

Louisiana Law Review

Volume 34 | Number 2

*The Work of the Louisiana Appellate Courts for the
1972-1973 Term: A Symposium
Winter 1974*

Procedure: Criminal Procedure I

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Repository Citation

Paul R. Baier, *Procedure: Criminal Procedure I*, 34 La. L. Rev. (1974)

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CRIMINAL PROCEDURE I

Paul R. Baier*

I. ARREST, SEARCH AND SEIZURE

A. Warrantless Arrest

(1) Probable Cause

Several opinions decided this term concern the validity of warrantless arrests. The cases turn on whether the arresting officer has probable cause to believe the defendant committed an offense. Otherwise there is a violation of article 213(3) of the Code of Criminal Procedure and the state¹ and federal² constitutions as well. Defense counsel always make the point in these cases that each of us, including the fellow caught red-handed, is supposed to be free from unreasonable seizures. A nice principle, but hardly ever does a defendant benefit from its invocation and this term proved no exception. Either there were enough facts to support a finding of probable cause, or something less than probable cause was needed under article 215(1) of the Code,³ or the arrest itself produced no evidence sought to be used against defendant at trial.⁴ Once in a while though, in this area of probable cause, the facts of a particular case were sufficient—better still, the facts were insufficient—to prick a member of the court to dissent, especially Justice Barham. It seems he has taken

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1. LA. CONST. art. I, § 7.

2. U.S. CONST. amend. IV.

3. The stop and frisk section of the Code. See generally *State v. Winesberry*, 256 La. 523, 237 So. 2d 364 (1970), and see page 248 *infra*.

4. Although an arrest may be quite illegal and violate constitutional guarantees, this is no defense to the criminal prosecution of an accused provided the illegal arrest is unaccompanied by a seizure of evidence later sought to be used against the accused at trial. Compare *Frisbie v. Collins*, 342 U.S. 519 (1952) with *Mapp v. Ohio*, 367 U.S. 643 (1961). This doctrine, however, has been questioned where the police conduct in making the arrest is flagrant. See Allen, *Due Process and State Criminal Procedures: Another Look*, 48 Nw. U.L. REV. 16, 27-28 (1953). Whether the new constitution for Louisiana, if ever adopted, would enable a defendant to complain at his criminal trial about an illegal arrest unaccompanied by any seizure of evidence remains to be seen. At least the language of the first enrollment's declaration of rights article dealing with privacy, article I, § 5, suggests such a challenge would be possible: "Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise the illegality of that search or seizure in the appropriate court of law." This express standing provision would be new to Louisiana law. Compare LA. CONST. art. I, § 7. It may be, however, that the provision is only intended to adopt the rule of *Jones v. United States*, 362 U.S. 257 (1960).

to dissenting quite frequently, and across the entire spectrum of the criminal process at that. Usually his work is an earmark that the case deserves close attention, particularly in a survey like this.

*State v. Millsap*⁵ is an easy case. Like all probable cause cases it turns on an assessment of the facts known to the police officer at the moment of apprehension. Millsap robbed a finance company at about 6:00 P.M. The victim described the robber and his clothes to the investigating officer, and a radio bulletin to this effect was broadcast, together with information that the car used in the robbery was a beige VW with its license plate secured by only one bolt, hanging down to the right. At 6:13 P.M. officers on patrol spotted the suspect vehicle and attempted to stop it, but the car sped away until intercepted a block later. There is no question but that all these facts combined support the conclusion of probable cause. After all, there are not too many beige VWs with their license plates hanging down to the right. A gun and some loose currency discovered in Millsap's car after the arrest were admissible at trial.

*State v. Jones*⁶ is a much harder case. This time nothing is particularly remarkable about the vehicle involved: it's a U-Haul panel truck. At about 3:00 A.M. in Shreveport a prowler is observed running from a newly constructed, unoccupied house. He enters the U-Haul and drives slowly away. Minutes later, alerted by a radio dispatch, Officer Robertson follows the truck outside city limits and when it stops at a gas station he asks for and is shown identification. The officer inquires about the contents of the truck and is told it contains air conditioners. Without opening the truck and using his flashlight, Robertson peers through the truck's back window and observes two air conditioners partially covered by blankets. The units' copper connections are sawed off. A radio call discloses that two units were stolen from the area of the prowler incident by sawing off their pipe connections. With this knowledge Robertson enters the truck and seizes the air conditioners. At this point everyone leaves for the Shreveport police station, but whether Jones is under arrest is unclear. At the station house the police discover the serial numbers on the seized units match those reported stolen. Jones is formally arrested and advised of his rights.

Was Jones' warrantless arrest legal? That depends on when the arrest occurred, whether at the gas or the police station. If the arrest was at the gas station, it took place outside Shreveport city limits and

5. 274 So. 2d 696 (La. 1973).

6. 263 La. 164, 267 So. 2d 559 (1972).

for that reason, Jones argued, it was illegal. This was not a case of "hot pursuit,"⁷ since Officer Robertson could not reasonably have believed Jones to have been involved in crime at the time he followed the U-Haul out of Shreveport. The trial judge held the police had probable cause to arrest Jones at the gas station for possession of stolen property and that hence the evidence was seized pursuant to a lawful arrest.⁸ But clearly this theory is no good on the facts of the case because, as Justice Barham pointed out in his dissent, "the fallacy of this conclusion is that probable cause was acquired too late under the factual sequence to authorize the search and seizure."⁹ In other words, a bad arrest is never legitimated by what a search incident thereto turns up. Probable cause to arrest must always precede the incidental search.

For the rest of the court, however, it was unnecessary to decide when the arrest occurred since there was another way of looking at the sequence of events. What the case really involved was an arrest incident to a lawful search, not the other way around. The supreme court held the police had probable cause to believe stolen air conditioners were contained in the truck and hence they were entitled to search it even though defendant had not yet been arrested. Moreover, since the case involved an automobile, special rules applied to permit a search of the U-Haul without a warrant provided there was probable cause for the search.¹⁰ The court also found it unnecessary to decide whether Officer Robertson's flashlight look into the rear win-

7. Act 646 of 1972 amended Code of Criminal Procedure article 213 so as to authorize arrest in close pursuit into other jurisdictions. But under the amendment a police officer must "be making an arrest pursuant to this article" when he follows in close pursuit and leaves his jurisdiction. This proviso would seem to preclude application of the hot pursuit doctrine to stop and frisk investigative situations like the kind involved in the *Jones* case.

Under an early opinion of the Louisiana Attorney General, one way for the police to proceed on leaving their jurisdiction to make an arrest was to take the prisoner after capturing him to the proper authorities in the parish in which the arrest was made. See LA. ATT'Y GEN. OP. 152 (Apr. 1, 1938-Apr. 1, 1940). Something quite similar to this happened this term in *State v. Edgcombe*, 275 So. 2d 740 (La. 1973), in which a St. Bernard parish police officer lawfully pursued a suspect into New Orleans where the arrest was made. The court rejected the contention that evidence seized incident to defendant's arrest was inadmissible because the arrest was effected by a St. Bernard parish policeman outside his jurisdiction. The court noted that the arrest was made with the assistance of New Orleans policemen who were within their jurisdiction.

8. See *State v. Jones*, 263 La. 164, 171, 267 So. 2d 559, 562 (1972).

9. *Id.* at 182, 267 So. 2d at 566 (dissenting opinion).

10. The United States Supreme Court has consistently recognized that warrantless searches of automobiles based on probable cause are in a class by themselves. See

dow of the truck was an unreasonable search. It was not a search at all—the officer merely observed what was in plain view.¹¹

In the writer's view the per curiam opinion in *Jones* is inadequate. The majority's rationale seems too neat, and decision in the case comes too quickly. The opinion leaves a lot undecided and there are important questions which need asking. Justice Barham's dissent, by way of contrast, seems to confront the case squarely. He is not afraid to ask the hardest question of all: What right did Officer Robertson, who was acting outside his jurisdiction, have to detain Jones and his U-Haul at the gas station in the first instance? By what authority did the police question Jones and what authorized Officer Robertson to snoop into the back portion of the truck with his flashlight? Certainly not probable cause. It was Justice Barham's conclusion that, lacking jurisdiction for the detention and incidental scrutiny of the truck which established probable cause, the police could neither arrest Jones nor seize the stolen air conditioners.¹²

Who was right in the case, and how should it have been decided? Only Justice Barham mentioned article 215.1, the so-called "stop and frisk" section of the Code. This approach seems right, for the case is closer to the idea of police investigative pursuit on less than probable cause, but more than naked hunch, than it is to probable cause seizure—either of the person¹³ or of evidence of crime. In the language

Chambers v. Maroney, 399 U.S. 42 (1970); *Brinegar v. United States*, 338 U.S. 160 (1949); *Carroll v. United States*, 267 U.S. 132 (1925). Cf. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The theory is that an automobile, unlike a house or other building, may easily be spirited away if police officers are required to leave the scene and go before a judge to obtain a warrant before searching the vehicle. See *State v. McQueen*, 278 So. 2d 114, 117 (La. 1973); *State v. Jones*, 263 La. 164, 171, 267 So. 2d. 559, 562 (1972).

