ("The wicked flee when no man pursueth"), seemed to criticize the concession by California but noted that "[w]e do not decide that point here, but rely entirely upon the State's concession." *Id.* Justice Stevens, writing for himself and Justice Marshall in dissent, responded:

> The Court's gratuitous quotation from Proverbs 28:1 . . . mistakenly assumes that innocent residents have no reason to fear the sudden approach of strangers. We have previously considered, and rejected, this ivory-towered analysis of the real world for it fails to describe the experience of many residents, particularly if they are members of a minority. *See generally* Johnson, Race and the Decision to Detain a Suspect, 93 Yale L.J. 214 (1983). It has long been "a matter of

The majority concluded that the answer to the question of what constitutes a seizure of the person lies in the definition of arrest at common law.[35] The Court found that, at common law, an arrest was effected either by "the mere grasping or application of physical force with lawful authority whether or not it succeeded in subduing the arrestee"[36] or the submission of the detainee to the show of authority even if there were no contact.[37] The Court then concluded that seizure within the meaning of the Fourth Amendment should be interpreted in the same manner.[38]

The Court found that "an arrest is effected by the slightest application of physical force," but noted that if the arrestee escapes "that [is not to say] for Fourth Amendment purposes there is a *continuing* arrest during the period of fugitivity."[39] It stated:

> If, for example, [the officer] had laid his hands upon Hodari to arrest him, but Hodari had broken away and had *then* cast away the cocaine, it would hardly be realistic to say that that disclosure had been made during the course of an arrest.[40]

The dissent took exception to this dictum. The dissent reasoned that whether the abandonment was during the arrest is not the relevant inquiry and that the inquiry should focus on whether the arrest caused the abandonment.[41] It appears that the dicta in the majority opinion will, in the proper case, have to yield to the better reasoned position of the dissent on this issue. Such a case may arise where the defendant immediately throws away the item upon being physically contacted and as a direct result of the contact. To the extent that the abandonment of the item is caused by the touching (the seizure), the Court would have to at least consider whether this fruit was sufficiently attenuated from

---

> common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.'"

Id. at 1553 n.4 (Stevens, J., dissenting) (quoting from Alberty v. United States, 162 U.S. 499, 511, 16 S. Ct. 864, 868 (1896)).

35. *Id.* at 1549-50. However, at the same time, that Court rejected the notion that simply because at English common law an attempted unlawful arrest gave rise to a cause of action in tort such attempted arrests should be considered seizures within the meaning of the Fourth Amendment. The Court reasoned that "neither usage nor common-law tradition makes an *attempted* seizure a seizure." *Id.* at 1550-51 n.2 (emphasis in original).

36. *Id.* at 1550.

37. *Id.* at 1551.

38. *Id.* at 1550-51.

39. *Id.* at 1550.

40. *Id.*

41. *Id.* at 1552-62 (Stevens, J., dissenting).

the "poisonous tree."[42] Under these facts, it appears that there would not be sufficient attenuation of the taint, and the evidence would be inadmissible.

Although the dissent appears to have the better argument regarding the abandonment, its analysis on the issue of what constitutes a seizure is subject to criticism. In substantial part, the dissent contends that the interpretation given to seizure in the *Hodari D.* case is inconsistent with the Supreme Court's earlier expansion of the definition of seizure in the cases of *Katz v. United States*[43] and *Terry v. Ohio*.[44] However, at no point does the dissent justify why *Katz* and *Terry* ought to be the *a priori* point for the definition of seizure.[45]

Initially, it appeared that the United States Supreme Court's position in *Hodari D.* was not consistent with the requirements under Louisiana law. In *State v. Saia*,[46] the Louisiana Supreme Court stated, "The police cannot *approach* citizens under circumstances that make it seem as if some form of detention is imminent unless they have probable cause to arrest the individual or reasonable grounds to detain . . . ."[47] However, shortly after the United States Supreme Court announced the decision in *Hodari D.*, the Louisiana Supreme Court issued a *per curiam* opinion reversing and remanding to the lower court a case involving the *Hodari D.* issue.[48] The Louisiana Supreme Court instructed the lower court that the case should be reconsidered in light of *Hodari D.*[49]

---

42. United States v. Wong Sun, 371 U.S. 471, 487-88, 83 S. Ct. 407, 417 (1963). This analysis, of course, assumes the invalidity of the initial seizure. If the initial seizure is valid, then there is no poisonous tree to taint the fruit.

43. 389 U.S. 347, 88 S. Ct. 507 (1967).

44. 392 U.S. 1, 88 S. Ct. 1868 (1968).

45. The dissent concedes that *Katz* and *Terry* were expansions of the definition. The dissent states that the "narrow view of 'seizure,' . . . is at odds with the *broader* view adopted by this Court [in *Katz*]" and "[t]he *expansive* construction of the word 'seizure' in the *Katz* case provided an appropriate predicate for the Court's holding in [*Terry*]." California v. Hodari D., 111 S. Ct. 1547, 1554-55 (1991) (Stevens, J., dissenting) (emphasis added).

None of this comment should be construed to mean that the author agrees with the narrower definition as opposed to the broader definition of seizure. No position is being taken in this article on that issue. What is being suggested is that the starting point of the analysis of the definition should not be the Court's prior interpretation but (as the majority at least purported to do) the Fourth Amendment itself. *See generally* Eulis Simien, Jr., *It is a Constitution We are Expounding*, 18 Hastings Const. L.Q. 67 (1990).

46. 302 So. 2d 869 (La. 1974).

47. *Id.* at 873 (emphasis added).

48. State v. Guilyot, 584 So. 2d 1145 (La. 1991).

49. *Id.; see also* State v. Green, 598 So. 2d 624 (La. App. 3d Cir. 1992) (citing *Hodari D* but finding that police had reasonable suspicion to stop); State v. Francise, 597 So. 2d 28, 33 (La. App. 1st Cir. 1992) ("Until [the] defendant eventually submitted to the officer's show of authority by stopping his vehicle, there was no seizure of

In *Florida v. Bostick*,[50] the United States Supreme Court held that the Florida Supreme Court erred in adopting a *per se* rule that police encounters with bus passengers were seizures.[51] The test relied upon by the majority to determine whether a police/citizen encounter was a seizure was not a new one.[52] The Court, however, did explain this test somewhat. It explained that when the police encounter a person seated on a bus about to depart, that person has no desire to leave and would not feel free to leave even if the police were not present. Accordingly, a court should not focus on the "free to leave" language found in some earlier opinions. Instead, the court should focus on whether the reasonable person would feel that he could decline the requests of the officer or otherwise terminate the encounter.[53] If there is any true innovation in the case, it is the adoption of the position advanced by Justice Blackmun, dissenting in *Florida v. Royer*.[54] In that case, Justice Blackmun suggested that the "reasonable person" test presumes an innocent person.[55] The majority in *Bostick* adopted that position.[56]

---

defendant . . . ."); State v. Williams, 596 So. 2d 399, 401 (La. App. 4th Cir. 1992) ("Under *Hodari D.*, these items were discarded before the defendant was 'seized' within the meaning of the Fourth Amendment"); State v. Riley, 591 So. 2d 1348 (La. App. 4th Cir. 1991) (it is only when a person is stopped without reasonable cause that the right to be left alone is violated); State v. Ganier, 591 So. 2d 1328 (La. App. 4th Cir. 1991) (even if the Louisiana Constitution provides greater protections than the Fourth Amendment as interpreted in *Hodari D.*, under the facts of the case, the police had sufficient justification to pursue defendant); State v. Gray, 589 So. 2d 1135 (La. App. 5th Cir. 1991), *writ denied*, 594 So. 2d 1315 (1992) (upon encountering police, defendants fled and discarded contraband while fleeing; therefore, under *Hodari D.* the contraband was properly seized); State v. Pittman, 585 So. 2d 591, 595 (La. App. 5th Cir.), *writ denied*, 586 So. 2d 545 (1991) ("If the appearance of the [police] vehicles could be construed to be a legal show of authority, the defendant did not submit. Thus, we find there was no investigatory stop and no illegal seizure of the defendant"); and State v. Morales, 583 So. 2d 129 (La. App. 4th Cir. 1991) (absent any evidence that the police exhibited physical force or that defendant submitted to the show of authority there is no basis for a defendant to complain).

50. 111 S. Ct. 2382 (1991).

51. *Id.* at 2385-88.

52. The test employed by the Court was whether, taking into account all of the circumstances surrounding the encounter, reasonable persons would feel that they had lost their ability to end the encounter, with the fact that the encounter took place on a bus being only one of the factors in this inquiry. *Id.* at 2386-88.

53. *Id.* The Court found the case analytically indistinguishable from INS v. Delgado, 466 U.S. 210, 104 S. Ct. 1758 (1984). The Court concluded that, just as for the workers in *Delgado*, the relevant inquiry for a bus passenger is whether the passenger had reason to believe that if he answered truthfully or refused to answer he would be subject to further detention. *Bostick*, 111 S. Ct. at 2387.

54. 460 U.S. 491, 103 S. Ct. 1319 (1983).

55. *Id.* at 519 n.4, 103 S. Ct. at 1335 n.4 (Blackmun, J., dissenting).

56. *Bostick*, 111 S. Ct. at 2388.

In *State v. Williams*,[57] the Louisiana Supreme Court held that during the course of a routine traffic stop, it is not permissible under Louisiana law to require a passenger to disembark unless the officer has articulable facts giving rise to a reasonable suspicion of danger from the passenger. In *State v. Landry*,[58] just as in *Williams*, the defendant was a passenger in an automobile stopped for a routine traffic stop. This stop occurred at 1:00 a.m. in New Orleans. The officer had no particular reason to order the driver and passenger out of the car—it was simply "normal safety procedure."[59] After ordering the passenger out of the car, the officer requested and received identification from him. Upon discovering that an outstanding warrant existed for the passenger's arrest, the officer arrested him and conducted a search incident to that arrest. It was during this search that the contraband at issue in the passenger's trial was discovered. After having "granted certiorari to consider the applicability and continued viability of the *Williams* decision,"[60] the court overruled *Williams*, "to the extent that it conflicts with this decision."[61]

Except for the fact that in *Williams* the time was 9:25 p.m. rather than 1:00 a.m. as it was in *Landry*, there are no factual distinctions between the two cases. Therefore, unless the court is implying that it is less reasonable (and therefore in violation of the Louisiana Constitution) to require a passenger to disembark at 9:25 in the evening than it is at 1:00 a.m.,[62] the limitations of *Landry*'s impact on *Williams* are illusory. For this reason, it appears that the comment that *Williams* is overruled only "to the extent it conflicts" with *Landry* is without effect and that *Williams* is overruled in its entirety.[63]

In *Gerstein v. Pugh*,[64] the Supreme Court held that a defendant may not be subjected to extended pretrial deprivation of his liberty interests without a prompt independent determination of probable cause

---

57. 366 So. 2d 1369 (La. 1978), *overruled by* State v. Landry, 588 So. 2d 345 (La. 1991).

