CRIMINAL PROCEDURE MANUAL

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PROJECT DIRECTOR: JAMES W. GALLMAN

ASSISTANT DIRECTOR: JOHN R. LINEBERGER

SPECIAL CONSULTANTS: WILLIAM N. CARTER
HERMAN D. McCORMICK

ADVISORS AND CONSULTANTS

GERALD PEARSON
PROSECUTING ATTORNEY

DAVID HODGES
PROSECUTING ATTORNEY

LLOYD HENRY
PROSECUTING ATTORNEY

FRANK WYNN
PROSECUTING ATTORNEY

JUDGE WILLIAM J. KIRBY
CIRCUIT JUDGE

JUDGE JOE D. VILLINES
CIRCUIT JUDGE

CARL W. BEYER
CHIEF OF POLICE

JOE HOLMES
PROSECUTING ATTORNEY

JOE PURCELL
ATTORNEY GENERAL

BILL THOMPSON
PROSECUTING ATTORNEY

ROBERT PENNINGTON
CHIEF OF POLICE

R. E. BRIANS
CHIEF OF POLICE

R. D. BENTLEY
DETECTIVE

HOLLIS SPENCER
CHIEF OF POLICE

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LAW ENFORCEMENT ACADEMY

M. R. GILL
INVESTIGATOR

COLONEL CARL MILLER
LAW ENFORCEMENT ASSOCIATION

KENNETH FOSTER
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CHARLES DEARMAN
SHERIFF

ROBERT MOORE
SHERIFF

JUDGE HARRELL SIMPSON
CIRCUIT JUDGE

COLONEL RALPH D. SCOTT
DIRECTOR, ARKANSAS STATE POLICE

JUDGE MAUPIN CUMMINGS
CIRCUIT JUDGE

JAMES MITCHUM
CHIEF OF POLICE

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PREFACE

Prior to the mid sixties, small metropolitan and rural police departments were a neglected group in most State Houses and in the Halls of Congress. Money was seldom if ever appropriated to institute training programs. Instructional material designed to assist officers in solving day to day problems was non-existent. A rising crime rate coupled with several controversial Supreme Court decisions that slapped the hands of police officers using procedures deemed to offend the Constitution, however, aroused a public demanding a return to "law and order". Congress was listening and responded with the Law Enforcement Assistance Act of 1965, marking the first major effort by the federal government to improve law enforcement at the local level.

The University of Arkansas School of Law was an early applicant for a grant under the Law Enforcement Assistance Act to produce instructional material covering the law of criminal procedure to serve as models for small metropolitan and rural police departments. It was expected that the availability of such material to guide an officer in solving day to day problems would increase the effectiveness of law enforcement and at the same time help to preserve the basic rights of defendants.

The material following does not purport to contain a discussion of all areas of criminal procedure that should be covered in an adequate police training program. For example, local court rules and departmental regulations constitute a most important part of each department's program and must be supplied locally. In addition, some departments may need officers skilled in such important procedural areas as wiretapping,

electronic surveillance, or in riot control, subjects not covered in this manual. The authors attempted to include only those topics which could prove useful to all departments in solving day to day procedural problems.

While this manual was produced as a model for use by all small metropolitan and rural police departments, it was prepared in consultation with Arkansas police and court officials and with a great deal of Arkansas case law and the Arkansas Statutes readily available. This resulted in the reader being referred to numerous decisions of the Arkansas Supreme Court and to the Arkansas Statutes Annotated as the primary authority for purported rules of law. Since the U. S. Supreme Court has placed minimum standards on such procedural requirements as the taking of a confession (Miranda), search and seizure (Mapp), stop and frisk (Terry), line-up identification (Wade), and pre-trial publicity (Sheppard), the liklihood of procedural requirements differing substantially between the states is diminished. Local adaptation of the material can be made by supplementing the manual with local references.

The writer's competence to venture into a project of this nature includes service as a prosecutor (1st Assistant U. S. Attorney in Eastern District of Arkansas), defense attorney, and law professor. The staff included individuals with special competence in investigation, prosecution and defense of cases. Valuable assistance was rendered by consultants and advisors from all phases of the Arkansas criminal justice system. While every effort was made to produce material accurate in all respects, the authors recognize that errors of fact,

law and judgment may be contained in the material for which we solely accept the blame.

One of the greatest impacts of this project was the establishment of the Criminal Procedure Institute at the University of Arkansas by the Arkansas General Assembly. Through the Institute, this manual will be published and distributed to all Arkansas law enforcement officers. In addition, a newsletter will be published monthly giving highlights of important cases and legislation. As procedural requirements change, supplements to the Manual will be prepared and delivered to the officers.

James W. Gallman
Project Director

Fayetteville, Arkansas

November 1, 1969

PRE-TRIAL PUBLICITY

PRESERVATION OF DEMONSTRATIVE EVIDENCE

- CHAIN OF CUSTODY -

ENTRAPMENT

THE LAW OF ARREST

STOP AND FRISK

THE MIRANDA WARNINGS

SEARCH WARRANTS

SEARCH OF VEHICLES

SEARCH AND SEIZURE

LINE-UP PROCEDURES

POLICE REPORT WRITING

BAIL PROCEDURE

SURVEY OF THE LAWS OF EVIDENCE

PRE-TRIAL PUBLICITY

I. Introduction

A. Necessity to Assure Public

It is absolutely necessary that the public be informed of the success of law enforcement agencies in solving crimes and apprehending those violating the law. The public has a right to a prompt report of the occurence of a crime, the solution therof, if any, and the apprehension of the culprit. It is therefore incumbent upon every law enforcement agency to provide the assurance to the public through the communications media that the laws are being enforced and that those guilty are being apprehended so that the citizenry is safe. This builds faith in law enforcement.

Despite the necessity for prompt dissemination of criminal news there are legal pitfalls that may later affect the prosecution of the crime. Therefore,

every law enforcement agency should have guidelines for the release of news in the crime field. If an agency is sufficiently large, it should have one person designated to handle all news releases. That person should be responsible for the release of all information and he should be aware of the prohibitions against releasing information that might, at a later date, hamper effective prosecution of the accused.

The release of the bare facts of a crime, including the identification of the accused, is an acceptable guideline in most cases. Where the public serves the purpose of assisting in the location of a suspect or a fugitive, the information may describe the appearance of the suspect, his habits, and his method of operation in crime.

B. Preliminary Hearings

Many times the prosecuting official decides that the defendant should receive a preliminary hearing. Ordinarily, the purpose of such a hearing is to show probable cause for binding a defendant over to the grand jury for prosecution

on a felony charge. This procedure is useful where the testimony of a witness is doubtful, conflicting or unreliable, or where the witness is subject to pressure from other sources. In such a situation the prosecutor may feel that sworn testimony should be taken in the arraigning court in order to prevent later change in the testimony. The law enforcement agency cannot control the release of information in the case of a preliminary hearing, and it is not its responsibility except in so far as it can assume that a law enforcement official testifying in such proceedings does not make extra judicial statements which might prejudice the case. The news media's use of information obtained in preliminary hearings is privileged, and while it may cause difficulty in the later successful prosecution of the case, the problem is one for the Court to handle by exercising self-restraint. Therefore, this chapter is not concerned with pre-trial publicity in preliminary hearings, but is confined to the legal considerations surrounding pre-trial publicity.

C. Danger Areas

The basic danger areas involved in the release of information may be summarized as follows:

1. Disclosure that a person has confessed to a crime;
2. Disclosure of an accused's prior record;
3. Disclosure of an accused's participation in, or refusal to participate in, the results of tests, e.g., lie detector;
4. Release of evidence including exhibits and oral testimony that may be used at the trial;
5. Release of statements, or conclusions by witnesses;
6. Disclosure of negotiations regarding either the charge to be brought or the sentence to be received.

II. Background

The Sixth Amendment of the United States Constitution states that in all criminal prosecutions an accused shall enjoy the right to a trial by an impartial jury.[1]

1. In addition to this Federal Constitutional requirement, the Arkansas Constitution, Article II §10 guarantees the right to an "impartial jury of the county in which the crime shall have been committed."

Pre-trial publicity can influence prospective jurors to the extent that they cannot render an impartial verdict. Therfore, they do not constitute an "impartial jury".[2]

In Patterson v. Colorado,[3] the United States Supreme Court explained why pre-trial publicity is so detrimental to the constitutional rights of an accused:

> The theory of our system is that the conclusion to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.

Recently, in Turner v. Louisiana,[4] the Court reiterated the negative aspect of pre-trial publicity.

> The requirement that a jury's verdict must be based upon evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.

It is evident that where certain kinds of information about a defendant's case are made public and are widely distributed prior to his trial, they may

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2. Sheppard v. Florida, 341 U.S. 50 (1951).

3. 205 U.S. 454, 462 (1907).

4. 379 U.S. 466, 472 (1965).

make it impossible to select an "impartial jury" which can render a verdict based solely on the evidence presented in the courtroom. If this situation exists, an American Bar study has shown that chances are one-in-six that a court will grant the defendant a new trial.[5]

In the past, it was almost impossible for a defendant to be granted a new trial because of pre-trial publicity. This resulted from the requirement that a defendant must make a specific showing of "actual prejudice". In other words, the defendant's lawyer had to prove to the court that pre-trial publicity had in fact denied his client the right to a fair trial by an impartial jury. The difficulty of making such a showing is exemplified by a few early United States Supreme Court decisions.

In Holt v. U.S.[6] Justice Holmes, speaking for a unanimous court, stated the rationale behind the requirement that a defendant must prove actual prejudice:

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5. American Bar Association Project on Minimum Standards for Criminal Justice, Tenative Draft (1966).

6. 218 U.S. 245, 251 (1910).

> If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.

In Stroble v. California,[7] the defendant was convicted of first degree murder. Prior to his trial, local newspapers published excerpts from a confession the defendant had made to the police. Subsequently, the whole confession became headline material. The Court, adhering to the requirement that "actual prejudice" must be shown, stated that the defendant had not sufficiently met that requirement and affirmed the conviction.

The Arkansas Supreme Court also required a defendant to show "actual prejudice". In fact, it appears that our court required something more than "actual prejudice".[8] Two Arkansas cases will illustrate this point.

In Meyer v. State[9] the defendant was convicted of violating an Arkansas Statute which dealt with the sale or manufacture of adulterated food. The defendant

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7. 343 U.S. 181 (1952).

8. Leggett v. State, 227 Ark. 393, 299 S.W.2d 59 (1957); Meyer v. State, 218 Ark. 440, 236 S.W.2d 996 (1951).

9. Supra, note 7.

produced several witnesses who testified that they had been biased against the defendant because of pre-trial publicity. Newspaper articles and pictures were introduced into evidence to show the extent of the publicity. The Arkansas Supreme Court affirmed the conviction, stating that it did not appear that there had been a "studied effort or plan by the newspapers to build up public feelings and prejudice against the defendant."

In Leggett v. State,[10] the defendant was convicted of murder and sentenced to death. The record showed extensive newspaper, radio and television pre-trial publicity concerning the defendant's case. Four jurors testified that they had formed opinions about the defendant's guilt before the trial.

The Arkansas Supreme Court, citing Meyer, supra, affirmed the conviction. The court again said that there was "no indication that the reports were biased or represented a studied effort by the news media to inflame the public."

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10. Id.

III. The Law Has Changed

Recently the law has completely changed in the area of pre-trial publicity, and the cases discussed and cited previously are not the law today! The change began with the case of Irvin v. Dowd.[11] In that case the Court decided that pre-trial publicity could have a prejudicial effect upon the rights of a defendant without a showing of "actual prejudice". Mr. Justice Frankfurter, in a concurring opinion, stated:

> How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused.

The importance of the Irvin decision was recently recognized when the United States Supreme Court, in three leading cases, dispenced entirely with the requirement that a defendant prove "actual prejudice".[12]

The first case was Rideau v. Louisiana. In that case a defendant's confession made in the local sheriff's office

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11. 366 U.S. 717, 729, 730 (1961).

12. 373 U.S. 723, 726 (1963).

was televised for twenty minutes. It was estimated that one hundred six thousand persons out of a county of one hundred fifty thousand had seen the confession. The Supreme Court reversed the conviction without even examining the voir dire of the jurors, saying that "any subsequent court preceedings in a community so ~~prevasively~~ pervasively exposed to such a spectacle could be but a hollow formality."

The significance of Rideau is that the United States Supreme Court there did away with the requirement that a defendant must show "actual prejudice". Rideau introduced the concept that certain kinds of pre-trial publicity are "inherently prejudicial". Therefore, if police officials allow newsmen to televise a defendant confessing to a crime, a later conviction will be automatically reversed. It makes no difference that the selected jurors state that they have not been prejudiced by the pre-trial publicity.

The second case in point was Estes v. Texas.[13] The defendant in that case was convicted of swindling. The case was highly publicized and the trial itself was televised. On June 7, 1964, the

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13. 381 U.S. 532 (1965).

United States Supreme Court reversed Estes' conviction. Utilizing the concept laid down in Rideau, the Court held that televising a criminal trial was "inherently prejudicial".

While the decision to televise a criminal trial is usually not within the power of police officials, the Estes decision is still appropriate to our discussion. In essence, Estes stands for the proposition that in certain instances a defendant need only show that the procedure employed by the state (which includes the acts of police officials) involves a probability that prejudice will result. If such a probability is shown, a defendant will be entitled to a new trial.

The third most recent and important case dealing with pre-trial publicity is Sheppard v. Maxwell.[14] In this highly publicized case Dr. Samuel Sheppard was convicted of murdering his wife. Sensational publicity from newspapers, radio and television attended the murder investigation and the trial process. Most of the information disseminated

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14. 384 U.S. 333 (1966).

by the news media was released by police officials. The Supreme Court, citing Rideau and Estes, reversed the conviction stating that such publicity was "inherently prejudicial".

The importance of the Sheppard decision in relation to the release of certain information by police officials to the news media cannot be over emphasized.

A policeman may release what he considers innocent material to members of the press. This material may later appear in the news services in a different context than the policeman intended. It may even become a highly publicized story, and the final result can constitute pre-trial publicity within the concept of Sheppard.

The major question which should concern police officials is what kind of information will lead to publicity which is prohibited by the rule in Sheppard? It would seem that the kind of information publicized is decisive, instead of the amount. Although in some instances, it appears that the amount of publicity or its overall accumulated effect,

is decisive. Perhaps, the most realistic answer is to say that the final determination is within the discretionary powers of each individual judge.

IV. The Danger Areas

There are certain areas in which the danger of disseminating information is more likely to be deemed "inherently prejudicial". The remainder of this discussion will be concerned with an examination of the different kinds of information which may potentially be "inherently prejudicial".

A. Before Arrest or Formal Charge

Before an arrest or formal charge there is little liklihood of prejudicial information being given. However, certain statements made by police officials during this period can and do create problems.

A statement from a policeman which identifies a person as a "prime suspect", or one who had a

"definite part" in the murder, has the potential of being "inherently prejudicial".[15] Such statements often occur in situations where police officials want to soothe a frightened or aroused community. One reason that such statements may be "inherently prejudicial", is that they have a certain ring of authenticity and authority when made by police officials. The public will place great reliance upon them. This reliance may make the later selection of an impartial jury impossible.

B. From Arrest to Trial

Between the arrest and trial the liklihood of potentially prejudicial information being released is great. Any evidence released may be considered prejudicial if it is of a type which would not be allowed by the judge in the actual trial of the case. The most common kinds of information that may be prejudicial are as follows:

1. Confessions - The most potentially prejudicial kind of information that can be released to the

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15. American Bar Association Project on Minimum Standards for Criminal Justice. Tenative Draft, p. 26 (1966).

news media is an alleged confession of an accused. A confession is the strongest evidence available against an accused, and its publication may be remembered by a prospective juror. Therefore, if the confession is later found to have been obtained under improper circumstances, jurors who have read the publication are exposed to inadmissible evidence. This evidence, because of its effectiveness and importance, will probably be "inherently prejudicial".

2. Prior Record - A second type of prejudicial information that can be released is a prior criminal record of an accused. This includes statements or information relating to previous arrests, indictments, prior convictions and any other crimes the defendant may be suspected of having committed. This kind of information is potentially prejudicial because evidence of prior arrests or indictments is generally inadmissible. A majority of cases show that similar

rules are applied to "prior convictions".[16] In almost every case in which a defendant's prior conviction has been publicized, serious questions of prejudice have been raised.[17]

3. Tests - Another major problem is caused when information is released about a defendant's performance on, or refusal to take, certain tests, such as a lie detector test. This information can be "inherently prejudicial" because both the result of and the refusal to take such tests are generally inadmissible as evidence during a trial.[18]

In Bloeth v. Denno, several newspapers reported that the defendant had "flunked" a lie detector test. The United States Supreme Court held that such information was inadmissible as evidence because of the privilege against self incrimination. Therefore,

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16. Marshall v. U.S., 360 U.S. 310 (1959). The United States Supreme Court granted the defendant a new trial because several jurors had read newspaper accounts which related the defendant's prior convictions. See also Janko v. U.S., 366 U.S. 716 (1961).

17. Irvin v. Dowd, 366 U.S. 717 (1961); Williams v. State, 162 Tex. Cir. 202, 283 S.W.2d 239 (1955); People v. Gomez, 41 Cal. 2d 150, 258 P.2d 825 (1953).

18 313 F.2d 364 (2d Cir. 1963).

jurors who had read the newspaper reports had been exposed to inadmissible evidence.

In Sheppard v. Maxwell,[19] newspapers reported that the defendant had refused to take a lie detector test and this pre-trial publicity was held to be inherently prejudicial.

4. Evidence - The release of certain kinds of information describing evidence which is to be used against the defendant may be inherently prejudicial. Tangible evidence or "real evidence" may be a gun or knife found at the scene of the crime. Intangible evidence may be oral statements or remarks by witnesses or bystanders made at the scene of the crime. The release of information concerning both tangible and intangible evidence may be inherently prejudicial if it is later determined that such evidence was obtained in violation of the defendant's constitutional right against unreasonable search and seizure.

5. Witnesses - Another kind of information which may be prejudicial concerns statements

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19. Supra, note 13.

made by witnesses to a crime. Eye witness reports are one of the most important kinds of evidence against an accused, and therefore, may be the most potentially prejudicial. A statement by an eye witness that he "saw" the defendant commit the crime, if publicized, cannot be erased from the minds of prospective jurors who have read it. If for some evidenciary reason this statement was later excluded and ruled inadmissible in court, the jurors would have been exposed to inadmissible evidence.

6. Negotiations - The last kind of material that police officials should be cautious about releasing to the news media concerns the negotiations between a defendant and the State. These negotiations usually concern an agreement between the defendant and the State whereby the defendant will plead guilty to a lesser offense in order to obtain a reduction of his sentence.

Testimony of negotiations between the State and a defendant are inadmissible as evidence in court, and publication of these negotiations by the news media would expose prospective jurors to inadmissible evidence.

V. Conclusion

When a conviction is reversed on appeal because certain pre-trial publicity is determined to be "inherently prejudicial", it is only natural that police officials feel a sense of frustration. A policeman who has spent many hours investigating a crime does not like to think that all of his work has been in vain. It would be unrealistic to assume that all potentially prejudicial publicity could be kept from reaching the news media. However, through teaching and informing individual policemen of the prejudicial nature of certain kinds of information, much of the

problem may be ~~connected~~ corrected.

Recently, there has been a concerted effort by the courts, police departments, and the Congress of the United States, to make known information concerning pre-trial publicity and its effect on the trial process.

On April 16, 1965, the Attorney General of the United States, issued a directive to the Justice Department setting out guidelines for the release of information relating to criminal proceedings. This directive advised against the release of five kinds of information:

1. Observations about defendant's character;
2. References to investigative procedures, such as fingerprints, polygraph exams, ballistic tests or laboratory tests;
3. Statements, admissions, confessions or alibis attributable to the defendant;
4. Statements concerning the identity, credibility or testimony of prospective witnesses;
5. Statements concerning evidence or argument in the case.

Certainly, this directive provides a useful and workable guideline, however

the most important factor is that individual policemen realize and understand the potential problems inherent in the release of certain information to the news media. Prejudicial pre-trial publicity is as detrimental to the work of police officials as it is to the rights of the accused.

PRESERVATION OF DEMONSTRATIVE EVIDENCE

- CHAIN OF CUSTODY -

I. Introduction

There is a kind of evidence which is called real, demonstrative or autopic evidence. The more familiar term is "demonstrative". It consists of tangible things, such as bullets, knives, clothes and blood samples, submitted for inspection, which enable the judge or jury by the direct use of their senses to perceive facts about the things in evidence.[1] Every police official, during the course of his work, has had the opportunity to understand and appreciate the value of an article or object to be used as demonstrative evidence in the prosecution of a case. It can be the deciding factor in determining guilt or innocence [2] and is generally considered the most powerful

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1. Kabase v. State, 12 So.2d 758 (C.A. Ala. 1943).

2. Virgil v. N.Y.C. & St. L.R. Co., 347 Ill. App. 281, 106 N.E.2d 749 (1952).

evidence that can be produced.[3]

II. The Legal Problems

When an article or object is sought to be introduced in evidence in court it must first be identified in order to satisfy two requirements: (1) that the object or article has the connection with the case that it is said to have; and (2) that it is unaltered or in substantially the same condition as it was when it was found. Identification in most situations is a simple procedure, established by the direct testimony of a witness.[4] However, in many cases it is not possible to establish the identity of the thing in question by a single witness.

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3. State v. Johnson 21 P.2d 813 (N.M. 1933).

4. People v. Fisher, 340 Ill. 216, 172 N.E. 743 (1930); Larmon v. State, 81 Fla. 533, 88 So. 471 (1921). Where the taking and the continous custody of the object is by one person, the testimony of that person alone is sufficient to establish identification.

Thus, when the object has passed through several hands before being produced in court, identification becomes a serious legal problem This situation commonly arises where an object is transferred from police officials to lab technicians or physicians for purposes of analysis or examination. Under such circumstances it is necessary to establish a complete and continuous chain of evidence, tracing the possession of the object to the final custodian. If one link in this chain is missing, the object is inadmissible as evidence and cannot be made the basis for testimony by an expert or police officer.[5]

This is commonly called the "chain of custody" method of identification.

III. The Chain of Custody

Where it appears that the various steps from the taking of the object until its introduction into court are not traced or shown by the evidence, the idenitfication is insufficient. A majority of courts in this country strictly adhere to the chain of custody rule and will not

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5. Joyner v. Utterback, 195 N.W. 594 (Iowa 1923).

allow important demonstrative evidence to be presented where it is shown that a particular link in the chain of custody is missing.[6]

The legal prerequisites necessary to establish the chain of custody usually require proof of four elements:[7] (1) that the object was taken from the particular locale from which it was purported to have been taken; (2) that thereafter it was properly kept; (3) that it was properly transported; and (4) that it was delivered to the person through whom it will be introduced at trial or who seeks to use it as a basis for his testimony. Each of these elements requires separate proof, and if any element cannot be established by such proof the object cannot be introduced as evidence in court.[8]

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6. 21 ALR2d 1220 (1952).

7. McCormick, Evidence §179 (1954).

In discussing these four elements particular attention will be directed to objects such as bullets, specimens and blood samples taken from a human body.

A. Taking

Using the example of a blood sample taken in a drunken driving case, the first problem one encounters is to establish a taking. It must be shown that the sample was taken from the body from which it was supposed to have been taken.

In Life & Casualty Co. v. Sanders,[9] the Arkansas Supreme Court rejected the introduction of a blood sample in evidence where the physician who supposedly performed the test stated at the trial that, although he took ninety percent of such tests, he was not positive whether that particular sample was taken by him or his partner. The

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9. 173 Ark. 362 (1927).

court held that there was insufficient proof of the element of a taking to establish the blood sample as the one taken from the defendent at the time of his arrest.

A similar result was reached in People v. Berkman.[10] There police had a surgeon remove a bullet from a wounded victim. The bullet was to be the basis of testimony by the police expert in ballistics. The court rejected the expert's testimony when it was shown that the surgeon who had removed the bullet handed it to a nurse, who handed it to the defendant, who subsequently handed the bullet to the police. The court held that there was no showing of a proper taking since the bullet produced at trial could have come from a source other than the victim's body.

These cases show that certain procedures are necessary to insure a proper taking. The following case has been cited by a majority of jurisdictions as being the best example of how to prove the fact of a taking.

In State v. Werling,[12] the defendant was prosecuted

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10. 307 Ill. 492 139 N.E. 91 (1923).

11. 13 N.W.2d 318 (Iowa 1944).

for drunken driving. Police took him to a physician who performed a blood test. The physician handed the sample to a policeman who observed the entire procedure. The sample was placed in a sealed container with the physician's name, the defendant's name, the policeman's name and the date written upon it. The court subsequently admitted the sample in evidence and stated that "the evidence showing a proper taking was particularly accurate and thorough".

B. Keeping

The various steps in the "keeping" of an object taken into custody constitute the second element or link in the chain of custody. Proof of a proper keeping depends upon the precautions taken by the various persons having custody of the object.[12]

The court will look for any indication that the object has been tampered with or circumstances which raise a reasonable suspicion of a possibility of tampering.[13]

If it is shown that certain necessary precautions were neglected or that the object was unaccounted for during

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12. State v. Thompson, 34 S.W.31 (mo. 1896).

13. Hershiser v. Chicago, B.& Q.R. Co., 102 Neb. 820, 170 N.W. 177 (1918).

a specific period of time a presumption of such suspicious circumstances arises.[14] It was held in Jones v. City of Forrest City,[15] that a urinalysis for the alcoholic content of blood was inadmissible when the specimen was left in a room for a period of time, and was not in the possession of an officer or lab technician. Since there was no "hand to hand" or direct transmittal of the specimen from the officer to another the court felt that the chain of custody was broken.

One of the necessary steps to prove the element of "keeping" is the attachment of a proper label to the object in question. In McCowan v. Los Angeles,[16] the court rejected the introduction of a blood sample in evidence as the basis of an expert's testimony to show intoxication where no one knew who labeled the sample.

A second step necessary to insure a proper keeping is that the object be sufficiently isolated.[18] It is sufficient to say that the best method of isolation would be to keep the object under lock and key until trial date. However, what constitutes proper isolation will be determined by the type of object in question and the circumstances of each case.

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14. State v. Wealtha, 292 N.W. 148 (Iowa 1940) The specimen was unaccounted for during a four-month period.

15. 239 Ark. 211 (1965).

16. 223 P.2d 862 (Calif. 1950).

17. American Mut. Liability Ins. Co. v. Industrial Acci. Comm., 178 P.2d 40 (Calif. 1947).

18. People v. Bowers, 2 Cal. Unrep. 878, 18 P. 660 (1888); State v. Cook, 17 Kan. 392 (1877).

C. Transportation

In proving that an object has been properly transported between the taking and trial, courts look for evidence that certain precautionary steps have been used during the period of trasportation. The courts vary as what particular steps are deemed necessary or essential. A study of the cases on this point indicate a split in authority between courts which reject an object as evidence where only one specific precaution has been omitted, and those which will do so only if all precautions have been omitted.

In proving the chain of custody particular emphasis should be placed upon insuring a proper container, proper labeling, and a correct mailing and addressing procedure.

In Nichols v. McCoy,[19] the court rejected a coroner's report concerning a blood sample because the prosecution had presented no evidence as to the type of container the sample was in when it was received by the coroner, It was also not shown whether it was the proper type of container for transportation and keeping of blood samples.

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19. 235 P.2d 412 (Calif. 1951).

In State v. Smith,[20] the defendant was accused of murder by poison. Part of the victim's stomach was removed and sent by a police official to an expert for chemical analysis. During the course of its transportation the official left the specimen unguarded in his car in an "unsealed container" for a short period of time. The court admonished the police official at the trial for his careless disregard of the necessary precautions to insure proper transportation.

The proper procedure for transporting objects was discussed in State v. Van Tassel.[21] A specimen (portion of victim's stomach) was delivered by police officials to an express agent for shipment to a chemical analysist. The container was sealed and labeled with the name of the police officers, the express agent and the date. It was properly addressed by the express agent and the whole procedure was witnessed by the police officers. The express agent made a record of the custody of the object until it was mailed.

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20. 225 S.W. 455 (Mo. 1920).

21. 103 Iowa 6, 72 N.W. 497 (1897).

D. Delivery

The element of delivery in the chain of custody involves proof that the object in question was properly delivered to an expert for examination or to various police officials for keeping until trial. The problem is one of identity. Evidence that the object was properly labeled at the time of delivery will satisfy the proof requirements of this element.[22]

IV. Conclusion

Police officials cannot be too cautious when handling demonstrative evidence. A missing link in the chain of custody will render it inadmissible in court. Each element in the chain must be shown by separate proof. This usually means that a witness must be available to testify that proper procedures were followed each time the object was transferred from one place or person to another. Therefore, since the number of witnesses may be very large in a particular case, police officials should record each

22. State v. Werling, 13 N.W.2d 318 (Iowa 1944).

transaction and the names of those persons involved so that they may later be called as witnesses. If this procedure is followed, the chain of custody, in most instances, will be complete.