11. *State v. Jones*, 263 La. 164, 173, 267 So. 2d 559, 563 (1972), citing *United States v. Lee*, 274 U.S. 559 (1927), in which a boatswain using a search light discovered cases of illegal liquor sitting in open view on the deck of a boat. "Such use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution." *United States v. Lee*, 274 U.S. 559, 563 (1927).

For a general discussion of the "plain view" doctrine and its application to automobiles, see *Harris v. United States*, 390 U.S. 234 (1968) and especially Mr. Justice Stewart's refined analysis in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). See also *State v. Jackson*, 263 La. 849, 856, 269 So. 2d 465, 467-68 (1972).

12. *State v. Jones*, 263 La. 164, 185, 267 So. 2d 559, 567 (1972) (dissenting opinion).

13. The terminology of the fourth amendment and most state constitutions, including Louisiana's (art. I, § 7), uses the expression "seizure of the person" instead of the more familiar "arrest" idea. But it is clear from this history of the amendment that an illegal arrest is an illegal seizure of the person within the meaning of the amendment's language. See LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 79-82 (1937), cited in HALL, KAMISAR, LAFAVE & ISRAEL, *MODERN CRIMINAL PROCEDURE* 290-91 (1969).

of article 215.1, it seems fair to say on the facts of the case that Officer Robertson "reasonably suspect[ed]" that Jones and his U-Haul had been involved in crime. Flight from a newly constructed, unoccupied building at 3:00 in the morning surely calls for police investigation. Thus Officer Robertson was right to pick up the U-Haul panel truck as it left Shreveport and follow it a few minutes after he had the report of the prowler incident.

Under section A of article 215.1 it is clear that had Officer Robertson stopped the U-Haul on the spot, that is, inside Shreveport city limits, he could have demanded of its driver "his name, address and an explanation of his actions." But Jones gave his name, produced identification, and explained that there were air conditioners in the truck. A hard question is whether, at this point, the law required the police to let Jones move on. What authorized Robertson's flashlight look—crucial as it turned out—into the back window of the truck? Reading article 215.1 strictly, there is nothing in any of its three sections which allows this further investigation. The "frisk" authorized by section B only permits the pat-down of a suspect's outer clothing;¹⁴ section B says nothing about frisking the vehicle driven by a suspect. If the U-Haul involved in *Jones* had had no windows at all, could Robertson have opened it up? Probably not. The majority opinion in the case is careful to point out that Robertson looked into the back window "*without opening the truck.*"¹⁵ Even though the opinion also emphasizes that the rules relating to warrantless searches are different in cases involving moving vehicles,¹⁶ to broaden the "frisk" concept of article 215.1 so as to allow a police officer to snoop for evidence of crime concealed in a moving vehicle is to forget the fourth amendment and defense counsel's admonition that individuals are supposed to be free from unreasonable searches and seizures. The frisk authorized by section B finds constitutional vindication only in the desire to protect the life and limb of policemen, not to uncover evidence of possessory offenses on less than probable cause, and this includes even evidence concealed in moving vehicles.¹⁷ When Officer

14. "The limited search for dangerous weapons sanctioned in the Louisiana statute, as all searches in the absence of probable cause for arrest, must be strictly circumscribed by the exigencies which justify its initiation." Comment, 29 LA. L. REV. 523, 532 (1969).

15. *State v. Jones*, 263 La. 164, 169, 267 So. 2d 559, 561 (1972).

16. See note 10 *supra*.

17. *Terry v. Ohio*, 392 U.S. 1 (1968). ("The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.") The authority to frisk does not include the right to make "a general exploratory search for whatever evidence of criminal activity [the officer] might find." *Id.* at 29-30. See also

Robertson flashed his light into the back window of Jones' U-Haul, what was he looking for? Nothing indicates he feared for his life. Rather, his glance was probably meant to check out Jones' story that air conditioners were being hauled; and it was only a fortuity that he observed the sawed-off connections. The majority are quite right that at this point there was probable cause to believe the air conditioners were stolen. Jones had produced no evidence of ownership of the two units nor had he established a right to the truck he was driving. But the majority's application of the plain view doctrine at this point in the sequence of events brushes over the delicate problem of Robertson's right to glance into the truck in the first instance.

It is possible however to treat the policeman's flashlight view into Jones' vehicle as a concluding step in the investigative process authorized by article 215.1 of the Code. Even though not expressly mentioned, an officer's quick glance into the windows of a stopped vehicle to verify the driver's explanation of his actions is probably only natural anyway and within the intent of the Code.¹⁸ Moreover, the law ought not to force policemen to close their eyes to what is plainly there to be seen nor should it prescribe the kind of natural investigative step that is involved when an officer glances into the windows of a vehicle whose driver is "reasonably suspect[ed]" of involvement in crime. But no more. Otherwise what is a delicate balance of reasonableness would be tilted the wrong way. If the blanket in Jones' U-Haul had covered the tell-tale pipe connections and if Robertson's call to the stationhouse had not alerted him to the fact that two air conditioners had been stolen in the area of the prowler incident, Jones would have been legally free to go. To reiterate the root metaphor, so long as the curtains are drawn even the criminal suspect is entitled to his privacy. Our supreme court should carefully avoid too expansive a reading of the stop and frisk section of the Code. But sloughing off the question in the name of plain view is no answer either. With all deference, the majority in *Jones* should have at least tested the validity of Officer Robertson's conduct against the

Comment, 29 LA. L. REV. 523, 532-34 (1969).

18. Section A of article 215.1 provides that after stopping a person an officer may demand of him his name, address, and an explanation of his actions. This provision was probably not written with moving vehicles in mind, but there is no good reason for not allowing a police officer to stop a car reasonably suspected of involvement in crime; the driver and passengers could then be questioned pursuant to the express provisions of section A. Once a car is lawfully stopped, an officer's flashlight look around would seem to facilitate the section's investigative purpose. *Cf. State v. McQueen*, 278 So. 2d 114 (La. 1973). Thus, such conduct should be held within the authority impliedly granted police officers under article 215.1A of the Code.

provisions of article 215.1.¹⁹

*State v. McLeod*²⁰ is another troublesome case. For all that appears in the report, a state trooper stopped a car near Lafayette on the strength of a radio report that "three white males out of New Orleans were wanted for a criminal act" and because a passenger in the car appeared "slouched down as if hiding" to the trooper.²¹ These two facts alone are hardly sufficient to constitute probable cause for an arrest.²² Moreover, nothing about the car involved was unique in any way. But as it turned out, stopping the car was indeed fortunate because *after the stop* and *after ordering the occupants out of the car*, the officer noticed that a passenger fit the description of one of the wanted men. And this official detention gave the driver of the car just enough time to blurt out that he had been kidnapped and that his captor had a gun in his shirt, all of which was quite true. However defense counsel argued there was no probable cause to arrest defendant at the time the gun was taken from him and that, therefore, the seizure was invalid and inadmissible in evidence against defendant at his trial.

The supreme court rejected this contention. At the time of the seizure, the police were "armed"—to use the court's own felicitous

19. One problem remains in the *Jones* case. What about the fact that the Shreveport police officer was outside city limits when he completed his investigation of suspected crime? Was Jones' arrest illegal for want of jurisdiction? The majority answers no, treating Officer Robertson as a private person under article 214 of the Code. A felony was in fact committed and the arresting officer, albeit outside his jurisdiction at the gas station, had probable cause to believe Jones was in possession of stolen property. See *State v. Jones*, 263 La. 164, 174, 267 So. 2d 559, 563 (1972). In the present writer's view, Justice Barham is right in his dissent when he states that it is a mistake to equate a police officer with a private individual for purposes of an arrest analysis. That there are significant differences is also well expressed in *Bivens v. Six Unknown Named Agents of the Federal Narcotics Bureau*, 403 U.S. 388, 392 (1971). But still, the majority's result on this point in *Jones* seems correct. The court might have added that even an illegal arrest, without more, traditionally is no cause for voiding the prosecution of defendant. See *Frisbie v. Collins*, 342 U.S. 519 (1952).

20. 271 So. 2d 45 (La. 1973).

21. *Id.* at 47.

22. *But cf.* *Brinegar v. United States*, 338 U.S. 160, 183 (1949) (dissenting opinion, Jackson, J.): "If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and indiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime."

Nothing in the *McLeod* case, however, suggests that the police had set up a roadblock or that they knew that the driver of the car had been kidnapped.

phrase—not only with guns, but with enough facts to arrest defendant on probable cause and, in turn, to disarm him. Therefore the search and seizure were incidental to a valid arrest.²³ While at first blush this conclusion seems wholly sound, the question remains: What about the initial stop itself? By what authority is a state trooper allowed to stop cars in Lafayette merely because of a report of criminal acts in New Orleans? If the legitimacy of defendant's arrest and seizure of the gun is tested against a different contention, specifically, that a state trooper has no business stopping a car simply because a passenger appears slouched down as if hiding, the result in the case might well have been different. *McLeod*, then, is a case which proves that how one comes out in legal argument often depends on where one begins. From the report, it appears defense counsel began his argument too late in the sequence of events,²⁴ and just like the situation in the *Jones* case, it seems counsel and the court in *McLeod* missed another chance to apply Louisiana's stop and frisk legislation. In the writer's view, application of article 215.1 of the Code to the facts of both these cases would have produced a more genuine assessment of the legality of the police investigative techniques employed.

