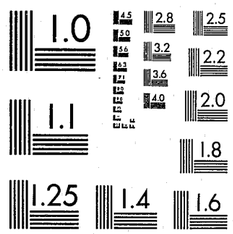

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National Institute of Justice
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Washington, D.C. 20531

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Contents

The Cover: The Newberg, Oreg., Police Department sends a 6'4" sergeant to kindergarten to explain that being a policeman is a big job. Photograph by Bob Ellis, "Oregonian," Portland, Oreg.

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William H. Webster, Director

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PROBABLE CAUSE TO SEARCH:
USE OF INFERENCES

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Legal Counsel Division
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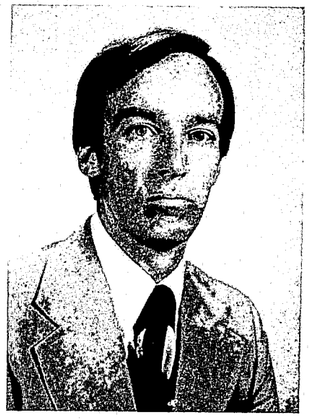
Washington, D.C.



Special Agent McGuiness

Law enforcement officers of other than Federal jurisdiction who are interested in any legal issues discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

Consider this situation. You are in the process of solving a crime. You have identified a suspect through fingerprints or an eyewitness identification which will be persuasive evidence at trial. You wish to seek out additional evidence of the crime, or simply recover the fruits thereof, and believe the suspect may still be in possession of it. However, no one has observed the suspect with this evidence at any particular place. Does this lack of direct evidence foreclose your ability to obtain a search warrant, or on the other hand, may probable cause to search be inferred based upon the existence of certain facts and circumstances? If so, what factors have the courts considered important in drawing such an inference? Two cases, in which contrary results were reached, illustrate

the problem well. They are *United States* v. *Haala* [1] and *United States* v. *Charest,* [2] both Federal cases, from the 10th and 1st circuits, respectively.

In *United States* v. *Haala,* the victim of the crime received a package at her home in Oklahoma sent through the mail from Missouri. It exploded upon opening. An examination of the inner wrappings of the package disclosed latent fingerprints which matched those of the defendant, whom the victim had suspected of being responsible for the act. The victim's suspicions were based, among other things, on an affair the defendant was having with her husband. It was also learned that the defendant was a science teacher who would have the knowledge necessary to construct a bomb of the type employed. Although the postal inspector investigating the case had no evidence based upon direct observation that evidence of the crime was located at any particular place, warrants were nevertheless applied for to search the defendant's automobile, her apartment in Minnesota, and her dormitory room at a university in Iowa, based upon the above facts. The search disclosed several items of incriminating evidence in all three places, which were introduced at the trial resulting in defendant's conviction. On appellate review of the question of probable cause for the searches, the court, without much discussion, found the evidence for probable cause "cogent, indisputable, trustworthy and overall substantial." [3]

Although the court in *Haala* had no trouble in finding probable cause, the case of *United States* v. *Charest* expresses the opposite treatment accorded to the problem by the courts. In *Charest,* the victim was murdered by means of a .38-caliber handgun. An eyewitness to the murder was later uncovered and named the defendant as having committed the murder. A warrant was sought to search defendant's home for the weapon. Again, as in *Haala*, no one had seen the weapon at the premises to be searched. The court found the search warrant invalid and suppressed the evidence seized in the search on the basis that probable cause for the search was lacking. The court pointed out: "Common sense tells us that it is unlikely that a murderer would hide in his own home, a gun used to shoot someone." [4]

Why did the courts treat these cases differently? What factors have the courts looked to as important or controlling in resolving these cases? This article identifies such factors, and in so doing, provides some guidance to law enforcement officers in drafting affidavits for search warrants in cases where there is no direct evidence linking the item sought with the place to be searched.

Before offering such guidance, it is necessary to recount some basic legal principles that will guide the discussion.

