Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **29th day of January, 2020** are as follows:

BY Hughes, J.:

2019-KK-00645 STATE OF LOUISIANA VS. DONOVAN ALEXANDER (Parish of Orleans Criminal)

We granted certiorari in this case to determine whether the court of appeal erred in reversing the district court judgment that granted the defendant's motion to suppress an uncounseled statement. After reviewing federal and state authorities, we have determined that when the police failed to inform the defendant that his attorney sought to speak with him and failed to allow his attorney access to the defendant when the attorney was on the scene of the arrest and asked to see his client, the statement is inadmissible. Accordingly, we reverse the ruling of the court of appeal and reinstate the district court's judgment.

COURT OF APPEAL REVERSED, DISTRICT COURT JUDGMENT REINSTATED.

Chief Judge Susan M. Chehardy of the Court of Appeal, Fifth Circuit, heard this case as Justice pro tempore, sitting in the vacant seat for District 1 of the Supreme Court. She is now appearing as an ad hoc for Justice William J. Crain. Retired Judge James H. Boddie, Jr., appointed Justice ad hoc, sitting for Justice Marcus R. Clark.

Crichton, J., dissents and assigns reasons.
Chehardy, J., dissents and assigns reasons.

01/29/20

SUPREME COURT OF LOUISIANA

No. 2019-KK-00645

STATE OF LOUISIANA

VS.

DONOVAN ALEXANDER

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH CIRCUIT, PARISH OF ORLEANS

Hughes, J.[*]

We granted certiorari in this case to determine whether the court of appeal erred in reversing the district court judgment that granted the defendant's motion to suppress an uncounseled statement. After reviewing federal and state authorities, we have determined that when the police failed to inform the defendant that his attorney sought to speak with him and failed to allow his attorney access to the defendant when the attorney was on the scene of the arrest and asked to see his client, the statement is inadmissible. Accordingly, we reverse the ruling of the court of appeal and reinstate the district court's judgment.

I. FACTS AND PROCEDURAL HISTORY

Defendant Donovan Alexander was charged by bill of information with possession with intent to distribute heroin, a violation of La. R.S. 40:966(A)(1), and possessing a firearm while in possession of a controlled dangerous substance, a violation of La. R.S. 14:95(E). The defendant entered a plea of not guilty and filed a motion to suppress statement. At the hearing on the motion to suppress, the following facts were established.

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[*] Chief Judge Susan M. Chehardy of the Court of Appeal, Fifth Circuit, assigned as Justice pro tempore, sitting for the vacancy in the First District. Retired Judge James H. Boddie Jr., appointed Justice ad hoc, sitting for Justice Clark.

The police investigation of the defendant began in June 2016 when a confidential informant provided officers with a tip that the defendant was distributing heroin in the New Orleans metro area. The confidential informant further provided that the defendant stored heroin and firearms at 8243 Curran Boulevard, in New Orleans, and lived on Vintage Drive, in Kenner. Police surveilled the defendant on three occasions and watched him make many stops throughout the New Orleans area as well as at the two addresses given by the confidential informant.

On June 21, 2016 officers began surveilling the Vintage Drive residence in Jefferson Parish. The police approached the residence and addressed the defendant. Officers received consent from defendant to search the residence and seized two pounds of marijuana, a firearm, and Carispodol pills. The defendant was arrested at the scene. After his arrest, officers traveled to the address at 8243 Curran Boulevard in Orleans Parish. The female occupant there gave consent to search via consent form and gave directions to officers where they could find the defendant's "stash." From the bottom drawer of a dresser in a bedroom officers recovered 8 grams of heroin, a loaded firearm, plastic bags, packaging material, and a scale. An arrest warrant for possession with intent to distribute heroin and possessing a firearm while in possession of a controlled dangerous substance was prepared based on the evidence recovered from the Curran Boulevard search.

DEA Special Agent Joseph Blackledge testified that the defendant was read his rights and waived them at the scene of his arrest and also prior to being interviewed at Kenner Police Headquarters. Specifically, the defendant signed a DEA advice of rights form. While the defendant was detained at Kenner Police Headquarters, police informed him of the search and recovery from the Curran Boulevard residence. The defendant then told officers that the drugs and gun were his and that he did not want the woman who lived there to be charged. This is the statement sought to be suppressed.

At some point during the search of the Vintage Drive residence, attorney Dwayne Burrell arrived on the scene. Attorney Burrell is the defendant's cousin and had previously represented him.[1] He testified that the defendant's girlfriend called him and said law enforcement was at the house on Vintage Drive. When Attorney Burrell arrived, he spoke with the defendant's girlfriend. He next identified himself to officers on the scene as the defendant's attorney and attempted to stop the search of the home. At one point, Attorney Burrell showed officers his Bar card. Attorney Burrell was told by officers that drugs had been found and that the defendant was being detained. Attorney Burrell then told the officers that he wanted to speak with the defendant and that the defendant was not going to make any statements. According to Attorney Burrell, he was told by law enforcement that the defendant was going to be booked in Gretna and that he could speak with the defendant then. He testified that he did not know which officer told him the defendant would be taken to Gretna as there were officers from multiple agencies on the scene. At no point was Attorney Burrell informed that the defendant would be brought to Kenner for questioning. Attorney Burrell testified that at that point in time the defendant was in a police unit, in the living room of the house, or perhaps had been taken away by then.

