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# Search and Seizure--A Constitutional Standard for South Carolina

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# NOTES

## SEARCH AND SEIZURE—A CONSTITUTIONAL STANDARD FOR SOUTH CAROLINA

The decision of the United States Supreme Court in *Mapp v. Ohio*[1] is generally recognized as a landmark decision in the field of search and seizure. The holding in *Mapp* that evidence obtained in an illegal search and seizure is inadmissible in state court criminal prosecutions overruled *Wolf v. Colorado*,[2] which had been the authority for the doctrine that the exclusionary rule[3] was applicable only to federal courts. *Mapp* enforced the protections of the fourth amendment against the states through the fourteenth amendment.

As is often the case with a decision that overturns an established rule, the extent of *Mapp* was not completely clear. Therefore, in the next term, the Court used *Ker v. California*[4] to elucidate the *Mapp* decision. In *Ker* the Court held that although *Mapp* stood for the proposition that evidence obtained in an *unreasonable* search and seizure was inadmissible in state courts, the states could establish standards of reasonableness, subject only to review by the Supreme Court.

These two cases have marked the turning point in the law of search and seizure. They have generated as much comment by law review writers as any other subject in recent years.[5] There

1. 367 U.S. 643 (1961).

2. 338 U.S. 25 (1949). The Court held that the fourth amendment is enforceable against the states through the fourteenth amendment, but that the latter did not, in a prosecution in a state court for a state crime, forbid the admission of evidence obtained in an illegal search and seizure.

3. The exclusionary rule was laid down in Weeks v. United States, 232 U.S. 383 (1914). There the Court held that the fourth amendment barred the use in federal prosecutions of evidence secured through an illegal search and seizure. This rule was later extended to prohibit federal agents from turning over illegally obtained evidence to state authorities for use in a state prosecution. Elkins v. United States, 364 U.S. 206 (1960).

4. 374 U.S. 23 (1963).

5. See, *e.g.*, Broder, *The Decline and Fall of Wolf v. Colorado*, 41 NEB. L. REV. 185 (1961); Collins, *Toward Workable Rules of Search and Seizure—An Amicus Curiae Brief*, 50 CALIF. L. REV. 421 (1962); Knowlton, *Supreme Court, Mapp v. Ohio and Due Process of Law*, 49 IOWA L. REV. 14 (1963); Morris, *The End of an Experiment in Federalism—A Note on Mapp v. Ohio*, 36 WASH. L. REV. 407 (1961); Sloan & Leeds, *Mapp for the Road Towards Exclusion*, 35 TEMP. L.Q. 27 (1961); Specter, *Mapp v. Ohio (81 Sup. Ct. 1684): Pandora's Problems for the Prosecutor*, 111 U. PA. L. REV. 4 (1962); Traynor, *Mapp v. Ohio (81 Sup. Ct. 1684) at Large in the Fifty States*, 1962 DUKE L.J. 319.

The cases also produced a profusion of student comment. On *Mapp*, see, *e.g.*, 24 GA. B.J. 129 (1961); 50 GA. L.J. 166 (1961); 47 IOWA L. REV. 254

will be no attempt here to discuss *Mapp* and *Ker* in depth—their holdings will be taken at face value. The purpose of this article is to determine the effect of the federal rules on the law of South Carolina, with the objective of establishing definitive rules of search and seizure that will stand under attack.[6]

There is now justifiable speculation that the federal rules of search and seizure apply to the states in toto. In stating a clear constitutional standard it is necessary, therefore, to establish a federal standard.

## I. The Federal Standard

Prior to 1961 the rules of search and seizure were applied by a "double standard"—the federal courts and a minority of states holding that evidence obtained in an illegal search and seizure was not admissible in a criminal prosecution, and the majority of the states holding that such evidence was admissible. All courts were put on equal footing by the Supreme Court in *Mapp*. It becomes necessary therefore to determine when the search is unreasonable and thus illegal.

### *A. Persons and Objects Protected*

The fourth amendment prohibits the unreasonable search and seizure of one's person,[7] home,[8] private papers,[9] and effects.[10]

(1962); 38 N.D.L. Rev. 117 (1962); 23 Ohio St. L.J. 147 (1962); 9 U.C.L.A. L. Rev. 254 (1962); 23 U. Pitt. L. Rev. 233 (1961). On *Ker* see, *e.g.*, 30 Brooklyn L. Rev. 145 (1963); 24 La. L. Rev. 401 (1964); 39 Notre Dame Law. 227 (1964); 38 Tul. L. Rev. 414 (1964); 11 U.C.L.A. L. Rev. 426 (1964); 1963 U. Ill. L.F. 501.

6. Similar studies have been conducted in several states. See, *e.g.*, Barnette, *Impact of Mapp v. Ohio (81 Sup. Ct. 1684) Upon the Connecticut Law of Search and Seizure*, 37 Conn. B.J. 52 (1963); Scurlock, *Searches and Seizures in Missouri*, 29 U. Kan. City L. Rev. 242 (1961); Thompson, *Illinois Search and Seizure Law—The New Frontier*, 11 De Paul L. Rev. 27 (1961); Williams, *Trends of Search and Seizure in Florida*, 16 U. Fla. L. Rev. 180 (1963); Woody, *Illegal Searches and Seizures—The Conflict Between Federal and Texas Courts*, 6 So. Tex. L. J. 91 (1962); Note, *Search and Seizure In New Jersey*, 18 Rutgers L. Rev. 177 (1963); Note, *Search and Seizure in California*, 4 Santa Clara L. Rev. 86 (1963).