58. 588 So. 2d 345 (La. 1991).

59. *Id.* at 345.

60. *Id.* at 346.

61. *Id.* at 347.

62. There is no indication in the court's opinion that the order to disembark was based either in actual or perceived danger to the officer, so the difference in time between the two occurrences appears irrelevant.

63. The court's discussion about the propriety of requiring the defendant to disembark from the car was dicta. *Landry*, 588 So. 2d at 347. The true issue in the case turned on whether the acquisition of the identification from the defendant was proper. As the officer might have obtained this identification whether or not he had requested the defendant to disembark, *id.* at 347-48, the resolution of that issue was not necessary for the court's opinion. Of course, since the court did go out of its way to discuss the continued viability of *Williams*, those statements, as a practical matter, will guide decisions in the future.

64. 420 U.S. 103, 95 S. Ct. 854 (1975).

to believe that he is guilty of an offense.[65] In *County of Riverside v. McLaughlin*,[66] the respondents argued that *Gerstein* required that if the determination were made post-arrest, it had to be made immediately upon completion of the necessary administrative booking procedures. The Court rejected this argument.[67] At the same time, the Court rejected the County's argument that its procedures which called for an appearance, with a concurrent determination of probable cause, within forty-eight hours exclusive of holidays and weekends satisfied constitutional mandate.[68] The Court held that in order to satisfy *Gerstein*'s requirement of a "prompt" probable cause determination after a warrantless arrest, the government must determine probable cause as soon as is reasonably feasible, but in no event later than forty-eight hours after arrest.[69] If the determination is made within forty-eight hours, it is presumptively reasonable; if it takes longer than forty-eight hours, the determination is presumptively unreasonable. An intervening weekend is not sufficient justification to extend the forty-eight hours.[70]

The Court rejected the County's argument that the fact it combines other pretrial proceedings with the probable cause determination should extend the forty-eight hour limit.[71] It should be noted that the County practice in *McLaughlin* was very similar to that authorized by Louisiana

---

65. This independent determination may come either before the arrest (by way of indictment or arrest warrant) or promptly after the arrest. *Id.* at 125, 95 S. Ct. at 868-69.

66. 111 S. Ct. 1661 (1991).

67. The Court stated: "Inherent in *Gerstein*'s invitation to the States to experiment and adapt was the recognition that the Fourth Amendment does not compel an immediate determination of probable cause upon completing the administrative steps incident to arrest." *Id.* at 1668.

68. *Id.* at 1670.

69. *Id.*

70. *Id.* A hearing within forty-eight hours may violate *Gerstein* if the arrested individual can prove that the determination was delayed unreasonably. Where an arrested individual does not receive a probable cause determination within forty-eight hours, the burden of proof shifts to the government to demonstrate circumstances that justify the delay. The Court stated:

> Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake. In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities.

Id.

71. *Id.*

Code of Criminal Procedure article 230.1.[72] To the extent that the probable cause determination awaits the initial appearance provided under this provision, a defendant's rights under *Gerstein* would be presumptively violated if the initial appearance does not occur within forty-eight hours of the arrest. Of course, to the extent that a determination of probable cause had been made prior to the arrest or a post-arrest *ex parte* probable cause determination is timely made, the delay in the initial appearance would not implicate *Gerstein*. For that reason, the legislature by Acts 1992, No. 674, § 1 added Article 230.2 to the Code. That article provides for an *ex parte* probable cause determination within forty-eight hours of a non-warrant arrest.

B. Searches of Persons and Things

In *California v. Acevedo*,[73] the United States Supreme Court revisited the troublesome issue of searching containers during a search pursuant to the automobile exception. In *Arkansas v. Sanders*,[74] the Court had held that where the police have probable cause to search a container in the car, the container could not be searched pursuant to the automobile exception. The container could, however, be seized and then searched but only if a warrant were obtained.[75] In *United States v. Ross*,[76] the Supreme Court expanded the permissible scope of a search under the automobile exception. It held that if the police have probable cause to search the automobile, they may search the containers therein.[77] The Court specifically provided, however, that *Sanders* survived this expansion. It stated, "Although we have rejected some of the reasoning in *Sanders*, we adhere to our holding in that case . . . ."[78]

This reservation of the *Sanders* holding created the anomaly that the more information the police had, the less they could search. For example, if the police had only generalized probable cause to believe that the object of the search could be found somewhere in the car, they could search the entire car and all containers.[79] While at the same time, if the police knew precisely in which container the object of the

---

72. According to that provision, an initial appearance, variously referred to as an arraignment in other jurisdictions (including the one in question in *McLaughlin*), is to be held "promptly" but in no event more than seventy-two hours after the arrest excluding weekends and legal holidays.

73. 111 S. Ct. 1982 (1991).

74. 442 U.S. 753, 99 S. Ct. 2586 (1979).

75. *Cf.* United States v. Chadwick, 433 U.S. 1, 97 S. Ct. 2476 (1977) (police could seize but not search without a warrant a locked footlocker found in the trunk of a car).

76. 456 U.S. 798, 102 S. Ct. 2157 (1982).

77. *Id.* at 825, 102 S. Ct. at 2173.

78. *Id.* at 824, 102 S. Ct. at 2172.

79. *Id.* The Court was careful to point out that this right to search was not limited

search could be found, they were precluded from opening it.[80] This distinction was not logical.[81] In order to address this anomaly, the Court in *Acevedo* chose to overrule *Sanders* (and implicitly did the same as to *Chadwick*).[82] Accordingly, if the police have probable cause to search the entire automobile or probable cause that is specific to a container within the automobile, the container(s) may be searched. If the probable cause is limited to a single container, then only that container may be searched, not the entire automobile.[83]

In *State v. Brady*,[84] the Louisiana Supreme Court addressed the prosecution's claim that the search involved in that case was proper without a warrant under the "murder scene" exception. The Louisiana Supreme Court reviewed the prior jurisprudence on this alleged exception. The court found that prior to *Mincey v. Arizona*,[85] generally accepted practice was to validate a warrantless search "when there were compelling reasons for the immediate investigation of the scene of a possible murder."[86] The Louisiana Supreme Court noted that the search in *Mincey* was invalidated by the United States Supreme Court but concluded that

---

or defined by the nature of the container. It stated: "One point on which the Court was in virtually unanimous agreement in *Robbins* was that a constitutional distinction between 'worthy' and 'unworthy' containers would be improper." *Id.* at 822, 102 S. Ct. at 2171.

80. *Id.* at 824, 102 S. Ct. at 2172.

81. That is not to say that *Ross* was correct and *Sanders* incorrect—only that the two cases were inconsistent.

82. California v. Acevedo, 111 S. Ct. 1982, 1991 (1991).

83. The Court stated, "'Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.' We reaffirm that principle." *Id.* (citation omitted) (quoting from *Ross*, 456 U.S. at 824, 102 S. Ct. at 2172).

For Louisiana cases in accord with *Acevedo*, see State v. Harmon, 594 So. 2d 1054 (La. App. 3d Cir. 1992) (although police knew evidence was in the bag, bag was properly seized and searched and need not have been held until a warrant could be obtained); and State v. Wells, 593 So. 2d 465 (La. App. 2d Cir. 1992) (recognition of theoretical distinctions between forms of warrantless automobile searches are no longer justified).

84. 585 So. 2d 524 (La. 1991). *Brady* is interesting because it expands the Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317 (1983), "fair probability" test for probable cause to a non-warrant context. In *Gates*, the United States Supreme Court also provided that when a warrant had been issued, the reviewing court is not to reassess probable cause *de novo*. It is instead merely to review the fact to determine whether there was a substantial basis for the issuing magistrate's decision that there was a fair probability of probable cause. *Id.* at 236, 103 S. Ct. at 2331. The Louisiana court in *Brady* did not address whether the same deference provided in *Gates* to an issuing magistrate would be given to an officer's determination of probable cause. However, to the extent that courts want to encourage searches pursuant to warrants rather than warrantless searches, *see* Massachusetts v. Upton, 466 U.S. 727, 733, 104 S. Ct. 2085, 2088 (1984), it would appear inappropriate for a court reviewing the probable cause decision of a police officer to use the same deferential standard. If that were done, much of the incentive to obtain the warrant would be lost.

85. 437 U.S. 385, 98 S. Ct. 2408 (1978).

86. *Brady*, 585 So. 2d at 527.

the invalidation was based on the facts of that case.[87] According to the Louisiana Supreme Court, one of the pre-*Mincey* exceptions to the warrant requirement was where

> there were compelling reasons for the immediate investigation of the scene of a possible murder. When the initial entry of the police was legal and there were exigent circumstances such as the fleeing of the unknown assailant, the need for immediately developing possible identification evidence was deemed to justify warrantless action.[88]

Finding that this exception was still alive and well after *Mincey*, the court concluded that the warrantless search under the facts of this case was valid. It distinguished *Mincey* and *Thompson v. Louisiana*[89] in the following manner:

> The present case is vastly different from *Mincey* and *Thompson*. In *Mincey* and *Thompson* the circumstances of the killing and the identity of the perpetrator were known before the search was conducted; in the present case the police knew a stabbing with some instrument had occurred somewhere, but knew nothing of the identity of the assailant. In *Mincey* and *Thompson* no occupant of the premises called the police, requested or participated in the investigation, or acted in any manner that demonstrated the occupant's diminished expectation of privacy in the premises; in the present case a co-occupant (defendant) had her neighbor summon the police, admitted the police into the apartment herself, disclaimed any culpability, and tacitly manifested an interest in the officers' conducting an investigation, thereby significantly indicating that her expectation of privacy was yielding to her interest in apprehending the killer of her boyfriend.[90]

---

87. The court stated:

> The Court held that "the warrantless search of Mincey's apartment was not constitutionally permissible simply because a homicide had recently occurred there." [*Mincey*, 437 U.S.] at 395, 98 S. Ct. at 2415. Thus the Court refused to recognize a general murder scene exception to the warrant requirement, but noted that the state court could determine on remand whether any evidence was permissibly seized under established Fourth Amendment standards.