Agent Blackledge testified that the defendant was brought from the scene of his arrest to Kenner Police Headquarters. Agent Blackledge said he did not recall anyone named Dwayne Burrell coming to the Kenner Police Department and testified if he had known the defendant's attorney wished to be present, he would have stopped the interview and allowed the attorney to be present. Attorney Burrell eventually spoke with the defendant the next day when he was booked in Gretna.

[1] Attorney Burrell testified on cross-examination: "I'm his cousin. I'm always his attorney."

After a hearing, the district court granted the motion to suppress. In written reasons, the district court stated:

> The attorney in question was the cousin of the defendant. He testified at the suppression hearing that he was emphatic in explaining to the officers on the scene that he did not want the defendant to be questioned by law enforcement agents and that he wanted to speak with the defendant. He testified that he identified himself to the officers as an attorney, even showing them his 'bar card.'. . .
>
> There was no evidence indicating that the statement had been obtained from the defendant before the attorney made his intentions known to the officers. . . .
>
> The State failed to specifically rebut the serious allegations made by the defense attorney. The State did not call any of the officers on the scene in Kenner to deny the allegations of the attorney; nor to explain any conversations they may have had with the attorney. The State did not provide any testimony regarding any attempts the officers may have made to ascertain if the defendant was indeed being questioned by one or more of their fellow officers.

State v. Alexander, No. 531-509, pp. 1-2 (Orleans Criminal District Court 2/11/19).

The district court reasoned that where there are allegations of police misconduct in connection to statements given by an accused, the State must specifically rebut these allegations. **Id.** at p.2 (citing **State v. Montejo**, 2006-1807 (La. 5/11/10), 40 So.3d 952).

The court of appeal reversed, relying on **Moran v. Burbine**, 475 U.S. 412 (1986), and **State v. French**, 2011-576 (La. App. 5 Cir. 11/29/11), 79 So.3d 1155, which heavily relies on **State v. Carter,** 94-2859 (La. 11/27/95), 664 So.2d 367, each discussed *infra*. **State v. Alexander**, 2019-0036 (La. App. 4 Cir. 4/3/19), 267 So.3d 682. The court of appeal determined that the defendant was properly advised of his rights and validly waived those rights prior to giving his inculpatory statement as the right to counsel is the right of the client rather than the attorney and can thus be waived without counsel's participation. **Id.** at 687-88.

I. STANDARD OF REVIEW

Appellate courts review lower court rulings under a deferential standard with regard to factual and other trial determinations, while legal findings are subject to a *de novo* standard of review. **State v. Wells**, 2008-2262 (La. 7/6/10), 45 So.3d 577, 580. A district court's decision relative to the suppression of evidence is afforded great weight and will not be set aside unless there is an abuse of that discretion. **Id.** at 581.

II. LAW AND ANALYSIS

At a hearing on a motion to suppress a statement, the State bears the burden of proving the free and voluntary nature of the confession given while in custody. **State v. Scarborough**, 2018-1791 (La. 11/14/18), 256 So.3d 265, 265 (per curiam). In order for an inculpatory statement or confession to be admitted into evidence, the State must affirmatively show that the statement was free and voluntary and not the result of fear, duress, intimidation, menace, threats, inducements, or promises. La. R.S. 15:451; La. C. Cr. P. art. 703(D); **State v. Anderson**, 2006-2987 (La. 9/9/08), 996 So.2d 973, 994. The State must also prove that the defendant was advised of his **Miranda** rights and voluntarily waived those rights. **Scarborough**, 256 So.3d at 266. A court will examine the totality of the circumstances surrounding the statement to determine its voluntariness. **State v. Manning**, 2003-1982 (La. 10/19/04), 885 So.2d 1044, 1075.

A. Federal Law

The Fifth Amendment of the U.S. Constitution provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." The U.S. Supreme Court has stated that custodial questioning creates "compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." **Miranda v. Arizona**, 384 U.S. 436, 467 (1966). The warnings derived from **Miranda v. Arizona** are meant to combat

these “compelling pressures” in order to protect one’s Fifth Amendment privilege against self-incrimination. **Id.** Under **Miranda**, a suspect must be informed of his or her right to remain silent, that anything said can and will be used in court proceedings to secure a conviction, and of his or her right to an attorney before questioning begins. **Id.** at 444. If the individual indicates at any time that he or she wishes to remain silent, or requests an attorney, the interrogation must end. **Id.** at 444-45.