7. Wrightson v. United States, 222 F.2d 556 (D.C. Cir. 1955); Nelson v. Hancock, 239 F. Supp. 857 (D.N.H. 1965).

8. Silverman v. United States, 365 U.S. 505 (1961); United States v. Jeffers, 342 U.S. 48 (1951); Weaver v. United States, 295 F.2d 360 (5th Cir. 1961); Catalanotte v. United States, 208 F.2d 264 (6th Cir. 1953); Drayton v. United States, 205 F.2d 35 (5th Cir. 1953); Worthington v. United States, 166 F.2d 557 (6th Cir. 1948); *In re* Milburne, 77 F.2d 310 (2d Cir. 1935); United States v. Kaplan, 17 F. Supp. 920 (E.D.N.Y. 1936).

9. Boyd v. United States, 116 U.S. 616 (1886); United States v. Thompson, 113 F.2d 643 (7th Cir. 1940).

10. Marullo v. United States, 328 F.2d 361 (5th Cir. 1964); United States v. Peisner, 311 F.2d 94 (4th Cir. 1962); Weaver v. United States, 295 F.2d 360 (5th Cir. 1961); United States v. Scott, 149 F. Supp. 837 (D.D.C. 1957).

1. *One's Person.* Search of one's person is illegal unless it is pursuant to an arrest. Forceful physical examinations are unreasonable, although done under the authority of a search warrant or in one of the several situations where a warrant is not required.[11] On the other hand, if consent is given or if the search is otherwise non-forceful, the Constitution is not violated.[12] The federal rule today apparently prohibits a violent interference with one's bodily integrity in order to secure evidence.[13] There is a strong possibility, however, that this rule might not meet the constitutional test and the sounder view is that *any* violation of the accused's body sanctity without affirmative consent is illegal.[14]

2. *One's Home.* The right of officers to thrust themselves into a home is a matter of grave concern, and only in the most exceptional circumstances can the warrant be dispensed with.[15]

11. Rochin v. California, 342 U.S. 165 (1952). In this case two officers illegally entered the defendant's dwelling, at which time he swallowed two morphine capsules. The officers took him to the hospital and pumped his stomach, from which the capsules were recovered and introduced as evidence at the trial. In reversing the conviction, Justice Frankfurter stated that convictions cannot be brought about by methods which offend "a sense of justice." *Id.* at 173. See also United States v. Townsend, 151 F. Supp. 378 (D.C. Cir. 1957) (dictum); United States v. Willis, 85 F. Supp. 745 (S.D. Cal. 1949).

12. Briethaupt v. Abram, 352 U.S. 432 (1957). The defendant was the driver of an automobile involved in an accident. Since he was suspected of driving while intoxicated a blood test was taken from him while he was still unconscious. In a subsequent trial for manslaughter the results of the test were introduced in evidence. Affirming the conviction, the Supreme Court held that the absence of conscious consent does not necessarily render the taking a violation of defendant's constitutional rights, and that the test administered here could not have been considered oppressive by even the most delicate. The Court further said:

> It might be a fair assumption that a driver on the highways, in obedience to a policy of the State, would consent to have a blood test made as a part of a sensible and civilized system of protecting himself as well as other citizens not only from the hazards of the road due to drunken driving, but also from some use of dubious lay testimony.

*Id.* at 436 n.2.

13. Annot., 25 A.L.R.2d 1407, 1412 (1952).

14. Briethaupt v. Abram, 353 U.S. 432 (1957) (dissenting opinions). Mr. Chief Justice Warren and Mr. Justices Black and Douglas dissented on the ground that this case was indistinguishable from *Rochin v. California,* note 11 *supra.* The latter two Justices, in a separate dissenting opinion, expressed the view that due process is not limited to a prohibition of force against the accused, but equally prohibits the violation of the body sanctity of an unconscious man. These dissents by three of the Court's most influential Justices, along with the fact that this was a pre-*Mapp* decision, considerably weakens this case. It is doubtful if today anything short of actual consent, in the case of a violation of one's person, would be considered reasonable. For an earlier case to this effect see Application of Fried, 68 F. Supp. 961 (S.D.N.Y. 1946), where the court held that non-resistence is not equal to consent to search after arrest. See also United States v. Hoffenburg, 24 F. Supp. 989 (E.D.N.Y. 1938).

15. Johnson v. United States, 333 U.S. 10 (1948). See also Agnello v. United States, 269 U.S. 20 (1925).

Neither inconvenience to the officer nor probable cause for belief that certain articles are in the dwelling justify a search without a warrant.[16] Apparently the only time that a search of a home can be conducted without a warrant is when such a search is incident to a lawful arrest[17] or when the defendant consents to the search.[18] This protection includes situations where the residents are not at home and the officers can enter peacefully, or where the home is vacant at the time of the search.[19]

"Home" is not limited to dwelling houses but includes a place of residence,[20] or the place a man considers his home, although he is absent a great deal of time.[21] Thus an apartment,[22] a room in a boarding house,[23] and a hotel room[24] are within the protection of the Constitution.