(2) *Stop and Frisk, Article 215.1*

Mention of Louisiana's stop and frisk legislation, article 215.1 of the Code, rarely appears in the supreme court's opinions.²⁵ This may only indicate the provision is working well in the field. Police investigation pursuant to the article may clear a number of suspects who thereafter never have the chance to make the appellate reports. Or another explanation is that enough facts may accumulate during the investigative process to provide probable cause for an outright arrest of the suspect. However article 215.1 did make it to the surface of the opinion in one case decided during the survey period, *State v. Williams*.²⁶ This time defense counsel was careful to pinpoint his argument so as to require the court to consider the validity of the stop involved in the case. The facts are these: A grocery store is robbed by a young man wearing a brown hat and an eyewitness gets a good look at him. Three days later the police have a report that the defen-

23. *State v. McLeod*, 271 So. 2d 45, 47 (1973).

24. *Cf. State v. Jones*, 263 La. 164, 267 So. 2d 559 (1972).

25. So far as this writer can determine, since the article's enactment in 1968 it has been referred to only three times by the court. *State v. Williams*, 262 La. 317, 263 So. 2d 306 (1972); *State v. Amphy*, 259 La. 161, 249 So. 2d 560 (1971); *State v. Winesberry*, 256 La. 523, 237 So. 2d 364 (1970).

26. 262 La. 317, 263 So. 2d 306 (1972).

dant Williams took a radiator from his father. The police see defendant walking on Scenic Highway, accompanied by two boys, carrying a radiator. They take Williams and his two companions to headquarters where it is learned that the radiator was not stolen. The two boys are released. Meanwhile at the station an investigation reveals that a wanted bulletin is out for defendant; he is detained; the eyewitness identifies him at a station house line-up; and thereafter defendant is charged with robbery of the grocery store.

What about defense counsel's argument that this identification and the brown hat taken from defendant as evidence of crime at the police station are inadmissible at trial as fruits of Williams' illegal stop and arrest on the Scenic Highway? This theory, if accepted, would seem to preclude prosecuting the defendant for *any* offense that routine checking at the police station might turn up so long as the defendant's illegal arrest and presence at the station house stirred the police to further investigative inquiry.²⁷ From the facts, it appears the wanted bulletin out on defendant was for the very robbery involved in the case. This bulletin was based on the eyewitness' tentative identification of the defendant as the robber from a photograph shown to her immediately after commission of the offense. In these circumstances, to bar defendant's prosecution for robbery on account of an allegedly illegal arrest for another unconnected offense is too high a price to pay even conceding the illegality of the initial stop or arrest. Justice Sanders' concurring opinion in *Williams* makes this quite clear:

Assuming that the pickup whereby defendant was brought to Police Headquarters was an illegal arrest, as defendant contends, that custodial action passed out of the picture after he was arrested at Headquarters under the pickup bulletin. The line-up and seizure were accomplished by virtue of the headquarters arrest, not by 'exploitation' of the challenged arrest. Hence, the line-up identification and demonstrative evidence are untainted.²⁸

Justice Sanders' special concurrence is an important addition to the *Williams* case; his opinion is a commendable piece of work even if it does moot the law prof's inquiry: Was there anything illegal in picking Williams and his young friends up and taking them to police headquarters without a warrant? Still, an answer to that question is

27. Compare the facts in *Johnson v. Louisiana*, 406 U.S. 356 (1972).

28. *State v. Williams*, 262 La. 317, 341-42, 263 So. 2d 306, 314 (1972) (concurring opinion), *citing Johnson v. Louisiana*, 406 U.S. 356 (1972).

warranted here, especially in a survey like this, where the effort is always to guide judgments just around the corner of the reports towards keeping a reasoned balance—and not necessarily equipoise either—between the public's protection and the accused's. Achieving that end requires that we keep exactly what it is we're doing in mind in each case. Hobbes' advice is as good for criminal procedure as it is for jurisprudence.²⁹

Williams' counsel argued that there was not the slightest reason for stopping defendant "except that [Williams] was one of three young blacks walking down the street in broad daylight."³⁰ This is not quite true because the police had been notified of the theft of a radiator, and a defendant and his friends were carrying one when discovered on Scenic Highway. Whether at this point the police had probable cause to arrest Williams or his companions is hard to say. Very little appears in the opinion connecting Williams and his friends to the reported theft. Yet there is almost nothing inherently suspicious about a group of young boys carrying a radiator on a public street in broad daylight. Some young people simply like to tinker with cars. And what about the fellow, maybe even Justice Barham—to use his own example³¹—who is carrying his TV into the shop for repairs. Lots of television sets are stolen, but that is hardly enough reason to say that any individual carrying one, or even Williams with his radiator, probably stole it. Thus on the facts there seems to be no excuse for arresting either Williams or his companions if indeed that is what happened. For the majority, Justice Hamlin rejected Williams' argument as follows:

When the police officers saw three boys carrying a radiator along the public highway, they became suspicious of the boys. We find that the suspicion was justified. . . . We also find that the officers actions were justified at their inception and were reasonably related in scope to the circumstances. The officers certainly had a right to interfere with the boys' activities; they had a right to question them under LSA—C.Cr.P. Art. 215.1. . . . Defendant and his two companions, as stated supra, were taken to police

29. In his *Leviathan* Hobbes tells his reader how he should "regulate" his "Trayne of Thoughts"; that is, what we should do "in case our thoughts begin to wander." Hobbes' prescription is that we should always keep in mind the problem we are trying to solve. He concludes with a general admonition: "in all your actions, look often upon what you would have, as the thing that directs all your thoughts in the way to attain it." Quoted in L. FULLER, *THE LAW IN QUEST OF ITSELF* 1 (1940).

30. *State v. Williams*, 262 La. 317, 323, 263 So. 2d 306, 308 (1972).

31. *Cf. State v. McQueen*, 278 So. 2d 114, 120-21 (La. 1973) (dissenting opinion).

headquarters; *they accompanied the officers voluntarily; there was no arrest.* Information at police headquarters revealed prior suspicious activities of defendant, and it was only after apprehension on the highway and the voluntary trip to police headquarters that defendant was arrested. At the time of arrest, police had probable cause to believe that defendant had committed a crime. Defendant was therefore not the victim of illegal arrest.³²

Clearly Justice Hamlin is right to hold the police had authority to question Williams and his friends under section A of article 215.1 of the Code and to demand an explanation from them. The theory of this section is that something less than probable cause is needed to "stop" a suspect because the restraint involved is minimal, requiring the individual to give only his name, address and to explain his actions. But on the same theory the police should never be allowed under the article to switch the locus of the investigation from the street to the police station save either extraordinary circumstances or probable cause to arrest. Moreover, the court should be slow to hold even voluntary removal to the police station legitimate under section 215.1(A). The risk of an unintelligent waiver of constitutional rights is too great. Indeed, where there is no probable cause to arrest, it might not be a bad rule to preclude consent altogether as an excuse for removing a suspect from the street and taking him to the police station for further investigation. This would avoid the recurring and troublesome problem of proof of consent. It would also moot the sticky problem of what to do if the victim of the crime happens to be at the station house and identifies the suspect as he is brought in for investigative questioning. This almost happened in *Williams*.³³ If it ever does, Justice Sanders will surely have to reshape his concurring opinion. If probable cause comes after the line-up identification and not before, the issue of a suspect's knowing consent and especially the task of reasoned application of the fruits doctrine will be hard indeed.

B. Search and Seizure

(1) Search Warrants

Three cases this term are important for what they say about issuance of search warrants, which in Louisiana "may issue only upon probable cause established to the satisfaction of the judge, by the

32. *State v. Williams*, 262 La. 317, 326, 263 So. 2d 306, 308-09 (1972).

33. *Williams* was identified at a line-up, but this took place after defendant's arrest. *Id.* at 327, 263 So. 2d at 309.

affidavit of a credible person, reciting facts establishing the cause for issuance of the warrant."³⁴ But probable cause as to what? The notion of probable cause *to arrest* means there are good reasons for suspecting a particular accused's guilt. So too, probable cause for a search warrant means there is a connection in all probability between the items sought under the warrant and crime. But probable cause in this latter context means more. The idea is two dimensional. For a search warrant to issue, the supporting affidavit must also show there is good reason for believing the items sought will be found in the specific place to be searched at the time the warrant is issued. There is no comparable requirement on issuance of an arrest warrant; a suspect can be sought out and arrested anywhere in the state.³⁵ This is an important distinction which is sometimes overlooked in cases. For instance, the affidavit in *State v. Bastida*³⁶ clearly establishes enough cause on its face for believing Bastida robbed his victim on April 7 using an automatic pistol as his weapon. But is a search warrant good which issues ten days later authorizing a search of Bastida's residence for automatic weapons? That depends on whether there is any good reason for thinking Bastida would keep weapons at his home. The affidavit suggests that Bastida was a narcotics addict who used the proceeds of the robbery to purchase heroin.³⁷ On these facts the conclusion of the court seems reasonable:

[T]he warrant was properly issued to search for the automatic weapons used in the armed robbery. It is true that the robbery occurred April 7, the detective received the information from his informant on April 8, and the warrant issued when applied for on April 17. The time lag might have affected the issuance for a narcotics search or even to search for the stolen money. Nevertheless, there was a reasonable inference from the affidavit, and probable cause to issue the warrant to search defendant's house for automatic weapons used in the robbery.³⁸

But the warrant actually issued in the case was not limited to seizure of automatic weapons; the list of items capturable under the warrant

34. LA. CODE CRIM. P. art. 162.

35. An arrest warrant "may be executed in any parish by any peace officer having authority in the territorial jurisdiction where the person arrested is found . . ." LA. CODE CRIM. P. art. 204.