There are numerous opinions from federal courts interpreting and applying **Miranda**. The U.S. Supreme Court in **Moran v. Burbine** addressed a case very similar to this case. In **Burbine**, a confidential informant identified a man who had recently been arrested on burglary charges as the person who had killed a woman several months prior. **Burbine,** 475 U.S. at 416. While being held on the burglary charges, the defendant was read his **Miranda** rights but refused to sign a waiver. **Id.** During this time, the defendant’s sister called the local Public Defender’s Office to secure representation for her brother. **Id.** The defendant was unaware of this effort or that counsel had called the police station. **Id.** at 417. An attorney from the Public Defender’s Office called the police and informed a detective that in the event that the police intended to place the defendant in a lineup or question him, the defendant had counsel. **Id.** The detective told the attorney that the defendant would not be questioned or put in a lineup that evening. **Id.** However, less than an hour later, police brought the defendant into an interrogation room and conducted an interview concerning the murder. **Id.** The defendant was interviewed three times, and each time he was read his rights. **Id.** On each occasion, he signed a written form acknowledging that he “understood his right to the presence of an attorney and explicitly indicating that he ‘[did] not want an attorney called or appointed for [him]’ before he gave a statement.” **Id.** at 417-18.

The issue before the United States Supreme Court in **Burbine** was whether a prearraignment confession should be suppressed either because the police

misinformed an inquiring attorney about plans concerning the suspect's questioning or because the suspect was not informed of the attorney's effort to reach him. **Id.** at 420. Ultimately, the Court determined that neither circumstance would result in the suppression of an otherwise valid statement made to police.

The Court noted that voluntariness of the waiver was not at issue. **Id.** at 421. As to whether the conduct of the police in not informing the suspect of the attorney's phone call, "fatally undermined the validity of the otherwise proper waiver," the Court reasoned:

> Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right. Under the analysis of the Court of Appeals, the same defendant, armed with the same information and confronted with precisely the same police conduct, would have knowingly waived his **Miranda** rights had a lawyer not telephoned the police station to inquire about his status. Nothing in any of our waiver decisions or in our understanding of the essential components of a valid waiver requires so in congruous a result. No doubt the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights. Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.

Id. at 422-23 (citations omitted).

The **Burbine** decision also discussed the effect of the withholding of information by the police from the defendant and his attorney:

> [W]hether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights. Although highly inappropriate, *even deliberate deception* of an attorney could not possibly affect a suspect's decision to waive his **Miranda** rights unless he were at least aware of the incident. *Compare* **Escobedo v. Illinois**, 378 U.S. 478, 481, 84 S.Ct. 1758, 1760, 12 L.Ed.2d 977 (1964) (excluding confession where police incorrectly told the suspect that his lawyer '"didn't want to see" him'). Nor was the failure to inform respondent of the telephone call the kind of 'trick[ery]' that can vitiate the validity of a waiver. **Miranda**, 384 U.S., at 476, 86 S.Ct., at 1629.

> Granting that the 'deliberate or reckless' withholding of information is objectionable as a matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them. Because respondent's voluntary decision to speak was made with full awareness and comprehension of all the information **Miranda** requires the police to convey, the waivers were valid.

Id. at 423-24 (emphasis added).

The Court acknowledged that numerous state courts have reached a different conclusion on this issue.[2] **Id.** at 427. The Court also acknowledged that its opinion

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[2] **Burbine**, 475 U.S. at 439, n.10 (Stevens, J., dissenting) states:

> The American Bar Association has summarized the relevant cases:
>
> 'In all but the last two of the following cases, the Court excluded the statement(s) obtained. **Elfadl v. Maryland**, 61 Md.App. 132, 485 A.2d 275, *cert. denied*, 303 Md. 42, 491 A.2d 1197, *petition for cert. filed*, 54 U.S.L.W. 3019 (U.S. June 21, 1985) (No. 85–24) (lawyer retained by defendant's wife refused permission to communicate with defendant or have him informed of counsel's presence); **Lodowski v. Maryland**, 302 Md. 691, 490 A.2d 1228 (1985), *petition for cert. filed*, 54 U.S.L.W. 3019 (U.S. June 21, 1985) (No. 85–23) (police prevented communication between lawyer and defendant and did not tell defendant that lawyer was present); **Dunn v. State**, 696 S.W.2d 561 (Tex.1985), summarized, 37 Crim.L.Rep. (BNA) 2274 (July 17, 1985) (suspect not told that his wife had retained an attorney who was close at hand); **Lewis v. State**, 695 P.2d 528 (Okla.1984) (lawyer hired by defendant's parents misdirected by sheriff throughout jail and courthouse while defendant, unaware that parents had retained attorney, was being interrogated in another part of the building); **Commonwealth v. Sherman**, 389 Mass. 287, 450 N.E.2d 566 (1983) (police failed to honor lawyer's request to be present during interrogation and failed to inform suspect of the request); **Weber v. State**, 457 A.2d 674 (Del.1983) (defendant's father and attorney hired by the father refused access to defendant; police failed to inform defendant of lawyer's presence); **People v. Smith**, 93 Ill.2d 179, 66 Ill.Dec. 412, 442 N.E.2d 1325 (1982) (associate of defendant's retained lawyer denied access to client based on fabricated claim that defendant was undergoing drug withdrawal and would not be interrogated in the near future; individual never told of lawyer's attempt to see him although he was given card lawyer left for him); **State v. Matthews**, 408 So.2d 1274 (La.1982) (attorney's request to speak with defendant refused and instruction to cease interrogation ignored); **State v. Haynes**, 288 Or. 59, 602 P.2d 272 (1979), cert. denied, 446 U.S. 945, 100 S.Ct. 2175, 64 L.Ed.2d 802 (1980) (lawyer retained by defendant's wife was told where defendant was being held but the police moved him before lawyer could offer counsel and defendant never told of lawyer's request to offer counsel); **State v. Jones**, 19 Wash.App. 850, [5]78 P.2d 71 (1978) (defendant not informed that counsel had been retained for him or that attorney had instructed client not to speak); **Commonwealth v. Hilliard**, 471 Pa. 318, 370 A.2d 322 (1977) (lawyer first misinformed that defendant was not in custody and later denied access to defendant until he confessed; defendant was not told of lawyer's presence until he confessed); **State v. Jackson**, 303 So.2d 734 (La.1974) (lawyer retained by defendant's family denied permission to see defendant who was not told of the lawyer's presence); **Commonwealth v. McKenna**, 355 Mass. 313, 244 N.E.2d 560 (1969) (lawyer retained by suspect's mother asked to see client; police misinformed lawyer of suspect's whereabouts and did not indicate that he was already being interrogated); **Blanks v. State**, [254 Ga. 420], 330 S.E.2d 575 (1985)