Brady, 585 So. 2d at 527.

88. *Id.*

89. 469 U.S. 17, 105 S. Ct. 409 (1984). In *Thompson*, the police found the defendant at the scene of a murder. They removed the defendant, who was unconscious, from the premises to the hospital. Thirty-five minutes later, homicide detectives arrived and conducted a two-hour search of the premises. The Supreme Court held that the evidence obtained during this search was obtained in violation of the Fourth Amendment. *Id.* at 18-23, 105 S. Ct. at 410-12.

90. *Brady*, 585 So. 2d at 528-29 (footnote omitted).

Although these are distinctions between *Brady* and *Mincey* and *Thompson*, these distinctions do not really go to the recognized exception to which the Louisiana court ascribes its analysis in *Brady*—the exigency exception. Without more of a demonstration that there was a likelihood that the evidence would be destroyed or that the officers or public were in danger, there is no exigency that requires the search be made without the delay of obtaining a warrant. Justice Dennis, in dissent, pointed this out. He reasoned:

> The burden is on the government to show that the search falls within one of the exceptional situations.
>
> A justifiable warrantless search to prevent the destruction of evidence is a subcategory of the exigent circumstances exception. . . .
>
> The Supreme Court has concluded that the need to prevent destruction of evidence is one type of exigent circumstance that may justify warrantless action but has not clearly defined at what point the fear that evidence might be destroyed becomes sufficient to justify warrantless action. The Court has never approved a warrantless entry into private premises on this basis, although it has suggested that evidence "in the process of destruction," *Vale v. Louisiana*, *supra* or "threatened with destruction," *Johnson v. United States*, *supra*, might justify such action.
>
> . . .
>
> . . . [A]ssuming for the sake of argument, that the officer had probable cause to believe that evidence of criminal activity was located on the premises, he necessarily would have had probable cause to believe that a crime had been committed there and that Brady had committed the offenses, since she was the only person known to be in the residence with the victim when he died. Consequently, under such an assumption, the officer would have had probable cause to arrest her, place her in custody and remove her from the premises, thereby eliminating any possibility that the evidence would be destroyed before a warrant could be obtained.[91]

---

91. *Id.* at 531-33 (Dennis, J., dissenting) (citations omitted). In defense of the majority opinion, it should be noted that the need to prevent destruction of evidence is merely one of the bases for the exigent circumstances exception recognized by the United States Supreme Court (as recognized by Justice Dennis, *id.* at 531). *See, e.g.*, Michigan v. Tyler, 436 U.S. 499, 98 S. Ct. 1942 (1978) (search to discover cause of fire when search was a continuation of prior lawful entry does not violate the Fourth Amendment).

C. Consent to Searches

In *Florida v. Jimeno*,[92] the officer heard what he believed to be the defendant arranging a drug transaction over a public telephone. Since the officer believed that the defendant might be involved in illegal drug trafficking, the officer followed the defendant. When the defendant made a right turn on red without stopping, the officer pulled him over. The officer advised the defendant that he had been stopped for a traffic violation and that the officer suspected defendant of drug trafficking.[93] Upon request that the officer be allowed to search the car for drugs, the defendant gave the officer consent. Narcotics were found in a folded paper bag on the car's floorboard. The defendant had not expressly consented to the search of the bag, nor had he expressly limited the search.[94] The Supreme Court did not specifically address the issue of whether the consent given by the defendant was actual consent to open the bag. Instead, the Court chose to address the issue of the propriety of the search even if the bag were not intended by the defendant to be within the scope of the consent given.[95] It held that the Fourth Amendment is satisfied when, under the circumstances, it is objectively reasonable for the police to believe that the scope of the suspect's consent permitted them to search in the area (or container) actually searched.[96]

Under the facts of the case, the Court found that the officer's authority to search the automobile extended beyond the car's interior surfaces and permitted the officer to open containers large enough to hold the object declared by the officer to be the object of the search.[97] The rationale employed by the Court was consistent with its earlier

---

92. 111 S. Ct. 1801 (1991).

93. *Id.* at 1803. Neither the majority nor dissenting opinions addressed the issue of the potential pretextual nature of the stop. The issue of whether an officer may validly seize a person when the officer has a justification unrelated to his actual motivation is one that is ripe for determination by the Supreme Court. *See* United States v. Causey, 835 F.2d 1527 (5th Cir. 1988) (holding en banc that pretext is irrelevant so long as officer had authority pursuant to warrant to make stop); Missouri v. Blair, 480 U.S. 698, 107 S. Ct. 1596 (1987) (writ granted to consider pretext issue dismissed as improvidently granted).

94. *Jimeno*, 111 S. Ct. at 1803-04.

95. *Id.* at 1804.

96. *Id. Cf.* United States v. Springs, 936 F.2d 1330 (D.C. Cir. 1991). In *Springs*, the court found that a bus passenger's consent to a search of her tote bag extended to a search of a closed container found within that bag. The passenger was explicitly advised by a government agent that he was looking for narcotics, and the closed container was not an unlikely storage place for narcotics. *See also* State v. Brady, 585 So. 2d 524 (La. 1991) (search of linen closet was within the tacit consent to search the house where victim had been stabbed to death).

97. *Jimeno*, 111 S. Ct. at 1804.

ruling in *Illinois v. Rodriguez*.[98] In *Rodriguez* the Court held that even if the person giving an officer permission to conduct a search did not have actual authority to do so, the search was reasonable so long as the officer in objective good faith believed that the putative consenter had such authority.[99]

The import of the Court's holding in *Jimeno* is clearly limited to circumstances where the officer is objectively reasonable in his belief that the defendant's consent authorized the search in question. For that reason, the Court found it significant that the officer had declared the object of the search prior to the consent.[100] Once the officer knew that the defendant knew the object of the search, the Court concluded that the officer could reasonably believe the defendant was consenting to not only a search of the car itself but also any container readily accessible within the car which might hold the object of the search.[101] The Court also pointed out that since such a search is justified by the defendant's consent (or the officer's objective reliance thereon), the defendant has the power to define the scope of that consent and may limit the search to the interior surfaces of the car.[102]

III. CONFESSIONS

The defendant in *McNeil v. Wisconsin*[103] requested the right to counsel during a judicial proceeding arising out of an armed robbery charge. While he was still in custody on this charge, he was questioned about an unrelated murder charge. Although before this questioning the defendant waived his rights under *Miranda v. Arizona*,[104] he contended that the waiver was invalid.[105] The basis of the defendant's argument was that under *Edwards v. Arizona*,[106] *Arizona v. Roberson*,[107] and

98. 110 S. Ct. 2793 (1990).

99. *Id.* at 2798-2800.

100. *Jimeno*, 111 S. Ct. at 1804.

101. *Id.* The Supreme Court cited with apparent approval and distinguished the case of State v. Wells, 539 So. 2d 464 (Fla. 1989). In *Wells*, the Florida Supreme Court held that police officers exceeded the scope of consent when they searched a locked briefcase found in the trunk of a car during a search pursuant to consent to search the car. *Id.* at 467.

102. *Jimeno*, 111 S. Ct. at 1804. Of course, should the officer have probable cause to search the automobile, he may do so without a warrant under the automobile exception, Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280 (1925), and the automobile emergency exception under Louisiana law, State v. Guzman, 362 So. 2d 744 (La. 1978). This then allows the officer to search containers, possibly even locked ones, within the car. *See* discussion *supra* at notes 77-83 and accompanying text.

103. 111 S. Ct. 2204 (1991).

104. 384 U.S. 436, 86 S. Ct. 1602 (1966).

105. *McNeil*, 111 S. Ct. at 2206-07.

106. 451 U.S. 477, 101 S. Ct. 1880 (1981).

107. 486 U.S. 675, 108 S. Ct. 2093 (1988).

Michigan v. Jackson,[108] the *Miranda* waiver was ineffective because it came pursuant to police-initiated conduct after the request for counsel.[109] The Supreme Court rejected the claim, limiting the cited cases to their facts. It held instead that a defendant's invocation of his Sixth Amendment right to counsel at his appearance on a charged offense was not an invocation of his right to counsel as to a separate uncharged offense. Accordingly, the Court found that the invocation in the instant case did not preclude police interrogation about an unrelated offense, as to which the defendant had waived his *Miranda* rights.[110]

IV. CRIMINAL TRIAL PROCEDURE

A. Harmless Error

In a split opinion in *Arizona v. Fulminante*,[111] a five-member majority held that the admission of a coerced confession into a criminal defendant's trial is subject to the harmless error analysis. In reaching this conclusion, the majority distinguished trial errors from structural defects.[112] It noted that a trial error occurs during the presentation of the case to the trier of fact and may be assessed in the context of the other evidence to determine whether its admission at trial is harmless beyond a reasonable doubt.[113] The Court defined structural defects as those which infect the trial mechanism and cannot be analyzed under a harmless error standard because the entire conduct of a trial is affected by the error.[114]

---

108. 475 U.S. 625, 106 S. Ct. 1404 (1986).

109. McNeil v. Wisconsin, 111 S. Ct. 2204, 2207 (1991). *Edwards* held that after the defendant has invoked his *Miranda* right to counsel, any subsequent waiver of that right pursuant to police initiated conduct would be ineffective. *Edwards*, 451 U.S. at 484-85, 101 S. Ct. at 1884-85. *Roberson* expanded *Edwards* to a situation where different officers questioned the defendant about a different offense. *Roberson*, 486 U.S. at 678, 108 S. Ct. at 2096. *Jackson* held that the defendant's invocation of the Sixth Amendment right to counsel at a judicial proceeding precluded the subsequent waiver of that right pursuant to police initiated conduct. *Jackson*, 475 U.S. at 636, 106 S. Ct. at 1411.