36. 271 So. 2d 854, 855 (La. 1973).

37. See *State v. St. Amand*, 274 So. 2d 179 (La. 1973), in which the court took judicial notice of the fact that: "It is almost axiomatic today that most armed robberies are associated with drug addicts trying to obtain funds to sustain their grim appetites." *Id.* at 192.

38. *State v. Bastida*, 271 So. 2d 854, 855-56 (La. 1973).

was much broader. Accordingly, as Justice Barham saw it, this warrant was too broad and all-inclusive; it exceeded the scope of the supporting affidavit's showing of probable cause.³⁹ For this reason Justice Barham dissented. What does not appear in the case, however, is just what evidence was admitted at trial over Bastida's objection. If the gun used in the robbery was all that was admitted, then the breadth of the warrant, even if error, seems harmless. Without more information, it is impossible to say who was right in the case. Justice Barham's dissent, in other words, is not full enough.

Such is not the case in *State v. Hightower*,⁴⁰ however. In that case, Justice Barham's dissent is masterful: he sifts through the cases, snatching out good thinking; and his conclusion comes in four crisp pages, leaving one with the reasoned conviction that the majority is wrong. The case involves seizure of marijuana nine days after the police witness the sale of a lid out of defendant's apartment. Some hashish is also sold from an adjacent apartment sixteen days before the police swear out the warrant. Nothing else appears in the supporting affidavit except the fact that the occupants of both apartments are close associates and visit each other regularly.

The trial court granted the defendant's motion to suppress for the reason that nothing in the affidavit established probable cause to believe there was marijuana in defendant's apartment at the time the warrant was issued. The state's application for writs was granted and the supreme court reversed. The majority held that the nine days which had elapsed between the date of the alleged sale of marijuana and issuance of the search warrant did not constitute such remoteness of time as to leave the probable cause recited in the affidavit stale and inadequate. Chief Justice Hamlin relied on article 163 of the Code which allows ten days for the execution of a search warrant and thus, it was said, the delay in the case was "within the contemplated legal limitation."⁴¹

It should be noted, however, that article 163 relates to delay *after* issuance of the warrant, not before the application, although the rationale of the provision, that sometimes probable cause is vitiable owing to the lapse of time, is applicable in either event. It is interesting that no mention at all was made of the court's dictum in *Bastida* that a time lag may very well affect the issuance of a search warrant where narcotics are involved,⁴² the very point at issue in the

39. *Id.* at 857 (dissenting opinion).

40. 272 So. 2d 363 (La. 1973).

41. *Id.* at 356.

42. See *State v. Bastida*, 271 So. 2d 854, 856 (La. 1973) (dictum).

Hightower case. In this writer's view, the theory of the dissent in *Hightower* makes good sense. Without a showing in the affidavit that the apartment involved is the source of *continuing* drug traffic, there is no cause for believing marijuana to be there nine days after affiants observe what for all that appears is one isolated sale.⁴³ The fact that article 163 allows ten days for execution of a search warrant is not conclusive either. When the question is whether probable cause exists anterior to issuance of the warrant, the article should be considered only for what it is worth, a rough guidepost. Moreover, the fourth amendment would seem to preclude holding the presumption of staleness incorporated in article 163 irrebuttable as against the defendant. Finally, the language of the article speaks only to the police; it sets up a bright line which seems to apply exclusively to law enforcement officers.

One more case on search warrants; and something on the vagaries of judicial dicta. On the surface there is nothing unusual about *State v. George*.⁴⁴ Its twin, *State v. Anselmo*,⁴⁵ is already in the jurisprudence. *Anselmo* holds that probable cause for issuing a search warrant is to be adjudged on the face of the supporting affidavit itself; the truthfulness *vel non* of facts supplied by a confidential informer cannot later be attacked at a suppression hearing. But Louisiana may well be moving toward the rule that allows collateral attack if the claim is that *the affiant*, mainly police officers, and not the confidential informer lied.⁴⁶ Why else the dictum in this term's *George* case:

43. *State v. Hightower*, 272 So. 2d 363, 370 (La. 1973) (dissenting opinion).

44. 273 So. 2d 34 (La. 1973).

45. 260 La. 306, 256 So. 2d 98 (1971).

46. At least 5 states now permit defendant to challenge the facts upon which the warrant issues. *Theodore v. Superior Ct.*, 104 Cal. Rptr. 226, 501 P.2d 234 (1972); *O'Bean v. State*, 184 So. 2d 635 (Miss. 1966); *State v. Baca*, 84 N.M. 513, 505 P.2d 856 (1973) (dictum); *People v. Alfinito*, 16 N.Y.2d 181, 211 N.E.2d 644 (1965); *Commonwealth v. Hall*, 541 Pa. 201, 302 A.2d 342 (1973). The leading federal cases allowing impeachment of the affiant are *United States v. Ramos*, 380 F.2d 717 (2d Cir. 1967); *King v. United States*, 282 F.2d 398 (4th Cir. 1960); *United States v. Pearce*, 275 F.2d 318 (7th Cir. 1960). The United States Supreme Court has never resolved the question whether the fourth amendment requires that the accused be given a chance to attack the truthfulness of the facts alleged in the affidavit for a search warrant. The court expressly reserved the question in *Rugendorf v. United States*, 376 U.S. 528 (1964). Professor Forkosh has the best and most recent scholarship in this area. He concludes that in fourth amendment warrant searches and seizures the facts should be subject to questioning and where a slight preliminary showing so indicates the affiant permitted to be attacked on truthfulness and credibility, with some form of pretrial adversary proceeding and with a yes-or-no determination of probable cause stemming from the whole record thus created. See Forkosh, *The Constitutional Right to Challenge the Content of Affidavits in Warrants Issued under the Fourth Amendment*, 34 OHIO ST. L.J. 297, 340 (1973).

"The defendant did not allege in the motion to suppress that the police officer had knowingly recited false statements to the Houma city courts in his application for the search warrant."⁴⁷

For Justice Summers the court's side utterance was too much to take; he wrote specially in the case, protesting that the majority seemed "inadvertently or otherwise" to put too restrictive an interpretation on the *Anselmo* holding.⁴⁸ It is interesting that earlier on though, in the *Anselmo* case itself, it was Justice Summers who wrote for the court, and his opinion included lots of dicta to the effect that even an affiant's veracity was beyond collateral impeachment.⁴⁹ At that time the protests about "the wisdom of incorporating so much dicta as to matters not at issue"⁵⁰ were all on the other side, in special concurring opinions from Justices Tate and Barham. Now, with *George* out, it seems we have come full circle. The case is important because it is not really *Anselmo*'s twin at all; it's more a mirror image, with the judges and their dicta reversed. Moreover, it is probably significant that Justice Dixon, who took no part in *Anselmo*, authored the *George* opinion. His views are now known and there are at least 3 votes for holding the affiant's veracity subject to collateral attack. It will be interesting to see whether, indeed, the dictum in *George* proves more advertent than otherwise. This writer would not be surprised. If so, there is much to learn about the judicial process in all of this.

(2) Warrantless Search and Seizure

Evidence of crime "in plain view," as the cases say, is subject to seizure without a search warrant provided the view itself is lawful—that is, the police have a right to be on the premises or at the

47. *State v. George*, 273 So. 2d 34, 36 (La. 1973) (dictum).

48. *Id.* at 37 (concurring opinion).

49. *See State v. Anselmo*, 260 La. 306, 313, 256 So. 2d 98, 101-04 (1971) (dictum).

50. *Id.* at 324, 256 So. 2d at 105 (Tate, J., concurring).

51. More than likely in the vast majority of cases *any* evidence seized by the police will be in plain view, at least at the moment of seizure. But what is required under the "plain view" doctrine is something different: "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may

location from which the view derives.⁵¹ In *State v. DiBartolo*,⁵² officers broke into a New Orleans apartment house by removing a screen from a window; they suspected narcotics traffic, but there was no probable cause either to arrest anyone or to search the building. Unfortunately for the defendant, at the same time the police entered, he left his apartment unit and entered a common hallway carrying narcotics paraphernalia. He was immediately arrested and searched. Heroin was on his person and he was charged with its possession. Was the heroin admissible at trial?

The majority, Justice Barham writing, held no. While the police had a right to investigate the premises, they had no business breaking into the apartment house; the officers' action in illegally entering the locked building clearly tainted their subsequent observations, making the arrest and seizure incident thereto illegal.⁵³ In other words while defendant was plainly in the hallway, the police had no right to the view. Moreover, the idea that defendant could have no reasonable expectation of privacy in the hallway was rejected by the court. On the facts of the case the majority refused to treat the common hallway as a public area. Chief Justice Sanders' conclusion was just the opposite: "In the hall of the apartment building, there could be no reasonable expectation on [defendant's] part of freedom from governmental intrusion."⁵⁴ So, for the dissenters⁵⁵ the fact that the officers illegally entered the building's common hallway was irrelevant; there was no violation of *this* defendant's fourth amendment rights.⁵⁶ To the writer the idea that the police can break into a build-

not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971) (opinion of Stewart, J.). See also note 11 *supra*.