could be considered "at odds" with the recommendations found in the American Bar Association Standards of Criminal Justice.[3] **Id.** Finally, the **Burbine** Court noted that nothing in the opinion "disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law." **Id.** at 428.

B. State Law

As noted by the U.S. Supreme Court in **Burbine**, state law may permissibly provide stronger protections than federal law, and after review, we find that to be the case.

Louisiana Constitution, Article 1, Section 13 provides:

> (police finished taking confession before advising defendant that a lawyer was present who wished to see him); **State v. Beck**, 687 S.W.2d 155 (Mo.1985) (en banc) (lawyer obtained by defendant's mother at defendant's direction given before he was in custody; lawyer called the police and asked to be notified when defendant was arrested but at prosecutor's suggestion police did not so notify lawyer when defendant was arrested in Florida, nor did they advise defendant of lawyer's request).' Brief for American Bar Association as Amicus Curiae 4, n. 2.
>
> Since the filing of the ABA brief, still another State Supreme Court has expressed this prevailing view that statements obtained through police interference in communications between an attorney and a suspect must be suppressed. See **Haliburton v. Florida**, 476 So.2d 192 (Fla.1985) (police continued questioning suspect without telling him that an attorney retained by his sister was at the police station seeking to speak with him).

We note that since its publication, many states have rejected **Burbine** on independent state grounds. *See, e.g.,* **State v. McAdams**, 193 So.3d 824, 832 (Fla. 2016); **State v. Simonsen**, 878 P.2d 409 (Or. 1994); **State v. Reed**, 627 A.2d 630 (N.J. 1993); **Commonwealth v. Mavredakis**, 725 N.E.2d 169 (Mass. 2000); **People v. McCauley**, 645 N.E.2d 923 (Ill. 1994); **People v. Houston**, 724 P.2d 1166 (Cal. 1986); **State v. Stoddard**, 537 A.2d 446 (Conn. 1988); **Bryan v. State**, 571 A.2d 170, 176-77 (Del. 1990).

[3] At the time **Burbine** was considered, ABA Standard 5-5.1 provided:

> Counsel should be provided to the accused as soon as feasible after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest. The authorities should have the responsibility to notify the defender or the official responsible for assigning counsel whenever a person in custody requests counsel or is without counsel.

In addition, ABA Standard 5-7.1 provided:

> A person taken into custody or otherwise deprived of liberty should immediately be warned of the right to assistance from a lawyer. This warning should be followed at the earliest opportunity by the formal offer of counsel, preferably by a lawyer, but if that is not feasible, by a judge or magistrate. The offer should be made in words easily understood, and it should be stated expressly that one who is unable to pay for adequate representation is entitled to have it provided without cost. At the earliest opportunity a person in custody should be effectively placed in communication with a lawyer. There should be provided for this purpose access to a telephone, the telephone number of the defender or assigned-counsel program, and any other means necessary to establish communication with a lawyer.

> When any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully of the reason for his arrest or detention, his right to remain silent, his right against self incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel. In a criminal prosecution, an accused shall be informed of the nature and cause of the accusation against him. At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment. The legislature shall provide for a uniform system for securing and compensating qualified counsel for indigents.
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> Code of Criminal Procedure Article 230 provides:
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> The person arrested has, from the moment of his arrest, a right to procure and confer with counsel and to use a telephone or send a messenger for the purpose of communicating with his friends or with counsel.
>
> Code of Criminal Procedure Article 511 provides:
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> The accused in every instance has the right to defend himself and to have the assistance of counsel. His counsel shall have free access to him, in private, at reasonable hours.