Neither have the courts limited their interpretation to the residence itself. Buildings within the curtilage of the dwelling house are also included.[25] On the other hand, buildings clearly

16. Johnson v. United States, 333 U.S. 10 (1948) (inconvenience of obtaining a warrant); Jones v. United States, 357 U.S. 493 (1958) (existence of probable cause). See also McDonald v. United States, 335 U.S. 451 (1948); Williams v. United States, 276 F.2d 522 (D.C. Cir. 1960); Catalanotte v. United States, 208 F.2d 264 (6th Cir. 1953); Papani v. United States, 84 F.2d 160 (9th Cir. 1936); Brown v. United States, 83 F.2d 383 (3d Cir. 1936).

17. For a general discussion of searches incident to arrests see notes 86 to 102 *infra*, and accompanying text. For cases to this effect see, *e.g.*, Harris v. United States, 331 U.S. 145 (1947); Robertson v. United States, 165 F.2d 752 (6th Cir. 1948); Shew v. United States, 155 F.2d 628 (4th Cir. 1946); United States v. Sam Chin, 24 F. Supp. 14 (D. Md. 1938).

18. See generally notes 110 to 20 *infra*, and accompanying text. See also United States v. Saka, 339 F.2d 541 (3d Cir. 1964); United States v. Minor, 117 F. Supp. 697 (E.D. Okla. 1953).

19. Morrison v. United States, 262 F.2d 449 (D.C. Cir. 1958); Steeber v. United States, 193 F.2d 615 (10th Cir. 1952); Roberson v. United States, 165 F.2d 752 (6th Cir. 1948); United States v. Thomas, 216 F. Supp. 942 (N.D. Cal. 1963). *But see* United States v. Romano, 330 F.2d 566 (2d Cir. 1964).

20. United States v. Minor, 117 F. Supp. 697 (E.D. Okla. 1953).

21. United States v. Novero, 58 F. Supp. 275 (E.D. Mo. 1944).

22. Lanza v. New York, 370 U.S. 139 (1962); United States v. Miguel, 340 F.2d 812 (2d Cir. 1965); United States v. Scott, 149 F. Supp. 837 (D.D.C. 1957).

23. United States *ex rel* Clark v. Maroney, 339 F.2d 710 (3d Cir. 1965); United States v. Marrese, 336 F.2d 501 (3d Cir. 1964).

24. United States v. Jeffers, 342 U.S. 48 (1951); Hall v. Warden Md. Penitentiary, 313 F.2d 483 (4th Cir. 1963). Probable cause will not justify search of a hotel room without a warrant. Eng Fung Jem v. United States, 281 F.2d 803 (9th Cir. 1960). As in the case of a dwelling house, the search is justified if incident to a lawful arrest. United States v. Lodewijkz, 230 F. Supp. 212 (S.D.N.Y. 1964). After the hotel room has been vacated and the manager gives his consent there can be no objection to the search. Abel v. United States, 362 U.S. 217 (1960).

25. Care v. United States, 231 F.2d 22 (10th Cir. 1956); Janney v. United States, 206 F.2d 601 (4th Cir. 1953).

located outside the curtilage are not protected.[26] Whether a building is within the curtilage is to be determined from the facts, including proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family.[27] Garages have been held to be within the curtilage,[28] and although there is authority to the contrary,[29] this is the sounder rule and probably represents the federal standard today. Similarly, barns,[30] bathhouses,[31] sheds,[32] and smokehouses[33] have been included within the curtilage. An open field, on the other hand, is not entitled to the amendments protection.[34]

Still a further extension of the amendment's protection is to places of business[35] provided they are not open to the public.[36] A person's office or the desk assigned to him for his exclusive use is protected,[37] but if the desk or office is for the common use of several employees a warrant is not required.[38]

26. Brock v. United States, 256 F.2d 55 (5th Cir. 1958); Hodges v. United States, 243 F.2d 281 (5th Cir. 1957); United States v. Thomas, 216 F. Supp. 942 (N.D. Cal. 1963); United States v. Wilds, 87 F. Supp. 459 (E.D. Tenn. 1949).

27. United States v. Minker, 312 F.2d 632 (3d Cir. 1962); Care v. United States, 231 F.2d 22 (10th Cir. 1956); United States v. Lewis, 227 F. Supp. 433 (S.D.N.Y. 1964).

28. Costner v. United States, 252 F.2d 496 (6th Cir. 1958); Martin v. United States, 183 F.2d 436 (4th Cir. 1950); United States v. Hayden, 140 F. Supp. 429 (D. Md. 1956); United States v. Novero, 58 F. Supp. 275 (E.D. Mo. 1944); United States v. Fowler, 17 F.R.D. 499 (S.D. Cal. 1955).

29. Carney v. United States, 163 F.2d 784 (9th Cir. 1947); Kitt v. United States, 132 F.2d 920 (4th Cir. 1942); Earl v. United States, 4 F.2d 532 (9th Cir. 1925).

30. Walker v. United States, 225 F.2d 447 (5th Cir. 1955); United States v. DiCorvo, 37 F.2d 124 (D. Conn. 1924). Probable cause is sufficient, however, for searching a barn without a warrant. United States v. Preisner, 96 F.2d 138 (2d Cir. 1938).

31. Wakkuri v. United States, 67 F.2d 844 (6th Cir. 1933).

32. United States v. Carter, 118 F. Supp. 559 (W.D. Pa. 1954).

33. United States v. Mullin, 329 F.2d 295 (4th Cir. 1964); Roberson v. United States, 165 F.2d 762 (6th Cir. 1948).

34. See, *e.g.*, Hester v. United States, 265 U.S. 57 (1924); United States v. Hassell, 336 F.2d 684 (6th Cir. 1964); Hodges v. United States, 243 F.2d 281 (5th Cir. 1957); United States v. Romano, 203 F. Supp. 27 (D.Conn. 1962); United States v. Sims, 202 F. Supp. 65 (E.D. Tenn. 1962); United States v. Hayden, 140 F. Supp. 429 (D. Md. 1956); Taylor v. Fine, 115 F. Supp. 68 (S.D. Cal. 1953).