52. 276 So. 2d 291 (La. 1973).

53. *Id.* at 294.

54. *Id.* at 296 (dissenting opinion).

55. Chief Justice Hamlin and Justice Summers also dissented without opinion.

56. Dissenting Justice Sanders stated: "In this case, the presence of the officers in the apartment house hallway violated no right of privacy of the defendant." *Id.* at 297 (dissenting opinion). But the majority rejected the idea that DiBartolo had no standing to challenge the police illegality in the case. The fact that he was a guest and not a tenant of the apartment unit did not affect his right to challenge the legality of the officers' actions in breaking into the apartment house since any person legitimately on premises where a search occurs has standing to challenge the validity of the search. *Id.* at 294 n.3, citing *Jones v. United States*, 362 U.S. 257 (1960).

The first enrollment of the proposed new constitution for Louisiana expressly adopts the *Jones* rationale. The proposed declaration of rights article includes a privacy section, article I, § 5, which states: "Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise the illegality of that search or seizure in the appropriate court of law." This standing provision is new. Compare with LA. CONST. art. I, § 7.

ing and still claim the public's view is a contradiction in terms. The better conclusion in *DiBartolo* seems to be the majority's. Moreover, it is not stretching the fourth amendment to say that a tenant who has to use the hallway to reach the bathroom and who knows the building is kept locked and that only tenants have keys⁵⁷ probably has a reasonable expectation that when he enters the hallway he is safe from governmental intrusion. Defendant was hardly carrying his narcotics paraphernalia in plain view in the lobby of Le Pavillon Hotel.

(3) Consent to Search

That the defendant "consented" is often relied on by the police to justify a search where there is no probable cause either for a search warrant or for an arrest.⁵⁸ Such is the case in *State v. Pitts*.⁵⁹ Moreover the case holds a suspect need not be told specifically of the right to refuse consent. For the writer this seems too risky. Without telling a suspect he has the right to refuse consent, the likelihood of an unintelligent waiver of the protection against unreasonable searches and seizures is significantly increased.⁶⁰ How can there be an "intentional

57. The majority in *DiBartolo* relied on these facts in support of the conclusion that defendant's expectation of privacy in the hallway was reasonable. *State v. DiBartolo*, 276 So. 2d 291, 294 (La. 1973).

58. See, e.g., *Vale v. Louisiana*, 399 U.S. 30 (1970); *Zap v. United States*, 328 U.S. 624 (1946); *Davis v. United States*, 328 U.S. 582 (1946).

"The 'consent search' is frequently relied upon by the police because it involves no time-consuming paper work and it offers an opportunity to search where probable cause, either for a search warrant or for an arrest, is lacking." TIFFANY, MCINTYRE, & ROTENBERG, *DETECTION OF CRIME* 156 (1967), quoted in HALL, KAMISAR, LAFAYE, & ISRAEL, *MODERN CRIMINAL PROCEDURE* 291-92 (1969).

59. 263 La. 38, 267 So. 2d 186 (1972).

60. The writer is thus in agreement with the dissenting views of Mr. Justice Marshall in *Schneckloth v. Bustamonte*, 93 S.Ct. 2041, 2073 (1973) (dissenting opinion): "I would have thought that the capacity to choose necessarily depends upon knowledge that there is a choice to be made. But today the Court reaches the curious result that one can choose to relinquish a constitutional right—the right to be free from unreasonable searches—without knowing that he has the alternative of refusing to accede to a police request to search. I cannot agree, and therefore dissent."

Moreover, the writer would have thought that requiring the police to inform the subject of a search that he has the right to refuse consent is a sensible and practical solution to the problem. *But see* the majority position. *Id.* at 2043.

Even after *Schneckloth*, however, it remains to be seen whether courts will require the officers who conducted the consent search to testify at trial that they informed defendant of his right to refuse consent. This is different from requiring the prosecution to prove that defendant knew he had a right to refuse the search, although the two requirements are related. What troubled the court in *Schneckloth* was the difficult burden of proof the state would have to meet if it were obliged to prove the subjective state of defendant's mind. This would not be true if all that were required would be affirmative testimony from the searching officers that they informed defendant of his

relinquishment or abandonment of a known right"⁶¹ without telling the defendant something about the fourth amendment, especially that it includes the right to refuse an otherwise unconstitutional search? But the law in Louisiana is clearly the other way,⁶² and the United States Supreme Court just last term in *Schneckloth v. Bustamonte*⁶³ settled the question in favor of Louisiana's position. Failure to advise the defendant of his right to withhold consent is only one factor among others to be considered. And in *Pitts* our own supreme court added what usually appears in these consent cases:

Under the facts as they appear in the transcripts we cannot disagree with the trial judge's conclusion that the search was made with the consent of the defendant, though she may not have been told specifically that she could refuse to be searched. The factual determination of the trial court regarding the validity of the consent should be given great weight, and it will not be disturbed on review unless clearly erroneous.⁶⁴

While all of this makes sense in cases like *Pitts*, where the suspect has something to gain by consenting to the search,⁶⁵ what reason other

fourth amendment rights. For the writer, requiring the police to testify at trial that they informed defendant of his right to refuse consent to the search seems a reasonable accommodation of the interests at stake. While this approach would introduce problems of proof of its own, (see note 68 *infra*) at least it would require the officers who conducted the search to swear at trial that they told defendant he could refuse the search. This would avoid the possibility of what Professor Fuller has ingeniously depicted as the infliction of injustice by the elbows, and not with fists. See L. FULLER, *THE MORALITY OF LAW* 159 (1964): "[M]ost of the world's injustices are inflicted, not with fists, but with the elbows. When we use our fists we use them for a definite purpose, and we are answerable to others and to ourselves for that purpose."

61. The reference is to the holding in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), that waiver of counsel, to be effective, must be an intentional relinquishment of a known right. While the *Johnson* case involved the right to counsel, Professor Tigar has suggested that the waiver theory enunciated in *Johnson* is applicable to other constitutional rights as well, including fourth amendment protection. See Tigar, *Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1 (1970). But a majority of the United States Supreme Court has refused to apply the *Johnson* rule to the constitutional guarantee against unreasonable searches and seizures. See *Schneckloth v. Bustamonte*, 93 S. Ct. 2041 (1973).

62. *State v. Andrus*, 250 La. 765, 199 So. 2d 867 (1967).

63. 93 S. Ct. 2041 (1973).

64. *State v. Pitts*, 263 La. 38, 41-42, 267 So. 2d 186, 187-88 (1972).

65. In *Pitts*, the defendant attempted to smuggle drugs for her husband into the State Penitentiary at Angola. Prison authorities asked to search her and she agreed; the drugs were found secreted away in what appeared to be two new packages of cigarettes.

than "peaceful submission to a presumed lawful request"⁶⁶ is there for thinking a suspect would allow a search of his person or his house where the search is destined to turn up incriminating evidence?⁶⁷ In such circumstances the very idea that *any* defendant would consent to an otherwise unlawful search seems to defy human experience. An obvious fact of life cuts the other way. Unless coerced, a suspect with red hands will always try to keep them in his pockets. At the least, then, the court should keep this fact in mind when it reviews the validity of defendant's consent to a search without probable cause.⁶⁸

II. PRETRIAL IDENTIFICATION

A. *Photographic Identification*

There is nothing unusual about an eyewitness identifying defendant as the perpetrator of a crime from photographs shown to the eyewitness during the investigative stage of the criminal process. The technique of photographic identification is widely used and effective in criminal law enforcement; sometimes it is the only quick way the police have to pinpoint their investigation against a specific suspect. And, despite the hazards of initial identification of defendant by photograph, the United States Supreme Court has approved the

66. *State v. Amphy*, 259 La. 161, 174, 249 So. 2d 560, 565 (1971).

67. The federal courts generally are wary of claims of waiver or consent in these circumstances. See, e.g., *Judd v. United States*, 190 F.2d 649 (D.C. Cir. 1951). And in *United States v. Shropshire*, 271 F. Supp. 521 (E.D. La. 1967), the court declared it incredible that a suspect who denied his guilt would have consented to a search which he knew would disclose incriminating evidence.