ENTRAPMENT

I. Introduction

Entrapment occurs when an officer of the law entices or lures a person into committing a crime for the purpose of prosecuting him.[1] A defendant in such a case can raise such enticement as a complete defense to the prosecution.

By definition, entrapment is the conception and planning of an offense by an officer and the procurement of its commission by one who would not have committed a crime except for the trickery, persuasion, or fraud of the officer.[2] Entrapment occurs only when the criminal

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1. State v. Hochman, 2 Wis.2d 410, 86 N.W.2d 446 (1957); State v. Marquardt, 139 Conn. 1, 89 A.2d 219 (1952).

2. People v. Bernal, 174 Cal. App. 2d 777, 345 P. 2d 140 (1959); Sorrells v. United States, 287 U.S. 435 (1932).

conduct is the product of the "creative activity" of law enforcement officials.[3]

II. Reason for the Defense

It is contrary to public policy and established criminal law principles to punish a man for committing a crime which he would not have committed if a law enforcement officer had not persuaded him to do so.[4] The following statement of Judge Sanborn in Butts v. United States,[5] has been quoted as an example of this premise:

> The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.

3. Sherman v. United States, 356 U.S. 369 (1958).

4. Sorrells v. United States, 287 U.S. 435 (1932).

5. 273 Fed. 35, 38 (8th Cir. 1921).

The judicial system cannot be used to aid a scheme for the creation of a crime by those charged with the duty of deterring and preventing crime.

III. Mere Deception not Forbidden

Officers often use strategy designed to apprehend those engaged in criminal activity and which involves a certain amount of deception. It may consist of an officer posing as a narcotics user in order to purchase drugs from a pusher and subsequently using the drugs as evidence to convict the pusher. Deception as such, is not a forbidden act.[6]

In United States v. Perkins,[7] an informer for a treasury enforcement agent met a known drug addict and asked the addict to get him some narcotics. After they talked about the price, the addict drove away in an ~~automobile~~ automobile with money given him by the informer. Thirty minutes later the addict was back and handed the informer several capsules of heroin.

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6. State v. Marquardt, 139 Conn. 1, 89 A2d 219 (1952).

7. 190 F.2d 49 (1951).

At this point the addict was arrested and at his trial he raised the defense of entrapment. The Court held against him saying that the addict was a ready and willing seller who was caught while carrying out a criminal plan of his own conception.

A similar result was reached in United States v. Hughey.[8] There, two detectives of the Alcohol and Tobacco Tax Division of the Treasury Department had suspected that Hughey was selling untaxed whiskey. They placed the house occupied by Hughey under surveillance, and during the course of their vigil they saw ten or twelve men enter and leave. One of the detectives went into the house and bought a bottle of whiskey, after which Hughey was arrested and charged with failure to pay a retail liquor tax required by the Fedreal Government. The Court found that the conduct of the detective did not amount to entrapment. The criminal design originated with the accused and the officer did nothing more than provide a means by which the accused could commit a crime which he was otherwise ready, willing, and able to commit.

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8. 116 F. Supp. (W.D. Ark. 1953).

IV. Persuasion is Forbidden

While deception is not forbidden, any acts of persuasion on the part of the officer to induce an unwilling suspected criminal of fulfilling a criminal act are forbidden.[9] For example, in Sorrells v. United States, a prohibition agent suspected Sorrells of selling untaxed whiskey and posed as a tourist visiting near Sorrells' home. On a Sunday night the agent and three other residents of the area who knew Sorrells, went to his house. The men became engaged in a conversation and Sorrells and the agent discovered that they had served in the same Division in World War I. After an extended discussion the agent asked Sorrells for some whiskey and Sorrells stated that he did not have any. A second request for whiskey was made without result. The conversation then reverted to the men's war experiences until the agent made a third request to purchase whiskey. At that point, Sorrells left his house and after a few minutes returned with a one-half gallon jug of whiskey and sold it to the agent for five dollars. Sorrells was immediately arrested and at his trial the agent testified that he was the first and only person among those present who said anything about buying

9. 287 U.S. 435 (1932).

whiskey. The Supreme Court held that the agent's conduct constituted entrapment. Sorrells had no intention or predisposition to commit a crime until the idea was placed in his mind by the agent. The agent had in fact created the crime for the sole purpose of prosecution.

V. Affording an Opportunity not Forbidden

There is no entrapment when officers of the law or their agents merely afford an opportunity or a facility for the commission of a crime.[10] Even though an officer knows that a crime is about to be committed and does nothing to prevent or deter its commission, such action does not constitute entrapment so long as the officer did not implant the original intent in the mind of the accused. An illustration is provided in Dye v. State,[11] where the owner of a restaurant saw two ~~men~~ men "casing" his premises and immediately notified the police. Two officers were stationed inside the building. The two suspects returned and broke and entered the building, at which time the officers apprehended the two men and charged them with burglary. The court held that the conduct of the officers was not entrapment.

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10. Osborn v. United States, 385 U.S. 323 (1966).

11. 90 Ga. App. 736, 84 S.E.2d 116 (1954).

The accused had formed their own intent and design to commit the offense and it was not entrapment to merely afford them an opportunity to complete the planned act.

VI. Entrapment v. Consent

In crimes such as larceny, in order to obtain a conviction, the prosecution must prove that goods were taken by the accused without the consent of the owner. Occasionally the owner of property will suspect an employee or some other individual of stealing his property and will lay a trap to catch him. So long as the owner does not encourage or solicit the commission of a crime against his property, he can test a suspect by providing him with an opportunity to complete a planned act. But if the owner actually solicits the commission of an offense against his property, the accused can raise the defense of "consent of the owner" as a complete defense to the alleged crime. While the defense of "consent" in such a situation is similar to the defense of entrapment, they are separate in that entrapment arises only when an officer of the law solicits or encourages the commission of an offense.

The defense of consent of an owner is illustrated in People v. Frank.[12] There the owner of a fur shop suspected one of his employees, "A", of stealing furs. The owner approached another employee, "B", and asked him to participate in the plan to catch "A". At the request of the owner, "B" told "A" that he needed certain furs to finish a coat that he was making at his home. "B" further gave "A" three furs and "A" attempted to take them out of the store under his topcoat. The owner happened to be waiting at the door and captured "A" as he was leaving. The court held that the owner consented to the taking of his property and that "A" was not guilty of larceny. The owner had encouraged and solicited the commission of a crime against his property and violated the policy of preventing rather than aiding in the commission of a crime.

VII. Conclusion

A police officer may act as a decoy and furnish a person who has already conceived a criminal plan with an opportunity to commit the offense. The officer may even aid in the

12. 27 N.Y.S.2d 227 (1941).

commission of a crime in so far as he does so in order to secure evidence necessary to obtain a conviction. When the conception of the crime lies with the officer, however, and the accused has had no previous intent to commit the offense, the accused can raise entrapment as a complete defense.

Once the defendant has raised the defense of entrapment, the court will look toward his reputation to determine his predisposition to commit the offense.[13] Courts also look to the conduct of the officer to see whether it was consistent with good law enforcement techniques and public policy.[14]

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13. Sherman v. United States, 356 U.S. 369 (1958).

14. Kadis v. United States, 373 F.2d 370 (1st Cir. 1967).

THE LAW OF ARREST

I. Introduction

The word "arrest" is derived from the French word "arreter" meaning to stop and stay.[1] It is generally defined in the area of criminal law as the taking of a person into custody in order that he may be forthcoming to answer for the commission of an offense.[2]

The law of arrest is a highly complex procedure that must be followed in bringing an accused to justice. An officer can no longer overlook technicalities, but rather he must know, understand and follow each required step in order to make a lawful arrest. One small and seemingly insignificant omission of the proper procedure may eventually result in the acquittal of an accused.

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1. Alter v. Paul, 101 Ohio 139, 135 N.E.2d 73 (1955).

2. American Law Institute, Code of Criminal Procedure, Sec. 18.

II. Elements of Arrest

A lawful arrest is generally effectuated by the concurrence of three basic elements:

(1) An officer must intend to place a suspect in restraint and deprive him of his liberty.[3]

(2) The suspect must be informed of the officer's intent to arrest him, and of the offense for which he is being arrested,[4] if he did not commit the offense in the officer's presence.[5] This requirement is unnecessary when an officer is met with a demonstration of force at the outset.[6]

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3. Ark. Stat. Ann. Sec. 43-416 (Repl. 1964).

4. Ibid.; Milton v. State, 198 Ark. 875, 131 S.W. 2d 948 (1939).

5. Bookout v. Hanshaw, 235 Ark 924, 363 S.W.2d 125 (1962).

6. Milton v. State, 198 Ark 875, 131 S.W.2d 948 (1939).

(3) An officer must place the suspect in restraint of his liberty or take him into custody if he voluntarily submits.[7] The restraint may be actual or constructive and an officer is not required to place his hands upon the suspect to satisfy this requirement.[8]

A review of these elements will reveal that the mere stopping of a motorist for purposes of issuing a traffic ticket or checking an operator's license does not constitute an arrest.[9]

III. Power to Arrest

The general power to arrest is vested in peace officers although other designated individuals including private persons have limited arrest power.[10] Peace officers are defined as sheriffs, constables, coroners, jailers, marshals and policemen.[11] Enforcement Agents of the Alcoholic Beverage Control Board are also granted all powers,

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7. Ark. Stat. Ann. §43-412 (Repl. 1964).

8. Perkins, Elements of Police Science, 227 (1942),

9. Toledo v. Lowenberg, 99 Ohio App. 165, 131 N.E.2d 682 (1965).

10. Ark. Stat. Ann. §43-402 (Repl. 1964).

11. Ark. Stat. Ann. §43-406 (Repl. 1964).

rights and protection afforded peace officers including the power to make an arrest.[12] State Police are designated conservators of the peace with general arrest powers and statewide jurisdiction.[13]

More limited powers of arrest are vested in Game Wardens who are not considered peace officers,[14] but are granted the power to make arrest for violation of game and fish laws.[15] Wardens of municipal waterwork systems have authority to arrest or apprehend any person they have reason to believe has violated the provisions regulating the use of municipal waterworks systems, the boating laws of the state, or the rules and regulations of the Board of Health pertaining to the protection of municipal water supplies.[16] These wardens do not, however, have the authority to make arrests for violations of the Game and Fish laws.[17] Security officers of the educational, charitable, correctional, penal and other public institutions owned and operated by authority of state law may

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12. Ark. Stat. Ann. §48-1319 (Repl. 1964).

13. Ark. Stat. Ann. §42-407 (Repl.-1964).

14. Anderson v. State, 213 Ark. 871, 213 S.W.2d 615 (1948).

15. Ark. Stat. Ann. §47-121 (Repl. 1964).

16. Ark. Stat. Ann. §19-4237 (Supp. 1967).

17. Supra. Note 16.

be appointed and ~~designed~~ designated by their respective governing boards as peace officers. As such, they possess all the powers of city police and county sheriffs if such powers are required for the protection of their respective state institutions.[18]

A. Peace Officers

A peace officer may arrest:

(1) When he has obtained a warrant.

(2) When he does not have a warrant if the offense is committed in his presence, or if he has reasonable grounds for believing that the person whom he is about to arrest has committed a felony.[19]

An officer may also arrest when a magistrate or judge orally orders him to arrest someone who has committed a public offense in the magistrate's or judge's presence.[20]

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18. Ark. Stat. Ann. §7-112 (Supp. 1967).

19. Ark. Stat. Ann. &43-403 (Repl. 1964).

20. Ark. Stat. Ann. §43-405 (Repl. 1964).

B. Geographical Jurisdiction

The power granted to a peace officer generally extends only to that area which he is employed to protect. That is the geographical area within which he has jurisdiction. When an officer goes outside his jurisdiction, he normally has no more authority to make an arrest than a private citizen.

There are two exceptions when an officer may make an arrest outside his geographic area of employment. First, when a valid criminal summons or warrant of arrest is directed to an officer, he can serve it in any county in the state.[21] Secondly, when an officer is in fresh pursuit of a person who has committed an offense in his presence, or one whom he reasonably believes to have committed a felony, the officer may pursue the person and arrest him in any county in the state.[22] Fresh pursuit does not necessarily mean instant pursuit, but it does mean pursuit without unreasonable delay.[23]

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21. Ark. Stat. Ann. §43-411 (Repl. 1964).

22. Ark. Stat. Ann. §43-501 et. seq. (Repl. 1964).

23. Ark. Stat. Ann. §43-513 (Repl. 1964).

Such pursuit must start in the officer's own area of jurisdiction, and the officer must stay "hot" on the suspect's trail.

The normal geographical area of an officer's jurisdiction varies and is dependent upon whether he is a State Policeman, City Policeman, Sheriff, etc. Officers of the State Police have statewide jurisdiction.[24] The jurisdiction of city policemen and town marshals is confined to the city or town limits.[25] A sheriff and his deputies have jurisdiction to act anywhere within the county. A constable's jurisdiction is confined to his township.[26]

C. Private Citizens

A private citizen has the power to make an arrest when he has reasonable grounds for believing that the person whom he is about to arrest has committed a felony.[27]

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24. Ark. Stat. Ann. §42-407 (Repl. 1964).

25. Ark. Stat. Ann. §19-1701 (Repl. 1956).

26. Ark. Stat. Ann. §26-210 (Repl. 1962).

27. Ark. Stat. Ann. §43-404 (Repl. 1964).

However, a private person will not be justified in making an arrest unless a felony has in fact been committed.[28]

IV. Arrest With a Warrant

Ordinarily an officer armed with an arrest warrant needs no other authority to arrest the person named therin. The officer should read the warrant closely, in order to determine whether he is a member of the class designated to execute it, and whether the warrant is "fair on its face". "Fair on its face" means that the warrant appears regular in all respects and nothing indicates that it was issued without authority.[29] An officer who executes a warrant that is not fair on its face is subject to civil liability for false imprisonment.[30]

An arrest warrant directed to a person or class of persons, (sheriffs, constables, coroner, etc.) creates a privilege only in the one who comes within the description, and unless the sheriff, or to whomever the

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28. Carr v. State, 43 Ark. 99 (1884).

29. Trammell v. Russellville, 34 Ark. 105 (1879).

30. Smith v. Fish, 182 Ark. 115, 30 S.W.2d 223 (1930).

warrant is directed, deputizes another for purposes of arresting under the warrant, no one else can execute it.[31] For example, a constable cannot make an arrest on a warrant directed to a sheriff unless he is deputized, and a private citizen cannot serve an arrest warrant unless he is deputized.[32]

V. Arrest Without a Warrant

An officer's authority to make an arrest without a warrant is dependant upon a number of factors, including whether the offense committed was a felony or misdemeanor; whether the offense was committed in the officer's presence; and whether the officer had reasonable grounds for believing that a particular person committed the offense.

A. Felonies

An officer may arrest an alleged felon without a warrant when he has "reasonable grounds" to believe that the person about to be arrested committed the felony.[33]

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31. Winkler v. State, 32 Ark. 539 (1877).

32. Jett v. State, 151 Ark. 439, 236 S.W. 621 (1922).

33. Ark Stat. Ann. §43-403 (Repl. 1964).

This rule is simple to state but difficult to apply because the concept of "reasonable grounds" (discussed below) is an illusive one.

1. Offense Committed in Presence of Officer

When a felony is committed in the presence of an officer, he has the authority to make an arrest immediately. There is no need to get an arrest warrant because the element of "reasonable grounds" is satisfied by the facts before the officer.

2. Offense Not Committed in Presence of Officer

When an offense constituting a felony has been committed outside the presence of an officer, an arrest can still be made without a warrant so long as the officer has reasonable grounds to believe that the person about to be arrested committed the offense. This is true even though the officer may have had time to procure a warrant before making the arrest.[34] As a practical matter, however, a warrant should always be obtained when there is reasonable time to obtain one.

B. Misdemeanors

An officer is authorized to arrest a misdemeanant only when he has a valid arrest warrant or when the offense is

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34. United States v. Rabinowitz, 339 U.S. 56 (1950).

committed in his presence.[35] Even though an officer has reasonable grounds to believe a particular person committed a misdemeanor, if the offense was not committed in his presence or he does not have a warrant, he acts at his peril in ~~attempting~~ attempting to make an arrest.[36]

1. Offense Committed in Presence of Officer

If a misdemeanor is committed in the officer's presence, he has the authority to make an arrest immediately. Sometimes, however, it is difficult to determine whether the acts constituting the offense are committed "in the officer's presence". For example, if an officer hears loud screams coming from a dark alley two blocks away, is an offense being committed "in his presence"?

As a general rule, if an officer does not have actual knowledge of the acts constituting the offense at the time of their commission, the offense is not being committed in his presence.[37] For example, assume that a known bootlegger wearing a jacket with a bulge in it walks by an officer and the officer suspects but does not know that untaxed whiskey is concealed under the jacket. An

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35. Johnson v. State, 100 Ark. 139, 139 S.W. 117 (1911).

36. Edgin v. Talley, 169 Ark. 662, 276 S.W. 591 (1925); Perkins v. City of Little Rock, 232 Ark. 739, 339 S.W.2d 859 (1960).

37. Hoppes v. State, 70 Okla. Crim. 179, 105 P.2d 433 (1940); Smith v. Hubbard, 253 Minn. 215, 91 N.W.2d 756 (1958).

offense is not being committed in the presence of the officer even if the bulge is, in fact, an untaxed bottle of whiskey.[38] The facts which are subsequently disclosed do not determine whether an offense was being committed in an officer's presence. The officer must be aware through his own knowledge that an offense is being committed.

The offense does not have to be committed in the actual sight of the officer or in the same room to be committed in his presence.[39] If the offense is committed within his hearing, knowledge or understanding, the requirment is met.[40] It has been held that when an officer is aware, through any of his senses, that an offense is being committed, he may make an arrest.[41]

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38. United States v. Sipes, 132 F. Supp. 537 (E.D. Tenn. 1955).

39. In Re Cytacki's Estate, 293 Mich. 55, 292 N.W. 489 (1940).

40. Supra. Note 39.

41. People v. Bradley, 152 Cal. App., 527, 314 P.2d 108 (1957); Romans v. State, 178 Md. 588, 16 A.2d 642, cert. denied 312 U.S. 695 (1940); State v. McDaniel, 115 Or. 187, 237 P. 373 (1925); Clark v. State, 117 Tex. Crim. Va. 1014, 170 S.E. 734 (1933).

The most obvious question then becomes, why was the alleged bootlegger previously mentioned not committing an offense revealed through one of the senses of the arresting officer? In that case the court pointed out the subtle distinction involved, a distinction which every officer should understand and retain. It is useful to quote the opinion here, to wit:

> All the officer observed in the present case was a man crossing a public street, wearing a jacket which appeared to have something inside in addition to the wearer. The officer was interested not in public offenses in a general sense, but in an offense against the federal internal revenue laws, specifically traffic in tax-unpaid whiskey. All the evidence he had that such offense was being committed in his presence was a bulge in the pedestrian's jacket. The only one of his five senses relied on to detect crime in the given case at the given moment was his sense of sight. What was seen was a bulge in a jacket. The cause of the bulge was not revealed. It could have been a live pig, picnic ham, loaf of bread, or any one of countless other things. Yet what was hidden behind the impenetrable capacity of the jacket and denied to the sense of sight was imaginatively revealed not merely as whiskey, but as whiskey of the unpaid variety. Not in the officer's sensory presence, but only in his metaphysical presence, was a public offense being committed. By the present state of the law it is only the former which lends validity to an arrest without a warrant.[42]

When a public offense is committed in an officer's presence, he should make the arrest as soon as possible as a long delay can affect the legality of the arrest. Thus it has been held that the power to arrest without a

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42. Supra. Note 38, p. 540.

warrant for an offense committed in an officer's presence ceases when the offense ceases and order has been restored.[43] Where, however, a person called for help upon seeing a fight, but by the time help arrived the fight was over, the subsequent arrest without a warrant was deemed to be legal.[44]

2. Offense Not Committed in Presence of Officer

An officer is not authorized to arrest a misdemeanant for an offense not committed in the officer's presence, unless an arrest warrant is first obtained. If an arrest is made by an officer in breach of this rule, the person arrested can still be convicted,[45] but the officer is subject to possible civil proceedings for an illegal arrest.

C. Probable Cause

The term "probable cause"is defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant

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43. State v. Lewis, 50 Ohio St. 179, 33 N.E. 405 (1893).

44. Ogulin v. Jeffries, 121 Cal. App.2d 211, 263 P.2d 75 (1953).

45. State v. Chapin, 17 Ark. 561 (1856); Elmore v. State, 45 Ark. 243 (1885); Perkins v. City of Little Rock, 232 Ark. 739, 339 S.W.2d 859 (1960).

a cautious man to believe the accused to be guilty.[46] A mere general suspicion is not enough where there is not foundation in fact or insufficient circumstances on which to rest a belief that a person is guilty of a felony.[47] On the other hand, an officer does not have to be armed with prima facie evidence of guilt, nor does the person arrested have to later be found guilty, in order for there to be "probable cause" at the time of arrest.[48] The line is drawn at a point somewhere between these two extremes, and all the circumstances of each particular case must be weighed to see where the line lies.[49]

Probable cause is determined on the basis of the particular situation and circumstances known by the officer making the arrest at the time of the arrest.[50] Thus an arrest will not be justified by evidence that a

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46. Carroll v. United States, 267 U.S. 132 (1925); Henry v. United States, 361 U.S. 98 (1959); Brinegar v. United States; 338 U.S. 160 (1949); Beck v. Ohio, 379 U.S. 89 (1964); Jackson v. State, 241 Ark. 850, 410 S.W.2d 766 (1967); Russell v. State, 240 Ark. 97, 398 S.W.2d 560 (1967).

47. Terrones Rios v. United States, 364 U.S. 253 (1960).

48. United States v. Keown, 19 F. Supp. 639 (W.D. Ky. 1937).

49. Brinegar v. United States, 338 U.S. 160 (1948); United States v. Theriault, 268 F. Supp. 314 (W.D. Ark. 1967).

50. United States v. Volkell, 251 F.2d 333 (2d Cir., 1958) cert denied 356 U.S. 962.

subsequent search discloses,[51] or by any other knowledge acquired after the arrest is made.[52] The final outcome has no bearing on the issue as the court looks at the facts and circumstances presented to the officer at the time he made the arrest.

When one officer has probable cause to make an arrest without a warrant, he may delegate the actual making of the arrest to another officer, and the arrest will be justified on the basis of the first officer's knowledge.[53] In Williams v. United States[54] the court stated:

> We avail ourselves of the occasion to make it clear that in a large metropolitan police establishment the collective knowledge of the organization as a whole can be imputed to an individual officer when he is requested or authorized by superiors or associates to make an arrest. The whole complex of swift modern communications in a large police department would be a futility if the authority of an individual officer was to be circumscribed by the scope of his firsthand knowledge of facts concerning a crime or alleged crime.
>
> When the police department possesses information which would support an arrest without a warrant in the circumstances, the arresting officer, if acting under orders based on that information, need not personally or firsthand know all the facts.

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51. Henry v. United States, 361 U.S. 98 (1959).

52. Johnson v. United States, 333 U.S. 10 (1948).

53. People v. Harvey, 319 P.2d 689 (Cal. 1958); People v. Peah, 29 Ill.2d 343, 194 N.E.2d 322 (1963); Com v. McDermott, 197 N.E.2d 668 (Mass. 1964).

54. 308 F.2d 326, 327 (1962).

It should be apparent that there is no exact formula for determining probable cause. However, since courts look to the facts of each case, some of the factors which have been found to be most significant in determining whether "probable cause" existed should be examined.

1. Information from Informers:

A sizable percentage of the people who furnish information to law enforcement officers acquire their knowledge through a direct association with the criminal element of the community. Some are engaged in criminal activity at the time they transmit the information. Their reasons for tipping an officer vary. Some are sincere in wanting to see that justice is done, while others merely want to put a competitor out of business or get even with an associate. This merely points out the fact that many informants are not the most reliable members of the community. Nevertheless, they furnish an important source of knowledge.

One of the first problems that an officer encounters upon receiving information from an informer is whether the information is sufficiently reliable to justify an arrest. Even paid informants sometimes fabricate stories in order to receive money. If the informant has been known by the officer to be reliable, and there are no circumstances which might cast doubt on the information

received, an officer may act upon it and the requirement of probable cause will be satisfied.[55] The information received must indicate that a felony and not a misdemeanor has been, is being, or will be committed, since an officer cannot arrest a misdemeanant on probable cause alone. Even though the informant is unknown to the officer, if the information received is subject to proof through observation and is sufficiently accurate to lead the officer directly to the suspect, probable cause has been held to have been established.[56] The emphasis is upon the reliability of the information received, but an officer must be prepared to explain the circumstances supporting such reliability when called upon to do so.

2. Eyewitnesses and Victims

When an eyewitness or victim identifies a particular person as having committed a felony, an officer may arrest the one accused without a warrant and the element of probable cause will be satisfied if there are no factors casting doubt upon the reliability of the eye-witness

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55. Draper v. United States, 358 U.S. 307 (1959).

56. Costello v. United States, 324 F.2d 260 (9th cir. 1963).

or victim.[57] It was held in Grau v. Forge,[58] that an arrest without a warrant was justified when a fifteen year old boy who appeared sincere and credible pointed out an individual and alleged that he had tried to rob him. It has also been held that an officer may rely upon information contained in a telephone message from an eyewitness detailing the circumstances of a crime.[59]

The officer must use a different test of reliability when evaluating the reasons for making an arrest on information supplied by an eyewitness, and that which has been supplied by an informer. An eyewitness is often unknown to the officer; he has had no prior dealings with the police or sheriff's department, and his reputation for truthfulness is not subject to ready confirmation. Generally an officer cannot take time to check these factors because the accused will escape. In such a situation, an officer is justified in relying on the information received so long as he does not detect a motive

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57. Hammitt v. Straley, 338 Mich. 587, 61 N.W.2d 641 (1953); Bushardt v. United Invest. Co., 121 S.C. 324, 113 S.E. 637 (1922).

58. 183 Ky. 521, 209 S.W. 369 (1919).

59. Commonwealth v. Phelps, 209 Mass. 396, 95 N.E. 868 (1911).

on the part of the witness or the victim for making false accusations, and he further observes that a crime has been committed.[60]

3. Past Record

A look at the past record of an individual frequently leads to an investigation of his possible connection with a felony and may ultimately lead to an arrest, but a prior record alone is not enough to constitute probable cause.[61] For example, a long record of illegal liquor sales is not in itself enough to indicate that a person is presently engaged in the same misconduct.[62] In Beck v. Ohio,[63] the U.S. Supreme Court stated:

> ...to hold that knowledge of ...(a person's past record) consituted probable cause would be to hold that everyone with a previous criminal record could be arrested at will.

An officer should not overlook the importance of the criminal record file for investigative purposes but the evidence it contains can only be used with

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60. Hammitt v. Straley, 338 Mich. 587, 61 N.W.2d 641 (1953).

61. Beck v. Ohio, 379 U.S. 89, 97 (1964).

62. Odinetz v. Budds, 315 Mich. 512, 24 N.W.2d 193 (1946).

63. Supra. Note 61.

supporting evidence to determine whether there are reasonable grounds for arresting a suspect.

4. Failure to Protest

When a suspect is detained and questioned about his prior activities, an officer is often confronted with either a violent protest of innocence, or a blank wall of silence. In determining whether an arrest should be made in either situation, it is often easy for an officer to infer guilt from a lack of protest, Such an inference, however, is without merit in determining whether probable cause existed and will be given no weight. The Supreme Court of the United States in United States v. Dire,[64] stated the rule in these words:

> ... one has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistence in proper cases. But courts will hardly penalize a failure to display a spirit of resistence or holding of futile debates on legal issues in the public highways with an officer of the law.

Hence the failure of a suspect to protest his detention and questioning should not be considered in determining whether there was or is probable cause to arrest.

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64. 332 U.S. 581, 594 (1948).

5. Seriousness of Crime

An important question is whether the amount of evidence necessary to show probable cause varies with the seriousness of the crime committed. In other words, may a suspected murderer be arrested on a lesser probability of guilt than a suspected thief? The question is difficult to answer since court decisions on the matter are vague. A court seldom says that the nature of a crime affects the requirement of probable cause, but a close reading of the opinions indicates that such may actually be considered.

The reason stated by authorities in support of considering the seriousness of the crime is that the community needs more protection from a violent offense, and then its commission justifies a greater interference with individual liberties. Mr. Justice Jackson expressed this position in his dissenting opinion in Brinegar v. United States.[65] Although discussing the legality of a search, the rationale would equally apply to the legality of an arrest, as he states:

> 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 indis-

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65. 338 U.S. 160, 183 (1949).

> criminating 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. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of burbon and catch a bootlegger.