35. Gouled v. United States, 255 U.S. 298 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Martin v. United States, 183 F.2d 436 (4th Cir. 1950); *In re* Phoenix Cereal Beverage Co., 58 F.2d 953 (2d Cir. 1932); United States v. Vlahos, 19 F. Supp. 166 (D. Ore. 1937).

36. Fisher v. United States, 205 F.2d 702 (D.C. Cir. 1953); McWalters v. United States, 6 F.2d 224 (9th Cir. 1925).

37. United States v. Block, 188 F.2d 1019 (D.C. Cir. 1951).

38. Freeman v. United States, 201 A.2d 22 (D.C. App. 1964).

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3. *Private Papers.* If the purpose of the government is to use private papers solely as evidence, such a seizure is illegal regardless of the lawfulness of the search which discovered them.[39] On the other hand, if these documents were used as a means to commit the crime, seizure is lawful.[40] The government cannot, however, seize the entire contents of any house it might have searched.[41] Mere evidence cannot be seized, but instruments of the crime are always proper subjects of a search.

In contrast to this rule, public records are not protected.[42] Public records include documents in public registration offices,[43] and records required by law to be kept in order that there may be suitable information of transactions which are appropriate subjects of government regulation.[44] Similarly, corporate records are not within the protection of the amendment.[45] There can be, therefore, no objection to the seizure of public or quasi-public records although the search is without a warrant.

4. *Effects.* Articles that have been considered effects and therefore not subject to search and seizure without a warrant are books,[46] automobiles,[47] clothing,[48] and mail.[49] If in the

39. Abel v. United States, 362 U.S. 217 (1960); Gouled v. United States, 255 U.S. 298 (1921).

40. Abel v. United States, 362 U.S. 217 (1960); United States v. Clancy, 276 F.2d 617 (7th Cir. 1960); United States v. Best, 76 F. Supp. 857 (D. Mass. 1948).

41. Stanford v. Texas, 379 U.S. 476 (1965).

42. Davis v. United States, 328 U.S. 582 (1946).

43. Davis v. United States, 138 F.2d 406 (5th Cir. 1943).

44. Peeples v. United States, 341 F.2d 60 (5th Cir. 1965); Bowles v. Insel, 148 F.2d 91 (3d Cir. 1945); United States v. Pine Valley Poultry Distribs. Corp., 187 F. Supp. 455 (S.D.N.Y. 1960); Wagman v. Arnold, 152 F. Supp. 637 (S.D.N.Y. 1957); United States v. Kempe, 59 F. Supp. 905 (N.D. Iowa 1945); Bowles v. Stitzinger, 59 F. Supp. 94 (W.D. Pa. 1945).

45. Essgee Co. v. United States, 262 U.S. 151 (1923); Wilson v. United States, 340 F.2d 950 (8th Cir. 1965); Lagow v. United States, 159 F. 2d 245 (2d Cir. 1946); Genecov v. Federal Petroleum Bd., 146 F.2d 596 (5th Cir. 1945); United States v. White, 137 F.2d 24 (3d Cir. 1943); *In re* Greenspan, 187 F. Supp. 177 (S.D.N.Y. 1960); United States v. Cardiff, 95 F. Supp. 206 (E.D. Wash. 1951). *Contra,* Fleming v. Montgomery Ward & Co., 114 F.2d 384 (7th Cir. 1940); United States v. Kanan, 225 F. Supp. 711 (D. Ariz. 1963).

46. United States v. Peisner, 311 F.2d 94 (4th Cir. 1962). The court said that the fourth amendment was broad enough to afford protection against unreasonable searches and seizures to *all* types of property *although contraband or obscene in nature.* See also Stanford v. Texas, 379 U.S. 476 (1965) where the Court held that the seizure of 2,000 books, papers, and pamphlets belonging to a suspected Communist propagandist was illegal.

47. Weller v. Russell, 321 F.2d 848 (3d Cir. 1963); United States v. Peisner, 311 F.2d 94 (4th Cir. 1962). See also notes 57 to 62 *infra* and accompanying text.

48. Nelson v. Hancock, 239 F. Supp. 857 (D.N.H. 1965).

49. *Ex parte* Jackson, 96 U.S. (6 Otto) 727 (1877); Oliver v. United States, 243 F.2d 391 (10th Cir. 1957); United States v. Fulcher, 229 F. Supp. 456

course of an otherwise lawful search, however, officers discover evidence of some other crime, it may be seized and used in a subsequent trial.[50]

Effects lose their protection if they are abandoned.[51] Thus property left in a vacated hotel room,[52] a trash can,[53] an open field,[54] or a public place[55] is subject to seizure without objection. Abandonment is precluded, however, when the premises are under the control of the individual.[56]

5. *Automobiles.* A much litigated and uncertain field arises as to automobiles. The general rule is that motor vehicles are within the protection of the amendment.[57] If the search of an automobile is not incident to a lawful arrest or is without the consent of the owner, its validity is determined by reasonableness and probable cause; but the requirements are more lenient, and the standard less rigid, than that applied to dwelling houses.[58]

Probable cause must exist to search a motor vehicle without a warrant,[59] but at least two cases say that probable cause *alone*

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(D. Md. 1964). However, the mail must be first class and sealed. If it is of a class subject to postal inspection, search and seizure without a warrant does not violate the amendment. See, *e.g.*, Santana v. United States, 329 F.2d 854 (1st Cir. 1964); Webster v. United States, 92 F.2d 462 (6th Cir. 1937). There are a few exceptional situations where letters are not protected, such as letters sent to or from prison. See, *e.g.*, Stroud v. United States, 251 U.S. 15 (1919); Adams v. Ellis, 197 F.2d 483 (5th Cir. 1952); *In re* Bull, 123 F. Supp. 389 (D. Nev. 1954).