68. For example, in another consent case decided this term, *State v. Crothers*, 278 So. 2d 12 (La. 1973), a police officer "was admitted" into a house by the defendant after the officer knocked at the door of the house to investigate the report of a disturbance. Once inside, the officer recognized the smell of marijuana and seized a water pipe and its contents which were in plain view. This evidence was admitted at trial over defendant's objection and the supreme court affirmed for the reason that "we have found that the evidence supports the trial judge's conclusion that [the officer] was admitted to the house by the defendant . . ." *Id.* at 15. But just what does it mean that the policeman "was admitted" by the defendant? There is no suggestion in the case that defendant "voluntarily consented" to the officer's entry. Yet this, and not the fact of actual physical entry, is the crucial issue in the case. Surely it is fair to ask, why would any defendant whose house is full of marijuana in plain view agree to allow a police officer to take a look around unless on the officer's claim of right? With all deference to the court, that the officer "was admitted" to the house is irrelevant. What the *Crothers* case really asks is a different question entirely; that is, is appellate review really adequate in a case like *Crothers* when the reviewing court routinely affirms on the ground that a police officer testified "defendant consented" at the suppression hearing? Space hardly allows an adequate analysis of that question here.

practice against constitutional challenge provided the "photographic identification procedure was [not] so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."⁶⁹ What this means is that a suspect who is identified by photograph before a trial can later claim as defendant that the witness' conclusion at trial "this is the man" derives from the pretrial procedures used to identify him rather than from the witness' own independent recollection of the criminal episode.⁷⁰ Whether defendant's claim is good depends on all of the circumstances and "each case must be considered on its own facts."⁷¹

On the facts in *State v. Mitchell*,⁷² the court rejected defendant's contention that he had been misidentified at trial owing to an impermissibly suggestive pretrial photographic identification. The maintenance man of an apartment building that was burglarized gave the police a description of a stranger he saw in the building's parking lot on the afternoon of the burglary. A week or so later this eyewitness identified defendant from his picture as the stranger, but the identification procedure used was less than ideal because only one photograph of the defendant was shown to the witness. This practice car-

69. *Simmons v. United States*, 390 U.S. 377, 384 (1968). The problem of suggestive photographic identification of the accused is, of course, a problem of due process of law; there can be no claim of a right to counsel at a photographic identification array, even if the array is post-indictment. See *United States v. Ash*, 93 S. Ct. 2568 (1973).

70. The independent source test was articulated in *United States v. Wade*, 388 U.S. 218, 240 (1967), and *Gilbert v. California*, 388 U.S. 263, 272 (1967). These cases require that, to be admissible, an in-court identification must have a source other than a pretrial confrontation at which an attorney was impermissibly absent. The principle has been applied by analogy to pretrial confrontations in violation of due process under *Stovall v. Denno*, 388 U.S. 293 (1967).

Defense counsel might also challenge the admissibility of the photographic identification itself, if the state relies on it at trial, as well as the witness' in-court identification of the defendant. Whether the test for determining the admissibility of the in-court identification and the extrajudicial, pretrial identification are the same remains to be seen. For pre-*Stovall* cases, the United States Supreme Court has held that the tests are the same. See *Neil v. Biggers*, 93 S. Ct. 375 (1972). Just what the court will hold for post-*Stovall* cases is unclear. Compare *Clemons v. United States*, 408 F.2d 1230 (D.C. Cir. 1968) (*en banc*) with *United States ex rel. Phipps v. Follette*, 428 F.2d 912 (2d Cir. 1970). One federal court of appeals has held that in post-*Stovall* cases, the need to deter police from using less reliable identification procedures when more dependable means are available mandates barring evidence of unnecessarily suggestive confrontations regardless of evidence of an independent source. See *Smith v. Coiner*, 473 F.2d 877 (4th Cir. 1973). See generally Note, 73 COLUM. L. REV. 1168 (1973).

71. *Neil v. Biggers*, 93 S. Ct. 375 (1972); *Simmons v. United States*, 390 U.S. 377, 384 (1968); *Stovall v. Denno*, 388 U.S. 293 (1967).

72. 278 So. 2d 48 (La. 1973)

ries with it a powerfully suggestive thought: the police suspect *this* man; and the thought is conveyed even if nothing express passes between the police and the witness. Surely the procedure used in *Mitchell* was suggestive, but the supreme court decided it was not impermissibly so because the record in the case fairly indicated the witness' trial identification derived from a source independent of the photograph.⁷³ The witness had had a good opportunity to see the stranger on the afternoon of the burglary, and as a result he probably identified the defendant from his picture not because it was the only one displayed, but because it depicted the right man.

The result in *Mitchell* seems correct if one is satisfied that there was an independent basis for the witness' courtroom identification of defendant. And certainly the facts set out by the court tend in that direction. But one can never be sure of this conclusion when only one photograph is used for pretrial identification, and no excuse at all appears in the case for the police not including three or four other photographs along with defendant's so as to avoid the chance of misidentification.⁷⁴

*State v. Edgcombe*⁷⁵ is another photographic identification case. The case is important to practitioners because it seems to answer a very important strategic question: when and how can defense counsel contest the validity of pretrial photographic identification procedures?

Three rape victims all identified defendant at trial as their assailant. One of the victims prepared a composite picture of her assailant on the eve of the offense and it was this picture, together with the victim's detailed description of the rapist and his automobile, which finally led police to apprehend the defendant three months and two rapes later. At the bail hearing the same victim who prepared the composite picture was shown a group of mug shots and she picked out defendant's picture as that of her attacker. Before trial, defense counsel requested discovery of all photographs of the defendant and of others shown to the victims which produced defendant's pretrial

73. *But see* note 70 *supra*.

74. In *Neil v. Biggers*, 93 S. Ct. 375 (1972), the court acknowledged the possibility that unnecessary suggestiveness alone might require the exclusion of pretrial identification of the accused. The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure when a more reliable one is available. But the court did not reach the question because both the identification confrontation and the trial in the *Biggers* case preceded *Stovall v. Denno*, 388 U.S. 293 (1967), in which the court first announced that the suggestiveness of confrontation procedures is not simply a matter for jury argument and that pretrial identification procedures are subject to judicial control.

75. 275 So. 2d 740 (La. 1973).

identification. This seems a natural step to take in preparation for trial. How else can defense counsel decide whether to file a motion to suppress identification testimony or whether it would be strategic at trial to attack the victim's identification on cross-examination by showing taint? Furthermore, counsel's request in *Edgcombe* was supported by one of the more important objectives of pretrial discovery, that is, to surface and dispose of potential constitutional problems at an early date.⁷⁶ How can defense counsel assert that the defendant's photographic identification was impermissibly suggestive without at least knowing the number of mug shots used and what the pictures looked like? But the supreme court unanimously affirmed, treating counsel's request as if it were one for tangible evidence, which, under the jurisprudence, is privileged to the state.⁷⁷ For the same reason the court held counsel had no right to discover the composite picture of the rapist drawn on the night of his first attack. If produced, this picture would have enabled defense counsel to assess the likelihood of taint by comparing defendant to the picture.

The holding of the *Edgcombe* case on the photographs point appears harsh, especially since counsel was only doing his best to protect defendant's constitutional rights. The case seems to limit significantly the opportunity to contest the fairness of pretrial photographic identification—at least the holding will affect the timing of such a challenge, requiring the issue to be raised at trial and not before.⁷⁸ Finally, unless given a narrower reading, the case would seem to impair defense counsel's ability to determine whether to try to impeach the victim's identification at trial by showing it derives from an unfair photographic display. While it is true that the court decided the victim's courtroom identification of defendant was independent of her photographic identification, the testimony on this point quoted by the court in the opinion is that the victim was posi-

76. There is a thoughtful note on criminal discovery in Louisiana which makes this very point in *ABA Minimum Standards for Criminal Justice—A Student Symposium*, 33 LA. L. REV. 602, 610 (1973).

77. *Accord, State v. Frezal*, 278 So. 2d 64 (La. 1973), in which defense counsel requested pretrial disclosure of when, where, and under what circumstances the defendant was identified and by whom. The supreme court held that this information is not discoverable in Louisiana because it is part of the evidence relied upon by the state for conviction.

78. But so confining defense counsel may only force him "to probe in the dark in an attempt to discover and reveal unfairness, while bolstering the government witness' courtroom identification by bringing out and dwelling upon his prior identification." *United States v. Wade*, 388 U.S. 218 (1967). It would be much fairer in the writer's view to allow defense counsel to raise the issue at a pretrial hearing. This is the view of the federal courts. *See United States v. Cranston*, 453 F.2d 123 (4th Cir. 1971).

tive the defendant was her attacker.⁷⁹ But whether she was positive *because of* the photographic showup and not *in spite of* it, does not appear.⁸⁰

After *Edgecombe* an interesting question is whether the holding last term in *State v. Wilkerson*⁸¹ still applies on motions to suppress identification testimony when the claim is that the prosecution rests entirely on an unfair photographic identification. It seems inconsistent for the court to close off discovery of photographs used for pretrial identification while at the same time impliedly approving pretrial motions to suppress unfair photographic displays and derivative identification testimony. Yet the court has done just that. No doubt sometime soon the court will have to choose which line it prefers. In the meantime *Edgecombe* will probably result in nudging defense counsel to the curious position of having to move for suppression of photographic identification testimony without knowing whether any such identifications occurred—hardly a rational situation. It would make more sense to hold the defense is entitled to know in advance of trial whether any witnesses identified defendant from his photograph during the investigative stage.⁸² If so, the defense should have access to any photographs shown to the witness in order to decide whether to file a motion to suppress.⁸³ All of this means, of course, that the writer thinks *Edgecombe* is wrong and should be overruled. But then this writer favors a fair measure of pretrial discovery, especially when necessary to justly adjudicate constitutional claims. While the Louisiana supreme court is moving in that direction, it has not as yet gone very far. In the future in order to avoid what happened in *Edgecombe*, whenever the claim is that defendant's identification flows directly and without attenuation of the taint from an

79. *State v. Edgecombe*, 275 So. 2d 740, 744 (La. 1973).