The Restatement of Torts, §119, Comment j (1934), takes the same position:

> The nature of the crime committed or feared, the chance of the escape of the one suspected, the harm to others to be anticipated if he escapes and the harm to him if he is arrested, are important factors to be considered in determining whether the actor's suspicion is sufficiently reasonable to confer upon him the privilege to make the arrest.

In concluding how an officer should determine whether probable cause exists, the following summary is offered. A delay in making an arrest may endanger the public by permitting a criminal to remain at large. It may also permit a criminal to escape and leave an officer with insufficient identification to seek him out and bring him to justice. On the other hand innocent people are entitled to protection from an invasion of their privacy and to protection from the bad effects that an arrest casts upon their reputation. An officer is caught within this dilemma and must make decisions, sometimes in a matter of seconds, that a prosecutor and defense attorney have days and sometimes weeks to decide. It would be helpful to have concrete rules to guide an officer in making his determination of whether probable cause exists, but it is also recognized that such rules may be impossible in today's complex society, and that each situation must be judged by its own circumstances.

VI. The Arrest Warrant

A warrant of arrest is a written order directing the arrest of a person or persons, and issued by a court, body, or official having authority to issue warrants.[66]

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66. Restatement, Torts, §113.

A. By Whom Issued

The following officials are authorized by statute to issue warrants of arrest:

1. Magistrates, who are defined as judges of city or police courts, mayors, and justices of the peace.[67]

2. Clerks of municipal courts when given the power to do so by their judges.[68]

3. Coroners, under certain circumstances.[69]

4. State National Guard Military Tribunal Judges.[70]

5. Circuit Court Judges (bench warrants).[71]

6. County Court Judges in bastardy proceedings.[72]

7. Any Chancellor, judge of a Supreme or Superior Court, Circuit Judge, mayor, justice of the peace, or

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67. Ark. Stat. Ann. §43-406, 44-108 and 44-203 (Repl. 1964).

68. Ark. Stat. Ann. §22-751 (Repl. 1962).

69. Ark. Stat. Ann. §42-314 (Repl. 1964).

70. Ark. Stat. Ann. §11-607 (Repl. 1956).

71. Ark. Stat. Ann. §43-1112 (Repl. 1964).

72. Ark. Stat. Ann. §34-702 (Repl. 1962).

any other magistrate when an offense is committed against the United States.[73]

B. Duty to Issue

It is the duty of a magistrate to issue a warrant for the arrest of a person charged with the commission of a public offense when, from his personal knowledge or from information given him under oath, the magistrate is satisfied that there are reasonable grounds for believing the charge.[74]

When a municipal court clerk is authorized by his judge to issue arrest warrants, it is his duty to issue such warrants when the prosecuting attorney or city attorney files with him an information charging an individual with a crime. It is also the clerk's duty to issue an arrest warrant when an individual files with him an affidavit charging another individual with a crime, provided such affidavit has been approved by the prosecuting attorney or city attorney.[75]

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73. 18 U.S.C.A. §3041 (1967).

74. Ark. Stat. Ann. §43-408 (Repl. 1964).

75. Ark. Stat. Ann. §22-752 (Repl. 1962).

It is the duty of a coroner to issue a warrant of arrest when an inquisition reveals that there are reasonable grounds to believe that a particular individual is guilty of murder or manslaughter.[76]

A justice of the peace is under a duty to issue an arrest warrant when the prosecuting attorney files with him an information under oath charging an offender with a crime.[77]

A Circuit Judge may issue a bench warrant or a summons when an indictment is found and the defendant is not in custody or on bail.[78] He is not required, however, to issue such warrants or summons upon the filing of an information,[79] and it is not mandatory[80] even in cases involving indictments.

In bastardy actions, a county judge may issue a warrant for the arrest of the alleged father,[81] after a woman resident of the county has filed her complaint on oath alleging that the man is the father of her child.

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76. Ark. Stat. Ann. §42-314 (Repl. 1964).

77. Ark. Stat. Ann. §43-409 (Repl. 1964).

78. Ark. Stat. Ann. §43-1103 (Repl. 1964).

79. Beckwith v. State, 238 Ark. 196, 379 S.W.2d 19 (1964).

80. Nixon v. Grace, 98 Ark. 505, 136 S.W. 670 (1911).

81. Ark. Stat. Ann. §34-702 (Repl. 1962).

C. Grounds for Issuance

The Fourth Amendment of the U.S. Constitution requires arrest warrants to be made on certain occasions:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.

Although this Constitutional requirement is generally considered to apply to searches and seizures, it is equally applicable to warrants of arrest.[82]

Usually if the person authorized to issue the warrant is satisfied that there are reasonable grounds for believing the charge, either from his own personal knowledge or from information given him on oath, he has a duty to issue the warrant.[83] In determining whether reasonable grounds exist, a magistrate has the power to summon any person and examine him under oath to ascertain the name of the offender, so long as the magistrate is satisfied that a felony has actually been committed.[84]

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82. Giordenello v. United States, 357 U.S. 480 (1958).

83. Ark. Stat. Ann. §43-408 (Repl. 1964).

84. Ark. Stat. Ann. §43-410 (Repl. 1964).

"Reasonable grounds" means that a magistrate has information received from creditable sources that induces him to believe, as a man of ordinary caution, that the accused is guilty of the crime charged.[85]

D. Forms

A warrant of arrest must contain the following elements:[86]

1. In general terms name or describe the offense charged.
2. Designate the county in which the offense was committed.
3. State the officer or class of officers who may execute it.
4. Name the person to be arrested.
5. Specify where the person arrested is to be taken.

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85. Wipple v. Gorsuch, 82 Ark. 252, 101 S.W. 735 (1907); Kansas & Texas Coal Company v. Galloway, 71 Ark. 351, 74 S.W. 521 (1903); Hitson v. Sims, 69 Ark. 439, 64 S.W. 219 (1901); Keebey v. Stifft, 145 Ark. 8, 224 S.W. 396 (1920).

86. Ark. Stat. Ann. §43-407 (Repl. 1964).

The following is a sample of an arrest warrant:

The State of Arkansas

To any Sheriff, Constable, Coroner, Jailer, or policeman of the State of Arkansas:

It appearing that there are reasonable grounds for believing that A.B. has committed the offense of larceny in the county of Pulaski, you are therefore commanded, forthwith, to arrest A.B. and bring him before some magistrate of Pulaski County, to be dealt with according to law.

Given under my hand the ___ day of ___, 19___.

C.D.

Justice of the Peace
for Pulaski County

Summon as witnesses E.F. and J.K.

It is not necessary that the warrant be identical to the sample just given so long as the necessary particulars are stated.[87]

The following is an example of the coroner's warrant:[88]

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87. Ark. Stat. Ann. §43-407 (Repl. 1964).

88. Ark. Stat. Ann. §42-315 (Repl. 1964).

State of Arkansas,
County of _____.

The State of Arkansas to the constable of any township in said county of _____.

It having been found by an inquisition taken the ____ day of _____, 19___, before _____ coroner of the county aforesaid, upon view of the body of _____, that the said _____ came to his death (here set forth the time, cause, manner and circumstances, as in the inquisituon). You are therefore commanded to take the before named _____, wheresoever he may be found, and bring _____ before the said coroner, to be dealt with according to law.

Witness, the hand of said Coroner, the _____day of _____, 19___.

_____Coroner.

A bench warrant issued by a Circuit Judge upon the return of an indictment may be in the following form:[89]

Pulaski Circuit Court - State of Arkansas
To any Sheriff, Coroner, Jailer, Constable, Marshal, or Policeman in the State:

You are hereby commanded forthwith to arrest A.B., and bring him before the Pulaski Circuit Court, to answer an indictment found in that Court against him for felony (or misdemeanor, as the case may be) or, if the Court be adjourned for the term, that you deliver him to the custody of the jailer of (Pulaski) County.

Given under my hand and seal of said court this ___ day of _____, 19___.

C.D., Clerk, P.C.C.

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89. Ark. Stat. Ann. §43-1105 (Repl. 1964).

E. Territorial Validity

A peace officer to whom a criminal summons or warrant of arrest is directed has the authority to serve or execute the same in any county in the state.[90] For example, if the Sheriff of Washington County is holding a valid warrant for the arrest of a person hiding in Madison County, the county line is no barrier to service by the Washington County Sheriff. As a practical matter, however, this seldom happens.

F. How Long Valid

There are no statutes limiting the period of time that an arrest warrant is valid. If the person named therein cannot be found, it does not expire. There are, however, certain statutes which set forth the period of time within which the prosecution of an accused must be commenced and after which the State will forever be barred from commencing an action for the crime alleged.[91] These are as statutes of limitation.

In all capital cases there is no limitation on the length of time that may intervene between the commission

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90. Ark. Stat. Ann. §43-411 (Repl. 1964).

91. Ark. Stat. Ann. §43-1601 et. seq. (Repl. 1964).

of the offense and the prosecution.[92] A person charged with first degree murder may be tried fifty years or even one-hundred years after the occurence.

In all other felony cases except embezzlement (the time starts running when an embezzlement is discovered), an indictment must be found or an information filed within three years after the commission of the offense.[93]

For misdemeanor offenses, an indictment must be found or an information filed within one year after the commission of the offense.[94]

An exception arises when a person commits a crime in one state, then flees to another state. In this instance the statute of limitation is tolled and the time the accused spends outside the state where the crime was committed is not counted toward the running of the limitation period.

So long as the arrest warrant is issued within the limitation period, the prosecution of the named individual is deemed to have begun, regardless of when the warrant is served. Hence a warrant for the arrest of an accused bank robber issued two years and eleven months after the commission of the robbery is valid even though it may not be executed until five years after the robbery was committed.

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92. Ark. Stat. Ann. §43-1601 (Repl. 1964).

93. Ark. Stat. Ann. §43-1602 (Repl. 1964).

94. Ark. Stat. Ann. §43-1603 (Repl. 1964).

G. Officer's Return

An officer who has executed an arrest warrant must make a written return on the warrant stating the time and manner of execution, then deliver the warrant to the magistrate before whom the arrested person is to be brought. When an officer is authorized to take bail and does so, he should deliver the warrant and the bail bond to the magistrate or the clerk of the court in which the arrested person is bound.[95] If the arrest is made in a different county from that in which the alleged offense has been committed and bail is given, an officer may transmit the warrant and bail bond by mail to the magistrate or clerk instead of delivering it personally.[96]

VII. Use of Force in Making Arrest

An officer attempting to make a lawful arrest is privileged to use all the force which is reasonably necessary to

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95. Ark. Stat. Ann. §43-421 (Repl. 1964).

96. Ark. Stat. Ann. §43-422 (Repl. 1964).

effect an arrest and to prevent harm to himself,[97] but he is never privileged to use unnecessary force.[98] The amount of force that is reasonably necessary varies with each particular case and depends upon the facts perceived by the officer at the time he acts.[99] It has been said that an officer must determine the amount of force that is necessary and a jury will determine the amount of force that was necessary. The officer's problem is that he cannot stop and consult a lawyer or impanel a jury while he is apprehending a criminal, to see if he is using undue force.[100]

Before using any amount of force an officer should be reasonably certain that he has authority to make the arrest and that he has informed the person about to be arrested why he is being apprehended. An officer who uses force to effect an unlawful arrest may be found guilty of assault and battery, false imprisonment or even murder or manslaughter, depending upon his acts.[101] In addition, a person who is being unlawfully arrested, is entitled to

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97. Stevens v. Adams, 181 Ark. 816, 27 S.W.2d 999 (1930).

98. Ark. Stat. Ann. §43-413 (Repl. 1964).

99. Gillepsie v. State, 69 Ark. 573, 64 S.W. 947 (1901).

100. Machen, The Law of Arrest, (Institute of Government, U. of N.C. 1950).

101. Robertson v. State, 53 Ark. 516, 14 S.W. 902 (1890); Johnson v. State, 58 Ark. 57, 23 S.W. 7 (1893).

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resist by all reasonable means.

A. Self-Defense

An officer has a right to protect himself while he is effecting a lawful arrest and may use force, even deadly force, if it is reasonably necessary to save himself from death or great bodily harm.[102] This right is no greater than the right of self-defense, and it cannot be raised as a defense if the officer has failed to act with due care and circumspection.[103]

In any criminal prosecution the burden is on the state to prove the accused guilty of the crime charged. But after making such proof, the burden shifts to the accused to prove the circumstances which excuse or justify his acts.[104] This means that the officer must show that his act was the result of an apprehension on his part, that his life was in peril,[105] and that the action taken was

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102. Ark. Stat. Ann. §41-2237 (Repl. 1964).

103. Deatherage v. State, 194 Ark. 513, 108 S.W.2d 904 (1937).

104. Ark. Stat. Ann. §41-2246 (Repl. 1964); ibid.

105. Supra. Note 104.

reasonably necessary.[106]

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106. In Johnson v. State, 100 Ark. 139, 139 S.W. 1117 (1911), an officer went to Duncan's house seeking to arrest a man named Luster for a misdemeanor that had been committed earlier in the day. Duncan ran out the back door of the house and the officer fired three shots into the ground trying to stop Duncan but Duncan kept going. Finally, Duncan stopped at a fence and pulled a gun and pointed it at the officer. The officer pulled his own gun and shot Duncan, killing him. The officer was found guilty of manslaughter and the court said at page 142:

> The appellant (officer) did not observe (the) statutory requirements in attempting to make the arrest. He was not even armed with a warrant for the deceased. It was not shown that the deceased and Luster bore any resemblance to each other. Appellant did not attempt to inform Duncan, supposing him to be Luster, that he had a warrant for him or of his intention to arrest him. He did not say to him, when he saw that Duncan had drawn his pistol, that his only purpose was to arrest him for carrying a pistol. The conduct of appellant, in short, amounted to criminal carelessness, and was wholly unjustifiable in an officer of the law, and was such as to imply malice on the part of appellant. It showed a reckless disregard of human life, and what the jury might have considered a wicked and abandoned disposition. As an officer of the law, his supreme desire should have been to protect, rather than to take the life of, the one whom he was seeking to arrest. His own evidence shows that he shot at deceased because he supposed that the deceased was intending to shoot him, but he made no effort, by peaceful means and as the law directs, to withdraw from the encounter which he had brought on.

B. Arrest For Misdemeanor

In making an arrest or preventing the escape of a misdemeanant, an officer can use physical force if necessary to effect . . arrest or to prevent an escape but he is not privileged in either case to take the life of the accused or even inflict great bodily harm upon him unless it is done in self-defense.[107] An officer does not have a right to kill a misdemeanant, even to overcome resistance, unless such action is necessary to save the officer from death or great bodily harm. This rule is said to be justified because the security of people and property is generally not endangered by a misdemeanant being at large since a misdemeanant is in the eyes of the law a minor offender.[108]

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107. Edgin v. Talley, 169 Ark. 662, 276 S.W. 591 (1925); Thomas v. Kinkead, 55 Ark. 502, 18 S.W. 854 (1892); Whitlock v. Wood, 193 Ark. 695, 101 S.W.2d 950 (1937).

108. Pearson, The Right to Kill in Making Arrests, 28 Mich. L. Rev. 957, (1930).

C. Arrest for Felony

In arresting one accused of committing a felony, an officer has a right to use all reasonable force, including deadly force, if it is reasonably necessary to overcome resistance or to prevent escape.[109] But even in felony cases an officer can face criminal charges or civil liability if he uses excessive force.

The decision of whether to use deadly force is one of the most momentous decisions that a police officer must make. Whether it is justified generally turns on three factors:

1. Was the arrest lawful?

2. Was it necessary for the self-defense of the officer?

3. Were all other lesser methods of overcoming resistance exhausted?

When an officer's life is not in danger, he can only justify the use of deadly force by showing that all other reasonable methods failed and such force was used as a last resort.

Unlike an arrest for a misdemeanor, where the "force necessary" never includes killing or inflicting great bodily harm except in cases of self-defense, an officer may have to use such force to arrest a felon in order to

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109. Green v. State, 91 Ark. 510, 121 S.W. 727 (1909).

protect the community from a dangerous criminal remaining at large. The commission of a felony is the commission of a serious offense and the safety and security of society requires the speedy apprehension of a person committing such an offense. An officer should always weigh the circumstances, however, before employing deadly force as his action will be justified only if it is reasonably necessary.

Even though an officer may be justified in using deadly force to catch a fleeing felon, he must consider other circumstances. In Deatherage v. State,[110] an officer recognized a wanted felon in a crowded shopping center. The suspect resisted the efforts of the officer to place him under arrest and attempted to escape. The officer fired two shots at the suspect in an attempt to stop him. The shots missed the suspect and injured several innocent bystanders. The court held that even though the officer was justifeed in using deadly force in preventing the escape of the suspected felon, he was not justified in doing so in a crowded shopping center. The court further stated that the duty to stop a suspect "by any means reasonably necessary" must be exercised along with the duty to act with reasonable prudence to avoid injury to innocent persons. The care exercised must correspond

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110. 194 Ark. 513, 108 S.W.2d 904 (1937).

with the danger involved and a greater degree of caution is required when firing upon an escaping prisoner in a public street.

VIII. Arrest by Private Person

A private person may make an arrest when he has reasonable grounds for believing that a person has committed a felony,[111] if a felony has in fact been committed.[112]

The primary distinction between the power of an officer and the power of a private person to make an arrest without a warrant, is that, should the one arrested be found not guilty, the private citizen will not be justified unless an offense was in fact committed by someone, while an officer will be justified even though no offense was committed. The rule may be explained by the following examples:

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111. Ark. Stat. Ann. §43-404 (Repl. 1964).

112. Carr v. State, 43 Ark. 99 (1884).

1. A felony has been committed. X, a private person, has reasonable grounds for believing that Y is the person who committed the offense. X may arrest Y in good faith and will not be subject to liability for doing so.

2. A felony has been committed. X dislikes Y and arrests him as the felon. X did not have reasonable grounds to suspect Y. X is not justified in making the arrest.

3. A felony has not been committed. X has reasonable cause to believe that Y committed a felony. X would not be justified in arresting Y, because X is a private person and may not arrest even on reasonable cause if there has not been a felony committed by someone.

A magistrate or judge may orally order a private person to arrest anyone committing a public offense in the magistrate's or judge's presence.[113] This rule of law not only gives a private person authority to make an arrest but, curiously, has been construed as taking away the common law authority of justices of the peace to make an arrest.[114]

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113. Ark. Stat. Ann. §43-405 (Repl. 1964).

114. Herdison v. State, 166 Ark. 33, 265 S.W. 84 (1924).

Although a private person may make an arrest upon the verbal order of a magistrate, he has no authority to execute a warrant of arrest unless he is deputized.[115] Hence the mere action of an officer leaving a warrant with one individual for service on another will not give the individual authority to make an arrest under the warrant.

An officer making an arrest may orally summons as many people as he deems necessary to aid him in making the arrest, and anyone failing to obey the summons without reasonable cause can be found guilty of a misdemeanor.[116] This statute not only confers authority upon a private person to make an arrest in such a situation, it also places a duty upon him to do so.

There is no direct statutory authority, but many court decisions have stated that a private person may arrest a felon to prevent his escape.[117] The person who seeks the authority of this rule must, however intend to arrest the felon and nothing more. Hence, a man who pursued and overtook the person who hit his brother in the head with a rock, did not have authority to avenge

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115. Jett v. State, 151 Ark. 439, 236 S.W. 621 (1922).

116. Ark. Stat. Ann., §43-415 (Repl. 1964).

117. Rayburn v. State, 200 Ark. 914, 141 S.W.2d 532 (1940); Allen v. State, 117 Ark. 432, 174 S.W. 1179 (1915).

the injury to his brother although he did have authority to arrest the man.[118]

IX. Persons Exempt from Arrest

Article I, Section 6 of the United States Constitution provides that United States Senators and members of the U.S. House of Representatives are privileged from arrest in all cases except treason, felony and breach of the peace during their attendance at sessions of their respective houses and in going to and returning from the same. At first glance this exemption appears to protect such parties from arrest for minor offenses such as traffic violations. But the United States Supreme Court has held that the term "breach of the peace" means all criminal offenses and that the exemption only applies to civil arrest.[119] Members of Congress are therefore not exempt from criminal arrest.

Article 5, Section 15 of the Arkansas Constitution along with Section 43-301 and 43-306 of the Arkansas Statutes provides that members of the General Assembly,

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118. Martin v. State, 97 Ark. 212, 133 S.W. 598 (1911).

119. Williamson v. United States, 207 U.S. 425 (1907); Long v. Ansell, 293 U.S. 76 (1934).

clerks, sergeant-at-arms and doorkeepers are privileged from arrest in all cases except treason, felony or breach of the peace during sessions of the General Assembly and for fifteen days before and after the termination of each session. The Arkansas Supreme Court has not yet interpreted this provision so it is uncertain whether the provision applies to both civil and criminal arrest. A further provision of Article 5, Section 15,[120] appears to grant a complete exemption from both civil and criminal arrest, however, to members of the General Assembly for any speech or debate they may conduct in either House.

Article XI, Section 3 of the Arkansas Constitution grants an exemption from arrest to members of the State Militia in all cases except treason, felony, and breach of the peace during their attendance at muster, election of officers and in going to and returning from the same. In Reed v. State,[121] this exemption was raised as a defense, but the court found that the accused had waived the exemption, and it did not decide whether the exemption applies to criminal as well as civil arrest.

A similar exemption is granted to voters during their attendance at elections and in going to and returning

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120. Supra. Note 119.

121. 103 Ark. 391, 147 S.W. 76 (1912).

from the same,[122] to all persons in the Senate Chambers or House of Representatives during their sitting, and to all persons in any court of justice during the sitting of the court.[123]

It should be noted, however, that any members of the exempted group can be served with a summons, or notice, to appear after the exemption expires.[124]

If an individual comes into Arkansas or is passing through the state in obedience to a summons directing him to attend and testify in a criminal prosecution in either Arkansas or another state he is not subject to arrest in connection with any matters which arose before his entrance into Arkansas under the summons.[125] And an officer traveling with a prisoner in his charge is not subject to arrest on his route of travel.[126]

X. Procedure After Arrest

After making an arrest in obedience to a warrant,

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122. Ark. Stat. Ann., §43-303, 306 (Repl. 1964).

123. Ark. Stat. Ann., §43-305, 306 (Repl. 1964).

124. Ark. Stat. Ann., §43-306 (Repl. 1964).

125. Ark. Stat. Ann., §43-2007 (Repl. 1964).

126. Ark. Stat. Ann., §43-424 (Repl. 1964).

an officer should proceed with his prisoner as directed by the warrant.[127] The warrant constitutes full authority for the officer to transport his prisoner by ordinary routes of travel from the place of arrest to the place of incarceration.[128] The jailer of any county through which the officer passes with his prisoner is required to keep the prisoner at the officer's request, and redeliver him upon demand.[129] Should the prisoner escape, the officer has full authority in any county in the state to require any person to aid him in recapturing the prisoner.[130]

If the offense charged is a misdemeanor, the person arrested has a right to immediately give bail for his appearance on a day to be named in the bail-bond, before the magistrate who issued the warrant, or before the court having jurisdiction to try the offense. The sheriff or other officer making the arrest can be authorized by

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127. Ark. Stat. Ann. §43-417 (1964).

128. Ark. Stat. Ann. §43-423 (Repl. 1964).

129. Ark. Stat. Ann. §43-425 (Repl. 1964).

130. Ark. Stat. Ann. §43-424 (Repl. 1964).

the justice issuing the warrant to take bail by making an indorsement on the warrant to that effect.[131] If the person arrested gives bail for his appearance, the officer taking the bail must fix the date of appearance within five days of the arrest, unless the arrest is made in a different county from that in which the offense was committed. Should the arrest be made in a different county, one day must be added for each twenty miles distance.[132]

When a bench warrant is issued for an offense which is bailable, an indorsement should be make on the bench warrant substantially as follows:[133]

> The defendant is to be admitted to bail in the sum of ___ dollars, and if he desires to give bail, it may be taken by the sheriff of the county in which he is arrested, or the sheriff of _____(the issuing) county.

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131. Ark. Stat. Ann. §43-418 (repl. 1964).

132. Ark. Stat. Ann. §43-419 (Repl. 1964).

133. Ark. Stat. Ann. §43-1106 (Repl. 1964).

When a person is arrested under a coroner's warrant and he requests bail, he should be taken before some person authorized to take bail in the county where the arrest is made, if the offense is bailable.[134] if the offense is bailable.

XI. Civil (and Criminal) Liability of Officers

An officer cannot escape liability for his wrongful conduct merely because he is an official of the state. He is in the position of an ordinary citizen and as such must act with due regard for the rights of others. However, an officer is different in one respect. He is at times placed in a dangerous position and during those times he has been authorized to act with more force or in a manner different from an ordinary citizen. It must be remembered, however, that this special authority exists only under special circumstances.

A. False Arrest or Imprisonment

If an officer, acting without lawful authority, effectively prevents the freedom of movement of an individual, the officer can be liable in at least two ways:

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134. Ark. Stat. Ann. §42-316 (Repl. 1964).

1. The officer can be convicted in a court of law for the criminal violation of false imprisonment, and become subject to a fine of not more than $500.00, and possible imprisonment for not more than one year.[135]

2. The officer can be sued by a private citizen for the civil wrong (called a "tort") of false imprisonment and found liable for a money judgment.[136] The amount of damages the individual can recover is based on how much he suffered while imprisoned, which may include such considerations as illness, shame and humiliation, and loss of reputation in the community.[137]

When an officer wrongfully makes a person stay where he does not want to stay, or makes him go where he does not want to go, a false imprisonment takes place.[138] False imprisonment consists of the confinement of a person for any length of time, against the person's will and

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135. Ark. Stat. Ann. §41-1601, 1602 (Repl. 1964).

136. St. Louis I.M.&S.R. Co. v. Wilson, 70 Ark. 136, 66 S.W. 661 (1902).

137. Missouri Pac. R.Co. v. Yancy, 178 Ark. 147, 10 S.W.2d (1928).

138. Floyd v. State, 12 Ark. 43 (1851).

against the law.[139] It is an action committed against the personal freedom and liberty of the individual.

In order to prove false imprisonment, it is not necessary that malice be shown. All that is required is that the person suing be imprisoned forcibly and unlawfully.[140] Once the arrest has been proven, the burden is on the officer to show that he made the arrest under proper authority.[141] It is necessary to show malice, however, before an injured party can collect punitive damages.[142]

An officer may be liable even though the criminal charge is truthful. For example, if a warrant is defective and fails to state an offense an officer can be found liable even though the accused is found guilty of the charge arising out of the arrest. The violation arises out of the officer's wrongful use of authority and in no way depends

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139. St. Louis I.M. & S. Ry. Co. v. Wilson, 70 Ark. 136, 66 S.W. 661 (1902).

140 Akin v. Newell, 32 Ark. 605 (1877).

141. Wells v. Adams, 232 Ark. 873, 340 S.W.2d 572 (1960); Missouri Pacific R.R. Co. v. Yancey, 180 Ark. 684, 22 S.W.2d 408 (1929).

142. Ibid.; Kroger Grocery & Baking Co. v. Walles, 208 Ark. 1063, 189 S.W.2d 361 (1945).

on the guilt or innocence of the injured party. It is no defense that the arrest would have been valid had it been conducted properly.[143]

On the other hand, an officer is protected from liability if the warrant is "fair on its face" even though it may later develop that the warrant was wrongfully issued.[144] By "fair on its face" it is meant that the warrant appears regular in all respects with no indication that it was issued without authority.[145]

The fact that an officer is proceeding with a vaiid warrant does not always protect him against liability for false imprisonment. When a warrant is valid, but the officer arrests the wrong person, he may be found civilly liable.[146]

He may also be liable when he illegally detains a person after an arrest. An officer has the duty to take the arrested person before a court or magistrate within a reasonable time, and failure to do so

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143. Noe v. Meadows, 229 Ky. 53, 16 S.W.2d 505 (1929).

144. Cambell v. Hyde, 92 Ark. 128, 122 S.W.2d 99 (1909).

145. Trammell v. Russellville, 34 Ark. 105 (1879).

146. Restatement, (Second) of the Law of Torts, §125 (1965).

can result in civil liability.[147] The fact that the officer is following his superior's orders does not excuse him from liability for an unnecessary detention.[148] However, if an arresting officer turns a suspect over to a desk sergeant who in turn presents him to the magistrate, the arresting officer is relieved of responsibility.[149] A person causing a wrongful imprisonment is liable for all natural and probable consequences thereof.[150]

B. Excessive Force

The need to use a reasonable amount of force in making an arrest is recognized in all states.[151]

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147. Leger v. Warren, 62 Ohio St. 500, 57 N.E. 506 (1900).