50. Gouled v. United States, 255 U.S. 298 (1921); Kelly v. United States, 197 F.2d 162 (5th Cir. 1952); United States v. Kaplan, 17 F. Supp. 920 (E.D.N.Y. 1936).

51. Abel v. United States, 362 U.S. 217 (1960); Hester v. United States, 265 U.S. 57 (1924); Frank v. United States, 347 F.2d 486 (D.C. Cir. 1965).

52. Abel v. United States, 362 U.S. 217 (1960); Frank v. United States, 347 F.2d 486 (D.C. Cir. 1965).

53. United States v. Calise, 217 F. Supp. 705 (S.D.N.Y. 1962); United States v. Minker, 191 F. Supp. 683 (E.D. Pa. 1961).

54. Hester v. United States, 265 U.S. 57 (1924).

55. Trujillo v. United States, 294 F.2d 583 (10th Cir. 1961).

56. Rios v. United States, 364 U.S. 253, n.6 (1960). A package dropped to the floor by a passenger who was occupying a taxicab is not abandoned.

57. Smith v. United States, 335 F.2d 270 (D.C. Cir. 1964); Weller v. Russel, 321 F.2d 848 (3d Cir. 1963); United States v. Peisner, 311 F.2d 94 (4th Cir. 1962); Moring v. United States, 40 F.2d 267 (5th Cir. 1930). *Cf.* United States v. Gilliam, 87 F. Supp. 808 (E.D. Tenn. 1950).

58. [Q]uestions involving searches of motor cars or other things readily moved cannot be treated as identical to questions arising out of searches of fixed structures like houses, . . . what may be an unreasonable search of a house may be reasonable in the case of a motor car.

Preston v. United States, 376 U.S. 364, 366-67 (1964). See also United States v. Sutton, 321 F.2d 221 (4th Cir. 1963); Patenotte v. United States, 266 F.2d 647 (5th Cir. 1959).

59. Brinegar v. United States, 338 U.S. 160 (1949); Owens v. United States, 346 F.2d 329 (7th Cir. 1965); United States v. O'Leary, 201 F. Supp. 926 (E.D. Tenn. 1962).

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is not sufficient.[60] The courts more often speak in terms of reasonableness, and the existence of probable cause is often considered in determining if the search was reasonable. The most important factor in determining reasonableness is actual and immediate necessity. If there is a danger that the vehicle may be removed out of the locality or jurisdiction, the warrant may be dispensed with.[61] If the possibility of removal is not present, such as when the owner is in police custody, the vehicle can be searched only pursuant to a warrant.[62]

*B. Nature and Extent of the Search*

1. *Concept of Reasonableness.* All unreasonable searches and seizures are prohibited by the fourth amendment.[63] Reasonableness is a question of fact that must be determined from the particular circumstances of each case.[64] There is no fixed formula for its determination;[65] neither can a test be stated in rigid or absolute terms.[66] Like all questions of fact the determination is for

60. Smith v. United States, 335 F.2d 270 (D.C. Cir. 1964); Hart v. United States, 162 F.2d 74 (10th Cir. 1947).

61. United States v. Ventresca, 380 U.S. 102 (1965); United States v. Sutton, 321 F.2d 221 (4th Cir. 1963); United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y. 1960).

62. Westover v. United States, 342 F.2d 684 (9th Cir. 1965); Smith v. United States, 335 F.2d 270 (D.C. Cir. 1964); Conti v. Morgenthau, 232 F. Supp. 1004 (S.D.N.Y. 1964). *But see* Burge v. United States, 342 F.2d 408 (9th Cir. 1965).

63. Harris v. United States, 331 U.S. 145 (1945); Carroll v. United States, 267 U.S. 132 (1925); Caldwell v. United States, 338 F.2d 385 (8th Cir. 1964); Burge v. United States, 333 F.2d 385 (9th Cir. 1964); United States v. Zimmerman, 326 F.2d 1 (7th Cir. 1963); Lane v. United States, 321 F.2d 573 (5th Cir. 1963); McDonald v. United States, 307 F.2d 272 (10th Cir. 1962); White v. United States, 271 F.2d 829 (D.C. Cir. 1959); United States v. Pardo-Bolland, 229 F. Supp. 473 (S.D.N.Y. 1964); United States v. Roberts, 223 F. Supp. 745 (E.D. Ark. 1963); United States v. Sorenson, 202 F. Supp. 524 (E.D.N.Y. 1962); United States v. Juvelis, 194 F. Supp. 745 (D.N.J. 1961).