Relying on these authorities, this court has previously ruled that when, unknown to a person in custody, an identified attorney is actually available and seeking an opportunity to render assistance to a defendant, and the police do not inform the defendant of that fact, any statement or the fruits of any statement obtained after the police know of the attorney's efforts to assist the arrested person cannot be rendered admissible on the theory that the person knowingly and intelligently waived counsel. **State v. Matthews**, 408 So.2d 1274, 1278 (La. 1982). In **State v. Matthews**, the defendant was alerted to the fact that police officers were seeking to speak with him in connection with a drowning death of his neighbor. **Id.** at 1275. The defendant immediately called his attorney who advised him not to speak to police before they could confer in the event he was arrested. **Id.** The defendant was arrested and taken to the police station. **Id.** A short while later, after a phone call from a family member, the attorney called the police station, identified himself as the defendant's lawyer, and asked to speak with the officer conducting the

interrogation. **Id.** at 1275-76. Apparently, that could not be accomplished over the phone, and the attorney went to the police station. **Id.** at 1276. According to the attorney's testimony, he waited there for 1 ½ hours. **Id.** When he was finally allowed to meet with his client and the officers, he was told that statements had already been given. **Id.**

This court determined that the refusal by police to communicate with the attorney or to inform the defendant that his lawyer was available and wanted to assist him was an "unwarranted interference" with the accused's right to the assistance of counsel. **Id.** at 1278. Because this information was withheld from the accused, the statements made during the interrogation were given without an informed waiver of the defendant's right to the assistance of counsel and to remain silent. **Id.**

The **Matthews** court made clear that "the constitutional and statutory policy of our state favors a person having the assistance of counsel during in-custody interrogation and prohibits any interference with it by governmental authorities." **Id.** at 1277. The court continued:

> Article 1, [Section] 13 of the 1974 Louisiana Constitution requires that any person arrested or detained in connection with the investigation or commission of any offense must be advised fully of the reasons for his arrest or detention, his right to remain silent, his right against self-incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel. This guarantee clearly affords a person subjected to in-custody interrogation the right to assistance of retained or appointed counsel, including the right to have counsel present during any questioning if the person so desires. By the adoption of Article 1, [Section] 13, Louisiana enhanced and incorporated the safeguards of **Miranda v. Arizona**. **In Re Dino**, 359 So.2d 586 (La.1978); L. Hargrave, The Declaration of Rights of the Louisiana Constitution of 1974, 35 La.L.Rev. 1, 41 (1974).

Id.

The **Matthews** court further explained its holding by reasoning that a person being questioned may be "indifferent to an abstract offer to call a nameless lawyer" but "may regard differently his opportunity to talk to an identified attorney actually available and willing to assist him during interrogation." **Id.** at 1278. In addition,

police cannot ignore or refuse to communicate with an attorney seeking to assist his client. **Id.** The court noted that it was not holding that "an arrested person, not yet indicted or formally charged with the crime, cannot voluntarily and after proper warnings waive consultation with counsel and make voluntary statements which will be admissible against him." **Id.** The court concluded: "No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, his rights." **Id.**

The **Matthews** decision also relied on **State v. Jackson**, 303 So.2d 734 (La. 1974). In **Jackson**, which arose before the adoption of our present Constitution, a New Orleans lawyer named Ronald Rakosky had been retained, unbeknownst to the defendant, by her family. 303 So.2d at 735-36. The defendant was in custody in Vidalia. **Id.** The attorney called the Vidalia sheriff's office and told the person who answered the phone that he was a lawyer who had been retained to represent the defendant. **Id.** at 736. The attorney requested that she not be interrogated further until he could confer with her, which would be in the next twenty-four hours. **Id.** Interrogation of the defendant began thirty minutes later. **Id.** The defendant was given her **Miranda** warnings and was questioned if she had a lawyer or if she knew anyone by the name Ronald Rakosky, to which she answered in the negative. **Id.** Thereafter, she gave a statement linking her with the kidnapping for which she had been arrested. **Id.**

The **Jackson** court did not find availing the arguments that the State did not have a duty to check on the validity of the information provided in the phone call with attorney Rakosky nor that Rakosky could not be considered counsel since he was not enrolled as counsel or participated in court proceedings. **Id.** "The constitutional rights to counsel and to remain silent upon advice of counsel cannot be evaded so simply," the court wrote. **Id.**

The court held that the interrogation was made without an informed waiver of the defendant's right to the assistance of counsel and to remain silent, and such a statement is inadmissible. It reasoned that when "counsel has been retained to represent a prisoner, the governmental authorities cannot deny the lawyer reasonable access to his client, nor may they ignore his request that he be allowed to confer with his client prior to, if not during, the interrogation." **Id.** at 737 (citing **Escobedo v. Illinois**, 378 U.S. 478 (1964); **Massiah v. United States**, 377 U.S. 201 (1964)).

C. Analysis

In reviewing these authorities, we find that **Burbine** is not controlling in this case. As noted in that decision, "[n]othing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law." **Burbine**, 475 U.S. at 428. Louisiana law indeed goes further to provide more protections than is guaranteed to defendants federally. La. Const. Art. 1, Sec. 13; La. C. Cr. P. art. 230; La. C. Cr. P. art. 511; *see also* **Matthews**, 408 So.2d at 1277.