First is the firm doctrine that probable cause to arrest an individual does not ipso facto equal probable cause to search any place connected with that individual; [5] different conclusions must be drawn for each determination. For arrest, the conclusion must be drawn that a crime has been committed and that the suspect has committed it; for search, it must be concluded that the evidence sought is presently located in the place to be searched. [6]

The second principle is that probable cause can, in fact, be inferred from other facts and circumstances and need not be based on direct observation. [7] However, the problem is a little more troublesome when attempting to infer probable cause to search as opposed to probable cause for arrest. For instance, where a suspect's fingerprints are found at the crime scene, probable cause for his arrest will usually be present and will continue to exist. However, evidence which was in the suspect's possession at the time of the crime—whether fruits, instrumentalities, contraband, or mere evidence—will not necessarily continue to exist, or to exist at any particular place. The fruits of the crime may quickly be turned into other property, such as where stolen goods are sold for cash. The instrumentalities of the crime may be destroyed. Even if such articles are not changed in form or destroyed, conceivably there are a multitude of places where they may be concealed. This is where a third principle comes into play, namely, that the standard of proof for a search warrant is probable cause, not certainty, and therefore, search warrants will issue where the likelihood exists that the items to be searched for are in existence at a particular place. [8]

Lastly, the principles announced by the Supreme Court as applicable to the review of affidavits by appellate courts are an important consideration. These principles may be summarized as follows:

1) Affidavits for search warrants are to be tested and interpreted by reviewing courts "in a commonsense and realistic fashion"; [9]

2) Deference is to be paid a magistrate's determination of probable cause, and reviewing courts are to sustain that determination in doubtful or marginal cases; [10]

3) Only facts disclosed to the magistrate at the time of application for the warrant may be considered in the assessment of probable cause for the warrant. Facts not made known to the

". . . probable cause to arrest an individual does not ipso facto equal probable cause to search any place connected with that individual. . . ."

magistrate cannot serve to support a warrant. [11]

Having established the principles applicable to the inquiry, the next step is to examine the factors considered important by courts in inferring probable cause to search. It is interesting to note that there are no Supreme Court decisions directly on point and that most of the cases in this area are of fairly recent vintage, having arisen primarily since the time of *Chimel* v. *California,* [12] which limited the area of search incident to arrest and indirectly lent greater emphasis to the warrant requirement.

Perhaps the most frequently cited case on this subject is that of *United States* v. *Lucarz* [13] because of the factors it indicated as having controlled the outcome of previous cases. In *Lucarz,* a postal employee was suspected of stealing registry envelopes containing the previous day's proceeds from the sale of stamps. Evidence indicated that the employee left the building for a time during the day of the theft. Other evidence was developed pointing to his involvement in the theft. However, no one had seen the envelopes in the employee's house or had even seen him enter the house with the envelopes. Nevertheless, a search warrant was sought and obtained for the employee's home. Execution of the warrant resulted in the recovery of $29,000 in currency. The court upheld the magistrate's determination of probable cause on the basis that the items sought under the warrant were "the sort of materials that one would expect to be hidden at appellant's place of residence, both because of their value and bulk." [14] In so holding, the court stated as follows:

> "The situation here does not differ markedly from other cases wherein this court and others, albeit usually without discussion, have upheld searches although the nexus between the items to be seized and the place to be searched rested not on direct observation, as in the normal search-and-seizure case, but on the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide stolen property." [15]

Although *Lucarz* was a case in which stolen property was sought, the test has been extrapolated to other situations in which contraband or mere evidence is sought. [16] It is useful to look at the manner in which the courts have applied the factors cited in *Lucarz.* [17] The first two factors may be treated together.

Type of Crime; Nature of Item Sought

In the *Charest* case, where the crime was a single murder and the item sought was a single handgun, the court concluded that it was not likely that the defendant would have maintained the traceable murder weapon in his residence. However, in *United States* v. *Kalama,* [18] where the criminal activity was a continuing one (defendants were alleged to have committed 11 armed robberies), the court observed that it was a commonsense inference that the spree was likely to continue, that the weapons used in committing the robberies would be retained, and that they were likely to be found in the motel room for which a key was found upon defendants' arrest.