64. See, *e.g.*, Ker v. California, 374 U.S. 23 (1963); Arwine v. Bannan, 346 F.2d 458 (6th Cir. 1965); United States v. Jones, 340 F.2d 913 (7th Cir. 1964); Davis v. United States, 327 F.2d 301 (9th Cir. 1964); Lano v. United States, 321 F.2d 573 (10th Cir. 1963); Keinick v. United States, 242 F.2d 818 (8th Cir. 1957); Drayton v. United States, 205 F.2d 35 (5th Cir. 1953); Martin v. United States, 183 F.2d 436 (4th Cir. 1950); Maxwell v. Stephens, 229 F. Supp. 205 (E.D. Ark. 1964); United States v. Lewis, 227 F. Supp. 433 (S.D.N.Y. 1964).

65. United States v. Rabinowitz, 339 U.S. 56 (1950); Arwine v. Bonnan, 346 F.2d 458 (6th Cir. 1965).

66. Harris v. United States, 331 U.S. 145 (1947); Flores v. United States, 234 F.2d 604 (5th Cir. 1956); Kelly v. United States, 197 F.2d 162 (5th Cir. 1952).

the trial court,[67] and although not binding on the reviewing court, it is entitled to weight.[68]

It is therefore virtually impossible to state a comprehensive standard that would be of any practical importance. Nevertheless, one court has said that the test in determining if a search and seizure was unreasonable is whether the thing done in sum of its form, scope, nature, incidents, and effects impresses the mind as being fundamentally unfair or unreasonable in a specific situation when the immediate end sought is considered against the private right affected.[69] The question is one of a realistic, not a theoretical, approach.[70] Reasonableness is a question of degree—a balance between the right of privacy and the right of search.[71] These tests are all subjective and must be used only as principles, not as rules.[72]

More concrete guidelines than the subjective test might prove beneficial. The validity of a search without a warrant in one of the situations where a warrant is not required, for example, turns upon reasonableness under all the circumstances and not upon the practicability of procuring a warrant.[73] Among the tangible factors to be considered are the time of day or night the search was conducted, the type of property, enclosed or unenclosed, where entry was effected, the distance from the business or dwelling where the search took place, the object or place that was subjected to the search, the presence of force or coercion, the definiteness and type of information that caused the officers to enter, and the time elements involved in entry, search, and seizure.[74]

The effect of the cases is to point out that no comprehensive standard can be stated for the determination of an unreasonable search; the facts and circumstances of each case are controlling, and precedents are helpful only as guidelines. In the light of recent Supreme Court decisions, however, it is likely that the

67. Ker v. California, 374 U.S. 23 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); United States v. Rabinowitz, 339 U.S. 56 (1950); Dicks v. United States, 247 F.2d 745 (10th Cir. 1957).

68. Blackford v. United States, 247 F.2d 745 (9th Cir. 1957).

69. United States v. Haskins, 213 F. Supp. 551 (E.D. Tenn. 1962).

70. Schwimmer v. United States, 232 F.2d 855 (8th Cir. 1956).

71. Giacona v. United States, 257 F.2d 450 (5th Cir. 1958).

72. Schwimmer v. United States, 232 F.2d 855 (8th Cir. 1956).

73. Janney v. United States, 206 F.2d 601 (4th Cir. 1953); United States v. Hayden, 140 F. Supp. 429 (D. Md. 1956).

74. United States v. Hayden, *supra* note 73. See also Jones v. United States, 339 F.2d 419 (5th Cir. 1964).

courts will require the search to meet stricter standards of reasonableness.

2. *Extent of Protection.* The privilege of the amendment is personal and can only be claimed by the person whose rights have been invaded.[75] The individual who has no proprietary interest in the property searched has no standing to assert violation of his constitutional rights.[76] Further, the protection reaches all alike, whether guilty or innocent,[77] but any previous criminal record can be considered in determining the reasonableness of the search.[78]

A search must be legal at its commencement; an illegal search is not made valid by what it turns up.[79] General exploratory searches are prohibited whether they are conducted under a search warrant or in one of the situations where the search is valid without a warrant.[80] Thus a search whose sole purpose is

75. Murray v. United States, 333 F.2d 409 (10th Cir. 1964); Baskerville v. United States, 227 F.2d 454 (10th Cir. 1955); United States v. Eversole, 209 F.2d 766 (7th Cir. 1954); Kitt v. United States, 132 F.2d 920 (4th Cir. 1942); United States *ex rel* Pantari v. Maroney, 220 F. Supp. 801 (W.D. Pa. 1963); Dorfman v. Rombs, 218 F. Supp. 905 (N.D. Ill. 1963); United States v. One 1955 Cadillac Eldorado Convertible, 148 F. Supp. 752 (E.D. Ill. 1957); United States v. Alberti, 120 F. Supp. 171 (S.D.N.Y. 1954); United States v. One 1951 Cadillac Sedan, 107 F. Supp. 491 (W.D. Okla. 1952); United States v. One 1948 Cadillac Convertible Coupe, 115 F. Supp. 723 (D.N.J. 1953).

76. United States v. Thomas, 342 F.2d 132 (6th Cir. 1965); Baskerville v. United States, 227 F.2d 454 (10th Cir. 1955); Casey v. United States, 191 F.2d 1 (9th Cir. 1951); United States *ex rel* Smith v. Reincke, 239 F. Supp. 887 (D. Conn. 1965); United States v. Shelton, 59 F. Supp. 273 (E.D. Ky. 1945).