In the case at bar, it is undisputed that "an identified attorney [was] actually available and seeking an opportunity to render assistance" to the defendant. **Matthews**, 408 So.2d at 1278. Here, Attorney Burrell arrived at a crime scene and introduced himself as an arrestee's attorney. The attorney told police officers that he wanted to speak with his client and that his client would not be making any statements.

Code of Criminal Procedure article 511 allows for counsel to have "free access" to the accused "in private" so long as the requested access is at "reasonable hours." In **State v. Serrato**, this court defined "reasonable hours" for purposes of Article 511 as anytime a "person in custody is interrogated by police officers." 424 So.2d 214, 221 (La. 1982). The State put on no evidence to show that allowing

Attorney Burrell the opportunity to speak with his client either at the scene or at the police station prior to the interrogation would be at an unreasonable time.

Another issue present in this case is whether all officers involved in the defendant's investigation are held to know of an attorney's request to speak to a client. Here, the interviewing agent testified that he was not aware that the defendant had an attorney who wished to speak to him. In **State v. Weedon**, this court ruled that a statement taken by a booking officer in violation of an agreement made at the scene of arrest between the defendant's attorneys and detectives should be suppressed. 342 So.2d 642, 645 (La. 1977). In that case, two detectives were called to the home of the defendant by the defendant's attorneys. **Id.** at 643. The defendant, with his lawyers present, gave consent to search his home, and the body of the defendant's wife was found in the trunk of a vehicle parked at the house. **Id.** The defendant was arrested and read his rights, and the defendant's attorneys instructed the detectives in the defendant's presence that the defendant was not to be questioned as to any aspect of the investigation. **Id.** at 644. The detectives asked the attorneys if the defendant could answer specific questions pertaining to personal data for the arrest register, and the attorneys agreed that he could answer these questions. **Id.** Relying upon this agreement, the attorneys did not accompany the defendant to the station for booking. **Id.** The booking officer was not one of the detectives who spoke with the attorneys and did not limit his questioning to personal data. **Id.** Specifically, he asked for the date and time of the offense, and the defendant gave an answer. **Id.** The defendant sought to suppress that statement. **Id.**

The court ruled that there was no knowing waiver by the defendant of his right to counsel and of his right against self-incrimination:

> [The defendant] answered questions asked by him at his booking in reliance upon his attorneys' advice. This advice was properly based upon the assurance by state officers that [the defendant] would only be asked to furnish the usual personal data at the time of booking ('name, rank, and serial number', as the attorney stated).

> The accused's constitutional rights against self-incrimination and to the effective assistance of counsel cannot be prejudiced by the state's failure to honor its agreement not to question the accused about the crime unless his attorneys are present. The claimed ignorance by one state officer of the agreement by other state officers cannot convert into an intelligent and knowing waiver uncounselled responses of the accused made by him perfunctorily as a result of the agreement that he would be asked only non-incriminatory statements.

Id. at 645.

In addition, this court has held that "once the defendant has expressed his desire to deal with the police only through counsel, all successive officers who deal with the defendant are held to have knowledge of this fact." **State v. Arceneaux**, 425 So.2d 740, 744 (La. 1983) (citing **State v. West**, 408 So.2d 1114 (La.1981)).

Under **Matthews**, police are required to communicate with an attorney who identifies him or herself as counsel for a person in custody. Here, the attorney was told that he could speak with his client after he was booked in Gretna. In fact, the defendant was taken to the Kenner Police Department to be questioned. Whether this misinformation was inadvertent or rose to the level of deception on the part of the police officers is of no moment. Once any officer involved in the defendant's case knew that an attorney was available and wished to render legal counsel, all successive officers should be held to have knowledge of this fact. *See* **Weedon**, 342 So.2d at 645.

In sum, we find that the officers in this case failed to provide Attorney Burrell with free access to his client before taking the defendant's statement and failed to inform the defendant of his attorney's attempts to speak with him. Thus, the defendant's statement must be suppressed as the defendant's right to remain silent and right to counsel were not knowingly and intelligently waived. The conclusion reached today is in accord with the constitutional and statutory policy of Louisiana that "favors a person having the assistance of counsel during in-custody

interrogation and prohibits any interference with it by governmental authorities." **Matthews**, 408 So.2d at 1277.

Finally, we note that in addition to **Burbine**, the court of appeal decision in this case relies on two Louisiana opinions for the proposition that the right to counsel "is the right of the client rather than the attorney, so that it may be waived by the client without counsel's participation." **French**, 79 So.3d at 1160 (quoting **Carter**, 664 So.2d at 380). These two cases are factually distinct from this case. In **French**, the issue was whether a father's assertion to police that he had retained counsel for the defendant was sufficient to invoke the defendant's right to counsel. 79 So.3d at 1159. Before the defendant in **French** made his statement, he called his father and spoke to him in front of the interrogating officer. **Id.** at 1158. The officer then spoke to the father over the phone at which point he was informed that the father had retained counsel for his son and that lawyer would be giving the officer a call. **Id.** Noting these facts, the court of appeal stated that "presumably [the defendant] was informed by his father that an attorney had been retained." **French**, 70 So.3d 1160. In **Carter**, the issue was whether the defendant's Sixth Amendment right to counsel was violated when police interrogated the defendant while in custody, outside the presence of counsel, after the defendant had made an initial appearance for purposes of setting bond and the appointment of an attorney. 664 So.2d at 370. In **Carter**, the defendant had been appointed counsel in open court, so he knew that he had an attorney at the time he gave his statement. **Id.** In these cases, it seems that the defendants were aware that counsel was available. As stated in **Matthews**, the protections outlined therein are extended only when the person in custody does not know that an attorney has been retained on his or her behalf.