This is not to imply that courts have taken a firm stance in not inferring probable cause to search for instrumentalities of a single crime, for in *United States* v. *Bowers,* [19] also involving a single shooting, the court upheld a finding of probable cause to search for a handgun and other specified evidence tied to the shooting at the defendant's residence. [20]

In dealing with the subject of "staleness" of probable cause, [21] courts have sometimes drawn a distinction between items which are incriminating in themselves and those that are not. Such distinction also seems pertinent here. Thus, in *United States* v. *Steeves,* [22] involving a warrant authorized search at defendant's home for bank robbery loot, a bank bag, a handgun discharged during the robbery, clothing, and a ski mask worn during the robbery, the court concluded:

> "We think that it may be conceded to the defendant that [three months after the bank robbery] . . . there was little reason to believe that any of the bank's money or the money bag would still be in the home. But, the same concession cannot be made with respect to the revolver, the ski mask, and the clothing. The ski mask and the clothes were not incriminating in themselves, and . . . the pistol was not unlawful in itself or particularly incriminating. Moreover, people who own pistols generally keep them at home or on their persons." [23]

When the evidence sought is business records prepared in the ordinary course of business, the Supreme Court in *Andresen* v. *Maryland* [24] indicated in a footnote dealing with "staleness" that "[i]t is eminently reasonable to expect that such records would be maintained in those offices [where prepared]. . . ." [25]

When the item sought is money, courts have usually considered the home to be the likely place for its retention, [26] as illustrated by the case of *United States* v. *Archer,* [27] where bribe money was paid to an assistant district attorney in the Queens, N.Y., District Attorney's Office. A search warrant was obtained to search for the money at the district attorney's home. On review of the warrant on appeal, the court found that the magistrate had a substantial basis for concluding that defendant "would keep the money in his home rather than chance almost certain discovery, or at the least, cause suspicion, should he try to deposit this cash in a bank." [28] The validity of the warrant was upheld.

Opportunity for Concealment

This is a logical factor that has not merited much attention by the courts. It is clear that if a suspect were arrested in his vehicle shortly after the commission of a theft, probable cause to search his vehicle for evidence relating to the theft may exist. [29] However, since there was not yet an opportunity for him to conceal the evidence in other locations, no probable cause would exist to search other locations.

Normal Inferences as to Where a Criminal Would Be Likely To Hide the Property Sought

This last part of the *Lucarz* test has been the most important element simply because it is the ultimate conclusion to be reached and depends upon the other indicated factors, such as the nature of the crime and the type of evidence sought. As such, many cases have simply concluded that it was a fair inference to believe that the items to be seized were at the particular place to be searched, usually the suspect's home, without a great deal more evidence than strong probable cause to believe the suspect committed the crime. [30] Other courts, such as *Charest,* cited above, have not been so ready to make the inference. Nor was the court in *United States* v. *Flanigan,* [31] where it was concluded that the fact that a person had committed a burglary, plus possession by him of some of the goods when arrested, did not in itself constitute probable cause to search his residence for the remainder of the goods (jewelry). The court stated that "[i]t would be inappropriate for us, in this case, to attempt to spell out what might tip the scales. What we do decide is that what was here presented . . . is not enough." [32]

From a comparison of cases like *Charest* and *Flanigan* with cases such as *Haala* and *Lucarz,* it is clear that a "normal inference" to one court means something different to another. Nevertheless, an examination of the cases in which the magistrate's determination of probable cause has been upheld reveals that perhaps other more subtle factors have been present in some of the cases which may have "tipped the scales," to use the words of *Flanigan,* in favor of the reviewing court's finding of probable cause.

Most Likely Place

The fact that the place to be searched appears to be the most likely in which to find the evidence sought has been a factor that has seemed to influence the courts. In *United States* v. *Melvin,* [33] defendant was implicated in the bombing of his own tavern. Of the three places with which he had a connection, namely, his home, automobile, and tavern, the court reasoned that his home, which had been the subject of search under a warrant, appeared to be the most likely place in which to search for evidence relating to the construction of the bomb. The court based its decision on the fact that the affidavit for the search warrant stated that bomb squad officers had indicated that the type of bomb employed would generally have been assembled in a workshop as opposed to a vehicle. Secondly, the court found that the other possible location—the defendant's tavern—was not as likely a place for the construction of a bomb because, being a public tavern, it was subject to regulatory inspections which may have uncovered its making. The court thus concluded that the evidence was sought in the location in which it was most likely to be found and thus upheld the warrant.