77. McDonald v. United States, 335 U.S. 451 (1948); Trupiano v. United States, 334 U.S. 699 (1948); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Weeks v. United States, 232 U.S. 392 (1913); Lawson v. United States, 254 F.2d 706 (8th Cir. 1958); Brock v. United States, 223 F.2d 681 (5th Cir. 1955); Catalanotte v. United States, 208 F.2d 264 (6th Cir. 1953); United States *ex rel* Staples v. United States, 222 F. Supp. 998 (N.D. Ill. 1963); United States v. Marci, 185 F. Supp. 144 (D. Conn. 1960); United States v. Duane, 66 F. Supp. 459 (D. Neb. 1946).

78. Martin v. United States, 183 F.2d 436 (4th Cir. 1950).

79. Byars v. United States, 273 U.S. 28 (1927); United States v. Como, 340 F.2d 891 (2d Cir. 1965); Cochran v. United States, 291 F.2d 633 (8th Cir. 1961); Cervantes v. United States, 278 F.2d 350 (9th Cir. 1960); United States v. Arrington, 215 F.2d 630 (7th Cir. 1954); United States v. Bush, 136 F. Supp. 490 (E.D. Tenn. 1956); United States v. Turner, 126 F. Supp. 349 (D. Md. 1954); United States v. Sully, 56 F. Supp. 942 (S.D.N.Y. 1944).

80. Stanford v. Texas, 379 U.S. 476 (1965); United States v. Rabinowitz, 339 U.S. 56 (1950); United States v. Lefkowitz, 285 U.S. 452 (1932); United States v. Haley, 321 F.2d 956 (6th Cir. 1963); Drayton v. United States, 205 F.2d 35 (5th Cir. 1953); Poldo v. United States, 55 F.2d 866 (9th Cir. 1932); United States v. 1013 Crates of Empty Old Smuggler Whiskey Bottles, 52 F.2d 49 (2d Cir. 1931); United States v. Stern, F. Supp. 187 (S.D.N.Y. 1964); United States v. Kidd, 153 F. Supp. 605 (W.D. La. 1957).

the securing of evidence is invalid.[81] On the other hand, it is not a search to observe what is open and patent in either daylight or artificial light, and police officers lawfully on the premises may seize fruits of the crime that are lying about in the open.[82] Observation is not an illegal search.[83]

*C. Justification of Searches*

A search is justified if conducted pursuant to a legally obtained and properly executed warrant. The requirements for obtaining and executing such a warrant are discussed in section *D*.

A reasonable search, although without a warrant, does not violate the fourth amendment. A search without a warrant is reasonable (1) if it is incidental to a lawful arrest, (2) if there is an immediate necessity to search, or (3) if the individual consents or waives his constitutional protection.

The existence of probable cause alone is not sufficient to justify a search without a warrant.[84] The belief that an article is in a dwelling furnishes no justification for a search without a warrant, and such a search is unlawful notwithstanding facts unquestionably showing probable cause.[85] Probable cause is merely a factor in determining if a search without a warrant was reasonable.

1. *Incident to Arrest.* A search may be conducted without a warrant if it is incident to an arrest.[86] The Supreme Court has

81. Abel v. United States, 362 U.S. 217 (1960); United States v. Sigal, 341 F.2d 837 (3d Cir. 1965); Marderosian v. United States, 337 F.2d 759 (1st Cir. 1964); United States v. Guido, 251 F.2d 1 (7th Cir. 1958); Harris v. United States, 151 F.2d 837 (10th Cir. 1945).

82. See, *e.g.*, Fagundes v. United States, 340 F.2d 673 (1st Cir. 1965); United States v. Barone, 330 F.2d 543 (2d Cir. 1964); Davis v. United States, 327 F.2d 301 (9th Cir. 1964); United States v. Williams, 314 F.2d 795 (6th Cir. 1963); Petteway v. United States, 261 F.2d 53 (4th Cir. 1958); United States v. McDaniel, 154 F. Supp. 1 (D.D.C. 1957); United States v. Strickland, 62 F. Supp. 468 (W.D.S.C. 1945).

83. United States v. Lee, 274 U.S. 559 (1927); Safarick v. United States, 62 F.2d 892 (8th Cir. 1933); Smith v. United States, 2 F.2d 715 (4th Cir. 1924); Boyd v. United States, 286 Fed. 930 (4th Cir. 1923).

84. Sirimarco v. United States, 315 F.2d 299 (9th Cir. 1963); United States v. One 1957 Ford Ranchero Pickup Truck, 265 F.2d 21 (10th Cir. 1959).

85. Chapman v. United States, 365 U.S. 610 (1961).

86. Abel v. United States, 362 U.S. 217 (1960); Jones v. United States, 357 U.S. 493 (1958); Harris v. United States, 331 U.S. 145 (1947); United States v. Burkhart, 347 F.2d 772 (6th Cir. 1965); United States v. Grisby, 335 F.2d 652 (4th Cir. 1964); United States v. Hanley, 321 F.2d 956 (6th Cir. 1963); Pold v. United States, 291 F.2d 230 (9th Cir. 1961); Barks v. United States, 287 F.2d 117 (9th Cir. 1961); United States v. Hopkins, 263 F.2d 597 (7th Cir. 1959); Williams v. United States, 260 F.2d 125 (8th Cir. 1958);

deviated from this rule only once,[87] and this case was subsequently overruled.[88]

In order for the search to be valid the arrest must be valid.[89] The arrest is lawful if the officer had probable cause for belief that a crime had been or was being committed.[90] If the evidence obtained by a search which was not in truth incidental to an arrest, but instead the arrest was the result of the search, it must be excluded.[91] The arrest must be for the purpose of arrest, and not for the purpose of searching.