148. Ibid.

149. Alvarez v. Reynold, 35 Ill Supp.2d 54, 181 N.E.2d 616 (1962).

150. Ross v. Kohler, 163 Ky. 583, 174 S.W. 36 (1915).

151. Stevens v. City of St. Helens, 321 Ore. 1, 371 P.2d 686 (1962).

The officer has the burden of proving, if the question is raised at trial, that he did not use unreasonable force in making the arrest.[152]

The reasonableness of an officer's action is generally a question of fact for a jury to decide. The jury will be instructed by the judge that the officer's action should be examined from the viewpoint of a reasonably careful officer at the time and place of the alleged injury. It would be unfair to use hindsight in judging an officer's action.[153]

In performing its duty, a jury may consider whether the arrest was for a felony or a misdemeanor. In arresting a felon, an officer may use all the force necessary to overcome resistance, including the use of deadly force,[154] but the force used must always be an unavoidable necessity without any will or design.[155]

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152. Orr v. Walker, 228 Ark. 868, 310 S.W.2d 808 (1958); Stevens v. Adams, 181 Ark. 816, 27 S.W.2d 999 (1930).

153. Breese v. Newman, 179 Neb. 878, 140 N.W.2d 805 (1966); Oliver v. Kasza, 116 Ohio App. 398, 188 N.W.2d 437 (1962).

154. Ark. Stat. Ann. §41-2237 (Repl. 1964).

155. Ark. Stat. Ann. §41-2240 (Repl. 1964).

In the case of a misdemeanor, an officer may defend himself from bodily harm and may use enough force to overcome the force he encounters.[156] He can even use deadly force for self-protection, but deadly force may never be used in the capture of a misdemeanant. The law considers it better to let a petty offender go free than to take his life or inflict great bodily injury upon him.[157]

In addition to considering whether a felony or misdemeanor was committed, a jury may consider other factors, including whether an alternative course of conduct which would not have lead to the injury, or to such a serious injury, was available to the officer. If such an alternative course of action could reasonably been taken, an officer may be liable for the damages he caused.[158]

Another factor which a jury may consider is the difference in the size of the injured party and the size of the officer. If the injured party is a large man of known physical strength, a smaller officer may be justified in using more force than normal.[159] A jury may also consider whether

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156. Thomas v. Kinkhead, 55 Ark. 502 (1892).

157. Supra. Note 156.

158. Chaudoin v. Fuller, 67 Ariz. 144, 192 P.2d 243 (1948); Graham v. Ogden, 157 So.2d 365 (La. App. 1963).

159. Defrene v. Rodrique, 38 So.2d 511 (La. App. 1949).

the injured party was armed with a deadly weapon,[160] and whether the resistance employed by the injured party was violent or non-violent.[161]

Liability can result where an officer injures a person without any intent to do so. Such is the case where an officer shoots at a tire on an automobile attempting to prevent an escape, but the bullet richochets and injures the escaping party.[162]

C. Invasion of Privacy

The Fourth Amendment to the U.S. Constitution guarantees the right of a person to be secure in his "person, house, papers, and effects against unreasonable searches and seizures...." Such protection may not be invaded by either the federal or state governments.[163] The reasonableness of a search is discussed in depth elsewhere in this manual, however a few of the major points will be noted here.

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160. Burvick v. New York, 15 Misc.2d 478, 181 N.Y.S. 2d 572 (1959).

161. Hood v. Brinson, 30 Ill. App.2d 498, 175 N.E.2d 300 (1961); Crouch v. Richards, 212 Ark. 980, 208 S.W.2d 460 (1948).

162. Edgin v. Talley, 169 Ark. 662, 276 S.W. 591 (1925).

163. Mapp v. Ohio, 367 U.S. 643 (1961).

If a warrant is illegal on its face, whether it is an arrest warrant or a search warrant, the officer executing it can be found civilly liable.[164] If a search warrant is valid on its face, however, no civil liability attaches even if the articles sought are not found.[165]

Courts will not protect officers who execute legal warrants in an unreasonable manner,[166] and an officer who causes an improper warrant to be issued by his own fraud and misdoing is subject to liability.[167]

An officer is liable if he acts beyond the law, even if acting under orders of a superior. For example, he can be liable if pursuant to orders he frisks everyone coming under police suspicion in an effort to deter an increasing crime rate.[168]

An officer may not enter a home without permission or without a search warrant. If he does he is considered a trespasser and liable for damages. The same rule applies to searches of a person when he is not incident to a lawful arrest.

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164. Banfill v. Byrd, 122 Miss. 288, 84 So. 227 (1920).

165. 24 R.C.L. 699.

166 Buckley v. Beaulieu, 104 Me. 56, 71 A. 70 (1908).

167. Bull v. Armstrong, 48 So.2d 467 (Ala. 1950).

168. Mason v. Wrightson, 205 Md. 481, 109 A.2d 128 (1954).

There are certain defenses which an officer has to free himself from liability. For example, if consent for a search is freely given, such consent is a complete defense.[169] It has been held, however, that consent is not freely given if the person to be searched is not informed of his ~~consittutional~~ constitutional rights.[170]

D. Defamation

The right of a person to be free from having defamatory statements made about him is considered a fundamental right. Many statements made by an officer during the course of his duty would be deemed slanderous except for certain privileges given him. A complete (absolute) privilege exists when two officers are speaking to each other so long as there is an official purpose behind their statements such as seeking aid or advice in an official capacity.

In the majority of states the rule is that in order to be privileged, a defamatory statement made by an officer must be warranted by the public well-being it seeks to serve.[171] Usually a statement made in the course of duty is privileged, but

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169. Fennemore v. Armstrong, 29 Del. 35, 96 A. 204 (1915).

170. State v. De Koenigswarter, 54 Del. 388, 177 A.2d 344 (1962).

171. Restatement of Torts §598 (1934).

the utterance must be made within the scope of the officer's duty and made for the specific purpose of discharging his duty.[172]

Of course there is no liability for defamation if an officer only makes the defamatory statement to the person alleged to have been defamed, as there has been no publication in such instances. To have a publication, the words must be heard by some third party.[173]

An officer is not normally liable for damages if he distributes pictures of wanted men,[174] but he should not exceed the scope of his duties.[175] Even an error in judgment will not excuse an officer's action when someone is injured thereby.

E. Negligent Operation of Vehicle

An officer is required to operate his official vehicle in a reasonably safe manner. The circumstances sometimes require, however, that an officer perform

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172. See, Hallen, Excessive Publication in Defamation, 16 Minn. L. Rev. 160 (1931).

173. Prosser, Law of Torts, 785 (3 ed. 1964).

174. State v. Clausmier, 154 Ind. 599, 57 N.E. 541 (1900).

175. Carr v. Watkins, 227 Md. 578, 177 A.2d 841 (1962).

tasks which an ordinary citizen never encounters. When an emergency exists, an officer may be authorized to take risks (particularly as to the speed of travel) which, if taken by an ordinary driver would amount to negligence.[176] But even in emergency situations the operator of an emergency vehicle is not relieved of the duty to operate his vehicle with due regard for the safety of all persons using the highway.[177] His duty is not fulfilled by merely turning on a siren or an emergency light.[178]

The standard speed limits do not apply to emergency vehicles when responding to emergency calls so long as the siren is sounding, but the operator of such vehicle must not drive with a "reckless disregard for the safety of others".[179] And when an emergency does not exist, an officer must drive with the care of an ordinary citizen.

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176. McCarthy v. Mason, 132 Me. 347, 171 A. 256 (1934); Russell v. Nadeau, 139 Me. 286, 29 A.2d 916 (1943); Usrey v. Yarnell, 181 Ark. 804, 27 S.W.2d 988 (1930).

177. Ark. Stat. Ann. §75-606 (Repl. 1957); La Marra v. Adam, 164 Pa. Super. 268, 63 A.2d 497 (1949).

178. Jensen v. Taylor, 2 Utah 2d 196, 271 P.2d 838 (1954).

179. Ark. Stat. Ann. §75-606 (Repl. 1957).

F. Injury to an Innocent Bystander

A civil cause of action exists when an innocent bystander is injured as a result of the negligent use of firearms by an officer. Even though an officer may be justified in a shooting at a criminal, if an innocent party is injured by such shooting, the officer may have to answer to a jury as to whether he was justified in using his gun at that particular time and place.[180] An officer should act with "reasonable prudence" to avoid injury to innocent persons and must take into account the fact that innocent pedestrians may be present before he begins shooting at an escaping felon.[181]

In evaluating what is "reasonable prudence", a high standard of care is applied,[182] because an officer is expected to possess special training and knowledge in the area.[183]

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180. Dyson v. Schmidt, 260 Minn. 129, 109 N.W.2d 262 (1961).

181. Davis v. Hellwig, 21 N.J. 412, 122 A.2d 497 (1956).

182. Collins v. New York, 171 N.Y.S.2d 710 (1958), Aff'd 11 Misc.2d 700, 164 N.E.2d 719 (1959).

183. Crump v. Browning, 110 A.2d 695 (Mun.Ct.App. D.C. 1955).

STOP AND FRISK

I. Introduction

"Stop and frisk" is a common procedure practiced by police officers in the United States. When an officer has probable cause to make a lawful arrest, with or without a valid warrant, it is axiomatic that an incidental frisk for dangerous weapons is justified. But when a "stop and frisk" is based on something less than probable cause for arrest it has been attacked as being violative of the Fourth Amendment to the Constitution of the United States.

This chapter will deal with the practice of "stop and frisk" by officers when there is insufficient probable cause to justify a lawful arrest. The conclusions reached are based on three decisions reached by the United States Supreme Court on June 10, 1968: Terry v. Ohio,[1] Sibron v. New York,[2] and Peters v. New York.[3]

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1. 392 U.S. 1 (1968).
2. 392 U.S. 40 (1968).
3. 392 U.S. 40 (1968).

II. Analysis of Terry, Sibron, and Peters

A. Statement of Facts

A review of the facts in each case decided by the Court is essential in understanding the standards and reasoning the Court applied to the stop and frisk procedure.

Terry v. Ohio - A plain clothes police officer with thirty-nine years experience observed petitioner and another person standing on a street corner in downtown Cleveland. For approximately ten to twelve minutes they alternately left the corner and peered into a store window and then returned to the corner to converse with the other. In turn the other person would leave the corner, repeat the actions and return to the corner. This ritual was repeated by each five or six times. They then left the corner and walked several hundred feet and met and conversed with a third person. Suspecting a "stick-up or casing job", the officer approached the men, identified himself and asked for their names. When the officer received only a mumbled response, he spun the petitioner around and patted down the outside of petitioner's overcoat and felt something like a pistol. He reached inside the coat but was unable to remove the pistol. The officer then took petitioner's coat off and removed a

loaded revolver. The petitioner was charged with and convicted of carrying a concealed weapon and the conviction was affirmed on appeal. The search for dangerous weapons was considered reasonable within the Fourth Amendment to the Constitution.

Sibron v. New York - A police officer observed the petitioner continually for about eight hours. During that time the petitioner was seen talking to persons known by the officer to be drug addicts. The police officer later testified that he had not overheard any of the conversations between the petitioner and the known addicts, nor did he see anything pass between them. While petitioner was eating in a restaurant, the officer approached him and told him to come outside. Once outside the officer said to petitioner, "You know what I am after." Petitioner reached into his pocket and the officer simultaneously thrust his hand into the same pocket, discovering several packets which contained heroin. Petitioner was convicted for unlawful possession of narcotics, but the conviction was reversed on appeal. the search was held to be an unreasonable intrusion which violated the Fourth Amendment, and the heroin was inadmissable as evidence against the petitioner.

Peters v. New York - An off-duty police officer, who resided at the same apartment for twelve years, heard a noise at his door. Through a peep hole he observed two strangers tip-toeing toward the stairway. Believing that he had dis-

covered an attempted burglary, the officer entered the hall and slammed the door loudly behind him. This caused the two men to begin running down the stairs and the officer gave chase and caught one of the men, petitioner, between the fourth and fifth floors and proceeded to frisk him for weapons. Feeling a hard object which he believed to be a knife, the officer removed the object from petitioner's pocket. It was an opaque plastic envelope containing burglar's tools. The petitioner was convicted of unlawful possession of burglary tools and the conviction was affirmed on appeal. The court held that the stop and frisk was reasonable under the circumstances and did not violate the Fourth Amendment.

B. Summary of Court's Decision

The United States Supreme Court via these three cases held that a police officer under reasonable circumstances may stop a person without a valid warrant and without the existence of probable cause to arrest when the officer observes unusual conduct which leads him to reasonably conclude,

in light of his experience that criminal activity may be afoot. The officer may investigate by questioning after such stopping and a self-protecting frisk for dangerous weapons may be warranted by particular facts from which the officer reasonably inferred that the individual was armed and dangerous.

The Court repudiated the argument that "stop and frisk" conduct does not come within the purview of the Fourth Amendment. Seizure is "... whenever a police officer accosts an individual and restrains his freedon to walk away ... [A]nd it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his body in an attempt to find weapons is not a 'search'." Such a search and seizure does not, however, come within the warranty clause of the Fourth Amendment. Historically, stop and frisk conduct has been excluded from the clause by reason of necessity because there is a practical need for quick, on the spot action by the police. The court added this warning, however, "[W]e do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure."

III. The Right to Stop

There is a "seizure" when a police officer by means of physical force or show of authority has in some way restrained an individual's freedom to walk away. When an officer "stops" a person without probable cause to arrest, the Fourth Amendment protects the individual from unreasonable conduct on the part of the police. An officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to arrest. The purpose of such a stop must be to investigate suspicious behavior which has led the officer to believe "that criminal activity may be afoot."

A. Standard

A "stop" comes within the purview of the Fourth Amendment's proscription against "unreasonable" seizures. The standard in determining the reasonableness of the stopping is whether the facts available to the officer at the moment of the seizure would warrant a man of reasonable caution to believe that the action was justified to investigate possible criminal conduct. It is the judge who evaluates the reasonableness of the action taken by the police officer. The standard which he uses is objec-

tive rather than subjective. The officer must not rely on "inarticulate hunches" or "good faith" alone. He must be able to testify to "specific and articulate facts which taken together with rational inference from those facts" reasonably warrant the existence of criminal activity. However the officer may take into account his previous experience in crime detection to arrive at such an inference. Although this reasonable belief standard is not a justification for all "stops", it does justify such conduct in appropriate circumstances.

B. Application of Standard

In order to assess the reasonableness of the officer's conduct under the Fourth Amendment, it is necessary to "first focus upon the governmental interest which allegedly justified official intrusion upon the constitutional protected interests of the private citizen...for there is no ready test for determining reasonableness other than by balancing the need to search ...against the invasion which the search entails."

The prime governmental interest in "stop" conduct is effective crime prevention and detection by its police officers. It is this interest which "underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for the purpose of

investigating possible criminal behavior even though there is no probable cause to arrest." This interest must be weighed against the individual's right to personal security free from unreasonable governmental intrusions. Only by looking at the facts and circumstances of each case can the court properly weigh these interests.

The circumstances and facts which may infer a reasonable belief that possible criminal activity is "afoot" and which will justify a stop without probable cause to arrest can be seen in the three decisions of the Court.

In Terry the policeman observed petitioner and another walking back and forth over the same block and peering into the same window on each trip. At the end of each trip they would converse. When the men met again a few blocks away the policeman decided to investigate. The Court concluded that each act by itself was perhaps innocent, but when taken together created a reasonable inference that warranted further investigation. The officer was discharging a legitimate investigative function when he decided to approach the man. The Court said, "it would have been poor police work for an officer of 30 years experience in the detection of thievery from stores in the same neighborhood to have failed to investigate this behavior further." Thus, the officer was able to testify to facts and circumstances which taken together reasonably inferred that

possible criminal activity was afoot.

In Sibron the petitioner was seen talking to known addicts. The Court said that "...the inference that persons who talk to narcotics addicts are engaged in the criminal traffic of narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security." It was emphasized that the officer saw nothing pass between petitioner and the addicts, and that as far as the officer knew they "...may have been talking about the World Series." As Justice Harlan said in a concurring opinion: "The forcible encounter between Officer Martin and Sibron did not meet the Terry reasonableness standard.... (I)n the first place, although association with known criminals may properly be a factor contributing to the suspiciousness of circumstances, it does not, entirely by itself, create suspicion adequate to support a stop....There must be something at least in the activities of the person observed or in his surroundings that affirmatively suggests particular criminal activity, completed, current or intended."

In Peters the officer heard odd noises at his door and saw two strange men tip-toeing to the stairs (not the elevator), and when he slammed the door they fled down the stairs. The Court held that these facts reasonably justified the officer to believe that the men were engaged in criminal activity.

In fact, the Court felt that these circumstances would have constituted probable cause to arrest the men for attempted burglary: "...deliberately furtive actions and flight at the approach of strangers or law officers are strong ~~indica~~ indications of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest." Because the Court expressed the idea that the officer had probable cause to arrest, its value as precedent justifying a stop without probable cause may be diminished.

The Peters case presents the circumstances of flight as one factor to be considered in arriving at probable cause, it could also be an important factor in justifying a "stop". Surely it is one of the circumstances which the court may consider in supporting a reasonable inference that criminal activity is afoot. In fact, an opposite result may have been reached in the Sibron case (the drugs case) if Sibron had attempted to flee from the officer when the officer approached him.

C. Difference Between an Arrest and a Stop

An arrest with probable cause is a wholly different kind of intrusion upon individual freedom. It is the initial stage of a criminal prosecution. A stop is merely for the purpose

of making an inquiry into possible criminal behavior. Therefore facts needed to justify a stop will be judged by a different standard than those needed to justify an arrest. An arrest is a much greater intrusion on individual freedom. It follows that the courts will be strict in adhering to the necessity that the officer had probable cause for believing a crime had been committed. However, it will look with more lenience on the facts necessary to justify a stop since the interests of good law enforcement are balanced with the not so great intrusion on individual freedom found in the stop situation.

D. Conclusion

All of these cases involved situations where the warrant clause of the Fourth Amendment was not applicable, i.e., a public place. If the warrant clause is not applicable, an officer may stop an individual when there is no probable cause for arrest if:

(1) he has a reasonable belief that the individual is engaged in possible criminal conduct;

(2) the officer can point to specific facts and circumstances which justify this belief; and,

(3) the stop is for the limited purpose of making reasonable inquiries to investigate possible criminal behavior.

IV. Right to Frisk

A frisk is usually defined as a patting of the outer

clothing of a person to detect concealed weapons.[4] The Terry Court clearly held that frisk conduct is within the scope of the Fourth Amendment. But the Court realistically justified such conduct by saying:

> American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and injuries are inflicted with guns and knives. In view of these facts, we cannot blind ourselves to the need of law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest ...

When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officers or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is carrying a weapon and to neutralize the threat of physical harm.[5]

The police officer is not entitled to seize and search every person whom he sees on the street. The right to frisk after a reasonable stop when there is no probable cause to arrest is confined strictly to a search for dangerous weapons. It must be limited to that which is necessary for the dis-

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4. People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32 (1964).

5. Terry v. Ohio, 392 U.S.1, at page 24 (1968).

covery of weapons which might be used to harm the officer or others nearby.

A. Standard

The standard for a frisk is whether the conduct was reasonable under the Fourth Amendment. The judge must objectively evaluate the reasonableness of the particular frisk in light of the particular circumstances, i.e., did the facts warrant a man of reasonable caution in the belief that a frisk for dangerous weapons was necessary. The officer must be able to point to specific and articulable facts from which he reasonably inferred that the person he stopped was armed and dangerous. The court may take into account the officer's previous experience in determining the reasonableness of his conduct.

B. Application of the Standard

The governmental interests must be weighed against the rights of individuals. The frisk ~~prodedure~~ procedure concerns more than just the governmental investigative interest, in addition, it concerns the right of the police officer to protect himself.

In Terry the actions of the men were consistent with the officer's belief that they were planning a daylight robbery. The Court said that this leads to a reasonable

inference that dangerous weapons might have been carried.

In Sibron the Court held that just because a person talks to a drug addict, the inference may not be drawn that such a person is armed and dangerous. Justice Black, in a dissenting opinion, felt that when Sibron reached into his pocket on being stopped, such action could have reasonably been interpreted by the officer to mean that Sibron was going for a weapon. However, the majority of the Court felt that the officer's statement, "you know what I am after", immediately before he put his hand in Sibron's pocket defeated that inference. From this statement and other testimony, the Court concluded that the frisk was not predicated on a belief that Sibron was armed; it was conducted for the sole purpose of finding heroin.

In Peters the Court had no trouble in justifying the frisk. The petitioner's actions reasonably inferred that he was engaged in burglary which gave rise to a reasonable belief that he may have been armed.

C. Scope of Frisk

A search reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. The scope of a search must be "... strictly tied to and

justified by the circumstances which rendered its initiation possible." If a frisk is conducted without probable cause to arrest, it must be "...reasonably designed to discover guns, knives, clubs or other hidden instruments..." The scope of the frisk must be limited to what is adequate for the purpose of discovering weapons.

In Terry the frisk was confined to a "patting down" of the outer clothing. The officer did not reach in the coat until after he felt what appeared to be a gun. The court said the officer "confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find."

The Court in Sibron concluded from the officer's testimony that he had reached into Sibron's pocket to find narcotics. There was no attempt at an initial limited exploration for weapons. "The nature and scrop of the search...were so clearly unrelated to that justification (finding weapons) as to render the heroin inadmissible." This case should serve as a warning that a frisk for dangerous weapons must be limited in scope and manner to just that purpose.

D. Correlation Between Reasonable Belief and the Time of Frisk

When an officer is frisking a person for dangerous weapons without probable cause to arrest, the reasonable belief that the person is armed and dangerous must exist at the moment of the frisk. The Terry Court said that nothing must occur between the stop. questioning and frisk which would dispel this belief.

Mr. Justice Harlan in a concurring opinion said that the right to frisk depends upon the reasonableness of a forcible stop to investigate possible criminal behavior. He felt that where the stop is reasonable the right to frisk is immediate and automatic provided the reason for the stop is an articulable suspicion of a crime of violence. Justice Harlan would base justification of a frisk on the nature of the crime being investigated, but this is just one factor a court should use in weighing the reasonableness of the frisk.

E. Differences Between a Search Incident to a Lawful Arrest and a Frisk

When an officer has probable cause to arrest for a crime he may generally search the person for (1) dangerous weapons, (2) fruit of the crime, (3) instruments of the crime and

(4) the purpose of preserving evidence. If the search is justified as incidental to an arrest, it can involve relatively extensive exploration of the person, but a frisk for dangerous weapons must be limited to that purpose. The Court said in Terry, that a search for weapons not incidental to a valid arrest cannot be justified by any need to prevent the disappearance or destruction of evidence of crime, and that it involves only a brief intrusion upon the sanctity of the person. It does not follow that a justifiable search for weapons must wait until the officer has probable cause to arrest. As the Court cogently noted "...a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for prosecution of a crime."

F. Conclusion

A frisk for dangerous weapons where there is no probable grounds for arrest may be justified if:

(1) after a justifiable stop to investigate criminal behavior the officer reasonably believes the person he is dealing with is armed and dangerous;

(2) this belief is based on a reasonable inference from the circumstances of the situation;

(3) the scope and manner of the frisk is limited to finding dangerous weapons; and

(4) the belief that the person is armed and dangerous exists at the moment of frisk.

A frisk for weapons by itself cannot be justified by any need to prevent the disappearance or destruction of evidence of a crime when there is no cause to arrest. Its sole justification is the protection of the officer and others nearby.

V. Admissibility of Evidence Obtained from a Frisk

The due process clause of the Fourteenth Amendment incorporates the protection afforded by the Fourth Amendment, and any search or seizure which violates the Fourth also violates the Fourteenth Amendment. Therefore any illegally seized evidence must be excluded in state proceedings.[6] The exclusionary rule cannot be properly invoked, however, to exclude the products of legitimate police investigative techniques on the ground that such conduct, while closely similar, involves unwarranted intrusion upon constitutional protections. Thus the ordinary rule is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal.

The Terry Court held that weapons which are obtained by

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6. Mapp v. Ohio, 367 U.S. 643 (1961).

a frisk which is reasonable under the Fourth Amendment may be properly introduced in evidence against the person from whom they were taken. By the Court affirming the conviction of Terry, two points are established:

(1) evidence of a crime obtained in a justified frisk which is not directly related to the reason for a "stop" may be admissible in the prosecution of that crime, e.g., in Terry the suspected burglary justified the stop, but the gun found during the frisk was not directly related to burglary;

(2) evidence obtained in a justified frisk will be sufficient to constitute probable cause for a subsequent lawful arrest, e.g., when the officer found the loaded gun in Terry's pocket this constituted probable cause to arrest him for the crime of carrying a concealed weapon.

In the Peters case the Court inferred that evidence of a crime obtained from a proper frisk which is related to the reason for the "stop" may be admissible in the prosecution of that crime.

The exclusionary rule was applied in the Sibron decision. The heroin found in the petitioner's pocket by the frisk was inadmissible as evidence. The Sibron decision holds that:

(1) evidence obtained from an unreasonable stop and frisk is inadmissible in the prosecution of any crime;

(2) evidence is inadmissible if it was discovered by means of a frisk, (without probable cause to arrest),

if the frisk was not reasonably related in nature or in a scope to a search for dangerous weapons;

(3) a frisk is not justified because there is a need to preserve or prevent the destruction of evidence of a crime.

In Sibron if there had existed probable cause before the frisk, the evidence (heroin) found would have been admissible on the basis of an incidental search to a lawful arrest. But as the Court noted, "...an incidental search may not precede an arrest and serve as part of its justification."

The Court in these three decisions seems to be saying that the police have the right to stop and frisk for dangerous weapons in appropriate circumstances but it must be conducted in an appropriate manner and scope. If not, then any evidence so seized is inadmissible and cannot serve as justification for a lawful arrest of any crime.

VI. State Law Prior to Terry, Sibron and Peters

A. Arkansas

Article 2, Section 15 of the Arkansas Constitution provides: "The rights of the people of this State to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and

no warrant shall issue except upon probable cause, supported, by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."

No reported cases in Arkansas have dealt with the problem of a stop and frisk without probable cause to arrest. If such a case should now arise it must be decided within the mandates and standards set by the United States Supreme Court in Terry, Sibron and Peters.

B. Other States

Several states by either judicial decision or legislative enactment have authorized "stop and frisk" in certain situations. A factual analysis of these cases will be helpful in reviewing these decisions, however, no conclusion will be attempted as to whether these cases are correct under the Terry standards.

The leading case before Terry was probably People v. Rivera.[7] There two plain clothes detectives were patrolling a neighborhood with a high percentage of crime in an unmarked car. They observed two men for about five minutes. The men walked up to a bar and grill, looked in the window, then continued to walk a few steps. They stopped, came back and looked into the window a second time. At this point, one of the men looked in the direction of the detectives, said

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7. 14 N.Y.2d 441, 201 N.E.2d 32 (1964) Cert. Den. 379 U.S. 978 (1965).

something to his friend and they both started walking away rapidly. The detectives halted the men, frisked them, and recovered a .22 caliber pistol fully loaded. The pistol was used as evidence to support a conviction for the unlawful possession of a gun. The New York Court in applying the state's stop and frisk statute upheld the conviction. The court stated that the business of police is to prevent crime, and proper inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. The United States Supreme Court refused to review the case.[8]

In another New York case, three police officers had an office building under surveillance in which the defendant had an office, and observed the defendant carrying a briefcase into the building. The officers stopped the defendant and asked him to accompany them to a squad car. Once in the car, the defendant was frisked. The officers then looked into his briefcase and found a loaded gun. The defendant was convicted of possessing a concealed and loaded firearm. Proof was presented that the defendant had been under surveillance for several months, and was being taken to the police station for further questioning, when the frisk of the briefcase took place. The court held that this was not so unreasonable as to be constitutionally illegal.

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8. People v. Pugach, 15 N.Y.2d 65, 204 N.E.2d 176 (1964) Cert. den. 380 U.S. 936 (1965).

The loaded firearm concealed in a briefcase carried in the hands of the defendant was held to be the same as being concealed upon his person.

In Commonwealth v. Hicks,[9] a police officer, after receiving a police report of a burglary in the area, stopped the defendant about five blocks from the scene. The defendant matched the description given to the officer. While frisking the defendant, a pen knife was found which was later admitted into evidence as the tool with which the burglary was attempted. The Pennsylvania Supreme Court affirmed the conviction although there is no stop and frisk statute in that state. The Court allowed the stop and frisk and said that a frisk must be based on a reasonable belief by the officer that his safety requires it. It must be limited to the person and his immediate surroundings, and be only to the extent necessary to discover any dangerous weapons which might be used against the officer. These statements sound almost identical to the Terry pronouncements.

In State v. Dilley,[10] a veteran police officer patrolling by himself in a police car in a low income, high crime rate section of the city, saw two men walking on the sidewalk about three o'clock in the morning. As they walked they kept turning their heads every few minutes looking behind them. The officer

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9. 209 Pa.Super. 1, 223 A.2d 873 (1966).