Similarly, in *United States* v. *Belcufine,* [34] another bombing case, it was demonstrated that the place to be searched was the most likely place for the evidence sought. The defendant was implicated through fingerprints and other evidence in the bombing of a competitor's business. Soldering was employed in constructing the bomb. The victim stated that the defendant had electrical wiring experience and was apt to have a workshop at his place of business where soldering could be done. Postal inspectors included these facts in their affidavit seeking to search the defendant's business for evidence of the bombing. The court held, without discussion, that "these facts viewed in a commonsense manner were sufficient to establish probable cause. . . ." [35]

"Accumulation of evidence tying the suspect to the place to be searched and the goods to that location is important."

The fact that authority is sought to search more than one place for the evidence, however, has not been treated by the courts as fatal,[36] as demonstrated by the above-cited *Haala* case. *Haala* is not unique, however. In *Porter* v. *United States,*[37] a search was upheld even though warrants were issued to search two vehicles belonging to the defendant. In *Commonwealth* v. *Davis,*[38] warrants issued to search four places (two residences and two vehicles of defendant) were upheld. In both *Porter* and *Davis* the evidence sought was a gun used and clothing worn during a robbery.

Where the facts indicate that one place appears to be significantly more likely to contain the evidence than another, some courts have indicated that the former must be searched first before applying for a warrant to search the latter.[39] *State* v. *Joseph* [40] is illustrative. There, a warrant was sought to search defendant's car for counterfeit money that he was seen selling from such car a few hours earlier. A warrant was also sought to search the home of defendant's parents where the car was parked. The court struck down the warrant for the parent's home, indicating that the vehicle was the more likely place. "There is a lack of any factual data that would give rise to a probability of a transfer of the bogus cash from the vehicle to the home." [41]

Connection of Place To Be Searched to Defendant

Unlike the *Porter* decision, mentioned above, where it was alleged that the two vehicles to be searched belonged to the defendant, no such allegation was made in *United States* v. *Bailey.*[42] In *Bailey,* defendants were arrested for a bank robbery which had occurred 6 weeks earlier. Defendant *Bailey* was arrested in an automobile; codefendant *Cochran* in a house. Search warrant applications were made for both the car and the house. The court refused to uphold the warrants, stating that with respect to the car, there was no indication that defendant *Bailey* owned it, had been seen in it prior to the robbery, or that it had been used in the robbery. With respect to the search of the house, the court found the probable cause to be no better:

> "The affidavit simply discloses that Bailey had been seen at the house and that Cochran was arrested there. No facts are recited from which it could be inferred that Bailey and Cochran were other than casual social guests at the residence. At the trial, there was evidence that Bailey and Cochran had leased the house, but that fact was not before the issuing magistrate." [43]

Connection of Place To Be Searched to Illegal Activity

In narcotics cases, where there is no information tying the drugs to the suspect's premises, warrants to search the premises for the contraband have been struck down as lacking probable cause.[44] However, where the officer has seen the suspect leave his home and then has seen an apparent narcotics transaction take place,[45] or where the suspect indicated that if narcotics were needed to call him at home,[46] the courts have found probable cause to search his residence.

Experience and Expertise of Officer

Where affiants have alleged in a search warrant application that it was their experience that the type of items sought would be found at a particular location, the courts have accorded these statements weight. In *United States* v. *Spearman,*[47] the affidavit alleged that an informant had purchased narcotics at defendant's apartment and that the affiant had seen defendant in a particular automobile on numerous occasions; no specific information was alleged, however, that narcotics were ever seen in the car. Warrants were sought to search not only the apartment but the car as well, with the officer including the following statement with the above facts: "It is commonplace for dealers of heroin to have heroin that is packaged for sale in the place where they live or sell from, in their vehicles or on their persons." [48] The court sustained the warrant, concluding that the magistrate was justified in inferring that the automobile would also contain heroin.

It appears that an even better showing is made where the officer can cite some further facts upon which his experience statement is based. In *United States* v. *Trott,*[49] for example, it was alleged that the type of evidence to be searched for (records and ledgers of drug transactions at defendant's home) was seized from a codefendant's home previously in connection with an arrest.

Miscellaneous Factors

Other circumstances which are common to most cases upholding searches of this type are:

1) Generally, there is ample probable cause to believe the person whose premises are to be searched committed the crime; [50]

2) The searches are done pursuant to warrants, thereby having a judicial sanction for the search; and

3) The premises are those of the suspect and not those of a third party.[51]

This is not to suggest that the above conditions are critical because, for instance, probable cause to search can exist independently of probable cause to arrest.[52] Nevertheless, these factors are common to almost all of the decided cases addressing this issue.