110. *McNeil*, 111 S. Ct. at 2210. Since the Court found that the two offenses were unrelated, it did not address the result if the offenses had been related. Nor, under the facts of the case, was it necessary for the Court to do any substantial analysis of when two offenses are related.

111. 111 S. Ct. 1246 (1991).

112. *Id.* at 1254-55.

113. *Id.* at 1264.

114. *Id.* at 1265. The structural defects listed by the Court included the complete denial of counsel, Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963); deprivation of the right to self-representation at trial, McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944 (1984); adjudication by a biased judge, Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437 (1927); denial of the right to a public trial, Walker v. Georgia, 467 U.S. 39, 104 S. Ct. 2210 (1984); and unlawful exclusion of members of the defendant's race from a grand jury, Vasquez v. Hillery, 474 U.S. 254, 106 S. Ct. 617 (1986). *Fulminante*, 111 S. Ct. at 1256.

The Court in *Fulminante* must be commended for attempting to add some measure of predictability to the issue of when the harmless error analysis would be applicable.[115] What started out as a doctrine to be applied in a limited set of circumstances[116] has become the rule rather than the exception.[117] During the course of this transformation, the Supreme Court had given little guidance as to when the doctrine is applicable and when it is not. Instead, the Court had chosen merely to either apply the doctrine[118] or to not apply it[119] on a case by case basis.[120]

One of the first opportunities for the Louisiana Supreme Court to consider the *Fulminante* dichotomy arose in *State v. Cage*.[121] In that case, the jury had been erroneously instructed on the definition of the "beyond a reasonable doubt" burden. The Louisiana Supreme Court applied the "trial error" and "structural defect" dichotomy to conclude that a jury charge that erroneously instructed the jury on the definition

---

115. *See* Simien, *supra* note 45, at 77-78.

116. *See* Chapman v. California, 386 U.S. 18, 87 S. Ct. 824 (1967). In providing that the harmless error analysis is applicable to some federal constitutional violations, the Court stated: "We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Id.* at 22, 87 S. Ct. at 827.

117. *See* Arizona v. Fulminante, 111 S. Ct. 1246, 1254-55 (1991).

118. *See, e.g.*, Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431 (1986).

119. *See* cases cited *supra* at note 114. At other times the Supreme Court has merely raised questions about the propriety of using a harmless error analysis in a particular case. *See* Carter v. Kentucky, 450 U.S. 288, 304, 101 S. Ct. 1112, 1121 (1981).

120. Although commendation for the Court's effort at establishing some predictability is in order, that is not the same as saying that the means chosen was the proper one. Other options were available. For example, the jury serves at least a dual function in our criminal justice system—that of fact finder and that of the role of the conscience of society in a given case. *See* United States v. Dougherty, 473 F.2d 1113, 1136-37 (D.C. Cir. 1972). In light of this dual function, another dichotomy for determining the appropriate role of harmless error is suggested. In reviewing the evidence presented to the jury, it would be extremely difficult, if not impossible, for an appellate court to determine the impact of an error that affects the ability of that jury to act as society's conscience (*i.e.*, one that prejudices the jury against the defendant). It would be much less difficult to review the facts and determine how an error affected the jury's fact finding function. Accordingly, a better dichotomy might be one that divided errors along this basis and applied a harmless error analysis to errors where the reviewing court found that only the fact finding function was affected and not to those that might bias the jury against the defendant. *Cf. Van Arsdall*, 475 U.S. at 681, 106 S. Ct. at 1436 (explaining the Court's reasoning in *Chapman* of excusing errors that were "'harmless' in terms of their effect on the fact finding process of the trial").

This survey of recent developments is not the appropriate vehicle to conduct an in depth analysis of other available options or even a complete discussion of the pros and cons of this option, reference to which should not be construed as a recommendation thereof. This option has been listed as merely one of the possible alternatives.

121. 583 So. 2d 1125 (La.), *cert. denied*, 112 S. Ct. 211 (1991).

of reasonable doubt was a trial error. The court reached this result because the instruction "was given by the trial judge . . . during the guilt phase of defendant's trial [and] [u]nder the distinction drawn by Chief Justice Rehnquist in *Fulminante* between trial errors and structural defects in the trial mechanism, the instruction is a trial error."[122] After the court in *Cage* concluded that the harmless error analysis was appropriate, the court found the error harmless beyond a reasonable doubt

---

122. *Id.* at 1127. *Cage* must be compared to the same court's *per curiam* opinion in State v. Brown, 585 So. 2d 1211 (La. 1991). Over the objection of trial counsel, the defendant in *Brown* was presented before the jury in prison clothing. The defendant had been wearing "street clothes" when he was being transported to the trial. A sheriff deputy instructed the defendant to wear the prison garb to trial. In addition, the defendant's request for leave to change back into his "street clothes" was denied. *Id.* at 1212. The trial court admonished the jury that:

> Ladies and gentlemen, you will notice that the defendant is in his parish prison garb, which indicates to you that he is in parish prison. That's not to play any part whatsoever if you are chosen as a juror. The only thing that that means is that he could not afford to make bond. Many people are on the street when they commit a crime, and they make bond. Some people can't afford it, so they're in jail. It does not play any part whatsoever with . . . you inasfar as innocence or guilt is concerned.

Id.

The Louisiana Supreme Court held, citing *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691 (1976), that forcing the defendant to appear before the jury in prison garb violated his due process rights. *Brown*, 585 So. 2d at 1212-13. In addressing the issue of harmless error, the court held that the harmless error doctrine could not be applied. The court reasoned that:

> "[T]he constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment . . ." and create an "unacceptable risk . . . of impermissible factors coming into play." The error so affects "[t]he entire conduct of the trial from beginning to end," that we find no circumstances in this case which would justify holding such a pervasive and inherently prejudicial practice harmless to the defendant's right to an impartial verdict from the jury he selected.

Brown, 585 So. 2d at 1213 (alteration in original) (citations omitted).

Some of these statements might be read as applying the harmless error analysis and having simply concluded that the error was harmful. However, the court's references to *Fulminante*, the clothes as a "constant reminder," and the effect on "the entire conduct of the trial," *id.*, indicate that what the court was, in fact, holding was that this was a structural defect not amenable to the harmless error analysis. *See Fulminante*, 111 S. Ct. at 1254-66.

Although not articulated by the court in *Brown*, what may have been just as significant in the facts of that case was the admonition given to the jury. In the admonition, the judge only made passing comments to the fact that the garb was to have no effect on the deliberations. Otherwise, however, the admonition merely implied that street clothing was no indication of innocence but only affluence. For example, the instruction indicated that "[m]any people are on the street when they commit a crime." The sentence was followed by another that said: "Some people can't afford it [bond]." The judge made no direct comment about the fact that a person who is innocent may be in jail. *Brown*, 585 So. 2d at 1212.

"[b]ecause of the overwhelming evidence establishing defendant's guilt . . . ."[123]

Justice Dennis argued strenuously in dissent that *this* erroneous jury charge was a structural defect.[124] Among other things, Justice Dennis found that the giving of this charge was indistinguishable from the dicta found in cases as late as *Rose v. Clark*.[125] In *Rose*, the United States Supreme Court applied a harmless error analysis to a mandatory presumption jury charge that was held to be unconstitutional under the Court's earlier pronouncement in *Sandstrom v. Montana*.[126] Justice Dennis pointed out, however, that the Court in *Clark*

> expressly declared that the erroneous presumption of malice instruction [is to be distinguished] . . . from "'other instructional errors that prevent a jury from considering an issue' . . . . Cf. *Jackson v. Virginia*, (suggesting that failure to instruct a jury as to the reasonable doubt standard cannot be harmless)." *Rose v. Clark*, 478 U.S. at 580, n. 8, 106 S. Ct. at 3107, n. 8, citing *Connecticut v. Johnson*, 460 U.S. at 95, n. 3, 103 S. Ct. at 982, n. 3 (Powell, J., dissenting) (citations omitted).[127]

Justice Dennis further pointed out that the majority opinion in *Rose v. Clark* made it clear that "'other instructional errors' which would prevent a jury from considering any issue on the merits such as 'a failure to instruct a jury as to reasonable-doubt standard' could not be harmless or subject to the Chapman standard."[128] Although Justice Dennis does not take the next step in his argument, one might reasonably conclude that the rationale of the *Rose v. Clark* dicta applies *a fortiori* to an erroneous reasonable doubt charge that lessens the State's burden.[129] Not only is the jury not advised of the obligation to put the State's evidence

---

123. *Cage*, 583 So. 2d at 1128. For a similar approach to the application of the harmless error analysis see United States v. Lane, 474 U.S. 438, 106 S. Ct. 725 (1986). In that case, the United States Supreme Court stated:

> "The [harmless error] inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

Id. at 449, 106 S. Ct. at 732 (quoting Kotteakos v. United States, 328 U.S. 750, 765, 66 S. Ct. 1239, 1248 (1946)). In determining whether such an influence might exist, the Court looked to the overwhelming weight of the evidence. *Id.* at 450, 106 S. Ct. at 732.

124. *Cage*, 583 So. 2d at 1135.

125. 478 U.S. 570, 106 S. Ct. 3101 (1986).

126. 442 U.S. 510, 99 S. Ct. 2450 (1979).

127. *Cage*, 583 So. 2d at 1133 (Dennis, J., dissenting).

128. *Id.* at 1134 (quoting *Clark*, 442 U.S. at 580 n.8, 106 S. Ct. at 3107 n.8).

129. The United States Supreme Court had already concluded that the charge given in *Cage* had the effect of lessening the State's burden of proof. Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328 (1990).

to the beyond a reasonable doubt test, but the jury is actually told that the level of proof is something less than it actually is. Since the jury is presumed to follow its instructions,[130] it is presumed that the jury applied this improper, lower burden. At least if the jury were not instructed at all on the standard, one might conclude that the informal educational process had advised the jurors of the State's burden in a criminal case, which presumably, without the improper instruction, would have been properly applied.