10. 49 N.J. 460, 231 A.2d 353 (1967).

followed them to a municipal parking lot where they stood between two cars, and asked them what they were doing. When he received no reply, the officer frisked them and found a loaded gun. In affirming the conviction for carrying a concealed weapon, the court said that the officer had a right to frisk the men by patting them down because the circumstances were so highly suspicious as to call for an inquiry by the officer. It said reason and common sense support frisking in dangerous circumstances.

In People v. Martin,[11] two officers on an auto patrol observed a parked car on the opposite side of the street headed in the opposite direction at about eleven o'clock at night. They were in a "lovers lane" district, and the car contained two men. When the police made a U-turn to check the car, it took off at a high rate of speed which resulted in a chase. The court held that the presence of the two men in a car parked on a lover's lane at night was in itself reasonable cause for the police to investigate, particularly after their sudden flight. The court held that under these circumstances the police were justified in taking precautionary measures to protect themselves by frisking for weapons.

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11. 46 Cal.2d 106, 293 P.2d 52 (1956).

In State v. Collins,[12] two officers observed the defendant and another party walking down the street at two-thirty in the morning at a well lighted intersection. As the other party crossed the street, the police noticed the defendant carrying a small brown canvas bag. The officers stopped the too men, asked where they had been and the men replied: "to a crap game". One officer took the bag and looked into it. The bag contained rolled money, loose change and an electric razor. Because the defendant was "acting fidgety", he was frisked. The Connecticut Supreme Court overruled a conviction for breaking and entering and ordered a new trial. The court said the frisking of the person was a search. The search of the bag amounted to a partial search of the person, since the bag was a portable personal effect in the immediate possession of the defendant.

VII. Statutory Enactments Dealing with Stop and Frisk

A. The New York Statute

The New York "stop and frisk" statute provides:

> Section 1. A police officer may stop any person abroad in a public place whom he reasonably

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12. 150 Conn. 488, 191 A.2d 253 (1963).

> suspects is committing, has committed or is about to commit felony or any of the crimes specified...and may demand of him his name address and an explanation of his actions.
>
> Section 2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

States may pass statutes providing for stop and frisk procedures, but such statutes must not violate the constitutional proscription against unreasonable searches and seizures or the rule that evidence so seized is inadmissible.[13]

In both Sibron and Peters the petitioners argued that the New York statute was unconstitutional on its face. The Court refused to bind itself by this argument saying,

> The constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case...A search authorized by state law may be unreasonable under the Fourth Amendment, and a ~~search~~ search not expressly authorized by state law may be justified as a constitutionally reasonable one...Our constitutional inquiry would not be furthered here by an attempt to pro-

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13. Ker v. California, 374 U.S. 23 (1963).

> nounce judgment on the words of the statute. We must confine our review instead to the reasonableness of the searches and seizures which underlie these two convictions.

In a concurring opinion Justice Harlan felt that the New York statute should not be ignored. He stated that because the New York statute was a deliberate attempt to deal with the complex problem of on-the-street police work, the Court should indicate the extent to which the statute was constitutionally successful.

B. Uniform Arrest Act

Several states (not Arkansas) have adopted the Uniform Arrest Act which reads as follows:

"Section 2. Questioning and Detaining Suspects.

(1) A peace officer may stop any person abroad whom he has reasonable grounds to suspect is committing, has committed, or is about to commit a crime and may demand of him his name, address, business abroad and where he is going.

(2) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.

(3) The total detention provided by this section shall not exceed two hours. Such detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention period the person so detained shall be released or shall be arrested and charged with a crime.

Section 3. Searching for Weapons - Persons Who Have Not Been Arrested.

(1) A police officer may search for dangerous weapons any person whom he has stopped or detained to question as provided in Section 2, whenever he has reasonable grounds to believe that he is in danger if the person possesses a dangerous weapon. If the officer finds a weapon, he may take it and keep it until the completion of questioning when he shall return it or arrest the person. The arrest may be for illegal possession of the weapon."

The standards set by the Uniform Arrest Act seem to comply with the mandates of the Terry, Sibron and Peters decisions. The statute allows a frisk for weapons when the officer has "reasonable

grounds to believe that he is in danger." It is almost identical with Terry's standard of reasonable belief. The provision that an arrest may be for the illegal possession of a weapon that is found by a justified frisk, is valid, since that was the exact crime charged and upheld in Terry. When applying any state statute on "stop and frisk" however, the facts and circumstances in each case must show that the stop and frisk was reasonable under the Fourth Amendment.

C. The Arkansas Statute

The newly enacted Arkansas stop and frisk statute provides:[14]

> SECTION 1. (a) A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person whom he reasonably suspects is committing, has committed, or is about to commit a felony, if such action is reasonably necessary to identify or determine the lawfulness of such persons conduct. An officer acting under this Section may require that person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes, at the end of such period the person detained shall be released without further restraint, or arrested and charged with a crime.
>
> (b) As promptly as is reasonable under the circumstances, a law enforcement officer who has detained a person under this Section shall advise

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14. Act 378 of 1969.

that person of his official identity and inform such person of the reason for the detention.

SECTION 2. A law enforcement officer acting under the authority of Section 1 hereof may use such force as may be reasonably necessary under the circumstances to stop and detain any person for the purposes authorized by this Act.

SECTION 3. (a) A law enforcement officer who has detained a person under Section 1 hereof may, if he reasonably suspects that such person is armed and presently dangerous to the officer or others, may search the outer clothing of such person and the immediate surroundings for, and seize, any weapon or other dangerous thing which may be used against the officer or others. In no event shall that search be more detailed than is reasonably necessary to insure the safety of the officer or others.

SECTION 4. Whenever a law enforcement officer has reasonable cause to believe that any person found at or near the scene of a felony is a material witness to the felony, he may stop that person and after having identified himself he must advise the person of the purpose of the stopping and may then demand of him his name, address, and any information he may have regarding the felony. Said detention shall in all cases be reasonable and in no event shall such detention be in excess of fifteen (15) minutes.

SECTION 5. For the purposes of this Act:

(1) The terms "law enforcement officer" and "officer" mean any law enforcement officer authorized to arrest individuals for the commission of a felony.

(2) The term "reasonably suspects" means that degree of certainty, less than the probable cause necessary to justify a lawful arrest but more than a mere suspicion, which a reasonably prudent law enforcement officer would have under all circumstances before he interferes with a person's liberty in the conscientious performance of his duties to prevent, detect, and investigate crime and preserve law and order in the community.

SECTION 6. This Act shall not be construed to:

(1) Permit an officer to stop just any passer-by and search him, nor allow the search of any person merely because he has a criminal record.

(2) Permit the stopping and searching of any person found in the vicinity of a felony scene, merely because he happens to be there.

(3) Dispense with the need for adequate observation and investigation, depending upon all the circumstances, before a stop is made.

(4) Permit an officer to stop anyone, under this Act, unless he is prepared to explain with particularity his reasons for stopping such person.

(5) Permit any officer to stop anyone, under this Act, unless the crime he reasonably suspects is a felony.

(6) Permit everyone stopped to be searched; searches are only permitted when the officer reasonably suspects he is in danger.

(7) Impair any existing law permitting an officer to make an arrest without an arrest warrant, or a search incident to such

SECTION 7. (a) The right to stop provided in the new law in no way changes the previously existing authority of an officer to make an arrest without an arrest warrant. The new rights to stop and to search, as defined in the new law, are separate and distinct from the established right to arrest, as provided by existing law, and to make a complete search incident to such arrest.

(b) The following are among the factors to be considered in determining if the officer has grounds to "reasonably suspect":

1. The demeanor of the suspect.

2. The gait and manner of the suspect.

3. Any knowledge the officer may have of the suspect's background or character.

4. Whether the suspect is carrying anything, and what he is carrying.

5. The manner in which the suspect is dressed, including bulges in clothing - when considered in light of all of the other factors.

6. The time of the day or night the suspect is observed.

7. Any overheard conversation of the suspect.

8. The particular streets and areas involved.

9. Any information received from third persons, whether they are known or unknown.

10. Whether the suspect is consorting with others whose conduct is "reasonably suspect".

11. The suspect's proximity to known criminal conduct.

12. Incidence of crime in the immediate neighborhood.

13. The suspect's apparent effort to conceal an article.

14. Apparent effort of the suspect to avoid identification or confrontation by the police.

SECTION 8. Any officer making a stop and search not in accordance with the laws of this State shall be civilly liable for damages suffered by the person who was unlawfully stopped and searched.

THE MIRANDA WARNINGS

I. Introduction

Every person taken into custody or otherwise deprived of his freedom of action by a law enforcement officer has certain basic rights that are guaranteed by the Constitution of the United States and the Constitution of the State of Arkansas. A violation of these rights can result in a confession or other evidence being declared inadmissible as evidence in a court of law.

In the landmark case of Miranda v. Arizona,[1] the Supreme Court of the United States spelled out, in detail, sweeping rules designed to insure that an accused's Fifth Amendment Right to remain silent is not impaired. More specifically the opinion is aimed at custodial interrogation practices and requires as an absolute constitutional prerequisite to interrogation that the accused be given the following or similar warnings:

(1) That he has a right to remain silent;

(2) That any statement he does make may be used as evidence against him in a court of law;

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1. 384 U.S. 436 (1966).

(3) That he has a right to have an attorney present;

(4) That if he cannot afford an attorney, he will be appointed one prior to any questioning if he so desires.

After the above warnings are given, the accused may waive his rights but such a waiver is not effective unless it is given intelligently, knowingly, voluntarily and without any trickery or duress by the law enforcement officers.

While all officers are familiar with the above warnings, there are many marginal situations which present the officer with questions. A discussion of these problems follows.

II. Custodial Interrogation

At the outset it is important that an officer knows

what is meant by the term "custodial interrogation" because that is the critical point in an investigation when the warnings must be given. In Miranda, the Court defined the term as follows:

> By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

The court stated in a footnote that this is what it meant in Escobedo v. Illinois,[2] when it spoke of the law enforcement process shifting from "investigatory to accusatory".

Since a person may be deprived of his freedom of action without being in the actual custody of an officer,[3] questions initiated by officers in a person's home,[4] or in a hospital,[5] may constitute "custodial interrogation". Questions an officer routinely asks a suspect in the course of filling out a lineup sheet can also constitute "custodial interrogation", even though the questions are asked without any intent on the part of the officer to elicit statements bearing on the crime charged.[6]

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2. 378 U.S. 478 (1964).

3. People v. Wilson, 74 Cal. Rptr. 131 (Cal. App. 1968).

4. State v. Hunt, 447 P.2d 896 (Ariz. App. 1968).

5. Howard v. State. 217 So.2d 548 (Ala. App. 1969).

6. Proctor v. U.S., 404 F.2d 819 (C.A.D.C. 1968).

Prior to the time that an individual is restrained for purposes of "custodial interrogation" an officer can question him about facts surrounding a crime without first giving any warning. But once the investigation process begins to focus on an individual suspected of committing a crime he should be given the warnings before any further questions are asked regardless of whether the individual has been placed under arrest.

When an individual has been arrested or taken into custody by law enforcement officers, the officers may question others about the facts surrounding a crime and as long as the people questioned are not suspected of participating in the crime, there is no need to advise them of their rights.

III. Volunteered Statements

Spontaneous and voluntary statements made by an accused at a time when he is not being interrogated are always admissible in evidence whether or not he has been advised of his rights.[7] Hence an officer is not required to stop and warn a person who comes to the station and says that he wishes to confess to a crime, nor must he warn a person who calls the station and offers a confession or other statement over the phone. If, however, an officer

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7. Steel v. State, 436 S.W.2d 800 (Ark. 1969).

desires to question an individual after the volunteered statements are given, he sould at that point give the warnings.[8]

The voluntariness of any statement used against a defendant must be proven by the state, beyond a reasonable doubt.[9] The state has the same burden of proof to show a confession voluntary as to show a defendant guilty.

IV. Prior Knowledge of Defendant

Even though a particualr defendant, because of his status or prior experience may already know of his rights, he must still be given the warnings prior to questioning. The Miranda court stated the following:[10]

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background

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8. People v. Savage, 242 N.E.2d 446 (ill. App. 1968).

9. People v. Nadile, 271 N.Y.2d 723 (N.Y. 1966); People v. Spears, 274 N.Y.2d 666 (N.Y. 1966).

10. 384 U.S. 436 at page 468, 469 (1966).

of the person interrogated, a warning at the time of interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

V. The Indigent Defendant

Merely telling an indigent defendant that he is entitled to counsel without making him aware that free counsel will be supplied if necessary, is an inadequate warning.[11] Likewise a warning to an indigent that "we cannot furnish you a lawyer, but one will be appointed for you, if you wish, when you go to court", is inadequate.[12] The indigent must understand that he is entitled to have counsel present during all stages of judicial procedure free of charge.[13]

After the warnings have been given, if an indigent defendant indicates that he wants an attorney present before speaking, no questions can be asked until he is provided with an attorney. Since law enforcement officers have no power to appoint an attorney, the court must be advised in order that such an appointment can be made. The Judge will generally make the appointment as quickly as

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11. Com. v, Dixon, 432 Pa. 423, 248 A.2d 231 (Pa. 1968).

12. Wilson v. State, 216 So.2d 741 (Ala. App. 1968).

13. People v. Stewart, 73 Cal. Rptr. 484 (Cal. App. 1968); Taylor v. State, 217 So.2d 86 (Ala. App. 1968).

possible, but in the event he desires to withold making the appointment for a reasonable period of time while an investigation is being conducted, he may do so without violating the defendant's Fifth Amendment privilege so long as the defendant is not questioned during that time.

VI. Successive Interrogation Sessions

Once a defendant has been warned, he does not have to have the warning repeated at each new stage of the proceedings. He may in addition be questioned about matters touching upon separate offenses without a separate warning.[14] This does not mean that the defendant is compelled to submit to further interrogation because he can, at any time, elect to remain silent and request an attorney even though he earlier waived his rights. If he voluntarily answers the questions asked, however, his statements can be used in evidence against him.

VII. Waiver of Rights

A defendant who has been effectively warned may waive his rights but a waiver is not effective unless it is given

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14. State v. Jennings, 448 P.2d 62 (Ariz. 1968).

intelligently, knowingly, voluntarily and without any trickery or duress by law enforcement officers. The Court requires a high standard of proof for showing a waiver of constitutional rights and if the defendant alleges in Court that he was not properly warned, a heavy burden rest on the state to show otherwise.[15] The Miranda Court stated the following about a waiver:

> An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after the warnings are given or simply from the fact that a confession was in fact eventually obtained. . . Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated.
>
> Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incummunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to

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15. Craig v. State, 216 So.2d 19 (Fla. App. 1968); People v. Stewart, 73 Cal. Rptr. 484 (Cal. App. 1968); State v. Collins, 217 So.2d 182 (La. 1968).

> the Fifth Amendment privilege and not simply the preliminary ritual to existing methods of interrogation.[16]

Before there can be an effective waiver the defendant must be told of the crime he is suspected of having committed.[17] He must clearly be advised of his Constitutional rights. If he is given several conflicting warnings he cannot be said to have been warned at all.[18] It has been held that a warning to a defendant which said that the defendant could consult an attorney prior to any questioning was not sufficient when the defendant was not further advised that he had a right to have an attorney present.[19]

Suggestions of leniency offered by officers to induce an accused to talk about his case will render a waiver ineffective.[20]

After an attorney has been retained or appointed to represent an accused, no statement should be taken from the accused (even at his request) without the attorney being present.[21] It was held in State v. Hancock, that a waiver taken in the absence of the defendant's attorney and without

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16. 384 U.S. 436 at page 475, 476 (1966).

17. Schenk v. Ellsworth, 293 F.Supp. 26 (D.C. Mont. 1968).

18. People v. Johnson, 74 Cal.Rptr. 889, 450 P.2d 265 (1969).

19. U.S. v. Fox, 403 F.2d 97 (C.A.2Cir. 1968).

20. People v. Duran, 74 Cal. Rptr. 459 (Cal. App. 1969).

21. 164 N.W.2d 330 (Iowa 1969).

his permission was ineffective. Also, in People v. Isby,[22] the court held that an accused is entitled to an effective aid of counsel at any interrogation instigated by law enforcement officers and that if he makes any incriminating statements with out the help of counsel, such statements are inadmissible despite the fact that the accused signed a waiver.

VIII. How Warnings are Given and Waiver Taken

Many departments have a printed form which contains the warnings and a clause designating a waiver of rights. When an individual is taken into custody, prior to questioning, the officer will either read the warnings contained in the form to the individual or submit the form to him for his own reading. If the individual states that he understands his rights but wishes to talk with the officer without a lawyer, he is asked to sign the waiver form. Whether this procedure constitutes a valid waiver will depend on the circumstances. A person of low intelligence may have to be "spoon fed" the warnings, because the threshold requirement for an intelligent waiver is that the defendant understand his rights, understand that the officer will respect his rights, and understand that his

22. 73 Cal. Rptr. 294 (Cal. App. 1968).

silence in the face of an accusation is not in itself an admission of guilt.

It is most unlikely that one quick reading of the warnings to a person of low intelligence would be sufficient for him to make an intelligent decision. On the other hand, a person of average intelligence may be able to read the warnings himself and understand them, but it should be a customary practice for the officer to discuss the warnings and the waiver with each defendant. Regardless of the normal procedure utilized by the department, an officer must look to the circumstances in each particular case and then determine the steps he must take to make the warnings meaningful.

IX. Model Forms

STATEMENT OF RIGHTS

Place_____

Date_____

Time_____

You are informed that I, (name of officer), am a peace officer of (name of department). I am conducting an investigation for the offense of (name of offense) which was committed on (date). Before I ask you any questions, you must know and understand your legal rights. I therefore, warn and advise you:

1. That you have a right to remain silent and not make any statement at all, nor incriminate yourself in any manner whatsoever.

2. That anything you say can and will be used against you in a court of law.

3. That you have a right to talk with a lawyer for advice before I ask you any questions and to have him with you during any questioning.

4. That if you are unable to hire a lawyer, one will be appointed by the proper authority, without cost or charge to you, to be present and advise you before and during any questioning if you so desire.

5. That if you wish to answer questions now without a lawyer present, you have a right to stop answering questions at any time.

WAIVER OF RIGHTS

I have read the statement of my rights shown above. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me.

Signed_____

Witness_____

Witness_____

Time_____

VOLUNTARY STATEMENT

DATE_____ PLACE_____ TIME STATEMENT STARTED_____ AM PM

I, the undersigned,_____ of,_____

being_____ years of age, born at_____

do hereby make the following statement to_____

he having been identified as a_____,
knowing that I may have an attorney in my behalf present and that I do not have to make any statement nor incriminate myself in any manner. I make this statement voluntarily, of my own free will, knowing that such statement could later be used against me in any court of law, and I declare this statement is made without threat, coercion, offer of benefit, favor or offer of favor, leniency or offer of leniency by any person or persons whatsoever.

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WITNESSES:_____

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_____
Signature of Person Giving Voluntary Statement

Page_____ of_____ Pgs.

SEARCH WARRANTS

I. Introduction

A search warrant is one of the agencies provided by law for the detection and punishment of crime and the recovery of stolen property. However, the search and seizure power of the state is subject to stringent restrictions. The Constitution guarantees the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and a warrant cannot be issued except upon probable cause.

It should be noted that basically there are three requirements for the issuance of a valid search warrant, those being: (1) Probable cause; (2) which is supported by oath or affirmation; and (3) giving a particular description of the place to be searched and the person or thing to be seized. The courts, being quick to guard the privacy of the individual from governmental intrusion, have held that these requirements must be fully met before a valid search warrant can issue.[1]

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1. Ex Parte Levy, 204 Ark. 657, 163 S.W.2d 529 (1942); Frank v. Maryland, 359, U.S. 360 (1959).

II. Application for Warrant

A. Who May Apply

The complainant or affiant may be either a private individual[2] or any governmental officer, i.e., police officer, judge, etc.[3] The application need not be made by the officer executing the warrant.[4] Inasmuch as the statutes vary greatly in wording, it would seem advisable that the particular statute involved be consulted regarding who may make application for the warrant.

B. By Whom Issued

Basically, the search warrant is a judicial writ.[5] As such, it may be issued only by judicial officers, and

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2. United States v. Nichols, 89 F.Supp. 953 (W.D. Ark. 1950); Ark. Stat. Ann. §41-3216 (Repl. 1964); Ark. Stat. Ann. §41-3218 (Repl. 1964); Ark. Stat. Ann. §53-733 (Supp. 1967).

3. Ark. Stat. Ann. §48-1107 (Repl. 1964); Ark. Stat. Ann. §41-2009 (Repl. 1964).

4. State v. Shermer, 216 N.C. 719, 6 S.E.2d 529 (1940).

5. Bryan v. State, 99 Ark. 163, 137 S.W. 561 (1911).

as mentioned above, these officials may do so only upon the conditions and under the circumstances stated in the constitutional and statutory provisions.[6] The statute dealing with the issuance of search warrants in particular situations range from the general proscription of "any magistrate authorized to issue warrants in criminal cases",[7] to a more specific "Chancellors, Circuit Judges, Justices of the Peace, Mayors and Police Judges."[8] For a condensation of the basic requirements of the various statutes dealing with the issuance of search warrants in specific situations in Arkansas, see Appendix I, page 175 of this manual. It is certain, however, that Justices of the Supreme Court of Arkansas are not empowered by the Constitution to issue such writs and any attempt by statute[9] or otherwise to grant them the authority is unconstitutional.[10]

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6. Ex Parte Levy, supra, note 1.

7. Ark. Stat. Ann. §41-423 (Repl. 1964).

8. Ark. Stat. Ann. §48-1107, supra, note 3.

9. Ark. Stat. Ann. §41-2009 (Repl. 1964).

10. Ex Parte Levy, supra, note 1. The Arkansas Supreme Court declared unconstitutional the statute purporting to so grant them the power.

As unsure as the other statutes seem, however, there appears to be no doubt that Circuit Judges,[11] Municipal Judges,[12] and Justices of the Peace[13] have the authority to issue search warrants. In addition, County Judges, Mayor and Police Judges, and Chancellors are mentioned in the various statutes as having the power to issue the writs in specific situations.

In practice it appears that the municipal judge is most often sought as the issuing official. Jurisdictional problems must be kept in mind, however, in determining the official to issue the warrant.

Since the issuance of the search warrant is a judicial act, it naturally follows that no ministerial officer, such as a clerk of the court, has the jurisdiction to issue such a writ.[14]

C. Upon What Grounds

The Arkansas Constitution provides that no warrant shall issue except upon probable cause.[15] By this pro-

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11. Vandergriff v. State, 239 Ark. 1119, 396 S.W.2d 818 (1965); Ex Parte Levy, supra, note 1; Bryan v. State, supra, note 5.

12. Albright v. Karston, 206 Ark. 307, 176 S.W.2d 421 (1943); United States v. Walters, 193 F.Supp. 788 (W.D. Ark. 1961).

13. Albright v. Karston, supra, note 12.

14. Ex Parte Levy, supra, note 1; Ark. Stat. Ann. §22-753 (Repl. 1962).

15. Arkansas Constitution, Article 2, §15.

vision, a showing of probable cause becomes mandatory for the issuance of a search warrant, and a lack of it renders the writ a nullity.[16] The term probable cause cannot be defined in specific terms as its existence depends upon the facts of a particular case.[17] Even though there is no exact test, if the facts set out in the affidavit are such that "a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant.[18] The amount of evidence necessary to show probable cause does not need to be the same as the amount of evidence necessary to obtain a conviction of guilty.[19]

An important element of probable cause is time. The facts in the affidavit must show that probable cause is in existence at the time of the search, instead of sometime in the past.[20] It has been held that a time lapse of three weeks between the date of the offense and the date of the

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16. United States v. Walters, supra, note 12.

17 Lowrey v. United States, 161 F.2d 30 (8th Cir. 1947).

18. Dumbra v. United States, 268 U.S. 435 (1925); United States v. Nichols, supra, note 2.

19. United States v. Ventresca, 380 U.S. 102 (1965).

20. United States v. Nichols, supra, note 2.

issuance of the affidavit was unreasonable.[21] In another recent case, the court held that four days was too long a time lapse in the absence of a showing that the violation was continuous. The important element is that at the time the application for a search warrant is made the person making the application must have reasonable cause to believe that criminal activity is occurring.[22]

It should be noted that in many of the various statutes dealing with the issuance of search warrants, no mention is made of probable cause, reference instead being made to a "reasonable grounds to suspect"[23] or a "reason

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21. People v. Siemieniec, 368 Mich. 405, 118 N.W.2d 430 (1962).

22. Annot, 162, A.L.R. 1406, 1414 (1946); Annot, 100 A.L.R.2d 525 (1965).

23. Ark. Stat. Ann. §41-2009, (Repl. 1964).

to believe".[24] Such requirements would, of course, yield to the probable cause provision of Article 2, Section 15 of the Arkansas Constitution.

D. Need For Affidavit

A valid search warrant may be issued only upon an application made under oath or affirmation.[25] This is usually in the form of an affidavit, and a failure to adequately support the search warrant by oath or affirmation renders the warrant void.[26]

The affidavit must comply with all the constitutional and statutory requirements regulating the issuance of such writs. It must set forth the facts constituting probable cause, and it must contain a particular description of the place to be searched and the property to be seized.[27] In addition, it would be advisable to include a description of the person having possession of the property at the place to be searched.

As in the case of probable cause, there is need for

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24. Ark. Stat. Ann. §41-3216, (Repl. 1964).

25. Arkansas Constitution, Article 2, Section 15.

26. Walton v. State, 245 Ark. 91 (1968); Garland Novelty Company v. State, 71 Ark. 138, 71 S.W. 257 (1902).

27. Arkansas Constitution, Article 2, Section 15; Walton v. State, 245 Ark. 91 (1968).

promptness in regard to the time lapse between the making of the affidavit and the issuance of the search warrant. In one case an eight day delay was held to invalidate the search warrant.[28] Once again, it would seem that each case must be examined on its particular facts to determine the reasonableness of the delay.

E. Who May Execute

As to who may execute a search warrant, the statutes vary from a general "any person authorized by law to make arrests for such offenses",[29] to the more particular "sheriff, coroner or constable as the case may be most convenient".[30] On first impression it would seem that the granting of the power to execute warrants to "any person authorized by law to make arrests" would include private individuals in light of the statute[31] which authorizes arrests to be made by "a peace officer or by a

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28. State v. Perkins, 220 Mo. App. 349, 285 S.W. 1021 (1926).

29. Ark. Stat. Ann., §41-423, (Repl. 1964).

30. Ark. Stat. Ann., §41-2009, (Repl. 1964).

31. Ark. Stat. Ann., §43-402 (Repl. 1964).

private person".[32] However, an Arkansas statute[33] specifically provides that "every search warrant shall be executed by a public officer, and not by any other person".

In addition to those officials specifically authorized by statute, it has been held[34] that the state police possess the power to execute search warrants on a statewide basis. The court reasoned that since state police are granted the powers possessed by sheriffs,[35] they can legally execute any warrants which sheriffs can execute.

III. Form and Requisites

A. Description

The description of the premises to be searched and the things to be seized must be sufficient to enable the

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32. Ark. Stat. Ann. §43-404 (Repl. 1964).

33. Ark. Stat. Ann. §43-204 (Repl. 1964).

34. Albright v. Karston, supra, note 13.

35. Ark. Stat. Ann. §43-407 (Repl. 1964).

officer to locate the premises and identify the concealed articles. In one case,[36] the affidavit was found to sufficiently identify the premises even though the caption had to be looked to in order to determine the city in which the premises were located. Although the affidavit should be positive in its terms and as specific as possible, all that is required is that it be reasonably certain

Further,[37] the court has held that it is enough that the affidavit contain within its four corners the information necessary to enable the search warrant to be issued and that its recitation unequivocably establish, whether directly or by inescapable import, the significance and relationship of the information shown.

The requirement of particularity in description prevents the seizure of one thing under a warrant which describes another.[38] The United States Supreme Court has refused to allow a seizure of papers belonging to a defendant where the property described in the search warrant consisted of intoxicating liquor.

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36. Vandergriff v. State, supra, note 11.

37. Lowrey v. United States, supra, note 17.

38. Marron v. United States, 275 U.S. 192 (1927).

A blanket search warrant directing the search of "each and every person in said building" without naming or describing any particular person is unreasonable and void.[39] General exploratory searches are also illegal, whether conducted under the guise of a search warrant or not.[40] However, a single search warrant may direct that several peices of property owned by one person be searched.[41]

In the event of a variance ~~bewween~~ between the description in the affidavit and the search warrant, the benefit of the doubt will be given to the recitations in both to uphold the issuance of the warrant.[42]

B. Execution

We have previously discussed those officers authorized to execute the search warrant. Although Arkansas has not ruled on the matter, at least one other jurisdiction has held that in the absence of a statutory requirement, an officer charged with the execution of a lawful warrant is

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39. Crossland v. State, 266 P.2d 649 (Okla. 1954); Annot, 49 A.L.R.2d 1209 (1956).