Conclusion

An officer contemplating a search where personal observation of the articles sought is lacking should be mindful of the factors which have influenced the courts in sustaining searches of this type. If the officer has adduced facts to indicate that the place to be searched is the most likely place for the evidence to be, these facts should be clearly noted in his affidavit. An officer's experience as to where he has found such evidence in the past may be taken into consideration by a magistrate and should be detailed. Accumulation of evidence tying the suspect to the place to be searched and the goods to that location is important. Careful drafting of the affidavit cannot be overemphasized; more artful preparation may have led to a different result than that reached in *United States* v. *Bailey.*[53] Authority for searches based on inferences is abundant. It remains for the law enforcement officer to use his investigative and drafting skills in supplying the magistrate with a persuasive set of facts upon which probable cause may be found and upheld upon review. **FBI**

Footnotes

[1] 532 F. 2d 1324 (10th Cir. 1976).
[2] 602 F. 2d 1015 (1st Cir. 1979).
[3] *Supra* note 1, at 1328.
[4] *Supra* note 2, at 1017.
[5] *Zurcher* v. *Stanford Daily,* 436 U.S. 547, 556 n. 6 (1978).
[6] *Id.*
[7] *Johnson* v. *United States,* 333 U.S. 10, 13–14 (1948); *United States* v. *Lucarz,* 430 F. 2d 1051, 1055 (9th Cir. 1970).
[8] *Spinelli* v. *United States,* 393 U.S. 410, 419 (1969); *Porter* v. *United States,* 335 F. 2d 602, 604–05 (9th Cir. 1964), *cert. denied,* 379 U.S. 983 (1965).
[9] *United States* v. *Ventresca,* 380 U.S. 102, 108 (1965).
[10] *Id.* at 109. Many appellate decisions on this subject have indicated that the cases before them were "close," but sustained the warrants on the basis of these two principles emanating from the *Ventresca* decision. *See e.g., United States* v. *Melvin,* 596 F. 2d 492, 498 (1st Cir.), *cert. denied,* 100 S. Ct. 73 (1979); *United States* v. *Brown,* 584 F. 2d 252, 257–58 (8th Cir. 1978), *cert. denied,* 440 U.S. 910 (1979).
[11] *Whiteley* v. *Warden,* 401 U.S. 560, 565 n. 8 (1971); *Aguilar* v. *Texas,* 378 U.S. 108, 109 n. 1 (1964). The outcome of at least one appellate court case appears to have been affected by the failure of the officers to explicitly set forth the known facts in their affidavit. *See United States* v. *Bailey,* 458 F. 2d 408 (9th Cir. 1972).
[12] 395 U.S. 752 (1969).
[13] 430 F. 2d 1051 (9th Cir. 1970).
[14] *Id.* at 1055.
[15] *Id.*
[16] *United States* v. *Brown,* 584 F. 2d 252 (8th Cir. 1978), *cert. denied,* 440 U.S. 910 (1979) (contraband); *United States* v. *Scott,* 555 F. 2d 522 (5th Cir.), *cert. denied,* 434 U.S. 985 (1977) (mere evidence).
[17] However, even courts which apply the *Lucarz* test do not generally subject the facts before it to a penetrating analysis under this test. Nevertheless, it is clear that these factors do have a bearing on the probable cause determination. *See, e.g., United States* v. *Pheaster,* 544 F. 2d 353, 373 (9th Cir.), *cert. denied,* 429 U.S. 1099 (1977).
[18] 549 F. 2d 594 (9th Cir. 1976), *cert. denied,* 429 U.S. 1110 (1977).
[19] 534 F. 2d 186 (9th Cir.) (per curiam), *cert. denied,* 429 U.S. 942 (1976).
[20] The *Charest* court distinguished *Bowers* on the basis that in *Bowers* the search was for not only a single handgun but for other items as well. *Supra* note 2, 1017. It is questioned, however, whether this is a meaningful distinction, since the *Bowers* court could have invalidated the search for the handgun for want of probable cause, while upholding the search for the other items. Such a conclusion would be based on the principle that where an affidavit states probable cause for the search for some items, but not others, the seizure of those for which probable cause exists is lawful. The other evidence is subject to suppression for lack of probable cause. *See* 2 W. LA FAVE, Search and Seizure sec. 4.7 (f) (1978) (hereinafter cited as LA FAVE).
[21] "Staleness," the concept that probable cause for search may dissipate with the passage of time, is an additional, highly relevant factor in assessing probable cause to search. For a discussion of the doctrine of "staleness" see 1 LA FAVE sec. 3.7 (a).
[22] 525 F. 2d 33 (8th Cir. 1975).
[23] *Id.* at 38.
[24] 427 U.S. 463 (1976).
[25] *Id.* at 478 n. 9.
[26] *See, e.g., United States* v. *Mulligan,* 488 F. 2d 732, 736 (9th Cir. 1973), *cert. denied,* 417 U.S. 930 (1974) (bank burglary loot).
[27] 355 F. Supp. 981 (S.D.N.Y. 1972), *rev'd on other grounds,* 486 F. 2d 670 (2d Cir. 1973).
[28] *Id.* at 990.
[29] *Chambers* v. *Maroney,* 399 U.S. 42, 47–48 and n. 6 (1970).
[30] *See, e.g., United States* v. *Pheaster,* 544 F. 2d 353, 373 (9th Cir.), *cert. denied,* 429 U.S. 1099 (1977); *United States* v. *Archer,* 355 F. Supp. 981, 991 (S.D.N.Y. 1972), *rev'd on other grounds,* 486 F. 2d 670 (2d Cir. 1973).
[31] 423 F. 2d 745 (5th Cir. 1970).
[32] *Id.* at 747.
[33] 596 F. 2d 492 (1st Cir.), *cert. denied,* 100 S. Ct. 73 (1979).
[34] 508 F. 2d 58 (1st Cir. 1974). Another interesting bombing case from the first circuit is that of *United States* v. *Picariello,* 568 F. 2d 222 (1st. Cir. 1978).
[35] 508 F. 2d at 62.
[36] It appears that there is no case which directly holds that probable cause means more than 50 percent probable. See 1 LA FAVE sec. 3.2 n. 150. In this connection, with respect to inferring probable cause to search, Professor LaFave states as follows:
> "To the extent such rulings permit searches to be made upon something less than a 50% probability as to any one particular place [of the suspect], they do not appear objectionable. The fact remains that it is unlikely that the privacy of an innocent person will be disturbed under such circumstances." 1 LA FAVE sec. 3.2, at 487.
>
> "On the other hand, something more might be required where one of the possible hiding places is that of a possibly innocent party." *Id.* at n. 154.