The **Matthews** decision also only applies where "an identified attorney is actually available and seeking an opportunity to render assistance" to a client. 408 So.2d at 1278. In **French**, an attorney had been hired and identified by name by the

defendant's father to the police, however, this attorney had not sought to make contact with the defendant at the time of the statement. 79 So.3d at 1160. In **Carter**, there was no mention of any attempt on the part of the appointed counsel to provide legal assistance to the defendant before the interrogation began. 664 So.2d 367. In addition, because adverse judicial proceedings had commenced against the defendant in **Carter**, it was the defendant's Sixth Amendment right to counsel that was at issue. **Id.** at 372. In the case at bar, the defendant was in custody, but the State had not instituted judicial criminal proceedings, so his Sixth Amendment rights had not attached. *See* **McNeil v. Wisconsin**, 501 U.S. 171, 177-78 (1991) (The Sixth Amendment counsel guarantee is meant to protect an unaided layman at critical confrontations with the government after the initiation of the adversary process whereas the purpose of the **Miranda-Edwards** guarantee is to protect the suspect's desire to deal with police only through counsel.)

III. CONCLUSION

Under the authorities discussed herein, in cases in which an identified attorney is seeking to render assistance to a client in custody who is unaware of that fact, in order for a statement to be admissible at trial police cannot refuse to communicate with the attorney and must give the attorney free access to his or her client, and the person in custody must be told that an attorney retained on his or her behalf is available and seeking to speak to him or her. For these reasons, we have determined that the court of appeal erred in reversing the district court's grant of the motion to suppress statement. Therefore, we reverse the ruling of the court of appeal and reinstate the district court's judgment.

IV. DECREE

COURT OF APPEAL REVERSED, DISTRICT COURT JUDGMENT REINSTATED.

01/29/20

SUPREME COURT OF LOUISIANA

No. 2019-KK-00645

STATE OF LOUISIANA

VS.

DONOVAN ALEXANDER

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH CIRCUIT, PARISH OF ORLEANS

CRICHTON, J., dissents and assigns reasons:

For reasons eloquently assigned by Justice Pro Tempore Susan Chehardy, I dissent. In her dissent Justice Chehardy sensibly observes the practical concerns that the majority's ruling creates:

> To engraft onto a right that is personal the right of another party to assert that right on their behalf, even without consent or knowledge, is to introduce a level of uncertainty into a process that is now orderly and rational. If this holding is allowed to stand, the police will be required to cease investigations and questioning in a case in which a suspect has otherwise validly waived their right to counsel, simply because someone contacts them alleging that they have been hired to represent that suspect.

State v. Alexander, 19-00645, slip op. (La. 1/28/20) (Chehardy, J., dissenting).

I write separately to emphasize my view that the right to counsel under La. Const. Art. I, Sec. 13 is coextensive with, and not greater than, those rights provided by the Fifth Amendment. *See State v. Carter*, 94-2859 (La. 11/27/95), 664 So. 2d 367, 371 (finding the language in the Sixth Amendment and La. Const. Art. I, Sec. 13 show they are "similar in scope, operation and function" and that the provisions are "coextensive"). In *Carter*, this Court recognized that the conclusions of a prior case, *State v. Hattaway*, 621 So. 2d 796 (La. 1993), "were based in large part on a misapprehension of United States Supreme Court jurisprudence" and that, therefore,

this Court's analysis of a defendant's rights under Louisiana law must begin by reviewing the applicable federal jurisprudence. *Carter*, 664 So. 2d at 372.

The majority relies on this Court's decisions in *State v. Matthews*, 408 So. 2d 1274, 1278 (La. 1982) and *State v. Jackson*, 303 So. 2d 734 (La. 1974), each of which notably precede our opinion in *Carter* and the United States Supreme Court's decision in *Moran v. Burbine*, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (La. 1986). However, *Matthews* and *Jackson* are based on false reliance on *Escobedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964) for the proposition that "[w]hen counsel has been retained to represent a prisoner, the governmental authorities cannot deny the lawyer reasonable access to his client, nor may they ignore his request that he be allowed to confer with his client prior to, if not during, the interrogation." *Jackson*, 303 So. 2d at 737 (citing *Escobedo*, *supra*). Notably, the United States Supreme Court in *Burbine* expressly found otherwise and distinguished *Escobedo*, where the police conduct did interfere with voluntariness because the police incorrectly told the defendant that his lawyer "didn't want to see" him, with the police's failure in *Burbine* to inform defendant an attorney was available to represent him during interrogation. *Id*. at 423.