40. United States v. 1013 Crates of Old Smuggler Whiskey, 52 F.2d 49 (2d Cir. 1931).

41. Williams v. State, 95 Okla. Crim. 131, 240 P.2d 1132 (1952).

42. Lowrey v. United States, supra, note 37.

not obligated to exhibit the warrant as a prerequisite to his right to execute the writ.[43]

It is generally held that the constitutional guaranty against unreasonable searches and seizures means that the service of a search warrant be with reasonable promptness.[44] In Missouri a twelve day lapse was held to render a warranty a nullity. Each case, however, turns upon its own set of facts as to what constitutes an unreasonable lapse of time between the issuance of a warrant and its execution.[45]

After the search warrant has been served its validity is ended, and it may not be revived for the purpose of additional searches.[46]

It should be noted that one statute[47] provides for the issuance of search warrants which are to be conducted at night. The implication would seem to be that a night time search is a more serious intrusion on the privacy of the individual, and therefore might require a greater degree of

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43. State v. Brown, 91 W.Va. 709, 114 S.E. 372 (1922).

44. State v. Miller, 329 Mo. 855, 46 S.W.2d 541 (1932).

45. State of Connecticut v. Cesero,146 Conn. 375, 151 A.2d 338 (1959).

46. Coburn v. State, 78 Okla. Crim. 362, 148 P.2d 483 (1944).

47. Ark. Stat. Ann. §43-203 (Repl. 1964).

probable cause. No Arkansas cases have been decided on this point, however. Other jurisdictions are divided as to whether a search can be legally conducted outside of daylight hours.[48] A federal case held that a search warrant containing no provisions for a night time search must be served in the daytime.[49] As to what constitutes daytime, the rule commonly adopted is the so-called "burglary test" rule which provides that it is "daytime" as long as the officer has the ability to recognize a person's features.[50] Missouri has held that when such a recognition is possible, a daytime warrant may be executed, even though the time is after sundown.

C. Return of Warrant

There is no statutory requirement in Arkansas for the return of the search warrant to the issuing officer. Jurisdictions which do have such a requirement, however, have held that a failure to return a warrant properly issued will not invalidate the writ, since the return is merely a ministerial act.[51]

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48. Siragusa v. State of Texas, 122 Tex. Crim. 263, 54 S.W.2d 107 (1932).

49. Johnson v. United States, 46 F.2d 7, (6th Cir. 1931).

50. State v. Cain, 31 S.W.2d 559 (Mo. App. 1930).

51. United States v. Haskins, 345 F.2d 111 (6th Cir. 1965).

APPENDIX I

STATUTES CONTROLLING ISSUANCE OF SEARCH WARRANTS

Statute	Subject	Issued By	Executed By	Grounds
41-423	Cruelty to Animals	Any magistrate authorized to issue warrants in criminal cases.	Any person authorized by law to make arrests for such offenses.	Any just and reasonable cause to suspect.
41-110	Cruelty to children	"	"	"
41-2009	Gambling devices	Judges of Supreme Court, Circuit Court, County Court and J.P.'s.	Sheriff, coroner or constable.	Reasonable grounds to suspect.
41-3216	Enticing female to any house of ill-fame.	J.P. or other officer authorized by law to issue warrants.		Reason to believe.
41-3218	Enticing female under 18 years to any place for immoral purposes.	"		"
41-4515	Machine guns	Same officer as in 43-201, infra.	Same officer as in 43-204, infra.	Suspects property to be on premises.
43-201	Stolen property	Any officer authorized to issue process for apprehension of offenders.		Suspects property to be concealed on premises.
43-202	"		Sheriff of County or Constable.	
43-203	Night time search for stolen property.			
43-203	Every warrant shall be executed by a public officer, and not by any other person.			
47-502(M)	Game law violations--Game warden can proceed according to law to search any person.			
48-1107	Liquor law violations.	J.P.'s, Police Judges, Chancellors, Circuit Judges, Mayor Judges.	Some peace officer	Reasonable grounds to believe.
53-733	Liquified petroleum gas containers.	J.P., municipal judge, or other magistrate.		Reasonable cause

AFFIDAVIT FOR SEARCH WARRANT

THE STATE OF ARKANSAS
COUNTY OF YELL } ss. _____ } cc.

BEFORE _____
Name of Justice

The undersigned being duly sworn deposes and says:

That he (has reason to believe) (is positive) that (on the person of) (on the premises known as) _____

_____ in the County of Yell, State of Ark.

there is now being concealed certain property, namely _____
Here describe property

which are _____
Here give official grounds for search and seizure

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

_____
Signature of Affiant

_____
Address or R.F.D.

Sworn to before me, and subscribed in my presence, _____, 19__

_____
Justice

SEARCH WARRANT

STATE OF ARKANSAS }
COUNTY OF YELL } ss.

THE STATE OF ARKANSAS:

TO ANY SHERIFF, CONSTABLE OR POLICEMAN IN THE STATE OF ARKANSAS:

Affidavit having been made before me by _____

(has reason to believe) (as the person of)
that he (is positive) that (on the premises known as) _____

_____

_____ in the County of Yell, State of Arkansas,

that he now having concealed certain property, namely _____
(here describe property)

_____

_____

_____

which are _____
(here give alleged grounds for search and seizure)

_____

_____

and as I am satisfied that there is probable cause to believe that the property so described is being concealed
(person)
on the (premises) above described and that the foregoing grounds for application for issuance of the search warrant exist.

(person)
YOU ARE HEREBY COMMANDED to search forthwith the (place) named for the property specified, serving this warrant and making the search (at any time in the day or night) and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property as required by law.
(in the daytime)

Dated this _____ day of _____, 19____

_____
Judge

RETURN

I received the attached search warrant_____, 19____, and have executed it as follows:

On_____, 19____, at_____o'clock____M., I searched (the person) described in (the premises)
the warrant and

I left a copy of the warrant with_____
name of person searched or owner or "at the place of search"
together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

This inventory was made in the presence of_____

and_____

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

_____

Subscribed and sworn to and returned before me this_____day of_____, 19____

_____
Justice

SEARCH OF VEHICLES

I. Introduction

An officer's authority to search vehicles is broader than his authority to search persons and places. Persons and places can be searched under the authority of a search warrant, incidental to a lawful arrest or by consent. A vehicle can be searched (a) by search warrant, (b) in connection with a lawful arrest, (c) by consent, (d) when it has been surrendered or abandoned, and (e) when the officer has reasonable grounds for believing it contains contraband. The common-sense reason for this last ground for search is that a vehicle can be quickly and easily moved out of the jurisdiction before a warrant can be obtained.

It is not a search for the officer to view what is open and visible to his eyes in or on a vehicle or to shine his flashlight into a vehicle at night. The officer has a right to shine his light into a vehicle at night for his own protection, if for no other reason.[1] It is not a

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1. Bell v. United States, 254 F.2d 82 (C.A.D.C. 1958).

seizure for officers to take property which has been abandoned by those in a vehicle, such as objects thrown from a speeding car. Also there is no seizure of property when it is voluntarily relinquished by a person. It may be used as evidence against him even though he may later want it returned. The problem is often proving that a man has voluntarily given up property when he later denies it.

II. Probable Cause to Search

Federal law allows the search of a vehicle in a mobile condition where the officer has reasonable grounds to believe contraband is inside.[2] However, the officer must have had knowledge of the grounds before the search. A search which is illegal because of a lack of reasonable grounds is not made legal simply because officers find something they can seize.[3] The reasonable grounds which are necessary for a search must be the same as those justifying the issuance of a search warrant.

The right to search a vehicle on reasonable grounds

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2. Carrol v. United States, 267 U.S. 132 (1925).

3. Henry v. United States, 261 U.S. 98 (1959).

does not include the right to search a person inside the vehicle.[4] If someone inside the vehicle is to be searched, he sould be lawfully arrested before the search or be the subject of a search warrant, unless he voluntarily consents to the search. When the information the officer has is enough to justify either a search of the vehicle on reasonable grounds, or an arrest of the person inside, he may search the vehicle and arrest the ~~person~~ person after he finds the suspected goods, or he may first arrest the person and then search the vehicle.

Flight from officers in a marked police car can provide reasonable grounds for stoppong and searching the car, but the same is not true of an unmarked police car because the defendant may think he is about to be robbed.

Contraband, such as illegal liquor, which is in plain view of an officer from outside a car furnishes reasonable grounds for searching the car. The same is true of what appears to be filled bank sacks, or a large number of cartons of cigarettes, or a car full of small appliances shortly after a hardware store robbery. The thing seen by the officer must look like contraband, or the fruits of a crime, without any inspection or examination by the officer. In other words, the fact that a brown paper sack is on a

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4. United States v. Di Re, 332 U.S. 581 (1948).

car seat does not provide reasonable grounds to search even though a search might turn up something illegal. The facts and circumstances necessary to make a showing of reasonable grounds will not be the same with every crime. For example, the fact that a vehicle is heavily loaded is one element of reasonable grounds required for searching an automobile for a liquor violation, but a heavily loaded car would be no proof whatever of a narcotics violation or car theft.

The only vehicles which can be searched on nothing more that a showing of reasonable grounds are those which are in a mobile condition. There is no set rule as to when a vehicle is in a mobile condition; the result will depend on the facts of each case. It has been held that a car was not in a mobile condition when officers arrested a man inside a tavern, found car keys on his person, and then searched his car, because it was impossible for anyone to drive it away.[5] A car is not mobile while it is parked in a garage with no one threatening to move it and the owner in jail. On the other hand, a car is not immobile just because it is not moving and no one is inside. For example, a car was . . . in a mobile condition when officers, having information that it contained contraband, watched the car while it was parked on a city

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5. United States v. Stoffey, 279 F.2d 924 (7th Cir. 1960).

street and made a search on reasonable grounds after the driver returned.[6] The court noted that the driver could have returned and driven the car away while the officers were attempting to get a warrant.

III. Search Incidental to Arrest

An officer will often have reasonable grounds to justify either a search of an automobile on reasonable grounds alone or to arrest the persons inside the automobile and then search it incidental to the arrest. In such a case, it makes no difference which the officer does first.

A vehicle may be searched after a lawful arrest if a search is reasonably necessary to protect the officer, or to prevent escape. Also, if the officer has reasonable grounds for believing that the vehicle contains contraband or the fruits and instrumentalities of the crime for which the arrest was made, or if the vehicle is being used in the commission of a crime, he may search the vehicle. As in the case of a search of the person or a search of the premises incidental to an arrest, if the arrest is illegal so is the subsequent search. The search is also illegal if the arrest was made only to search the vehicle.[7]

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6. Husty v. United States, 282 U.S. 694 (1931).

7. Clay v. United States, 239 F.2d 196 (5th Cir. 1956).

The vehicle must be located at the place of the arrest or very near it. One court has held that an arrest of an individual inside a tavern did not justify a search of his personal automobile three hours later, while it was parked at a nearby curb, even though the defendant had the keys in his pocket when arrested.[8] Another court held that where a defendant was arrested in a barber shop while committing a burglary, a search of his car which was twenty feet from the shop was justified as incidental to the arrest.[9] As discussed previously under searches of the person, the rule requiring that the search be very close in both time and place does not require split-second timing. For example, where officers arrested two escaped convicts and used all their available manpower to guard them during a short trip to the jail, a subsequent search of the convicts' car, which had been towed downtown, was held to be legal.[10] The court reached its decision at least in part, however, because the men were escaped convicts. In a similar case, three men were arrested in a parked car on a vagrancy charge and later convicted for conspiring to rob a bank. The conviction was reversed because burglary tools, found in a search of the car that did not take place until the car

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8. United States v. Stoffey, supra, note 5.

9. People v. Trammell, 65 Ill. App.2d 331, 213 N.E.2d 74 (1965).

10. Bartlett v. United States, 232 F.2d 135 (5th Cir. 1956).

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2 OF 3

was driven to the police station,[11] where erroneously admitted in evidence. The search was held to be too far from the place and time of the arrest.

If an officer has authority to search a vehicle, he may search all areas of the vehicle within which the object of the search could be located. For example, an officer may search the trunk of an automobile for a stolen TV set but he could not search the glove compartment for an object as large as a TV, nor any other area in which a TV set could not logically be found. So long as the scope of an officer's search is legal, he may seize evidence which constitutes or points to the existence of another crime.[12] If the driver of an automobile will not surrender the key without a struggle or if a key cannot be found, an officer can use reasonable force to open locked compartments if he feels it is necessary to open and search such compartments immediately, otherwise he can have the vehicle towed to a place close by where it can be opened by a mechanic or a locksmith.[13]

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11. Preston v. United States, 376 U.S. 364 (1964).

12. Brinegar v. State, 97 Okla. Crim. 299, 262 P.2d 464 (1953).

13. Id.

IV. Search Incidental to Traffic Violation

Ordinarily the search of a vehicle following the issuance of a summons for a minor traffic violation is unjustified. In fact, the only time such a search is justified is when additional circumstances beyond the mere violation of a traffic law are present. For example, the fact that an automobile operator runs through a stop sign or passes in a no-passing zone does not standing alone furnish reasonable grounds to search the vehicle. But if an officer observes a sawed-off shotgun partially concealed under the seat of an automobile while he is issuing a ticket for a traffic violation, the officer is justified in making a search.[14]

When an arrest is made for a traffic offense and an officer has reasonable grounds to believe that the vehicle contains something connected with the offense, (such as a bottle of whiskey in the case of driving while intoxicated), the officer has authority to search the vehicle as well as the person of the violator. For example, in a recent California case, officers stopped a motorist after observing his car weaving from lane to lane and traveling above the

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14. Bushby v. United States, 296 F.2d 328 (9th Cir. 1961).

speed limit. The driver was not intoxicated to the extent of "failing" a test for drunkeness, but he appeared to be under the influence of something. One of the officers entered the car and noticed a marijuana cigarette in the ash tray and the driver was prosecuted for unlawful possession of drugs.[15] The search was deemed legal. In People v. Jackson,[16] officers stopped a vehicle for bearing a defective windshield and searched it after smelling a strong odor of marijuana and observing that the driver appeared to be dazed and glassy-eyed. The court held the search of the automobile (including the locked trunk) legal because of the odor and the appearance of the driver.

V. Search by Warrant

The basic rule for a search of vehicles is the same as for a search of premises; it must be searched only after obtaining a warrant when it is reasonably practical to obtain one. Federal courts have held that when a vehicle is parked in private premises it is protected by the Fourth Amendment against unreasonable search and seizure and the vehicle may be searched only by warrant, consent, or as incidental

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15. People v. Johnson, 139 Cal. App.2d 663, 294 P.2d 189 (1956).

16. 50 Cal. Rptr. 437 (1966).

to an arrest. An exception arises when a vehicle which officers have been following and have reasonable grounds to search is driven onto protected premises.[17]

Officers should be encouraged to obtain search warrants for vehicle searches whenever reasonably possible. The warrant takes a big responsibility from the officer by showing an official finding that reasonable grounds exist for the search.

VI. Search with Probable Cause to Believe the Vehicle is Carrying Illegal Goods

In Brinegar v. United States,[18] the court held that probable cause existed for a search when officers spotted Brinegar (who had a reputation for hauling liquor and had been arrested for this offense previously) coming into Oklahoma which was "dry", from Missouri which was "wet", in a heavily loaded car. The officers stopped and searched the car finding twelve cases of illegal liquor. The court said that while probable cause to search must be more than a mere suspicion, information obtained by officers fror reliable informants, or from prior experience could be

17. Scher v. United States, 305 U.S. 251 (1938).

18. 338 U.S. 160 (1949).

taken into account in deciding whether there was probable cause for the search. The officers had reliable information that Brinegar used this route to haul illegal liquor and when they saw his car moving into the state, heavily loaded, probable cause existed.

In United States v. Duke,[19] officers received a tip from a reliable informer that Duke had left Indianapolis for Chicago at three o'clock in the morning for the purpose of purchasing heroin nd returning to the city immediately. The officers placed the highway under surveillance and when they saw Duke driving the car that had been described to them, they stopped it, conducted a search and found the heroin. The court ruled that probable cause was present stating:

> Any doubt which they might have had at that time as to the existence of probable cause was completely dispelled when they observed an approaching car of the same description, with the same license number, and the same occupants as Sims had predicted.

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19. 369 F.2d 355 at page 357, (7th Cir. 1966).

In Mann v. City of Heber Springs,[20] the police knew that Mann had a reputation for being a "bootlegger" and after receiving a tip from a service station operator that Mann had filled his car with gas, the police secured a search warrant (which later turned out to be invalid) and searched Mann's house. The search produced nothing. The

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20. 239 Ark. 969, 395 S.W.2d 557, (1965).

police then requested Mann to give them the keys to his car which "looked a little heavily loaded". The officers found illegal liquor in the trunk of Mann's car. The Arkansas Supreme Court, in holding that no probable cause existed for the search of the car, said that the search was made only because the officers did not find whiskey in the house. The fact that Mann had a reputation as a bootlegger, purchased gas, and that his car was heavily loaded did not constitute probable cause.

In Clay v. United States,[21] police officers, knowing of Clay's reputation of engaging in the lottery business, waited beside a highway in two unmarked cars for Clay to make

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21. 239 F.2d 196 (5th Cir. 1956).

one of his usual stops. Clay drove by but did not stop, the officers gave chase, and eventually apprehended him. Evidence was found which reflected that Clay had been taking bets. The court held that probable cause did not exist for the arrest and search, because there was no indication from Clay's conduct on the highway that he was in the act of committing a crime. The fact that Clay had a reputation for being in the lottery business was not enough to constitute probable cause.

In Williams v. State,[22] an officer spotted Williams driving north on Highway 71 toward Ashdown. The officer gave chase at speeds up to one hundred twenty miles per hour before finally stopping Williams on a dead end street in Ashdown. The officer told Williams that he was going to search the car. Williams replied, "Hell, I've got some whiskey and beer in there." The officer found illegal liquor and the court held that the arrest was lawful because the offenses committed were done in the presence of the officer and the search was incidental to the arrest. Perhaps the same result could have been reached using the "consent" rule as well as the incidental search rule.

In Rhodes v. United States,[23] Rhodes and another were

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22. 230 Ark. 574, 323 S.W.2d 922, (1959).

23. 224 F.2d 348, (5th Cir. 1955).

arrested while working at a moonshine still. Rhodes automobile was parked about one hundred yards from the still. The officers found no alcoholic spirits at the still but took Rhodes car keys from his pocket, searched the car and found a half-pint of untaxed liquor. Rhodes argued that the search was not "at the place of arrest" so as to be incidental to a lawful arrest. The court, in holding against Rhodes, said the arrest and search were part of one continuous transaction and the fact that the automobile was one hundred yards from the scene of the arrest did not make the search unreasonable.

In United States v. Theriault,[24] officers in DeWitt received information reflecting that a pick-up truck answering the description of one used in a Parkdale bank robbery was parked outside a DeWitt motel. The officers observed burglary tools in the the truck bed subsequently arrested the defendant and his companion and took them to jail. The truck was driven to the jail by an officer and searched upon its arrival. In holding against the defendant, the court said the unloading of the pick-up truck at the station was an uninterrupted and continuing act of the police initiated by the lawful arrest of the defendant. The seizure of the articles from the truck was substantially contemporaneous with the arrest.

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24. 268 F. Supp. 314, (W.D. Ark.) (1967).

In United States v. Stoffey,[25] officers were advised that Stoffey was taking bets in his tavern. They obtained a search warrant for the tavern at eleven o'clock in the morning. Fifty minutes later Stoffey arrived, parked his car in front of the tavern and went inside where he was read the search warrant and was told to empty his pockets. Three hours later the officers told Stoffey his car would be seized and that he could either voluntarily relinquish the keys or the car would be towed away. Stoffey handed over the keys and was placed under formal arrest at two fifty in the afternoon. Approximately one hour later the officers seized the car, searched it, and found betting slips which were used in evidence against Stoffey. The court, in holding for Stoffey, said the seizure of the car was not incidental to his arrest. The car had been parked in front of the tavern for three hours and during that time there was no chance of it being driven away. The three hour period was an adequate time to obtain a search warrant, and under these circumstances the search of the automobile was unreasonable.

In Preston v. United States,[26] Preston and two friends were arrested for vagrancy after being found seated in a car at Newport, Kentucky at three o'clock in the morning. The police searched them, took them to jail, and had the car towed to a garage. Later the police went to the garage searched the car, and found evidence reflecting that Preston

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25. 279 F.2d 924, (7th Cir. 1960).
26. 376 U.S. 364, (1964).

was conspiring to commit a bank robbery. The court held that the search was too remote in time and place to have been incidental to the arrest and therefore the search was unreasonable. The car was no longer at the scene of the arrest and was no longer in the immediate presence of the defendant. The defendant therefore cound not have obtained access to weapons nor could he have destroyed evidence concealed in the car.

The most recent Arkansas case on this subject is Petty v. State.[27] In that case there was evidence reflecting that Petty and others burglarized a bowling alley in Fayetteville and left in a truck. The Fayetteville police radioed a "pick-up" order and Petty was arrested in Mount Ida. The arresting officers took the truck keys and jailed Petty. Six hours later two state policemen arrived, took the keys and searched the truck. Twelve hours later the truck was searched again. Each search produced certain incriminating evidence. The Arkansas Supreme Court held that the searches were unreasonable and that the officers should have obtained a warrant before making the searches. The court said the men had been arrested, they had no chance to escape, and there was no chance that the articles could have been removed or lost.

However, in Price v. United States,[28] a different re-

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27. 241 Ark. 911, 411 S.W.2d 6, (1967).

28. 348 F.2d 68 (C.A.D.C. 1965).

sult was reached. There a local store was robbed and police found a car reported to have been used in the robbery. The officers noticed a crowbar and other tools in the car. Later, Price came up to the car, was questioned by officers, and he was then arrested. The crowbar and tools were taken into the station and the car was taken to the station parking lot. About twenty minutes after the arrest, an officer observed a man reaching under the seat of the car and blinking the car's lights. The officer investigated and found an envelope which contained a note written by the store's owner. The court held that the taking of the tools and crowbar was reasonable and that the taking of the envelope was not too remote from the time and place of arrest to make it illegal.

In United States v. McKendrick,[29] officers had read a hijacking report describing an automobile and a maroon corduroy jacket. While investigating a shooting the officers stopped a car and noticed a jacket meeting that description in the back seat. The officer took the car and its occupants to the police station. There a

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29. 266 F.Supp. 718, (S.D. of N.Y. 1967).

search was made of the glove compartment and other incriminating evidence was discovered. The court, in holding against McKendrick said that the jacket and other items found in the car were property regarded as instrumentalities of the crime of hijacking. Under the circumstances the officers had reasonable grounds for the search. The items taken in the search were not rendered inadmissible merely because there had been time to obtain a search warrant.

In order to make a valid search incidental to arrest, the arrest itself must be lawful.[30] If the arrest is not lawful the search will be held unreasonable. The search should take place as soon as possible after the arrest and should take place at substantially the same place as the arrest.

VII. Consent to Search

Although a person has a constitutional right to be secure against unreasonable searches and seizures, he may waive this right by consenting to a search. If he consents to the search he cannot later complain that his constitutional rights were violated.

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30. Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L. Ed.2d 134 (1959).

There is a great deal of confusion as to what constitutes a valid granting of consent. The general rule is that the consent must be given freely and voluntarily without any fraud or duress by an officer of the law. For example, if any officer tells a person he has a search warrant with which to search the person's automobile when he really has no warrant, then any purported consent given is invalid, and any subsequent search would be illegal. Also a person's failure to resist a search does not show that he voluntarily consented. If the person alleged to have given consent to search denies it in court, then the burden of proof is on the officer to prove otherwise.

In Mosco v. United States,[3] Mosco was suspected of bank robbery. He could not be found but the police located his car parked across the street from his apartment. An officer searched the car and found a notebook which incriminated Mosco. The officer did not remove the notebook from the car but left it between two cushions on the back seat where it had been found. Later Mosco was arrested and allegedly consented to a search of the car and the notebook was then taken from the car by an officer. At his trial, Mosco contended that both searches were unlawful. The court, in holding for Mosco, said that the first search was made before any consent was obtained and the purported "request" for Mosco's consent was pure sham. Mosco's constitutional rights were violated when the first officer searched the automobile without consent

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3. 301 F.2d 180 (9th Cir. 1962).

and the subsequent search of the automobile with Mosco's purported consent following his arrest did not cure the invalidity of the first search.

As a general rule, only the person whose constitutional rights are affected by an unreasonable search and seizure can waive those rights. As a result, the owner of a vehicle or one rightfully in possession are generally the only people who can consent to the vehicle being searched. In United States v. Eldridge,[32] Eldridge gave Nethercott permission to use his car to take his daughter for a ride around town. Later, Nethercott's mother-in-law notified police that there was a stolen rifle in the back seat of the Eldridge car. Since there had been recent thefts of firearms in the area, police acquired a search warrant and went to investigate. After stopping Nethercott, the officers inquired about the rifle and allegedly obtained Nethercott's permission to search the car, In fact, Nethercott opened the car door, the glove compartment and the trunk. No stolen arms were found, however, two stolen radios were found in the trunk. Since Nethercott cooperated fully throughout the search the search warrant was never served. At his trial Eldridge contended that Nethercott's consent was not valid because he did not own the car. The court found otherwise saying Nethercott had rightful possession

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32. 302 F.2d 463 (4th Cir. 1962).

and control of the car and could therefore do whatever was reasonable. Eldridge had placed no restriction on Nethercott pertaining to the trunk and had delivered the keys to the ignition and to the trunk. The court also said that access to the trunk was a normal indicent to the use of an automobile, and observed that Nethercott did not obtain possession of the car with any deceptive purpose.

SEARCH AND SEIZURE

I. Introduction

Evidence obtained by methods that violate Federal or State constitutional standards is not admissible in court.[1] A search must begin in a lawful manner such as under the authority of a valid search warrant, incidental to a lawful arrest, or upon probable cause, and the extent of a search must be within permissible limits. All exploratory searches where officers are not looking for particular items are illegal.[2]

II. Protected Premises

The Fourth Amendment mentions no place except a house, but a "house" includes any dwelling, whether it is a mansion,

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1. Mapp v. Ohio, 367 U.S. 643 (1961); Ker v. California, U.S. 23 (1963), Aguilar v. Texas, 378 U.S. 108 (1964).

2. United States v. Lefkowitz, 285 U.S. 452 (1932).

an ordinary home, an apartment, or a room in a hotel or boarding house. Places of business and offices are also included, and a house is still protected when it is temporarily unoccupied, such as a summer home or weekend cabin. On the other hand, once a house has been vacated, such as where a tenant checks out of his hotel room, the room is no longer protected, at least as far as that tenant is concerned. A man's body is also protected against unreasonable search the seizure, and so are his papers and other things such as vehicles, safe-deposit boxes and mail.

III. What is Not Considered a Search

It is important for an officer to know what is not considered a search. because he may use any information obtained without a search.

For example,

if an officer stands in a street or an open field and sees contraband such as illegal whiskey inside a house, he can use that information to obtain a search warrant, or if he sees someone inside the house committing a crime he can enter the house to make an arrest and can also make a search and seizure following the arrest. The same is true even if the officer

uses field glasses or a telescope. On the other hand, if an officer obtains information by trespassing on protected premises, he is conducting an illegal search and seizure and he cannot use the information to justify a search warrant.[3] Information obtained by window-peeking into bathrooms, bedrooms, and the like is illegal.[4]

Open fields, pastures, woods and similar places are not protected. In one case officers received a complaint alleging a theft of building materials, and traced a truck which had been in the area of the theft, to the defendant. They went to his property, located in a new subdivision, where the defendant had laid a foundation for the construction of a home, and found the stolen goods among the building material stored on the property. The court said that the lot clearly could have been searched if it had been left completely bare and the fact that a foundation had been laid and building material

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3. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

4. People v. Hurst, 325 F.2d 891 (9th Cir. 1963).

brought onto the property did not make it a home.[5] It is also not a search for an officer to observe items located in a public place, such as a park, road, street, or alley, or on private premises that are open to the general public, such as a store, shoeshine shop or bar, or the hallway or lobby of a hotel or apartment house open to the public. For example, when officers in a tavern, open for business, see gambling equipment or open gambling, they may seize the equipment or arrest the offenders. It is also not a search for an officer to be in the halls or lobby of an apartment house or similar place which is not open to the public, if he has been admitted by the landlord or doorman or if he is a guest of the tenant. The same applies to a private home where the officer has been properly admitted. In some cases, the invitation may come as the answer to the officer's request to "look around." It must be remembered, though, that permission to enter is not the same as consent to search. An officer may act on what he can see without searching, but a search following an invitation to enter would be illegal.[6]

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5. People v. Grundeis, 413 Ill. 145, 103 N.E. 2d 483 (1952).