[37] 335 F. 2d 602 (9th Cir. 1964), *cert. denied,* 379 U.S. 983 (1965).
[38] 466 Pa. 102, 351 A. 2d 642 (1976).
[39] However, where the more likely place is that of a third party, Professor La Fave suggests that it would nevertheless be more reasonable to search the defendant's premises first than that of the third party for the evidence sought. See 1 LA FAVE sec. 3.2 at 489–91 and n. 166.
[40] 114 R.I. 596, 337 A. 2d 523 (1975).
[41] 337 A. 2d at 527.
[42] 458 F. 2d 408 (9th Cir. 1972).
[43] *Id.* at 412.
[44] *See, e.g., United States* v. *Gramlich,* 551 F. 2d 1359 (5th Cir.), *cert. denied,* 434 U.S. 866 (1977); *Commonwealth* v. *Kline,* 234 Pa. Super. 12, 335 A. 2d 361 (1975).
[45] *United States* v. *Valenzuela,* 596 F. 2d 824 (9th Cir.), *cert. denied,* 441 U.S. 965 (1979).
[46] *Commonwealth* v. *Frye,* 242 Pa. Super. 144, 363 A. 2d 1201 (1976).
[47] 532 F. 2d 132 (9th Cir. 1976).
[48] *Id.* at 133.
[49] 421 F. Supp. 550 (D. Del. 1976) (mem.).
[50] *See, e.g., United States* v. *Haala, supra* note 1.
[51] For a case in which a third party search was upheld, see *United States* v. *McNally,* 473 F. 2d 934 (3d Cir. 1973).
[52] 1 LA FAVE sec 3.1.
[53] *Supra* note 42.

END