80. *Cf. People v. Hutton*, 21 Mich. App. 312, 175 N.W.2d 860 (1970), where the identifying witness testified that he was sure defendant was the right man. But when asked why he was so sure, the witness responded: "I said it before and I'll probably say it again— *that's the fellow they had down at the police station.*"

81. 261 La. 342, 259 So. 2d 871 (1972).

82. *Contra*, *State v. Frezal*, 278 So. 2d 64 (La. 1973).

83. Discovery of photographs used to identify defendant is available in the federal courts under FED. R. CRIM. P. 16(b). *See Simmons v. United States*, 390 U.S. 377, 388 (1968); *United States v. Cranston*, 453 F.2d 123 (4th Cir. 1971); *United States v. Barber*, 296 F. Supp. 795, 297 F. Supp. 917 (D. Del. 1969). An inquiry into the facts and circumstances of the pretrial photographic identification is available at a suppression hearing, and a "reasonable assertion of possible taint" is required on motion to suppress. *United States v. Ash*, 93 S. Ct. 2568 (1973). *See Haskins v. United States*, 433 F.2d 836 (10th Cir. 1970); *United States v. Sutherland*, 428 F.2d 1152 (5th Cir. 1970); *United States v. Allison*, 414 F.2d 407 (9th Cir. 1969).

unfair pretrial confrontation, defense counsel should file a motion to suppress identification testimony before trial. This would have the beneficial effect of flushing out defendant's identification claim at an early stage; it would also mean freeing up the trial judge from the pressures of trial, making possible closer scrutiny of the pretrial confrontation procedures used and the issue of independent source would also stand on its own footing. Too frequently, if defense counsel waits—or worse yet if he is forced—to broach the subject of taint on cross-examination of an eyewitness at trial, the question never receives the studied attention it deserves.⁸⁴ Ideally, the matter should be raised on pretrial motion to suppress and the supreme court should do whatever it can to move Louisiana's criminal procedure in that direction. Finally, because fair identification of the defendant is such an important element of proof of guilt, bifurcation of the hearing on this account seems worth the price.⁸⁵

III. CHARGING THE CRIME

Charging the crime would seem an easy task. Just tell defendant what it is the state says he did and when. Moreover, the fundamental idea that defendant is entitled to be "informed of the nature and cause of the accusation against him"⁸⁶ is not hard to understand; without notice of the alleged offense, the accused is hardly in a position to meet the charge. So we have the root principle, and we think we understand its rationale. And by itself article 464 looks clear enough: "The indictment shall be a plain, concise and definite written statement of the essential facts constituting the offense

84. And there is the real problem that if defense counsel is forced to raise the issue of taint late in the proceeding at the trial itself, he may forego the opportunity for fear of only bolstering the state witness' courtroom identification by bringing out and dwelling on the earlier pretrial identification. See *United States v. Wade*, 388 U.S. 218 (1967).

85. Nothing in Louisiana's Code of Criminal Procedure authorizes a motion to suppress identification testimony. But the supreme court last term in *State v. Wilkerson*, 261 La. 342, 259 So. 2d 871 (1972), approved the practice by reasoning from the analogy of article 703 and on the basis of the court's general supervisory authority over Louisiana's criminal procedure spelled out in article 3 of the Code. And the court should go further. It should apply the same common sense approach evident in *Wilkerson* to hold that defense counsel is entitled to notice of any pretrial identifications of defendant involved in the case, whether by photograph, showups, or line-up. This time article 768 provides the relevant analogy. Such a notice, if required, would score an interest in rationality and open play, not gamesmanship, across the face of Louisiana's criminal procedure. *But see State v. Frezal*, 278 So. 2d 64 (La. 1973).

86. LA. CONST. art. I, § 10.

charged."⁸⁷ But the law on charging the crime in Louisiana is not that simple. The Code spends over twenty other articles trying to specify just how a district attorney is supposed to write up the accusation. For instance, is an information which charges armed robbery and alleges defendant "robbed City National Bank at 7415 Airline Highway, Baton Rouge, while armed with a dangerous weapon"⁸⁸ good? One would think so. At least a stranger to Louisiana's criminal procedure would guess that way. True, armed robbery requires the use of force against the *person*, and the information as drawn speaks only of robbing a *building*. Strictly speaking, then, the information is defective because it should also name the personnel of the bank who were robbed and put in fear. Still, the idea of "robbing a bank" suggests a stick-up, and usually somebody will be put in fear. Why not regard the word "bank" in its figurative sense to mean "personnel of the City National Bank." This would save the information. At any rate, if defendant really has no idea what the charge means, he can always challenge it at trial by moving to amend or to quash the accusation; and a stranger to Louisiana, reading article 484 of the Code, would think this state's bill of particulars practice a fair answer to any claim of prejudice in the case. Defense counsel can easily obtain the specifics of the charge through a bill of particulars.

Our outsider would have guessed wrong, however. Twice this term the supreme court reversed convictions for armed robbery because the charge failed to allege that a person was robbed.⁸⁹ In each case the information was defective because it charged armed robbery of a building, which is no offense at all as such, and the court refused to equate robbing a bank with robbing the bank's personnel. Justices Hamlin, Sanders, and Summers dissented from what they regarded as the court's "hypertechnical ruling."⁹⁰

To the writer, who is new in this state, the law on charging the crime in Louisiana is disappointing. To reverse a criminal conviction because of a defect in the form of the indictment looks too much like the folly of common law pleading⁹¹—at least to this common law lawyer it does. What especially irks the writer is the rule requiring reversal of defendant's conviction notwithstanding complete disregard of the indictment's defect at trial. This rule is unfair to the

87. LA. CODE CRIM. P. art. 464.

88. See *State v. Smith*, 275 So. 2d 733 (La. 1973).

89. *State v. Williams*, 275 So. 2d 738 (La. 1973); *State v. Smith*, 275 So. 2d 733 (La. 1973).

90. *State v. Smith*, 275 So. 2d 733, 734 (La. 1973) (dissenting opinion, Sanders, J.).

91. See generally R. PERKINS, CRIMINAL LAW AND PROCEDURE 909-11 (1972).

prosecution. If something is wrong with the indictment or information, defense counsel should be required to raise the matter at trial in order to give the prosecution a chance to amend. Otherwise defendant goes to trial hoping for acquittal while taking no risk of conviction. Any verdict against him could be set aside on appeal. The better rule would hold that failure to challenge the defect at trial waives it, provided defendant has actual notice of the crime charged and the defense is not prejudiced by the indictment's flaw.⁹² This approach would change the result in cases like *State v. Parrish*,⁹³ which was also decided during the survey period. In that case the written indictment was perfect in every respect, but it was orally amended at the instance of defense counsel at the start of trial. Thereafter the state adduced evidence supporting the amended charge and defendant was convicted. Clearly, Chief Justice Hamlin's dissent in the case is right in saying defendant was completely informed of the nature of the accusation against him;⁹⁴ he knew exactly what the state was going to try to prove. Moreover, defense counsel did not request a bill of particulars in the case. Why should he; counsel also knew what the specifics of the charge against his client were. In these circumstances what sense does it make to reverse defendant's conviction? At least the judgment in *Parrish* seems unrelated to the root principle involved. To the writer, the requirement that the accusation be in writing is not a technicality; nor is it hypertechnical to insist that the state specifically allege the name of the victim if the charge is armed robbery. These are indeed requirements of substance which the law should strictly enforce. But at the same time, enforcement *after* conviction is too late. The real technicality in these cases is not the requirement of fair notice, but the reversal itself, coming as it does at the last appellate minute, and often on the supreme court's own account.⁹⁵ The real irrationality here is allowing defendant to ignore the procedures the Code specifically sets up to flush these problems out earlier at trial. This is more gaming than good criminal procedure, with defendant holding the joker.

But law is law, especially if we are talking about Louisiana's Constitution; and Justice Tate's concurring opinion in *State v.*

92. Apparently Justice Tate would hold the same way if the court were willing to overrule the prior jurisprudence. See *State v. Smith*, 275 So. 2d 733, 736 (La. 1973) (concurring opinion).

93. 272 So. 2d 321 (La. 1973).

94. *Id.* at 326 (dissenting opinion).

95. The reversals in both *State v. Smith*, 275 So. 2d 733 (La. 1973), and *State v. Williams*, 275 So. 2d 738 (La. 1973) were *ex proprio motu*, that is, on the court's own account, without the matter having been raised by counsel.