6. Williams v. United States, 263 F.2d 487 (D. C. Cir. 1959).

The problem of who can consent to an officer coming in the house is similar to that of who can consent to a search. Some people who cannot consent to a search however, may be able to consent to an officer coming on the premises. For example, while it may be true that a child cannot consent to a search of his parents' house, the same child may very well have authority to invite the officer into the living-room.[7] The best rule to follow is that an officer may go into a house whenever an invitation is given by someone who apparantly has authority to give such an invitation.

IV. What is Not a Seizure

Instrumentalities and fruits of a crime plus contraband can be removed from the premises following a legal search. For example, a pistol used in a hold-up or homicide, or a can of gasoline used in committing arson, is an instrumentality of a crime which can be removed. Generally, when an officer is in a place where he is lawfully entitled to be and he sees contraband in open view, he can take it and it may be used as evidence.

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7. Davis v. United States, 327 F.2d 301 (9th Cir. 1964).

It is not a seizure for an officer to take property which has been abandoned by a person who has been arrested or is under investigation, such as things that have been thrown into a wastebasket in a vacated hotel room,[8] or things dropped on the street by a person seeking to escape. There is also no seizure if a defendant voluntarily surrenders possessions, and the property can be used as evidence against him if he later objects.

Property seized in an unreasonable search must be returned, unless it is property which the defendant has no right to possess, such as stolen property.

V. Search of the Person

A person may be searched under the authority of a search warrant, but the majority of such searches are made after a lawful arrest. American law has always recognized the right of the officer to search an accused after he has been legally arrested if it is necessary to:

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8. Abel v. United States, 362 U.S. 217 (1960).

(1) Protect the officer from harm;

(2) Deprive the prisoner of things he might use to effect an escape;

(3) Stop the person arrested from destroying evidence.[9]

If an arrest of the person is unlawful, the subsequent search of a person will be adjudged unreasonable. Most illegal arrests are due to a lack of probable cause, and the best assurance of probable cause is a valid arrest warrant. No matter how lawful the arrest may appear on the surface, if the court finds that it was made only in order to allow officers to make a search, such search of the person will be deemed unreasonable. A case in point involved an arrest made by officers for a traffic violation which had been committed a day earlier, because the officer wanted to search for narcotics.[10]

Since the right of an officer to search a person without a warrant is based on a valid arrest, it would logically follow that the search can only be made after the arrest.[11]

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9. Id. at 238.

10. Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961).

11. Stoner v. California, 376 U.S. 483 (1964).

It is equally true that where the search is made after the arrest, it must be made very soon thereafter, as the right to search is based on the arrest. Any unnecessary delay in the search may result in its being unreasonable. A short delay sometimes is necessary, however, such as in those situations when a woman is arrested and a matron is not present.

The area of the "person" generally is everything covered by his outstretched arms, and everything else so close that he could reach it by taking a step or two.

VI. Body Cavities

Body cavities may be searched for the fruits and instrumentalities of a crime, or for contraband. Problems concerning the search of body cavities usually result when some degree of force has been used. One common situation is where an individual arrested for a narcotics violation places the narcotics in his mouth and tries to swallow it in order to get rid of the evidence. If excessive force is used by officers in an effort to recover the narcotics, the search and seizure will be deemed unreasonable. It has been held that if an officer puts a severe choke hold on the defendant so that he cannot

breathe, too much force has been used.[12] On the other hand, if the officer merely puts his hands on the defendant's throat to a degree necessary to prevent swallowing, but not so great as to prevent breathing, the force has been held to be reasonable.[13]

Searches of a body cavity have generally been held legal when an officer had reasonable grounds for believing that some illegal object had been hidden in the cavity and no more force was used than was necessary to accomplish the search.[14] Such searches are also legal when made by a doctor using an accepted medical method, as in the case of blood samples showing the presence of alcohol taken from an accused without his consent.

In a California case, a motorist was convicted for driving while intoxicated. He had been arrested at a hospital while receiving treatment for injuries received in an accident involving the car he had been driving. At the direction of a police officer, a blood sample was taken by a doctor at the

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12. People v. Martinez, 130 Cal. App. 2d 54, 278 P.2d 26 (1954).

13. People v. Sanchez, 11 Cal. Rptr. 407 (1961).

14. Blackford v. United States, 247 F.2d 745 (9th Cir. 1957).

hospital, and the report of the chemical analysis of the sample was admitted in evidence at trial. The evidence further reflected that the defendant had refused, on the advice of his lawyer, to have the test taken. The U. S. Supreme Court held that a sample taken in a hospital by a doctor in a medically acceptable manner was legal, as the defendant had been lawfully arrested for driving while intoxicated. The officers had reason to believe that the desired evidence might be gained by the test, and there was no time to find a magistrate and get a warrant.[15]

Anything found in a search of the person may be taken, kept, and used as evidence, including evidence of a crime different from the offense for which the arrest was made.

VII. Property Located on the Person Arrested

A person who has been arrested is usually not placed in a cell until his property has been removed and inventoried.[16] Any evidence uncovered during the inventory is admissible.

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15. Schmerber v. California, 384 U.S. 757 (1966).

16. Baskerville v. United States, 227 F.2d 454 (10th Cir. 1955); Lanza v. New York, 370 U.S. 139 (1962).

In a recent case a man was arrested under authority of a warrant charging him with assault and battery. There was no visible evidence at the scene of the arrest and a frisk turned up no weapons. At the station the defendant was ordered to empty his pockets and a package containing narcotics was found. The court upheld the search, saying that modern police practice calls for a thorough search at the station house of any person taken into custody.[17]

VIII. Search of Premises by Search Warrant

An officer authorized to issue process may issue a search warrant to search for any personal property that has been stolen or embezzled after affirming under oath that there is reasonable cause to believe that the property can be found at a particular place.[18] The term "property" includes the fruits and instrumentalities of a crime as well as contraband. Where a search under the warrant also results in an arrest, the officers may seize weapons that might cause the officer injury or allow the accused to escape.

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17. Charles v. United States, 278 F.2d 386 (9th Cir. 1960).

18. Ark. Stat. Ann. §43-201 (Repl. 1964).

Examples of instrumentalities which may be seized include a crow bar used in a burglary, articles of clothing worn during the commission of a crime, records and papers used in operating a bootlegging business, and corporation papers used in committing a criminal offense. In addition to stolen goods, the fruits of a crime include anything that has been embezzled. Also objects such as diamond rings and bank deposits into which the fruits of a crime have been converted may be properly seized. Contraband includes (among other things) illegal whiskey, illegal firearms, counterfeit money, burglary tools, lottery tickets, and counterfeit liquor stamps.

The search warrant must "particularly describe" the things to be seized, and if the warrant does not describe the property adequately, the seizure will be illegal. An officer should get as accurate a description of goods as possible under the circumstances of each case. Obviously, he does not need to describe the contents of a gambling house as accurately as he should describe stolen goods. When an officer applies for a warrant to search for, and seize, several cases of liquor, it is not necessary to state the variety or brand name. Under the same warrant, however, it would be illegal to seize forged labels that were intended to be placed on said whiskey bottles, because the warrant only

described cases of liquor.[19]

The search warrant must describe the place to be searched in such a manner that the officer, with reasonable effort, can tell it apart from all others. The description does not have to be perfect, however. For instance, a mistake in a street number may not be fatal if the warrant contains enough additional information, such as the name of a grocery store, to enable the officer to tell it apart from all others. This does not mean that any general description of the area will suffice. A description has been held insufficient when it described a street by street and number but did not distinguish between north and south streets of the same name. A warrant authorizing a search of John Doe's barn in a certain community was held invalid when the area was farming country in which many barns were located. Another warrant was held invalid when an entire house was described, but the house was shared by two families, each living in a separate part, and reasonable grounds existed for searching only one part.[20]

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19. Marron v. United States, 275 U.S. 192 (1927).

20. United States v. Poppitt, 227 F.Supp. 73 (D. Del. 1964).

All parts of the building which come within the description of the warrant may be searched if reasonable grounds exist. After the object of the search has been located and seized, the search must end.

The permissible extent of a search varies with the size and type of object sought. A desk drawer may be searched for a watch or a diamond ring, but not for a stolen cow. Files and briefcases may logically be searched for stolen blueprints, but not for a washing machine.

An officer may seize objects specifically named in the warrant, and may also seize contraband or the fruits of any other crime if such ~~was~~ were discovered in a logical search for the objects named in the warrant. A search is illegal, though, if its purpose is to find things not included in the search warrant.[21]

IX. Search of Premises Incidental to Arrest

A house cannot legally be searched without a search warrant unless an arrest is made inside the dwelling or unless consent of a person authorized to consent to a search is given. The fact that reasonable grounds exist for the search make no difference if an arrest is not

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21. Woo Lai Chun v. United States, 274 F.2d 708 (9th Cir. 1960).

actually made or a warrant issued. When a search is made incidental to the arrest of a person inside a house, the search can extend no further than the person arrested and his immediate surroundings.

If the defendant is arrested outside his house, office, or other area protected by the Fourth Amendment, he cannot be taken back to those areas in order for the officer to conduct a search incidental to the arrest.[22]

Officers cannot deliberately delay an arrest until the defendant returns to his residence in order to make a search of that area. In a leading case, policemen repeatedly trailed the defendant over a regular route in the city because they believed him to be a "bagman" in a numbers operation. After following him for days, the officers saw the defendant enter a house in which they believed incriminating evidence was located. The next day, the officers got a warrant for the defendant's arrest and followed him over his entire route, but they were ordered not to arrest him until he went in the house. After an arrest inside the house, the officers seized numbers slips and other items. The seized evidence was inadmissible at trial because the officers deliberately delayed the arrest

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22. Agnello v. U.S. 269 U.S. 20 (1925).

in order to search the building.[23]

An arrest may be delayed, however, if the reason for the delay is the security of the arrest. For example, officers may delay an arrest until the defendant returns home if they have good reason to believe that a car chase and gun battle in the public streets will take place.

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23. McKnight v. United States, 183 F.2d 977 (D.C. Cir. 1950).

IX. Announcement

Officers sometimes enter premises to serve a search warrant without first announcing who they are or asking permission to enter. Generally this is done in order to prevent the destruction of the things named in the warrant. For example, if a narcotics offender has any advance notice, he may flush the drugs down a toilet. If notice is given to a bookie, he can very often destroy his bet records. Bookies today often use flash paper, which goes up in smoke when it is touched with a lighted cigarette or gelatin paper, which dissolves on contact with water. In these and many other cases, the police are faced with the choice of giving notice and suffering the loss of the evidence needed for conviction, or making an unannounced entry and possibly having the evidence declared inadmissible. A majority of states have enacted statutes which provide that an officer cannot enter a building for purposes of executing a search warrant until he first announces who he is and what he intends to do.[24]

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24. For example, see Ark. Stat. Ann. §43-414 (Repl. 1964).

XI. Search of Premises by Consent

An officer may conduct a search without a warrant and without first making an arrest if the defendant consents to the search. The consent must be voluntarily given without any force or threats by the officer. The person giving the consent must specifically consent to a search and not just give permission for the officers to come on the premises. Evidence indicating that the officers came to the defendant's premises in overwhelming numbers, or at an unreasonable hour of the day or night, or displayed symbols of force, or used demanding words or "put pressure" on the defendant in any other way will tend to indicate that consent was not voluntarily given. The courts are espectally quick to recognize force in the case of women, the very young, the very old, and foreign born individuals.

The nature and scope of the search is governed by the terms of the consent given, and if the defendant revokes his consent during the search, the search must end. Officers conducting a consent search may seize evidence relating to the crime for which the search is being conducted and incidental evidence from any other crime.[25]

As a general rule consent to search premises can be given only by a person who has the right of possession. If his consent is obtained, the evidence found can be used against any person, and not just the owner or the person in possession. As an example, if officers are investigating a tenant who occupies a building, a valid consent to search that building must be obtained from the tenant, as he has the right of possession, and not from the landlord even though he owns the building.[26] A partner in a business can consent to a search of the partnership business building and the evidence found can be used against another partner. A mother can consent

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25. Sap v. United States, 328 U.S. 624 (1946).

26. Stoner v. California, Supra, note 11.

to a search of her home and the evidence found used against her son who lives in the same house.[27] A guest or visitor on premises cannot consent to a search of the premises for evidence that may be used against the person in possession, but a person in possession may consent to a search for evidence that can be used against a non-paying guest or visitor who is living on the premises for a few days only.

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27. Maxwell v. Stephens, 229 F.Supp. 205 (E.D. Ark. 1964).

LINEUP PROCEDURES

I. Introduction

In our system of criminal justice it is the function of the police to gather the prosecution's evidence. One of the most valuable tools used in this collection process is the pretrial lineup. Such a proceeding may enable the police officials to obtain a positive identification of a suspect on which they may base further investigation as well as a prosecution. The lineup, by its nature, produces a confrontation between an accused and his accusors. Because of this factor the Supreme Court has defined the pretrial lineup as a "crucial" stage in the prosecution.[1] The court points out that today a defendant's guilt or innocence is largely determined at the pretrial stage and thus all protection afforded him at trial should be afforded him at the pretrial stages as well. It is therefore necessary that law enforcement officials have a thorough knowledge of the rules laid down by the Supreme Court which govern lineup practices.

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1. United States v. Wade, 388 U.S. 218 (1967). See also, Gilbert v. California, 388 U.S. 263 (1967)

II. The Fifth Amendment Right Against Self-Incrimination

In the landmark case of United States v. Wade, two arguments were raised concerning the validity of police lineup procedures. The first argument was based on the Fifth Amendment right against self-incrimination. The facts of the case were as follows: The defendant, Wade, was arrested for bank robbery and placed in a lineup consisting of five or six other persons. Each person wore strips of tape like those allegedly worn by the robber during the holdup, and each ~~person~~ person repeated the words "put the money in the bag". As a result of the viewing, two bank employees identified Wade as the robber.

The Fifth Amendment provides:

> "...nor shall be compelled in any criminal case to be a witness against himself."[3]

In two leading cases the United States Supreme Court made a distinction between evidence of a testimonial or communicative nature and evidence of a real or physical sort.[4] In the Wade case the court held that a lineup was physical in nature and not testimonial. The court said that there was no testimonial significance in requiring the accused to exhibit his person for observation by witnesses, or in having him speak the words supposedly used by the robber.[5]

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2. 388 U.S. 218 (1967)

3. U.S.C.A. Const. Amend. 5.

4. Schmeber v. California, 384 U.S. 757 (1966); Holt v. United States, 218 U.S. 245 (1910).

5. 388 U.S. at 222.

The court compared the lineup procedure to other preliminary investigative proceedings such as taking a blood sample,[6] requiring a suspect in a lineup to try on clothes,[7] submitting to photography, measurement, writing, speaking, standing, walking or jestering.[8]

III. The Sixth Amendment's Right to Counsel

The second argument advanced in the Wade case was based on the accused's right to counsel and was accepted by the court. Wade was compelled to participate in a lineup without notice to, and in the absence of, his appointed counsel. The Court held that this violated Wade's Sixth Amendment right to counsel. A similar decision was rendered in Gilbert v. California, decided on the same day.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

This provision has been construed by the court to apply to any "crucial" stage of the proceeding. The Wade court said:

> It is an established principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone at any stage of the prosecution, formal

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6. 218 U.S. 245.

7. 388 U.S. at 266.

8. Id.

9. 388 U.S. 263, (1967).

> or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.[10]

The importance of counsel's presence is that he can observe the proceedings and later make a meaningful cross-examination of the state's witnesses. If he is not present at the time of the lineup, he does not have a chance to attack any subsequent in-court identification made by a witness at an out-of-court lineup.

The court distinguished the lineup from other preparatory investigative procedures such as finger printing, taking a blood sample, etc., on the basis of technology.[11] The Court reasoned that technology is sufficiently available to both sides so that a defendant's counsel may gather enough material to meaningfully cross-examine the prosecution's expert witnesses. The Court concluded that since there is a potential for prejudice, whether intentional or not, the pretrial lineup is such a proceeding where a defendant is entitled to counsel.[12] It held that Wade's counsel should have been notified of the impending lineup and his presence was a requisite to its conduction.

An important note should be made that the Wade case further held that a lawyer's presence is not required provided the accused gives

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10. 388 U.S. 218 at 226

11. Id. at 227.

12. Id. at 236-37.

a voluntary, knowing, intelligent waiver of such right after he has been informed of it.[13]

No contention was made that the time required to give notice and secure the presence of counsel might prejudicially delay the lineup. The Court has left open the question of whether a substitute counsel might suffice in case the time required to secure the suspect's own counsel would result in prejudicial delay.[14] In a note to the decision the argument is made that substitute counsel may be justified on the basis that his presence would eliminate the hazards of the critical stage.[15] But in no event can the notification and presence of counsel be totally eliminated.

Failure to provide the accused with the aid of counsel at the pretrial lineup can result in the invalidation of a conviction. If counsel has not been present at the lineup, the State must establish by clear and convincing evidence that any in-court identification is a result of observations of the suspect other than at the lineup.

IV. The Fourteenth Amendment, Due Process of Law

Even though a suspect has no valid claim under the Fifth or Sixth Amendments against the conduct of a lineup, there may still be an

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13. See United States v. Wade, 388 U.S. 218, 237 (1967)

14. Id. at 237.

15. Id. at note 27.

attack on the proceedings as a denial of due process of law.

Stovall v. Denno[16] is the leading United States Supreme Court case on the problem of due process of law and pretrial lineups. In the Stovall case, five policemen and two members of the district attorney's staff brought a Negro suspect to the hospital room of a woman, which he was suspected of stabbing. The accused was the only Negro in the room and he was handcuffed to one of the officers. The woman was asked "if he was the man," and she identified him. Later an in-court identification was made and Stovall was convicted. It was contended on appeal that this confrontation was of such a nature as to deny him of due process of law.

The Fourteenth Amendment provides that:

> " . . . nor shall any State deprive any person of life, liberty, or property without due process of law."[17]

The Court's primary problem was to define what was meant by a denial of due process of law. In the case of Stovall the Court concluded that there was a denial of due process if the lineup was "so unnecessarily suggestive and conducive" that it produced an "irreparable, mistaken identification."[18] This test is difficult to apply since there are no clear-cut rules or standards for determining when the lineup activity becomes so suggestive as to be a denial of due process. The Court in Stovall said that this determination depends on the totality

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16. Stovall v. Denno, 388 U.S. 293 (1967).

17. U.S.C.A. Const. Amend. 14.

18. 388 U.S. at 302.

of the circumstances surrounding the lineup, with no one circumstance controlling.[19]

In that case the Court considered several factors which included the possible impending death of the only witness, the inability of the witness to attend a formal lineup, and the over-all need for immediate action.[20] Under these particular circumstances the police followed the only feasible alternative and took Stovall to the hospital for identification. Such action, was held not to be so suggestive as to lead to an irreparable mistaken identification. There was no denial of due process of law.

The factors to be considered will vary from case to case but the Supreme Court has set out several conditions which, if found in the necessary combination and number, will be "so suggestive" as to be a denial of due process. These include: showing a suspect singly to a witness rather than as a part of a lineup;[21] having a lineup in which only one of the suspects was an Oriental; placing a black haired suspect in a group of light-haired men; making a tall suspect stand with short men; and placing a suspect under twenty with others over forty.[22]

In the latest decision handed down by the Supreme Court involving lineup procedures[23] the court held it was prejudicial to allow a

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19. Id.

20. Id.

21. Id.

22. Id. and see Foster v. California, 392 U.S. 994 (1967).

23. Foster v. California, 392 U.S. 994 (1967).

witness to converse with the suspect after a lineup, and when he could not make a positive identification, to allow the witness to see a second lineup where the suspect was the only one who had been in the first lineup.[24]

Justice Black dissented saying that the Constitution did not give the Supreme Court any general authority to require inclusion of all evidence that the Court considered improperly obtained or insufficiently reliable.[25]

V. Conclusion: Suggested Lineup Techniques

The general principles governing a proper lineup are easily stated. The right of an accused to be represented by counsel at this critical stage of the proceeding is established under the Wade doctrine and Stovall makes it clear that the lineup must not be so unnecessarily suggestive as to violate due process of law. Since the failure to conduct a lineup within the framework of constitutional due process may jeopardize subsequent prosecution efforts, it is essential that the lineup be properly conducted. A few specific suggested procedures are therefore offered.

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24. Id.

25. Id. at 999.

An officer planning to include a suspect in a lineup must provide the Miranda warning, advising the subject of his right to counsel at this stage of the proceedings. The suspect should be advised that an attorney will be provided in the event the suspect is unable to employ counsel. If the suspect is already represented by counsel, the investigating officer should provide the attorney with reasonable advance notice of the proposed lineup and should provide the attorney with notice as to the time, place, and date of the proposed lineup. The attorney's role is solely that of an observer and his presence is only to enable him to subject an identification to proper cross-examination at any trial. The attorney has no right to interfere with the conduct of the lineup and the suspect has no right to refuse to participate in a lineup. In the event counsel advises the suspect not to participate, it should be made clear to the suspect that such refusal is noted and will be used as evidence against the suspect at any subsequent trial. As a practical matter the officer should determine the basis for counsel's refusal to allow his client to participate in the lineup because minor objections can usually be overcome. If this is not possible, however, the lineup can nevertheless be conducted over the objections of the accused and his attorney.

Prior to the lineup, the prospective witness should have the line-up procedure explained to him. He should be told that several subjects will be shown and that exoneration of the innocent is as important as detection of the guilty. The witness should be instructed not to speak,

but rather to write all comments and requests and to make his identification by writing the number of the suspect identified.

The importance of careful maintenance of records cannot be over-emphasized. The make-up of the lineup should be reduced to writing and careful records kept of the participants, their description and the order in which they appeared in the line-up. A photograph of the line-up may subsequently prove useful in establishing its fairness. Needless to say, no officer should offer any suggestion or comment indicating that the witness should identify any particular suspect, but rather any identification must be the independent decision of the witness. Care should be exercised in selecting the participants so that the composition of the lineup does not "suggest" identification. For example, a witness recalling a short blond suspect should not be shown a lineup of tall, dark men.

Assuming that the required warnings relative to the right to counsel have been given, a law enforcement officer contemplating a lineup must use his own good judgment in arranging for this procedure. The above-stated suggestions provide general guidance, but each situation must be viewed in its own circumstances. The guideline must be based on a concept of fundamental fairness, and every lineup must be conducted in a manner calculated to reflect such fairness.

POLICE REPORT WRITING

I. Introduction

The importance of police reporting has long been recognized, but only since the passage of the FBI's Uniform Crime Reports Act in 1930 has it been dealt on a national basis. The Crime Reports Act has designated seven basic crimes, which it calls Index crimes, and are as follows: murder, rape, aggravated assault, robbery, burglary, larceny over $50.00, and auto theft.

The purpose of the act was threefold: (1) to measure the trend of crime upon a selected sampling of the seven index crimes; (2) to provide an accurate survey of the volume of all types of crime; (3) to keep track of significant police matters such as the number of police, the number of police killed, or assaulted, and so forth.[1] Police reports should be geared to these three objectives.

Besides the national need for reporting in order to understand the scope of crime and police work, reporting is equally important on an individual level. The police

1. Crime & Delin.58 (1962).

officer needs to take accurate and complete notes on each case in which he is involved. The results of any investigation should always be expressed in a written report designed to record all facts related to the crime. Such a report serves as a permanent record of the evidence discovered in the investigation, serves as a reference for future investigation, and serves to refresh the memory of the investigator at a later date. A record made at the scene of the investigation is more accurate and more likely to present a spontaneous sense of the reactions of the witnesses.[2]

After making a record, a copy should be sent to a central file to be indexed. This assures that no changes may be made at a later date due to collusion between anyone. Also it allows authoritative control to be maintained in police procedures.[3] "Records provide a ready means of analysis of the internal and external problems of the department." They show what has happened in the past and reveal trends...for diagnosis of coming needs.[4]

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2. Sullivan, Introduction to Police Science 54 (1966)

3. International City Manager's Association, Municipal Police Administration 400 (1957).

4. Id. 400.

II. Essentials of Reports

Police departments may divide records into three catagories: complaint reports, arrest reports, and identification reports.[5] The complaint is the most important record as it contains the report received by the officer from a private citizen; and it also contains all the information received by the officer as a result of his investigation.

The arrest report contains information about the arrested person and is recorded at the time of booking. This record also includes reports as to the control of the prisoner, court procedure and release procedure.

Identification records contain fingerprints, discriptions and photographs of the prisoner.[6]

The complaint sheet is the most important to the police officer because it provides a greater margin of individual observation and reasoning. A complaint sheet should be fair and accurate. All information that is relevant to the investigation should be included in a concise manner. This includes a complete background and description of all suspects and prisoners. It should mention all warrants, subpoenas, and arrests, and should state which law or ordinance was violated.[7]

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5. Id.
6. Id. 401.
7. Id. 402.

If possible the report should contain answers to the questions who, what, when, where, how and why. Facts should be reported in such a manner that they speak for themselves. All inferences, opinions and conclusions of the writer should be so labeled, and when it is necessary to include hearsay evidence, it should be identified as such.

A report writer should avoid exaggerations, prejudices and wordiness. A clear, impartial statement of the material facts is all that is necessary. While repetition is sometimes helpful, it should be kept at a minimum and avoided entirely if it does not aid the reader in understanding the facts. After the report is completed, the writer should read and revise any part that does not appear to be complete and accurate.

A suggested complaint sheet is as follows:[8]

1. Resume of the subject matter under investigation
2. Detailed facts
   - A. Facts observed by the officer
   - B. Facts as reported to him by witnesses
   - C. Opinion of citizens
   - D. Descriptions
     1. Description of property
        - a. Article
        - b. Trade name

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8. Id. 404.

3. Results

A. Analysis

B. Conclusion

C. Recommendations

4. Disposition: Temporary or Final

III. Organizing the Final Report

When a police officer has terminated a case his report should contain all notes, workpapers, statements and documents made or acquired during the investigation. They should be reviewed and arranged in logical order.

The typical report will include five basic parts arranged in the following manner.

(a) Heading - The title or caption and the designated file number are placed in the heading of the report.

(b) Introduction - The introduction should contain a statement of the nature of the offense, the origin of the investigation, the period the investigation covers, and the geographical location of the investigation.

(c) Body - The substance of the information discovered during the investigation should be placed in the body in a narrative and logical sequence. The writer should state the source of the information and fully identify each witness.

(d) Conclusions and Recommendations - The ultimate conclusions drawn by the investigator are ordinarily not included in an investigative report. The investigator should, however, state his opinion of the reliability of each witness and in addition, offer his appraisal of the evidence. When an ultimate conclusion is stated, the writer should use great care to see that it is supported by the facts. Definite recommendations should always be made concerning undeveloped leads.

(e) Ending - The ending should contain the writer's signature, note any attachments, and designate the persons who should receive copies.

An example of the forms used by one police department follows in the order of which each was discussed:

POLICE DEPARTMENT

COMPLAINT REPORT

Complaint_____ Number

Received by _____ Date_____ Time_____

From_____ Address_____ Phone_____

_____

Assigned To_____ Date_____ Time_____

Detail

Disposition

Officer_____ Date_____

RECORD OF ARREST No.-_____

NAME: _____

CITY _____ STATE _____

STREET _____

PLACE OF ARREST _____

OFFENSE _____

_____

DATE _____ TIME _____ FINE: _____

SEX _____ COLOR _____ HEIGHT _____ WEIGHT _____ COST: _____

EYES _____ HAIR _____ DOB _____ AGE _____

REMARKS:

TOTAL: _____

DATE: _____

ARRESTING OFFICER _____

INTERROGATION SHEET

DATE: _____ CASE NO. _____
TIME: _____ ARRESTED: YES ____ NO ____
PLACE: _____ SUSPECT: YES ____ NO ____
WITNESS: YES ____ NO ____

NAME: _____ ADDRESS: _____

PHONE: _____ AGE: ____ BIRTH DATE: _____ BIRTH PLACE _____

LIVED IN CITY _____ PREVIOUS ADDRESS: _____ MARRIED: YES: ____ NO: ____

WIFE'S NAME _____ AGE: ____ ADDRESS: _____

FATHER'S NAME: _____ AGE: ____ ADDRESS: _____

MOTHER'S NAME: _____ AGE: ____ ADDRESS: _____

NEXT OF KIN: _____ AGE: ____ ADDRESS: _____

SERVICE INFORMATION: BRANCH _____ YRS. ____ TYPE OF DISCHARGE _____

EDUCATION: _____ RELIGION: _____

PLACE OF EMPLOYMENT: _____ NO.YRS. ____ SALARY _____

PAST EMPLOYMENT: _____ NO.YRS. ____ SALARY _____

_____ NO.YRS. ____ SALARY _____

DESCRIPTION: HAIR _____ EYES _____ HEIGHT _____ WEIGHT _____ OTHER _____

AUTO MAKE: _____ YEAR ____ MODEL _____ WEIGHT _____ OTHER _____

ADMITTED CRIME ORALLY: _____ WRITTEN STATEMENT: ____ LAWYER ____

ADMITS ARRESTS FOR: _____

_____

ON PAROLE: ____ LENGTH OF TIME _____ PAROLE OFFICER _____

SAMPLE OF HANDWRITING: _____

~~ADDOCIATES:~~
ASSOCIATES:

REMARKS:

POLICEMAN'S DAILY REPORT

POLICEMAN _____ On Duty ____ AM PM Off Duty ____ AM PM DATE _____

CAR No. _____ MILES TRAVELED _____ SPEEDOMETER READING _____

1. Arrests (Criminal) _____
2. Arrests (Highway) _____
3. Summons (Highway) _____
4. Warning (Highway) _____
5. First Aid _____
6. Light Cor. Made _____
7. Service to Motorists _____
8. Accidents Investigated _____
9. Felony Reports _____
10. Investigations Made _____
11. Fines Assessed _____
12. Stolen Prop. Rec. _____
13. Prop. Confis. _____
14. Spec. Assign. _____
15. Prev. Cases Dis. _____
16. _____
17. _____
18. _____

(Verify above information by listing all names, dates, charges, etc.)