At the time of the Louisiana Supreme Court's decision in *Cage*, the court was not privy to the United States Supreme Court's decision in *Yates v. Evatt*,[131] which was rendered twenty-two days later. The United States Supreme Court found that an erroneous jury instruction on the presumption of malice in a prosecution for accomplice murder could not be excused as harmless error under *Chapman*.[132] The state supreme court in *Yates* had concluded that the instructions established an unconstitutional presumption, but held that the error was harmless because there was sufficient evidence of malice such that the jury did not have to rely on the presumption. The United States Supreme Court disagreed. Although it agreed that the harmless error analysis was applicable, the Court disagreed with the state court's application.[133]

Justice Souter, writing for the majority, held that in the context of an erroneous presumption, the application of the harmless error doctrine is a two-step process.[134] First, the reviewing court must determine what evidence the jury actually considered in reaching its verdict.[135] Justice Souter wrote:

> Thus, to say that an instruction to apply an unconstitutional presumption did not contribute to the verdict is to make a judgment about the significance of the presumption to reasonable jurors, when measured against the other evidence *considered* by those jurors independently of the presumption.
>
> Before reaching such a judgment, a court must take two quite distinct steps. First, it must ask what evidence the jury *actually considered* in reaching its verdict. . . . In answering this question, a court does not conduct a subjective enquiry into the jurors' minds. The answer must come, instead, from analysis of the

130. Richardson v. Marsh, 481 U.S. 200, 211, 107 S. Ct. 1702, 1709 (1987).

131. 111 S. Ct. 1884 (1991).

132. *Id.* at 1895-97. "[T]he judge instructed the jury . . . that 'malice [which is an element of the offense] is implied or presumed' from either the 'willful, deliberate, and intentional doing of an unlawful act' or from the 'use of a deadly weapon.'" *Id.* at 1886.

133. *Id.* at 1891.

134. *Id.* at 1893.

135. *Id.*

> instructions given to the jurors and from application of that customary presumption that jurors follow instructions and, specifically, that they consider relevant evidence on a point in issue when they are told they may do so.
>
> . . . .
>
> . . . [The] assumption [that the harmless error analysis requires a review of the entire record] is simply [based on the notion] that the jury considered all the evidence bearing on the issue in question before it made the findings on which the verdict rested. If, on the contrary, that assumption were incorrect, an examination of the entire record would not permit any sound conclusion to be drawn about the significance of the error to the jury in reaching the verdict. This point must always be kept in mind when reviewing erroneous presumptions for harmless error, because the terms of some presumptions so narrow the jury's focus so as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to infer the fact presumed. When applying a harmless-error analysis in presumption cases, therefore, it is crucial to ascertain from the trial court's instructions that the jurors, as reasonable persons, would have considered the entire trial record, before looking to that record to assess the significance of the erroneous presumption.[136]

After the reviewing court determines what evidence the jury actually considered, it must then weigh the probative force of that evidence against the probative force of the presumption standing alone.[137] It is not enough that the jury considered evidence from which it could have reached the verdict without reliance on the presumption. The Supreme Court held that the reviewing court must be convinced beyond a reasonable doubt that the presumptions did not contribute to the jury's finding on the presumed fact.[138]

---

136. *Id.* at 1893-94 (emphasis added) (footnote omitted). *Yates'* requirement that the reviewing court only consider that evidence actually considered by the jury seems at odds with the Louisiana Supreme Court's analysis in *Cage*. To the extent that only the evidence actually considered by the jury can form the basis of the harmless error analysis, it would appear that only the evidence considered by the jury under the appropriate standard may be considered. Since the erroneous instruction in *Cage* affected the jury's assessment of the entire evidence, there is no evidence actually considered by the jury (under the appropriate standard) which the reviewing court may rely upon in making its harmless error determination. Certiorari has been granted by the United States Sureme Court in a case where it may have to decide whether the harmless error analysis is applicable to a misdefinition of reasonable doubt. Sullivan v. Louisiana, 113 S. Ct. 373 (1992).

137. *Id.* at 1893.

138. *Id.* at 1893-94. The Supreme Court found that the specific circumstances of the

In determining the effect of a federal constitutional violation, state courts must apply the federal harmless error analysis.[139] When the violation is based in state law, however, state courts are free to fashion the remedy of their choice, including automatic reversal if they so choose.[140] For this reason, Justice Dennis in dissent to the *Cage* opinion invited the majority to reconsider whether the *Cage* instruction violated state as well as federal law.[141] If so, Justice Dennis argued, then the harmless error analysis would differ. First, he argued that under state law, harmless error should not apply at all to this type of violation.[142] Second, Justice Dennis argued that if harmless error were applicable under state law, the application of the doctrine would differ.[143]

There is support for Justice Dennis' argument in Louisiana jurisprudence. In *State v. Gibson*,[144] the Louisiana Supreme Court held that the harmless error analysis under Louisiana law would not focus on the strength of the case (or overwhelming weight of the evidence). It instead indicated that the focus would be on the potential for prejudice inherent in the error.[145] The court reasoned that since the Louisiana Constitution extends appellate jurisdiction only to questions of law in criminal matters,[146] review for overwhelming weight of the evidence was not a permissible approach under state law.[147] It instead found that the approach utilized in *Chapman v. California*[148] was more consistent with the limits on appellate jurisdiction.[149] The *Gibson* court concluded that such an approach is less intrusive on the jury's function than the overwhelming evidence test and would require a Louisiana appellate court to conduct a more limited review of fact. Therefore, the review

---

victim's death did not so convincingly indicate the principal's malice in killing her that it could be said beyond a reasonable doubt that the jurors rested a finding of malice on that evidence exclusive of the presumptions. *Id.* at 1897.

139. *See* Chapman v. California, 386 U.S. 13, 21, 87 S. Ct. 824, 826-27 (1967).

140. *Id.*, 87 S. Ct. at 826.

141. State v. Cage, 583 So. 2d 1125, 1137 (La.) (Dennis, J., dissenting), *cert. denied*, 112 S. Ct. 211 (1991).

142. *Id.* at 1137-38 (Dennis, J., dissenting).

143. *Id.* at 1138-39 (Dennis, J., dissenting).

144. 391 So. 2d 421 (La. 1980).

145. *Id.* at 427.

146. *See* La. Const. art. V, § 5(C).

147. *Gibson*, 391 So. 2d at 426-27. Of course, to the extent a state appellate court finds that there was a violation of a right based *solely* in federal law, the Supremacy Clause requires application of the federal harmless error analysis. *See supra* text accompanying note 139. Accordingly, despite the state constitutional limits on appellate review of facts, the state appellate court would have to review facts to determine if the error was harmless due to the overwhelming weight of the evidence.

148. 386 U.S. 13, 87 S. Ct. 824 (1967) (Court looked to the nature of the error).

149. Since *Chapman*, federal appellate courts have not only looked to the nature of the error and the prejudice inherent in the error but also to the overwhelming weight of the evidence. If a trial error is insignificant *or* if the evidence is overwhelming, the error is considered harmless. *See* United States v. Lane, 474 U.S. 438, 106 S. Ct. 725 (1986).

would be more in accord with the limits on appellate review provided in the Louisiana Constitution.[150]

B. Confrontation and Hearsay

In *White v. Illinois*,[151] the United States Supreme Court held that the Confrontation Clause does not prohibit the admission of testimony under the spontaneous declaration[152] and medical examination exceptions to the hearsay rule even if the prosecution does not produce the declarant who was available.[153] The Court reasoned that these exceptions were traditional hearsay exceptions, and since the Confrontation Clause and the traditional hearsay exceptions were both designed to serve the same purpose—to assure reliability—the admission of reliable evidence under one of these exceptions would not violate the Confrontation Clause.[154]

C. Forcible Medication at Trial

The Supreme Court rejected the state's arguments in *Riggins v. Nevada*[155] that it should be allowed to forcibly medicate the defendant with antipsychotic medication during his trial. In that case, the defendant had moved to suspend the administration of the medication until after his trial. He argued that he had the right to show jurors his true mental state when he offered an insanity defense. The Supreme Court held that once the defendant made that motion, the burden was on the State to establish both the need for the medication and its medical appropriate-

---

150. *Gibson*, 391 So. 2d at 427. As recently as June of this year, the Louisiana Supreme Court was still citing *Gibson*. State v. Hearold, 603 So. 2d 731 (La. 1992). However, it is not clear whether that citation is an indication that the court still feels that Louisiana law provides a different harmless error analysis. *Hearold* was written by Justice Lemmon, who stated in *Cage* that the court had merely applied a standard to which it had "consistently adhered." In support of this statement, Justice Lemmon cited *Gibson*. State v. Cage, 583 So. 2d 1125, 1129 (La.) (Lemmon, J., concurring) (citing *Gibson*, 391 So. 2d at 421), *cert. denied*, 112 S. Ct. 211 (1991).

151. 112 S. Ct. 736 (1992).

152. This exception under Illinois law corresponds, although not in name, to the excited utterance exception under Louisiana law. *See* La. Code Evid. art. 803(2).

153. *White*, 112 S. Ct. at 742-43.

154. *Id.* at 743. The Court interestingly looked to the general presumption of reliability of the hearsay exceptions. It did not look to the specifics of the case under which the exception was applied. For example, in justifying the admission of the statements to a medical provider, the Court noted that such "a statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility . . . ." *Id.* However, under the facts of this case, it is highly unlikely that a four-year-old child (who made the statements) would have actually thought of the ramifications of an untruthful statement to her doctor. Accordingly, the reliability justification for the exception was not actually present.

155. 112 S. Ct. 1810 (1992).

ness.[156] Although not shown in the instant case, the Supreme Court indicated that if the medication were appropriate to maintain a psychological balance needed to sustain the defendant's trial competence, forced medication would be consistent with constitutional limitations.[157] Without such a showing and without the consideration of other alternatives to the medication, the Court concluded that even if expert testimony would be sufficient to permit jurors to assess the defendant's demeanor fairly, the unacceptable risk remained that forced medication compromised the defendant's trial rights.[158]

D. Right to Trial By Jury

Probably the leading case on jury trial rights during the last decade was *Batson v. Kentucky*.[159] In that case, the Supreme Court held that a defendant of the same race as jurors intentionally excluded on the basis of their race would have an equal protection claim sufficient to set aside his conviction.[160] Although the *Batson* holding was limited to exclusion on the basis of race, it would appear that its reasoning should have implications far beyond its narrow holding. This was implicitly recognized by the Supreme Court in *Hernandez v. New York*.[161] In that

---

156. *Id.* at 1815.