As was the case in *Carter*, this Court's jurisprudence in *Jackson*, *supra*, and its progeny on which the majority relies is based on a misapprehension of federal jurisprudence related to the Fifth Amendment right to counsel. Because there is no language in La. Const. Art. 1, Sec. 13 that extends the right to exercise the rights therein to any third party, including a suspect's counsel, and because the United States Supreme Court has clarified that the right to counsel belongs to the individual suspect, I would overrule *Jackson*, *supra*, and *Matthews*, *supra*, to the extent those decisions find otherwise.

I would find that "engrafting" rights of third parties into a right that is personal to this defendant, which the United States Supreme Court has declined to do,

introduces an unwarranted level of uncertainty into this process. Such "engrafting," in my view, borders on judicial activism and, as Justice Chehardy writes, presents an unworkable rule for law enforcement officers.

01/29/20

SUPREME COURT OF LOUISIANA

Nos. 2019-KK-0645

STATE OF LOUISIANA

VS.

DONOVAN ALEXANDER

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH CIRCUIT, PARISH OF ORLEANS

Chehardy, J., dissents and assigns reasons.

I would affirm the court of appeal's opinion in this case. In ***Moran v. Burbine,*** 84-1485, 475 U.S. 412 (1986), the U.S. Supreme Court definitively stated:

> The police's failure to inform respondent of the attorney's telephone call did not deprive him of information essential to his ability to knowingly waive his Fifth Amendment rights to remain silent and to the presence of counsel. Events occurring outside of a suspect's presence and entirely unknown to him can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right. Once it is demonstrated that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law. The level of the police's culpability -- whether intentional or inadvertent -- in failing to inform respondent of the telephone call has no bearing on the validity of the waivers. Pp. 475 U. S. 421-424.
>
> (b) *Miranda*'s reach will not be extended so as to require the reversal of a conviction if the police are less than forthright in their dealings with an attorney or if they fail to tell a suspect of an attorney's unilateral efforts to contact him. Reading *Miranda* to forbid police deception of an *attorney* would cut that decision loose from its rationale of guarding against abridgment of the suspect's Fifth Amendment rights. And, while a rule requiring that the police inform a

> suspect of an attorney's efforts to reach him might add marginally to *Miranda's* goal of dispelling the compulsion inherent in custodial interrogation, overriding practical considerations -- particularly the ease and clarity of *Miranda's* application -- counsel against adoption of the rule. Moreover, such a rule would work a substantial and inappropriate shift in the subtle balance struck in *Miranda* between society's legitimate law enforcement interests and the protection of the accused's Fifth Amendment rights. Pp. 475 U. S. 424-428.

This court followed that precedent in *State v. Carter*, 94-2859 (La. 11/27/95), 664 So.2d 367. Additionally, both codal articles cited by the majority in this case, La. Code of Criminal Procedure art. 230 and 511, speak solely to the arrestee's/accused's right to confer with counsel or have counsel assist *before* he is required to submit to an interrogation.

The case before us presents facts that suggest, identical to the facts in *Burbine*, that the suspect was not aware that his lawyer, called to the scene of the arrest by the suspect's girlfriend, was present and asking to speak to him. The record indicates that the attorney did inform the police when he arrived at the scene that not only had he represented the suspect in the past, but that he was actually the suspect's cousin. What the record is devoid of however, is an accurate timeline that indicates when these independent events took place, and if the presence of the attorney, and the imminent transfer of defendant to the custodial facility, were happening simultaneously, sequentially, or long after the suspect had already waived his rights and given information to the police that would inculpate him.

In light of these facts, this case presents an even less compelling problem then *Burbine* did. In *Burbine*, the suspect was already in custody, and completely unknown to him his sister had contacted the Indigent Defenders office and requested that counsel be allowed to speak to him before any interrogation. In the case at bar, the alleged attorney Dwayne Burrell was the suspects cousin, who in his words " …was always his lawyer". Defendant in this case was fully aware of the availability

of legal counsel to assist him, in the person of his cousin, yet the record reflects that at no time did he ask to speak to his attorney, or resist interrogation after he was properly read his *Miranda* warnings.

To engraft onto a right that is personal the right of another party to assert that right on their behalf, even without consent or knowledge, is to introduce a level of uncertainty into a process that is now orderly and rational. If this holding is allowed to stand, the police will be required to cease investigations and questioning in a case in which a suspect has otherwise validly waived their right to counsel, simply because someone contacts them alleging that they have been hired to represent that suspect. The investigating authorities will likewise be required to keep logs and records in order to rebut post-facto assertions that an attorney *attempted* to intercede on behalf of an unknowing suspect to stop an otherwise legal custodial interrogation. This is an unworkable rule, and this writer can envision a fact pattern in which this unrequested interference in an otherwise valid and legal police investigation could cost lives.

The *Miranda* warnings that suspects are read prior to being questioned by authorities could not be any clearer. The suspect in the case at bar had no language proficiency challenges or limitations that were developed in the record. While he may not have been made aware that an attorney was on the scene at the time of the actual arrest, he was fully aware of the existence and availability of that attorney, his cousin, and at no time did he request that assistance or ask that he be able to confer before he gave his properly Mirandized statements to police. For these reasons, I would affirm the Court of Appeals ruling in this case.