BAIL PROCEDURE

I. Introduction

The term "bail" refers to the process of obtaining the release of one charged with an offense upon a security or bond, to assure his future attendance in court. It is also used to designate the person in whose custody an accused is placed and who acts as surety. Historically, bail was the transfer of the custody of a defendant awaiting trial from the sheriff to a third party. The third party was then responsible for the attendance in court of the person charged with the crime.[1] Today, bail has come to stand for that sum of money, or promise of money, guaranteed a court for the temporary release of a person awaiting judicial process. The person giving bail is no longer physically responsible for the attendance in court of the accused, but he is financially responsible for payment of an amount set by a judge or magistrate, if the accused fails to appear in court.

The defendant can obtain his freedom by depositing cash in the amount set by the court, or he can offer the court a written undertaking, called a bail bond with liability

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1. 36 U. of Cin. L.R. 409 (1968).

in the sum set by the court. The bail bond must be signed by the accused and a person who satisfies certain statutory requirements.

Through the bail process the criminal justice system seeks to reconcile an accused's interest in pretrial liberty with the need for assurance that he will appear for trial. It's purpose is to secure the presence of an accused to answer the charge or charges against him and to respond to the judgemnt of the court, and at the same time afford him freedom from harrassment and confinement before he has been proven guilty of the offense charged.[2]

II. Right to Bail Before Trial

All persons charged with an offense that is not punishable by death have an absolute right to be admitted to bail prior to conviction.[3] A person charged with an offense for which he could be sentenced to death may be admitted to bail prior to conviction unless the proof is evident or the presumption great that he committed the

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2. Smith v. U.S., 357 F.2d 486 (5th Cir. 1966).

3. Fereral Rules of Criminal Procedure, Rule 46(a); Ark. Const., Art. 2, Sec. 8.

offense.[4] This rule of law permits the unhampered preparation of a defense and serves to prevent infliction of punishment Upon the accused prior to conviction.

III. Right to Bail Pending Appeal

The right to bail pending appeal after conviction is at common law a matter of judicial discretion in each individual case. Some states, however, including Arkansas, have enacted statutes which permit a person convicted in the Circuit Court an absolute right to give bail pending his appeal to the state supreme court, except in appeals from a conviction of a capital offense.[5] Even in capital cases, if the person convicted is sentenced to life imprisonment instead of

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4. Supra, note 2. The Arkansas Constitution provides the right to bail in Art.2, §8: "all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great. Ark. Stat. Ann. §43-709 (Repl. 1964) provides for bail before conviction in four instances. The defendant may be admitted to bail (1) for his appearance before a magistrate where the offense charged is a misdemeanor; (2) for his appearance in the court to which he is sent for trial, (3) for his appearance to answer an indictment; (4) for his appearance in a penal action.

5. Ark. Stat. Ann. §43-2714 (Repl. 1964).

death, he is entilled to bail on appeal.[6]

A person does not have an absolute right to bail pending an appeal from the state supreme court to the United States Supreme Court, although the state supreme court may permit bail if it determines that the case presents a substantial federal question.[7] Federal courts are governed by Rule 46(a)(2) of the Federal Rules of Criminal Procedure which provides that bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay.[8]

IV. Taking Bail

The taking of bail consists in the acceptance by a competent court, magistrate, or officer of a sufficient bail bond executed by the accused and other persons as sureties conditioned that the accused will appear to answer to the legal

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6. Walker v. State, 137 Ark. 402, 209 S.W. 86 (1919)

7. Lane v. State, 217 Ark. 428, 230 S.W.2d 480 (1950). After conviction by a state court the question of bail upon appeal is within the discretion of state courts and is not a matter for federal relief. Nelson v. Burke, 275 F.Supp. 364 (D.C. Wis. 1967).

8. Barnard v. U.S., 309 F.2d 691 (C.A. Or. 1962). An appeal is said to be "frivolous" when it presents no debatable question or no reasonable possibility of reversal. U.S. v. Martone, 283 F.Supp. 77 (D.C. Puerto Rico 1968); U.S. v. Piper, 227 F.Supp. 735 (D.C. Tex. 1964).

process of the court.[9]

The form of the bond should be substantially as follows:

> A.B., being in custody, charged with the offense of (naming or briefly describing it), and being admitted to bail in the sum of _____ dollars, we C.D., of (stating his place of residence), and E.F., of (stating his place of residence), hereby undertake that the above named A.B. shall appear in the _____ court on the _____ day of its _____ term to answer said charge, and shall at all times render himself amenable to the orders and process of said court in the prosecution of said charge, and, if convicted, shall render himself in execution thereof; or if he fails to perform either of these conditions, that we will pay to the State of Arkansas the sum of _____ dollars.

Since a bail bond is a debt by contract and the exemption laws apply to a judgment and execution on it, the person or persons making bail must be the owners of visible property valued at a sum above the exemption laws sufficient to cover the bond.[10] In order to determine whether a person or persons attempting to make bail are qualified, any officer authorized to take bail may examine such person or persons under oath, reduce all statements make to writing, and require the person or persons offered as bail to sign the statement.[11]

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9. Ark. Stat. Ann., §43-702 (Repl. 1964).

10. Ark. Stat. Ann., §43-703 (Repl. 1964); State v. Williford, 36 Ark. 155 (1880)

11. Ark. Stat. Ann., §43-704 (Repl. 1964).

The National Association of Insurance Commissioners has adopted a Uniform Bail Bondsman Licensing Act which has caused some states (not Arkansas) to adopt detailed legislative controls over the bail bond business. The controls reflect the fact that the bondsman may either use his own assets or operate as an agent for a surety company. The controls required are licensing, disclosure of all activities by mandatory record keeping and financial reports, establishing ceilings on rates, and prohibiting the commission of various acts.[12]

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12. 36 U. of Cin. L.R. 409 (1968).

V. Bail Reform Act of 1966

The 89th Congress of the United States enacted the Bail Reform Act of 1966[17] for the expressed purpose of assuring that no person, regardless of his financial status will needlessly be detained pending his appearance to answer charges or to testify, or pending his appeal when the detention serves neither the ends of justice nor the public interest. This act is binding only on the federal courts and the District of Columbia.

The Act provides for the release of an accused in non-capital cases prior to trial on personal recognizance if there is assurance that the accused will appear when required.

The term recognizance is often used interchangeably with bail. It was used at common law to refer to an obligation entered into before a court of record to do some particular act, usually to appear and answer criminal charges. It was different from a "bail bond" only in that a recognizance was an acknowledgement or record of an existing obligation and a bail bond created a new obligation.[18]

Federal judges and commissioners may release defendants awaiting trial, whenever possible, on the defendant's personal promise to return to court.

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17. 18 U.S.C.A. §§3146-3152.

18. 8 Am. Jur.2d 782.

In determining whether the accused should be released on personal recognizance, the court will consider the offense charged, the weight of the evidence, family ties of the accused, whether the accused is employed, his financ ial resources, his character and mental condition, his residency, whether the accused has been previously convicted of any crime, and whether the accused has violated previous bail conditions.

If the judge thinks that such a release is inadvisable he has other alternatives. He may (1) release the accused to designated persons or to an organization agreeing to supervise him; (2) release the accused with restrictions on travel, associations, and place of abode; (3) release him with the posting of money with the court; (4) release the accused with conditions attached such as only being allowed out during daylight hours. The bail bond is retained as an alternative method of release, but the newly enacted legislation designed to allow the indigent defendant, who cannot afford to post bail, his freedom until trial.

When an accused is denied bail, he has a right to review within twenty four hours, and an appeal therefrom is allowed.

There are provisions for bail after sentence, including capital cases when the appeal is not considered frivolous, and there is no danger of the accused fleeing. A person is also given credit toward service of his sentence for any days spent in custody prior to pronouncement of his sentence.

VI. Determination of Bail

The determination of the amount of bail reasonably required rest largely within the sound discretion of the judge hearing the application for bail.[19] Consideration is given to the financial ability of the accused, his past history and activities, the nature and circumstances of the offense, the accused's character and reputation, his motivation and means to flee and the punishment that could be imposed if convicted.[20]

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19. U.S. v. Piper, 227 F.Supp. 735 (D.C. Tex 1964).

20. U.S. v. Radford, 361 F.2d 777 (4th Cir. 1966), Cert denied 385 U.S. 877; White v. U.S., 330 F.2d 811 (8th Cir. 1964) Cert. denied 379 U.S. 855.

Bail that is set at an amount higher than that reasonably calculated to insure that an accused will appear to stand trial and submit to sentence if convicted, is excessive and violates the Eighth Amendment to the U.S. Constitution.[21] A requirement that the bail bond also operate as supersedeas to judgment for payment of a fine would render the bail excessive because that is not its intended purpose.[22] The mere fact that an accused is unable to pay the amount set, however, does not make the bail excessive.[23]

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21. U.S. v. Weiss, 233 F.2d 463 (7th Cir. 1956); Heikkinen v. U.S. 208 F.2d 738 (7th Cir. 1953); Kaufman v. U.S. 325 F.2d 305 (1963).

22. Cohen v. U.S., 82 S.Ct. 526, 7 L.Ed.2d 578 (1962).

23. Hodgdon v. U.S., 365 F.2d 679 (8th Cir. 1966); Cert denied 385 U.S. 1029.

SURVEY OF THE LAWS OF EVIDENCE

I. Introduction

A general explanation of the laws of evidence will be helpful to a police officer in his capacity as a fact-finder and investigatory agent in criminal activities. The policeman must constantly be aware that the arrests he makes must be supported by evidence acceptable in a court of law in order to obtain conviction.

Evidence is a collection of facts; but conversely, a collection of facts only becomes evidence when it supports a particular conclusion. The relationship of the facts, i.e. evidence, to the conclusion is known as relevancy. If the facts will support a belief which coincides with the proposed conclusion, they are relevant.[1]

The purpose behind having laws of evidence is the need to concentrate on issues of fact, to avoid obscuring the issues by the introduction of unduly prejudicial material, and to compensate for the fallacies inherent in the average individual's thought processes.

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1. See, 19 Van. L.B. 1 (1965).

The violation of a rule of evidence will not make a reversible error unless it has substantially denied the rights of the individual. On review the appellate court will look to whether or not the claimed defect actually influenced the jury and caused it to make a wrongful verdict.

II. Evidence Which Does Not Require Proof

Certain types of evidence, or facts, do not require formal proof at trial. They may be introduced in court, and acted upon by the jury, or trier of fact, without showing that their existence was more probable than not. The first type of such evidence is judicial notice. The judge may note any fact of common knowledge, such as the name of the President of the United States, and this will not have to be proven. Other facts which he may judicially notice are matters that a judge is required to know because of his position, or matters which are readily ascertainable and not generally subject to dispute.[2]

Another area where proof is not required is in the realm of presumptions. The law requires that the trier of fact make a certain conclusion once a set of facts is introduced in evidence if there is an absence of a sufficient

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2. Everight v. City of Little Rock, 326 S.W.2d 796 (1959). The Arkansas Supreme Court has taken judicial notice of the fact that radar speed measurement is reliable.

contrary showing. For example, if a person has been missing for seven years the law presumes he is dead. Unless the basic fact is disputed, that is, that the person has not been missing seven years, then the presumption operates as substantive law, and no evidence will be admitted to show that the person is not actually dead.

There is a second kind of presumption known as a rebuttable presumption. An example of this type of presumption is in the area of legitimacy. A child born to a married woman is presumed to be the child of her husband. Once this fact is established, then the opposing party has the burden of proving that the conclusion he seeks to establish is true. The rebuttable presumption operates to shift the burden of going forward with the evidence.

The law recognizes presumptions that all persons are innocent until proven guilty;[3] that all persons are moral until proven immoral;[4] that persons conduct themselves in a lawful manner;[5] that all persons are of normal and ordinary intelligence and understanding;[6] and that they know the law.[7]

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3. Wesson v. U.S., 192 F.2d 931 (8th Cir. 1949).

4. Gray v. Gray, 133 S.W.2d 874 (1939).

5. Union Century Life Insurance Co. v. Sims, 189 S.W. 2d 193 (1945).

6. Eureka Vinegar Co. v. Gazette Printing Co., 35 F. 570 (E.D. Ark. 1888).

7. Hasen v. Brown, 213 S.W.2d 242 (1944).

III. Matters on Which the Court Will Not Allow Evidence

The court will not allow evidence of offers of compromise. It is felt that such offers are not relevant to the ultimate issue of liability or guilt of a party; that their mention might unduly prejudice the jury; that offers of compromise come within the area of privileged communications; and that parties impliedly agree that settlement negociations are to be without prejudice to their positions.

The court will not allow similar but unconnected facts to be proved. Even though the facts may be logically relevant they may be excluded as being remote and misleading. A fact must be material. That is, fact A may prove fact B, but if fact B is not before the court for determination, then fact A is immaterial and therefore inadmissable.

Character evidence is generally inadmissable. It may not be used at all in civil cases to reflect on probable conduct, and may be used in criminal cases to a limited extent within very strict guidelines. Proof of past crimes committed cannot be introduced to show probable guilt of the present crime. There are exceptions to this rule, however. Proof of past crimes may be introduced when it is used to establish identity of the accused, or if it shows a common scheme of which the present crime is only a part, or if it tends to show the state of mind of the defendant, (motive, intent, knowledge, etc.).

In criminal cases the defendant is always allowed to give evidence of his good character to show the unliklihood of criminal conduct. Once the defendant has introduced evidence of his good character then the prosecution may rebut this evidence by proof that the defendant's reputation in the community was bad.

Another rule of evidence which includes a certain type of proof is in the area of opinion evidence. The law is not interested in impressions, conclusions or beliefs of a person testifying. A witness must speak from his personal experience and observation.

The best recognized exception to the opinion rule is in the area of the expert witness. If a person can be characterized as an expert by reason of training, experience, and competency in a certain field, then he may give his opinion on issues within his field of expertise. Frequently the police officer will be qualified as an expert witness in some area of law enforcement and therefore be allowed to express his opinion.

A second exception to the opinion rule is based on necessity and common sense. A lay witness may give his opinion of a matter within his personal observation if, from the nature of the facts, no better evidence can be obtained. This is known as the "collection of facts" rule. An opinion may be stated where the nature of the facts do not lend themselves to a simple statement. For example, a

witness may give his opinion as to age, size, color, weight, time and distance, mental state, insanity, drunkenness, and health and sickness.

Hearsay evidence is another broad category of evidence which has been traditionally excluded from proof by the courts. Hearsay testimony is that testimony which is not based on a witness' personal knowledge of the facts, but rather his knowledge of the facts as told him by a third party other than a party to the pending legal action. The tainted element in hearsay evidence is that the third person is not available in court for cross-examination. If this defect can be overcome then hearsay evidence may be admitted. The following exceptions have grown up in the hearsay field. Evidence will be admissible, even though it is hearsay if it:

(1) consists of evidence given at a formal judicial proceeding

(2) is a dying declaration

(3) is an admission

(4) is a confession

(5) is a declaration as to pedigree

(6) is an ancient document

(7) is a public document or record

(8) is an entry in the regular course of business

(9) is a spontaneous exclamation (ris gistae)

Also if words may be characterized as verbal acts they

will fall outside the hearsay rule. Verbal acts are statements made to explain an act or conduct which is otherwise ambiguous. If the making of the statement is relevant to prove some fact other than the truth of its contents, then hearsay is not involved.

The policeman should be aware that certain exceptions to the hearsay rule will make admissable evidence obtained by police in their investigations. Any statement, exclamation or act made by a person as a direct result of an exciting and sudden event (an auto accident, arrest, or crime) may be considered evidence. The statement or act must be so "close in time" to the event that the person cannot have had enough time to thoughtfully consider the event.[8] The statement or act must have been produced by the sudden nature of the occurrence. A statement made to an arresting officer at the time of the arrest may be used as evidence under this exception.[9] The statements made by persons at the police station after an arrest are not dominated by the arrest act itself.[10] A statement made to a traffic officer shortly after an auto accident will not be considered dominated by the suddenness of the auto accident.[11]

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8. Schwaum v. Reece, 210 S.W.2d 903 (1948).

9. Turney v. State, 395 S.W.2d 1 (1965).

10. Orr v. Walker, 310 S.W.2d 808 (1958).

11. Liberty Cash Grocers v. Clements, 102 S.W.2d 836 (1937).

However, the policeman should make a careful record of all statements made by witnesses at the scene of an accident. These may be competent evidence as admissions (including admissions by silence), declarations against interest, spontaneous or excited utterances, dying declarations, or they may show intent, knowledge, or other state of mind.

If a policeman cannot remember all he saw or heard about a case when it comes to trial, he may use his notes to refresh his recollection during his testimony. If he does use his notes to refresh his memory, however, such notes must be made available to the opposing counsel for purposes of cross examination. The notes themselves may be admitted under an exception to the hearsay rule known as past recollection recorded if the policeman who made them can recall at the time he made them that they were accurate.

IV. Burden of Proof in Criminal Cases

The prosecution has the burden of proving the defendant guilty beyond any reasonable doubt. There is a presumption that the defendant is not guilty until he has been proven guilty. The burden of proof never changes but the burden of going forward with the evidence does change when the prosecution has established its case. The defendant then has the burden of rebutting the evidence or casting a rea-

sonable doubt upon the prosecution's case.

V. Method of Proof

Witnesses constitute one of the most important elements in the proof of a case.[12] It is within the discretion of the judge as to whether or not a mental incompetent may testify. Usually if his mental impairment does not effect his capacity to perceive, recollect, and testify, he will be allowed to do so. The jury may then decide what weight is to be given his testimony.[13]

A person may not testify about facts which he learned because of a confidential or privileged relationship. The following are subject to the privileged communications rule:

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12. Ark. Stat. Ann. §28-501 (Repl. 1964). By statute Arkansas imposes the duty of being a witness upon an individual, and "he shall be obligated to attend court when he is properly served with a subpoena." At common law a witness was excused for a variety of reasons, but modern courts have held that a person qualifies as a witness if he has the capacity to perceive, to recollect and to testify. Ark. Stat. Ann. §28-601 provides that all persons are competent to testify except infants under ten and persons of unsound mind.

13. Ark. Stat. Ann. §28-605 (Repl. 1962) allows all persons who have been convicted of a crime to testify, but again the jury determines the amount of credibility to be accorded such a person's testimony.

husband and wife,[14] attorney and client,[15] priest and parishioners,[16] and physician and patient.[17] The privileged communications rule may be waived if not objected to by the party against whom the disclosure would work.

The policeman should be aware of the privileged communications rule particularly in regard to the attorney-client privilege. An attorney is privileged to have a private place in which to consult with his client, and if a client is a prisoner, the use of any listening device by a law enforcement officer is prohibited. If a listening device has been used this has been held grounds for reversal of a conviction.

The fifth amendment prohibition that no person "shall be compelled in any criminal case to be a witness against himself" has many legal ramifications regarding evidence. The court has held that "compelled" confessions are self-incriminating and therefore inadmissable. There must be a warning to the accused of his rights prior to taking a con-

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14. Ark. Stat. Ann. §28-601 (3) (Repl. 1964).

15. Ark. Stat. Ann. §28-601 (4) (Repl. 1964).

16. Ark. Stat. Ann. §28-606 (Repl. 1964).

17. Ark. Stat. Ann. §28-607 (Repl. 1964).

fession. It should be noted that under certain conditions a confession may be admissible if it is a "spontaneous utterance" without the necessity of a prior warning.

However, any confession or admission must be freely and voluntarily made. Admissions and confessions may be used as evidence of guilt or to impeach a witness by proving at his trial that he made prior inconsistent statements.[18] A law enforcement officer can testify that a person made an admission, but the state must prove that it was made voluntarily and the statement must be corraborated by other evidence of guilt.[19]

Generally the right to be free from self-incrimination applies only to verbal conduct.[20] For example, a police officer may direct a person to remove articles of clothing or to take a blood or urine test for the alcoholic content of the blood, without infringing upon the individual's right to be free from self-incrimination.[21]

The Constitution also provides that a person shall be free from an illegal search and seizure. Any evidence obtained as a result of an illegal search and seizure is

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18. Rook v. Moseley, 365 S.W.2d 718 (1963).

19. Ark. Stat. Ann. §43-2115-2116 (Repl. 1964

20. Shepherd v. State, 394 S.W.2d 624 (1965).

21. See, Schmerber v. California, 384 U.S. 747 (1965).

inadmissible in a court of law. A conviction based on evidence obtained from an illegal search and seizure will be reversed since the error goes to the substantial rights of the individual. If an arrest and search warrant are obtained, the problems of search and seizure usually are eliminated.

Examining witnesses is an important element in the method of proof. An attorney may not ask a witness "leading" questions except in unusual circumstances. A leading question is defined as any question which suggests an answer.[22] Sometimes leading questions which suggest desired answers have been permitted when dealing with a hostile, biased witness, or an ignorant witness, or with young children.

A party is not allowed to impeach his own witness.[23] This means that an attorney may not call a witness, and then cast doubt upon his testimony. Exceptions have been allowed when (1) the witness is required by law to appear and testify; (2) the witness is an adverse party; (3) the witness shows hostility to the party calling him.

A situation frequently arises when the examiner calls a witness to give testimony and the witness has an incomplete recollection as to what happened. The question then

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22. Braun v. Stephens, 246 F.Supp. 1009 (E.D. Ark. (1965).

23. See, Ark. Stat. Ann. §28-706 (Repl. 1964).

becomes to what extent can the examiner jog the memory of the witness? A witness may refresh or revive his memory by reference to a writing if he will then be able to testify from his present recollection without depending on the terms of the writing. It would be noted that whenever a writing is shown to a witness, it may be inspected by the adverse party.[24]

When the witness has no recollection of the events other than what is contained in the writing, then he will not be permitted to testify by reference to the writing. He may read the document, however, as past memory recollected.

Cross-examination, and possible impeachment of the credibility of witnesses is a valuable technique of proof. There is a basic right in every case to cross-examine the opposing party's witnesses. Unlike the direct examiner, the cross-examiner may use leading questions which are suggestive of an answer ("Isn't it true that . . ."). Cross examination is limited to matters put in issue on direct examination, but a witness may be impeached on cross-examination.[25] It is felt that the credibility of a witness is always in issue, and therefore not beyond the scope of direct examination.

A witness may be impeached by showing that he has been

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24. Ark. Stat. Ann. §28-711 (Repl. 1964).

25. Ark. Stat. Ann. §28-707 (Repl. 1964).

convicted of a crime.[26] A witness may not be impeached on evidence showing that he has committed wrongful acts or that he was a "bad character". However, if a party to an action takes the stand in his own behalf, then he is said to put his reputation for truthfulness in issue and he may be attacked on this aspect of character evidence during cross-examination.

Besides witnesses, documents and writings make up an important category in the methods of proof. It is a policy of the law that where a party has a choice of proving his case by several types of evidence, the strongest type must be presented. In the field of written evidence this policy is a matter of law and is known as the best evidence rule. It may be stated as follows: On proving a writing production must be made, unless it is not feasible, of the original writing itself, whenever the purpose is to establish its terms, unless an exception makes the best evidence rule inapplicable. The rule applies only to private writings, not to official documents or records, but a writing has been held to include photographs and photographic copies. Where the writing is executed in duplicate, and there are two signed copies, the law treats both copies as originals for purposes of the best evidence rule. The best evidence rule does not apply where the original copy has been lost or des-

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26. See, Hule v. State, 148 S.W.2d (1949), Shinn v. State, 234 S.W. 636 (1929). By case law, Arkansas permits both felonies and misdemeanors to be introduced to impeach a witness.

troyed without fault of the person seeking to offer secondary evidence. It does not apply where the original writing is in the possession of a third person who is outside the state, and thus outside the subpoena power of the court, if there is no way of attaching the original copy.

If the original writings are so voluminous as to make it impractical to bring them into court, then secondary evidence in the form of a summary or statement will be allowed.

If the original is in the possession of an adverse party who fails to produce it after being notified of his duty to do so, then secondary evidence will be allowed.

The Parol Evidence Rule embodies the policy of the law that favors written evidence as opposed to oral evidence of arguments. The rule stipulates that where a written instrument ~~mane~~ exists, other evidence will not be allowed to add to, alter, or contradict the terms of the written instrument. The rule is limited to the parties to an instrument, and it may be noted that where an ambiguity exists, other evidence will be allowed to explain the ambiguity.

VI. Types of Evidence

Tangible objects such as guns, clothing, and jewels which are presented to the judge and jury for inspection are known as real evidence. Documentary evidence consists of tangible writings such as letters, deeds, or wills. Testimonial evidence is that which is given by a witness. Real

evidence may supplement testimonial evidence in proving a fact, and may aid the jury in understanding a technical fact which it might not otherwise have been able to do.

If any fact, or any particular piece of evidence, proves another fact which is in question it is direct evidence. But if it only implies or suggests the truth of another fact it is circumstantial evidence. The law does not allow all facts to be proved by circumstantial evidence. For example, fleeing from the scene of a crime,[27] or resisting arrest,[28] is circumstantial evidence of guilt, but cannot establish guilt without some other showing of direct evidence.

Law enforcement officials are greatly aided today by the use of scientific devices in investigating crime. The evidence produced from these devices may or may not be admissable in a court of law. For example, the results of the polygraph, or lie-detector test have uniformly been held inadmissable.[29] The machine has been considered to have too many variables which affect its accuracy, such as unresponsiveness of a lying subject, undetected muscle responses, or

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27. Rowe v. State, 275 S.W.2d 887 (1955).

28. Walker v. State, 317 S.W.2d 833 (1953).

29. See, Ark. Stat. Ann. §71-2225 (Repl. 1964), and 3 Wigmore, Evidence §999 (Sup. 1964).

the presence of a heart condition in the subject.

X-rays and photographs are both admissible as evidence. The X-rays must be authenticated, however. To authenticate an X-ray it must be shown that the particular instrument is of an accepted type and in good working order; the witness operating the machine is qualified; the operator must be able to identify the person or object photographed with the subject in issue.

The preparation of all scientific evidence is particularly important for the policeman to note. Devices, such as radar, require checks before they are used to be sure they are operating efficiently. Failure to account for the requirement of testing scientific devices to see that they are in proper operating order, or failure to show that the operator of the devices had knowledge of their functioning or was otherwise qualified, will result in a rejection of any evidence produced by them in court.

When giving a blood or urine test for intoxication the subject should be observed to guard the quality of the sample. The sample should then be sealed, labled, and either locked-up or given to someone for safe-keeping. The sample should be identified and personally given to the party making the test.[30] A breath test should be given as soon following an

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30. Ark. Stat. Ann. §75-1031 (1957 Repl. 1965 Supp.) The chemical analysis must be made in a manner prescribed and approved by either the Director of the Arkansas State Police or the Director of the Arkansas Board of Health, in accordance with Arkansas Statutes.

an arrest as possible, although a test given three hours after an accident has produced results which were allowed in evidence.[31] It is generally believed that breath tests are less reliable than blood or urine tests and they are therefore subject to attack.[32]

VII. Conclusion

The law enforcement officer must realize that the laws of evidence are voluminous and complex, covering many areas and subject to many exceptions depending on the circumstances of a given situation. It will often be impossible for a police officer or even an attorney to determine what statements, documents, or objects might become evidence in a given situation. The officer should remember, however, that his function is to collect evidence to assist in prosecuting accused criminals and that all efforts should be directed toward collecting and protecting that material, whether testimonial, documentary or real, which might subsequently have probative value in a court of law. This requires only that the law enforcement officer make a careful and thorough investigation, paying careful attention to all attending circumstances, and that he use reasonable care and common sense in protecting, preserving, and accounting for that which has come to his attention or into his custody.

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31. Stacy v. State, 306 S.W.2d 852 (1959).

32. Curran, Law and Medicine, (Little, Brown & Co.) 1960.

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