157. *Id.*

158. *Id.* at 1816. The Court noted that the medications may have affected Riggins' appearance before the jury (which is significant in a case of a plea of insanity) and his ability to assist in his trial. *Id.* at 1811, 1813. The Court also noted that in balancing the State's interest and Riggins' interest, the state courts should have considered Riggins' liberty interest against forced medication. *Id.*

159. 476 U.S. 79, 106 S. Ct. 1712 (1986).

160. The defendant, of course, would not automatically prevail because a juror of a certain race was excluded from the jury by the prosecutor. The defendant would also have to demonstrate circumstances that give rise to an inference of discrimination. *Id.* at 96-97, 106 S. Ct. at 1722-23. Only then would the prosecution be called upon to demonstrate race neutral reasons for the exclusion. If the prosecutor provided such reasons, no equal protection violation would be found unless the defendant demonstrated that the purported reasons were a guise for discriminatory interest. *Id.* at 97-98, 106 S. Ct. at 1723-24.

As a practical consideration, however, if a *Batson* objection is made, judges might consider requiring a race neutral explanation even before the inference of discrimination is present. Otherwise, if the inference is later present, the allegedly improperly excluded jurors would have already been excused. Even if the jurors were not excused (but asked to remain some place in the courtroom), if the judge had not made a final ruling on the *Batson* objection, he might have to reseat a juror that had already been removed from the box or declare a mistrial and restart jury selection.

161. 111 S. Ct. 1859 (1991). The lead opinion in this case was only a plurality of four justices. However, Justice O'Connor, writing for herself and Justice Scalia, appeared to agree with much of what the plurality wrote:

I agree with the plurality that we review for clear error the trial court's finding

case, the defendant alleged that the prosecutor had intentionally excluded prospective "Latino" jurors on the basis of their ethnicity. Without a discussion of the difference, if any, between ethnic discrimination and racial discrimination, the plurality opinion authored by Justice Kennedy (and joined by Chief Justice Rehnquist and Justices White and Souter) accepted the proposition that "[i]f true, the prosecutor's discriminatory use of peremptory strikes [on the basis of ethnicity] would violate the Equal Protection Clause as interpreted" in *Batson*.[162]

The plurality opinion then turned its attention to the requirement that the prosecution provide a race-neutral explanation.[163] It provided that trial courts should review the prosecutor's explanation by a very deferential standard.[164] The Court also went on to hold that appellate review of the trial court's conclusions on discriminatory intent should

---

> as to discriminatory intent, and agree with its analysis of this issue. I agree also that the finding of no discriminatory intent was not clearly erroneous in this case. I write separately because I believe that the plurality opinion goes farther than it needs to in assessing the constitutionality of the prosecutor's asserted justification for his peremptory strikes.

Id. at 1873 (O'Connor, J., concurring). At no point did Justice O'Connor disagree with the application of *Batson* to a claim of ethnic discrimination. In light of this concurrence, it would appear that much of the discussion in the plurality opinion would qualify as an opinion by the Court.

Justice O'Connor's criticism of the plurality that a challenge must be explained at the for-cause level does not appear well founded. *Id.* at 1875. The plurality specifically stated that "[w]hile the reason offered by the prosecutor . . . need not rise to the level of a challenge for cause, the fact that it corresponds to a valid for-cause challenge will demonstrate its race-neutral character." *Id.* at 1868 (citation omitted).

On the issue of the applicability of *Batson* beyond the context of race, see United States v. De Gross, 960 F.2d 1433 (9th Cir. 1992) (en banc) (*Batson*'s prohibition against discriminatory use of peremptory challenges applies to striking potential jurors on the basis of gender). *But see* United States v. Hamilton, 850 F.2d 1038, 1042 (4th Cir. 1988), *cert. denied*, 493 U.S. 1069, 110 S. Ct. 1109 (1990) (*Batson* inapplicable to peremptory strikes on the basis of gender); and State v. Morgan, 553 So. 2d 1012 (La. App. 4th Cir. 1989), *writ denied*, 558 So. 2d 600 (La. 1990) (same).

162. *Hernandez*, 111 S. Ct. at 1864. The Court also noted that it was not attempting to draw any distinction between the term Latino and Hispanic, which term had appeared in *amicus* briefs and was used in the trial court. *Id.*

163. *Id.* at 1866. Since *Batson* applies beyond the context of racial discrimination, "race-neutral" is really a misnomer. However, the Court in *Hernandez* continued to use that term and, for the sake of convenience, I will continue to do so in this article.

164. The Court stated:

> A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.

Id.

Once the prosecution has set forth a neutral reason for the strike, the defendant might still prevail if he can otherwise prove purposeful discrimination. *Id.* at 1868.

be by the "clearly erroneous" standard.[165] Employing this standard, the Supreme Court found that the trial court was not clearly erroneous in concluding that the prosecutor, who volunteered that he struck the bilingual jurors because they hesitated before responding to his inquiry as to whether they would accept a translator's version of the witnesses' responses, provided neutral reasons for the strikes.[166]

The plurality rejected the defendant's argument that because of the close relationship to language and ethnicity this explanation should not qualify as neutral. The plurality concluded that even if a high percentage of bilingual jurors might hesitate before answering the question of whether they would accept the interpreter's testimony, and thus be excluded under the prosecutor's criterion, that fact did not cause the criterion to fail the race-neutrality test.[167]

In *Powers v. Ohio*,[168] a white male objected to the State's use of peremptory challenges to remove blacks from the jury. His objections, based on *Batson*, were overruled. Following his conviction, petitioner appealed to the Ohio Court of Appeal which affirmed the conviction.[169] The United States Supreme Court reversed, holding that under the Equal Protection Clause, a criminal defendant may object to race-based exclusions of jurors through peremptory challenges whether or not the defendant and the excluded jurors share the same race.[170] The Court

---

165. *Id.* at 1869. *See also De Gross*, 960 F.2d at 1442. The court applied the clearly erroneous standard to a trial court's determination that an inference of gender discrimination was present. At the time of the challenge, ten women and two men were seated in the jury box, and only one man remained in the venire.

166. *Hernandez*, 111 S. Ct. at 1864-65.

167. *Id.* at 1867. Justice O'Connor's concurring opinion went further to note that *Batson* "does not require that the justification be unrelated to race. *Batson* requires only that the prosecutor's reason for striking a juror not *be* the juror's race." *Id.* at 1875 (O'Connor, J., concurring).

168. 111 S. Ct. 1364 (1991).

169. *Id.* at 1366.

170. *Id.* at 1370. *See also* Trevino v. Texas, 112 S. Ct. 1547, 1548 (1992) (Hispanic defendant may object to the racial discrimination of black jurors).

The Court in *Trevino* also addressed the issue of whether the defendant had adequately raised the issue in the state court in order to seek relief before the Supreme Court. The defendant's trial was held prior to the Supreme Court's decision in *Batson*. The defendant filed a pre-trial "Motion to Prohibit the State From Using Peremptory Challenges to Strike Members of a Cognizable Group." The defendant not only relied on a claim of a historical pattern of discriminatory use of peremptory challenges, but in his argument to the trial court made an express reference to Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824 (1965). *Trevino*, 112 S. Ct. at 1548. The defendant also preserved his equal protection claim for the state appellate court by including an express reference in his argument caption to the Fourteenth Amendment and by presenting for review the very issue that he had raised before the trial court. The Supreme Court concluded that the claim had been sufficiently raised below. *Id.* at 1549. In so doing, the Court relied upon

reasoned that the defendant had standing to assert the equal protection claim of the excluded jurors.[171]

During the prior term, the Court held in *Holland v. Illinois*,[172] under identical factual allegations to those in *Powers*, that no cognizable claim is made under the alleged Sixth Amendment fair cross-section theory. The Court in *Holland* reasoned that as to the petit jury, the Sixth Amendment's requirement of an "impartial jury" includes no fair cross-section component.[173] The holding in *Powers*, in effect, made *Holland* "dead letter." Except for the unwary, a defendant of a race different than the excluded jurors will simply assert the excluded juror's equal protection claim rather than his own Sixth Amendment claim. To the extent that trial counsel fails to properly allege the objection, it would appear that an ineffective assistance of counsel claim would lie.[174] If the issue were presented as an ineffective assistance of counsel claim, one interesting question that remains is whether the burden to demonstrate that there were no race neutral reasons would fall upon the defendant.[175] However, in light of the fact that transfer of this burden to the defendant would require him to disprove a negative when all of the facts to do so are in the control of the prosecution, it would not appear appropriate to place the burden of effect of this error on the defendant, as is normally done in cases alleging ineffective assistance.

---

its earlier ruling in Ford v. Georgia, 111 S. Ct. 850, 857-58 (1991), where it held under similar facts that the failure of the defendant to raise an objection after the selection of the jurors (except by way of motion for a new trial) was not a sufficient independent state procedural bar to prevent review by the United States Supreme Court.

171. *Powers*, 111 S. Ct. at 1373. The Court found petitioner could assert "third party standing" under the three part analysis of Singleton v. Wulff, 428 U.S. 106, 112-16, 96 S. Ct. 2868, 2873-75 (1976): (1) the defendant received a cognizable injury and has a concrete interest in challenging the practice, because racial discrimination in jury selection casts doubt on the integrity of the judicial process and places the fairness of the criminal proceeding in doubt; (2) the relationship between the defendant and the excluded jurors is such that the defendant is fully as effective a proponent of their rights as they themselves would be, since both have a common interest in eliminating racial discrimination from the courtroom, and there can be no doubt that the defendant will be a motivated, effective advocate because proof of a discriminatorily constituted jury may lead to the reversal of the conviction; and (3) it is unlikely that a juror dismissed because of race will possess sufficient incentive to set in motion the arduous process needed to vindicate his or her own rights. *Powers*, 111 S. Ct. at 1372.