*Smith*⁹⁶ would tell our stranger that we are. There is a long line of firmly settled jurisprudence construing Article I, § 10 to require reversal *instante* if the indictment or information is constitutionally invalid, and the indictment is not saved if the facts of the charge are supplemented by a bill of particulars or are revealed at trial; nor is the defect waived by the accused going to trial without objection. Thus for Justice Tate, to affirm in a case like *Smith* would require the court to abdicate its judicial function, unless, of course, the court were willing to re-examine this entire body of jurisprudence and to overrule it. "[U]ntil such is done we cannot ignore this body of settled law."⁹⁷ Then Justice Tate said something very important:

Criminal procedure should, like in fact our civil procedure does, serve the purpose only of advancing decision of issues on their merits, not afford the basis for decision on the happenstance that certain words were or were not used by lawyers in pleadings. As Article 5051 of our Louisiana Code of *Civil* Procedure provides, '. . . rules of procedure implement the substantive law and are not an end in themselves.'⁹⁸

This writer would add a comparative note of his own. In sniffing out the civil law tradition for the first time, our stranger would no doubt discover the hallmark idea that in the civil law root principle, not procedure, is center-stage.⁹⁹ A true civilian would never allow the common law's fetish for form to control judgment on the merits. Perhaps this is why Henry George McMahon put article 5051 into our Code of Civil Procedure, and it is not too late for the supreme court to put the idea back into our criminal procedure as well. Justice Tate's suggestion is a good one. The law on charging the crime in Louisiana should change—as part of the renaissance.¹⁰⁰ But more than that, if the court is ever willing to look at the idea of fair notice from the perspective of principle and not technicality, then by working through the notice idea the court could very well shape a plan of discovery rights for the criminally accused in Louisiana. This is true

96. 275 So. 2d 733, 734-37 (La. 1973) (concurring opinion).

97. *Id.* at 736.

98. *Id.*

99. I owe my first introduction to my colleague, Professor Pascal. He makes the point about the subservience of procedure in the civil law in his review of René David's book *FRENCH LAW*. See Pascal, Book Review, 21 AM. J. COMP. L. 609, 611 (1973).

100. See Barham, *A Renaissance of the Civilian Tradition in Louisiana*, 33 LA. L. REV. 357 (1973). It seems ironic that the Louisiana supreme court should continue to insist on technical perfection in charging the crime, when criminal procedure elsewhere in common law jurisdictions has long since left that fetish behind. See R. PERKINS, *CRIMINAL LAW AND PROCEDURE* 911 (1972).

because Article I, § 10 of Louisiana's Constitution could be read generatively, that is, there is no principled reason for confining the notice idea to written indictments, bills of particulars, and opening statements. These devices may tell the accused too little, too late. Accordingly, a new means of disclosure earlier in the prosecution may be required, and from the cases it appears that Louisiana has already begun to inch in just that direction.

IV. PRETRIAL DISCOVERY

Last year an important question for the criminal proceduralist was just how far *State v. Migliore*¹⁰¹ carried criminal discovery in Louisiana. Professor Pugh characterized the case as a limited breakthrough in the right direction.¹⁰² *Migliore* held that if the offense charged is possession or sale of a prohibited substance, then defendant can have a small amount of the drug for independent, pretrial inspection. But the opinion in the case is very guarded; the justices were not "adjudicat[ing] generally—to the extent that prior jurisprudence would be overruled—on a matter which might be considered by the Legislature at a future date."¹⁰³ Justice Summers, who dissented in *Migliore*, foresaw a different result:

The Court's ruling today opens wide the door to pretrial discovery in criminal cases. This result must follow for we shall find it impossible to rationally distinguish this factual situation from the numberless fact situations future cases will present.¹⁰⁴

However it is fair to say that the path of the law on discovery this year indicates Justice Summers' prediction was wrong. Maybe, that is. At any rate, there are some interesting developments along the way.

First, immediately after *Migliore* defense counsel attempted to prove Justice Summers right, and at least on principle it is hard to distinguish between the discovery allowed in *Migliore* and discovery of the broken broom handle and bloody rag which defendant claimed would support his plea of self-defense in *State v. Lee*.¹⁰⁵ In the *Lee* case the state kept the broom handle and rag for five months without performing finger print or blood tests on these items. After another

101. 261 La. 722, 260 So. 2d 682 (1972).

102. *The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Evidence*, 33 LA. L. REV. 306, 322 (1973).

103. *State v. Migliore* 261 La. 722, 742, 260 So. 2d 682, 689 (1972).

104. *Id.* at 744-45, 260 So. 2d at 690 (dissenting opinion).

105. 270 So. 2d 544 (La. 1973).

month, tests were finally run at the insistence of court-appointed counsel, but these were negative because of "deterioration" of the items during their long stay in the evidence room. The supreme court affirmed Lee's conviction for manslaughter, rejecting his argument that what happened amounted to suppression of evidence favorable to him. The items themselves were in fact admitted at the trial, and the court could not see how the verdict would have dropped below manslaughter even if tests had been run and the results put before the jury.¹⁰⁶ Justice Barham dissented on the theory that storing away evidence which might prove exculpatory for a long period of time without scientific testing is tantamount to destruction of the evidence.¹⁰⁷

On the merits in *Lee*, this writer tends to agree with Justice Barham's dissent. But regardless of how one comes out on the *Brady* claim¹⁰⁸ raised in the case, *Lee* is important because it intimates that discovery lies if the evidence sought could possibly support a plea of self-defense. This would indeed be an extension of criminal discovery in Louisiana because the disclosure in the *Migliore* case, if in the accused's favor, would itself prove defendant innocent. But in cases like *Lee* production would only tend to support the defense; favorable discovery would not in and of itself end the whole prosecution. Whether the court allows discovery on the claim that production will facilitate proof of self-defense remains to be seen; at least there is no holding on that question one way or the other this term. The issue was not squarely before the court in *Lee* because defendant's retained counsel, who had been on the case earlier, had not requested discovery. But very subtly, in a footnote, the justices may have given us an intimation of their feelings: "However, there is nothing in the record to preclude that the opportunity did not exist for either of these [retained] counsel to have requested an examination of these items."¹⁰⁹ Why mention an opportunity if it does not exist?

Other cases this year suggest just the opposite, however. In *State v. Gibson*,¹¹⁰ the court reiterated that in Louisiana defense counsel are not entitled to discover what weapons were used in the alleged offense or anything about their ownership. Presumably counsel wanted this information in support of a plea of self-defense, but the court turned him down. Nothing was said about the effect of *Migliore*.

About six months after *Migliore* was decided the court adhered

106. *Id.* at 546.

107. *Id.* at 547. (dissenting opinion).

108. See *Brady v. Maryland*, 373 U.S. 83 (1963).

109. *State v. Lee*, 270 So. 2d 544, 545 n.* (La. 1973).

110. 271 So. 2d 868 (La. 1973).

firmly to its view that there is no general right of criminal discovery in Louisiana; *Migliore* applies only if the case involves "possession of a substance which is criminal merely by virtue of its chemical composition." This was in *State v. Jones*,¹¹¹ and after about six months more of repeated attempts on the part of defense lawyers to win broader discovery rights, the supreme court, obviously exasperated by all of this, declared: "[We] fail to understand why defense counsel continue to present such arguments to us on appeal."'¹¹² In fairness to the defense bar, however, it could hardly have done otherwise; good advocacy required defense counsel at least to try to outrun *Migliore's* facts toward applying its rationale instead. But a majority of the justices would have none of it.

Finally, *State v. Edgcombe*¹¹³ is this term's last considered word on discovery. The case expressly holds that *Migliore* has no life of its own beyond its narrow facts. It is fitting that Chief Justice Hamlin should have this year's last word on the important subject of criminal discovery. Not only did he retire this year, but also, and this is equally important, Chief Justice Hamlin wrote *Migliore* for the court a full year before. The cases in the interim suggest that he was wise to remit the question of discovery to the Legislature and to the agencies of general law revision in Louisiana.¹¹⁴ Piecemeal adjudication, unless absolutely necessary, hardly seems a sound way to fashion the rational, fair-minded plan of criminal discovery that this state needs. If the matter were ultimately left to the adversary system with only one lawyer on a side, a thorough articulation of all the interests at stake and a reasoned judgment on the question would appear more difficult.¹¹⁵

111. 263 La. 164, 267 So. 2d 559 (1972).

112. *State v. Rose*, 271 So. 2d 863, 866 (La. 1973), citing *State v. Haddad*, 221 La. 337, 344, 59 So. 2d 411, 414 (1952) (in which the supreme court had said the same thing over 20 years ago).

113. 275 So. 2d 740 (La. 1973).

114. In *Migliore* Chief Justice Hamlin expressly noted that discovery is a subject on which the legislature might act at a near future date. See *State v. Migliore*, 261 La. 722, 742, 260 So. 2d 682, 689 (1972).

115. The intervention of the Orleans Parish District Attorney in the *Migliore* case itself supports this point. See *Id.* at 726, 727, 260 So. 2d at 683-84. He was confronted with the overwhelming task of representing all the interests opposed to broader discovery rights in Louisiana criminal cases, and he had to present his arguments in the context of a single case, which was probably only one of a hundred waiting on his schedule. The question of discovery in criminal cases is a delicate one, with wide ramifications and important interests on both sides of the issue. See generally Reznick, *Justice Brennan and Discovery in Criminal Cases*, 4 RUTGERS CAM. L.J. 85 (1972). What is the appropriate scope of criminal discovery, and to what extent should discovery be a reciprocal affair, with defendant tendering his side too? Answers are not easy,

particularly if they have to come in the context of adjudication, as in *Migliore*. The rulemaking procedures of the legislative setting would seem a more appropriate forum in which to fashion a reasoned discovery plan for criminal cases. *See generally* Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).