172. 110 S. Ct. 803 (1990).

173. *Id.* at 807.

174. *Cf.* Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574 (1986); Murray v. Carrier, 477 U.S. 478, 106 S. Ct. 2639 (1986); Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); State v. Wright, 598 So. 2d 493 (La. App. 2d Cir. 1992).

175. *See* Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067 (1984) (burden on defendant to prove effect of deficient performance of counsel).

In *Edmonson v. Leesville Concrete Co.*,[176] the United States Supreme Court was called to address the question of whether the action of a private party in discriminatorily exercising peremptory challenges violates the Equal Protection Clause of the Constitution's Fourteenth Amendment.[177] The Court answered this question affirmatively. The analysis employed by the majority,[178] and by Justice O'Connor in dissent,[179] raised questions about the applicability of *Edmonson* to a criminal defendant's use of peremptory challenges. Justice Scalia disagreed, concluding that the criminal defendant's use of peremptory challenges was

---

176. 111 S. Ct. 2077 (1991).

177. The resolution of this issue was necessary because the Fourteenth Amendment is implicated only if the offending conduct is that of a state actor. *See Edmonson*, 111 S. Ct. at 2082 ("The Constitution's protection of individual liberty and equal protection apply in general only to action by the government"). *Cf.* NCAA v. Tarkanian, 488 U.S. 179, 109 S. Ct. 454, 461 (1988) (Due Process Clause only regulates state action and not that of private parties no matter how unfair).

178. The majority stated:

> We find respondent's reliance on *Polk County v. Dodson*, 454 U.S. 312, 102 S. Ct. 445 (1981), unavailing. In that case, we held that a public defender is not a state actor in his general representation of a criminal defendant, even though he may be in his performance of other official duties. *See id.*, at 325, 102 S. Ct. at 453-54; Branti v. Finkel, 445 U.S. 507, 519, 100 S. Ct. 1287, 1295 (1980). While recognizing the employment relation between the public defender and the government, we noted that the relation is otherwise adversarial in nature. 454 U.S., at 323, n.13, 102 S. Ct., at 452, n. 13. "[A] defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, . . . a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client." *Id.*, at 321, 102 S. Ct. at 451.

Edmonson, 111 S. Ct. at 2086 (citation omitted) (alteration in original).

179. Justice O'Connor, writing in dissent:

> "[I]t is the function of the public defender to enter 'not guilty' pleas, move to suppress State's evidence, object to evidence at trial, cross-examine State's witnesses, and make closing arguments in behalf of defendants. All of these are adversarial functions. We find it peculiarly difficult to detect any color of state law in such activities." 454 U.S., at 320, 102 S. Ct., at 451.
>
> Our conclusion in *Dodson* was that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Id.*, at 325, 102 S. Ct., at 453. It cannot be gainsaid that a peremptory strike is a traditional adversarial act; parties use these strikes to further their own perceived interests, not as an aid to the government's process of jury selection. . . .
>
> . . . At a minimum then, the Court must concede that *Dodson* stands for the proposition that a criminal defense attorney is not a state actor when using peremptory strikes on behalf of a client, nor is an attorney representing a private litigant in a civil suit against the government.

Edmonson, 111 S. Ct. at 2094 (O'Connor, J., dissenting) (alteration in original) (quoting from Polk County v. Dodson, 454 U.S. 312, 102 S. Ct. 445 (1981)).

indistinguishable from that of a private party litigant found to be a state actor in *Edmonson*.[180] The Court granted *certiorari* in *Georgia v. McCollum*[181] to resolve this issue. In what might be interpreted to have been a surprising result, the Court held that a criminal defendant's use of peremptory challenges is governed by the Fourteenth Amendment.[182]

E. Double Jeopardy

In a federal court proceeding in Missouri, the defendant in *United States v. Felix*[183] had been charged and convicted of attempting to manufacture an illegal drug. That conviction was affirmed by the Eighth Circuit Court of Appeals.[184] A subsequent federal prosecution was instituted in Oklahoma. The defendant was charged with substantive drug charges (independent of the activity in Missouri) and a drug conspiracy charge. Two of the overt acts alleged in the conspiracy charge were the same conduct for which the defendant had been prosecuted in Missouri.[185] At the trial in Oklahoma, the government "introduced much of the same evidence of the Missouri and Oklahoma transactions that had been introduced in the Missouri trial."[186]

Based on its reading of the earlier Supreme Court opinion in *Grady v. Corbin*,[187] a divided panel of the Tenth Circuit reversed the defendant's conviction of six of the eight counts with which he was charged.[188] Quoting from *Grady*, the Court of Appeals held that the Double Jeopardy Clause bars a subsequent prosecution where the government, "'to establish an essential element of an offense charged in that prosecution,

---

180. *See, e.g.*, the following statement: "In criminal cases, *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), already prevents the *prosecution* from using race-based strikes. The effect of today's decision (which logically must apply to criminal prosecutions) will be to prevent the defendant from doing so . . . ." *Id.* at 2095 (Scalia, J., dissenting) (emphasis in original).

181. 112 S. Ct. 370 (1992). The Louisiana Supreme Court had also granted writs in two consolidated cases to address the same issue. The only difference was that in *McCollum* the defendant was white, allegedly striking jurors because they were black, and in *Jackson* and *Knox* the defendants were black, allegedly striking jurors because they were white. *See* State v. Knox consolidated with State v. Jackson, No. 91-KK-1906 (La. Nov. 30, 1992) (WL 355140). Following *McCollum*, the Louisiana Supreme Court held *Batson* applicable. *Id.*

182. *McCollum*, 112 S. Ct. at 2354.

183. 112 S. Ct. 1377 (1992).

184. *Id.* at 1379.

185. *Id.* at 1380.

186. *Id.* at 1381.

187. 495 U.S. 508, 110 S. Ct. 2084 (1990).

188. United States v. Felix, 926 F.2d 1522, 1524 (10th Cir. 1991), *rev'd*, 112 S. Ct. 1377 (1992).

will prove conduct that constitutes an offense for which the defendant has already been prosecuted.'"[189] The Supreme Court reversed.

The Supreme Court first considered the dismissal of the substantive charges because evidence of them had been introduced in the previous Missouri trial.[190] The Court found that the Court of Appeals had given "an extravagant reading [to] *Grady*, which disclaimed any intention of adopting a 'same evidence' test."[191] As to the conspiracy charge dismissed by the Court of Appeals, the Supreme Court held, relying on a long line of precedent, that a substantive crime and a conspiracy to commit that crime are not the "same offense" for double jeopardy purposes even though based on the same underlying incidents.[192]

In *United States v. Miller*,[193] the defendants were to be reprosecuted on mail fraud charges after their original mail fraud convictions were reversed, because the indictment and jury instructions did not require the jury to find all the elements of the crime.[194] Following the second indictment, the defendants contended that reprosecution was barred by the Double Jeopardy Clause. The United States Court of Appeals for the Fifth Circuit held that the subsequent prosecution was not barred by double jeopardy.[195] In addition, the court rejected the defendants'

---

189. *Id.* at 1527 (quoting *Grady*, 495 U.S. 521, 110 S. Ct. at 2093).

190. The Oklahoma evidence had been admitted in Missouri "in order to help demonstrate Felix' criminal intent." *Felix*, 112 S. Ct. at 1382.

191. *Id.* It should be noted that although the Supreme Court rejects, in name, the "same evidence" test, that does not appear to be a rejection of the approach employed in Louisiana to determine whether two offenses are the same for double jeopardy purposes. In fact, after *Grady* and Illinois v. Vitale, 447 U.S. 410, 416, 100 S. Ct. 2260, 2265 (1980), the test for determining what is the same offense for double jeopardy purposes appears to be equivalent under federal and state law. *Compare* State v. Didier, 262 So. 2d 322 (1972) (referring to the Louisiana approach as the "same evidence" test).

The "same evidence" test employed in Louisiana is applied differently than the "same evidence" test rejected in *Felix*. Under Louisiana law, the "same evidence" test bars a subsequent prosecution only if evidence necessary to convict on one offense is sufficient to convict on the other. *Didier*, 262 So. 2d at 322; State v. Cotton, 438 So. 2d 1156, 1160 (La. App. 1st Cir. 1983), *writ denied*, 444 So. 2d 606 (1984). That approach is different from the "same evidence" test as defined in *Felix*, where the Court of Appeals held that simply because there was an overlap in evidence, there was a double jeopardy bar to the second prosecution. *Felix*, 926 F.2d at 1528-29.

192. *Felix*, 112 S. Ct. at 1384-85. *See also* La. R.S. 14:26 (1986), which provides: "If the intended basic crime has been consummated, the conspirators may be tried for either the conspiracy or the completed offense, and a conviction for one shall not bar prosecution for the other." Another limitation on an expansive reading of *Grady* can be found in United States v. Parker, 960 F.2d. 498, 501-02 (5th Cir. 1992) (holding that *Grady*'s supplement to the test employed in Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182 (1932), for determining when two offenses are the same, is only applicable to successive prosecutions).

193. 952 F.2d 866 (5th Cir.), *cert. denied*, 112 S. Ct. 3029 (1992).

194. *Id.* at 869-70. Some time after the defendants' convictions, the United States

claim that it should review the sufficiency of the evidence at the first trial to determine whether the government had sufficiently proved what was now understood to be the elements of the charged offense.[196] Although Fifth Circuit jurisprudence supported the defendants' claim,[197] the court held that the defendants, in this appeal, were not entitled to a review of the sufficiency of the evidence at the first trial.[198]

The scenario in *Miller* will only result when there has been a conviction and setting aside of that conviction for reasons other than insufficiency of the evidence. Accordingly, the court addressed the proper procedure following a defendant's initial conviction. Despite denying the defendants' claims in this appeal, the court indicated that when the errors in the initial trial are considered on appeal (and one would assume in a post-conviction motion in the trial court), the issue of sufficiency of the evidence should be considered if properly raised.[199] Presumably the reason for this consideration of sufficiency at that time is to determine if a subsequent prosecution should be barred.

That, however, would appear to be inconsistent with the *Miller* court's earlier statements that under *Richardson*, jeopardy had not terminated and therefore there was no bar to further prosecution.[200] Al-

---

Supreme Court held that the federal mail fraud provisions require proof of intent to defraud another of property rights. McNally v. United States, 483 U.S. 350, 360, 107 S. Ct. 2875, 2882 (1987). Based on circuit court opinions that pre-dated *McNally*, the jury was not charged on this requirement. The defendants' original convictions were set aside because the jury instructions allowed conviction without a finding that the defendants had deprived another of property rights. *Miller*, 952 F.2d at 869 n.1.

195. *Id.* at 874.

196. *Id.* at 872-74.

197. *See, e.g.*, United States v. Sneed, 705 F.2d 745, 749 (5th Cir. 1983). The court in *Miller* rejected *Sneed* as inconsistent with Richardson v. United States, 468 U.S. 317, 104 S. Ct. 381 (1984). *Miller*, 952 F.2d at 87. *Richardson* involved a claim by a defendant that he should have a review of the sufficiency of the government's proof when the jury failed to reach a verdict. *Richardson*, 468 U.S. at 319-20, 104 S. Ct. at 3083. The Supreme Court held that the defendant was not entitled to such a review. *Id.* at 326, 104 S. Ct. at 3086.

198. *Miller*, 952 F.2d at 874. The court, although exercising jurisdiction on this appeal, ruled that it would not do so in the future. It stated: "In light of our holding today, future appeals raising similar claims will no longer be colorable and will not be appealable *before final judgment* in this Circuit." *Id.* at 872 n.5 (emphasis added).

The emphasized portion of this quotation might be read as saying that the defendants could have a review of the sufficiency at the time of the post-conviction appeal. However, the court set aside any such construction of this language. *Id.* at 874.

199. The Court stated: "Although not mandated by the double jeopardy clause, it is accordingly clearly the better practice for the appellate court on an initial appeal to dispose of any claim properly presented to it that the evidence at trial was legally insufficient to warrant the thus challenged conviction." *Id.*

200. When discussing the impact of *Richardson*, the court stated: "Following *Richardson*, we hold that double jeopardy does not bar this retrial, and because under

though inconsistent with the court's statements about *Richardson*, review following the initial conviction would appear to be the better practice (if not the practice mandated by double jeopardy). Double jeopardy protects individuals not only from multiple punishments but also from multiple prosecutions.[201] As such, a defendant should be entitled to a determination of whether the government met its burden of proof at the first trial.[202] In fact, it could be strongly argued that if the first appellate court refused to consider the claim, the defendant should not be here to suffer as a result of that refusal, and the second appellate court should make this determination. *Miller*, of course, rejects this argument.

In *United States v. Sanchez-Escareno*,[203] the defendants contended that under *United States v. Halper*[204] the prosecution against them was barred under double jeopardy. In *Sanchez-Escareno*, the defendants had signed notes in which they unconditionally agreed to pay civil fines assessed against them for attempting to import marijuana into the United States. The fines had not actually been paid, and there had been no effort by the government to collect or enforce the notes.[205] Although the court ruled that *Halper* applied whether the civil fine preceded the criminal prosecution or vice versa,[206] it found that under these facts the

---

Richardson jeopardy has not terminated, double jeopardy will not be available as a ground for challenging any subsequent conviction that may result." *Id.*

201. Green v. United States, 355 U.S. 184, 187, 78 S. Ct. 221, 223 (1957).

202. *Richardson* should be limited to its facts. In light of the expansive role of the harmless error analysis, *see supra* discussion at notes 135-143 and accompanying text, in most instances where an appellate court chooses to set aside a conviction on the basis of some error at the trial, it will be required to review the entire record to determine if the evidence is otherwise overwhelming. For that reason, any transcription cost or loss of judicial economy from a rule that requires a sufficiency review would be minimal. The transcription would have already taken place, and the review for sufficiency is less onerous than a review to determine whether the evidence is overwhelming.

The Louisiana Supreme Court takes the position that a review for sufficiency is mandated when the issue is properly raised and that a defendant's conviction raises other issues on appeal. *See* State v. Hearold, 603 So. 2d 731 (La. 1992). Of course, such a rule may create practical problems in a case such as *Miller* where the government is misled (by prior case law) into believing that the elements of proof are different than they actually are. Under this belief, it is possible the prosecution may fail to admit evidence not because it does not have it but because it thinks it unnecessary.

203. 950 F.2d 193, 195 (5th Cir. 1991), *cert. denied*, No. 91-8381, 1992 WL130391 (Oct. 5, 1992).

204. 490 U.S. 435, 109 S. Ct. 1892 (1989). After the defendant's conviction in *Halper*, the government filed a civil penalty proceeding based on the same facts as the criminal conviction. The Court held that the Double Jeopardy Clause applied to the civil penalty proceeding under these facts and limited the amount that the government could recover. The government would not be allowed to recover civil penalties in an amount which is so disproportionate to its losses and expenses as to make the civil penalty additional punishment. *Id.* at 449-52, 109 S. Ct. at 1902-03.

205. *Sanchez-Escareno*, 950 F.2d at 197.

206. *Id.* at 200. *But see* United States v. Woods, 949 F.2d 175 (5th Cir. 1991) (per

defendants were not subjected to any "punishment" sufficient to trigger a double jeopardy bar to their subsequent prosecution on drug importation charges.[207]

In *Sanchez-Escareno*, the fines had not been assessed following some judicial proceedings. The defendants merely signed the notes upon demand that they do so.[208] Had a civil proceeding been instituted which resulted in the assessment of the fines, the issue may have been different.[209] Just as the civil fine might be considered punishment for the purposes of double jeopardy, the proceeding resulting in such a fine might be considered criminal for the same purposes. Accordingly, in a case where the civil fine of sufficient magnitude (to be considered "punishment") results from a judicial proceeding (even if not yet paid), double jeopardy would appear to bar the subsequent criminal trial.[210] To hold otherwise would result in the defendant being subjected to a "second prosecution for the same offense after conviction."[211]

F. Commitment Proceedings

Under Louisiana law, a criminal defendant found not guilty by reason of insanity may be committed to an appropriate treatment facility.[212] If the review panel at the treatment facility recommends the defendant be released, the trial court must hold a hearing to determine whether the defendant is dangerous to himself or others.[213] If he is found to be dangerous, he may be returned to and held in the facility even though the dangerousness does not result from a mental illness.[214]

---

curiam), *cert. denied*, 112 S. Ct. 1562 (1992). In *Woods*, the court held that the prosecution of an owner of a savings and loan association for bank fraud did not subject the owner to double jeopardy. The association had previously been placed in receivership by the government, but the court found that this was not punishment against the owner and therefore was not a bar to a subsequent prosecution of the owner. The court noted that the receivership was directed against the association and not the owner and was not a punishment but intended to protect the United States treasury by assuring proper management of the thrift according to the banking regulations. The court also concluded that no act taken in the receivership was retributive or meant as a deterrent. *Id.* at 176-77.

207. *Sanchez-Escareno*, 950 F.2d at 201-03.

208. *Id.* at 195-97.

209. As the court pointed out, there was no contention of multiple prosecutions: "[N]o one contends that here the defendants are being prosecuted again after a prior acquittal or conviction at an earlier trial." *Id.* at 198.

210. As noted by the court, double jeopardy "affords a trio of protections to the criminal defendant: protection against a second prosecution for the same offense after acquittal; protection against a second prosecution for the same offense after conviction; and protection against multiple punishment for the same offense imposed in a single proceeding." *Id.* at 197 (citations omitted).

211. *Id.*

212. *See* La. Code Crim. P. art. 654.

213. La. Code Crim. P. art. 655.

214. La. Code Crim. P. art. 657.

The defendant in *Foucha v. Louisiana*[215] had been acquitted of the charges against him on the basis of insanity and confined to a mental institution. At the hearing to determine whether he should be released, the testimony revealed that Foucha had recovered from the mental illness he had suffered at the time of the offenses and was "in good shape" mentally.[216] The testimony also revealed, however, that Foucha had an antisocial personality.[217] As a result of his antisocial personality, Foucha had been involved in several fights at the treatment facility.[218] Accordingly, "the doctor testifying did not 'feel comfortable in certifying that [he] would not be a danger to himself or to other people.'"[219]

Based, in part, on this testimony, the state court ordered Foucha returned to the mental institution. The United States Supreme Court concluded that to the extent that Louisiana Code of Criminal Procedure article 657 allowed continued detention under these circumstances, it violates the federal constitutional mandate. Civil commitments under Louisiana law require a showing that the confined person is both mentally ill *and* a danger to himself or others.[220] Under Louisiana Code of Criminal Procedure article 657, as applied in *Foucha*, only the latter finding is necessary to commit or continue to hold an insanity acquittee. The Court reasoned that because the statute allowed Foucha to be committed to a mental institution under a different criteria than a person not previously charged and acquitted of an offense, the provision violated his right to due process and equal protection.[221]

The Court distinguished *United States v. Jones*.[222] In *Jones*, the Court had held that the insanity acquittal was sufficient to justify a short detention without any other determination of need to commit.[223] The Court in *Jones* also sustained against constitutional attack the shifting of the burden of proof to the acquittee to show grounds for release.[224] *Jones* was distinguished on the basis that although a short commitment was authorized under a different standard and the *burden* to prove release was shifted to the defendant, the *standard* for a *con-*

---

215. 112 S. Ct. 1780 (1992).

216. *Id.* at 1782. At the time of the commission of the offense, Foucha was suffering from a drug induced psychosis.

217. This personality trait was not linked to a mental disease. *Id.*

218. *Id.* at 1782-83.

219. *Id.* at 1783.

220. *Id.* at 1788.

221. *Id.* at 1787-89.

222. 463 U.S. 354, 103 S. Ct. 3043 (1983).

223. This procedure differed from civil commitments, which required proof of the need for commitment before the person could be civilly committed. *Jones*, 463 U.S. at 366-67, 103 S. Ct. at 3050-51.

224. *Id.* at 364-66, 103 S. Ct. at 3049-50.

tinued commitment was the same for civil and insanity acquittee commitments.[225]

---

225. Foucha v. Louisiana, 112 S. Ct. 1780, 1786 (1992).