This rule does not validate all searches incident to an arrest, however, and definite limitations have been imposed. One such limitation is the time when it may be conducted. It is sufficient if the search was substantially contemporaneous with the arrest,[92] but where the line would be drawn is uncertain. Factors that must be considered are the time elapsed between arrest and search[93] and whether the items are in danger of being dis-

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Giacona v. United States, 257 F.2d 450 (5th Cir. 1958); Mills v. United States, 251 F.2d 464 (4th Cir. 1958); United States v. White, 237 F. Supp. 644 (E.D. Va. 1964); Maxwell v. Stephens, 229 F. Supp. 205 (E.D. Ark. 1964); United States v. Grasso, 225 F. Supp. 161 (W.D. Pa. 1964); United States v. Wai Lau, 215 F. Supp. 684 (S.D.N.Y. 1963); United States v. Tate, 209 F. Supp. 357 (D. Del. 1962); United States v. Monroe, 205 F. Supp. 175 (E.D. La. 1962); United States v. Royster, 204 F. Supp. 760 (N.D. Ohio 1961).

87. Trupiano v. United States, 334 U.S. 699 (1948).

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

89. Beck v. Ohio, 379 U.S. 89 (1964). For a discussion of this case and the validity of a felony arrest in general, see 17 S.C.L. Rev. 553 (1965). See also, Rios v. United States, 364 U.S. 253 (1960); Miller v. United States, 357 U.S. 301 (1958); Accarino v. United States, 179 F.2d 456 (D.C. Cir. 1949).

90. Ker v. California, 374 U.S. 23 (1963); United States *ex rel* Boucher v. Reincke, 341 F.2d 977 (2d Cir. 1965); Ralph v. Pepersack, 335 F.2d 128 (4th Cir. 1964); Wiggs v. United States, 304 F.2d 876 (5th Cir. 1962); *In re* Phoenix Cereal Beverage Co., 58 F.2d 953 (2d Cir. 1932). If the officers have no probable cause for arrest, the arrest is invalid and evidence seized in a search incident thereto is inadmissible. See, *e.g.*, Beck v. Ohio, 379 U.S. 89 (1964); Rios v. United States, 364 U.S. 253 (1960).

91. Jones v. United States, 357 U.S. 493 (1958); United States v. Lefkowitz, 285 U.S. 452 (1932); Worthington v. United States, 166 F.2d 557 (6th Cir. 1948); Papani v. United States, 84 F.2d 160 (9th Cir. 1936); United States v. Scott, 149 F. Supp. 837 (D.D.C. 1957); United States v. Alberti, 120 F. Supp. 171 (S.D.N.Y. 1951).

92. Stoner v. California, 376 U.S. 483 (1964); United States *ex rel* Clark v. Maroney, 339 F.2d 710 (3d Cir. 1965).

93. See, *e.g.*, Preston v. United States, 376 U.S. 364 (1964) (Search of a car which was not undertaken until the person who occupied it had been arrested and taken into custody and the car had been towed into a garage was too remote as to time to be incident to arrest); Williams v. United States, 323 F.2d 90 (10th Cir. 1963) (Search by federal agents made several days after defendant's arrest was not sustainable as incident to a lawful arrest); United States v. Scott, 149 F. Supp. 837 (D.D.C. 1957) (An illegal seizure of articles from defendant's apartment could not be made legal by returning defendant already under arrest to his apartment prior to taking him to the police station).

turbed.[94] Similarly, an arrest may not be delayed until an individual is in a desired location so that a search incident to an arrest may be made.[95]

The permissible area of search is limited to the area under the control of the person arrested,[96] but this does not mean that it is limited to the immediate place where the arrest occurred.[97] Thus, the search of an entire apartment is valid although the arrest was made in the living room,[98] as is a search of a barn from which the defendant fled although the actual arrest was made outside the barn.[99] If the area is clearly not within the control of the arrested person, however, the search is invalid.[100]

Finally, the search must be confined to those items connected with the crime for which the defendant is arrested and instruments with which it was committed, or with which the accused might escape or bring harm to the arresting officer.[101] However, if the search uncovers evidence of crimes other than the one for which the accused is arrested, this evidence may be used against him for the prosecution of crimes so discovered.[102]

2. *Immediate Necessity.* Immediate necessity exists when the object will shortly be removed or destroyed.[103] Probable cause

94. Sherman v. United States, 219 F.2d 282 (5th Cir. 1955); Rent v. United States, 209 F.2d 893 (5th Cir. 1954).

95. McKnight v. United States, 183 F.2d 977 (D.C. Cir. 1950); United States v. Alberti, 120 F. Supp. 171 (S.D.N.Y. 1954).

96. Preston v. United States, 376 U.S. 364 (1964); United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947); Kernich v. United States, 242 F.2d 818 (8th Cir. 1957); United States v. Fortier, 207 F. Supp. 516 (D. Conn. 1962).

97. Trupiano v. United States, 334 U.S. 699 (1948); United States v. Papani, 84 F.2d 160 (9th Cir. 1936); United States v. Burke, 217 F. Supp. 896 (D. Mass. 1963).

98. Harris v. United States, 331 U.S. 145 (1947).

99. Papani v. United States, 84 F.2d 160 (9th Cir. 1936).

100. Agnello v. United States, 269 U.S. 20 (1925) (Search of a home of a person arrested several blocks away is not incident to an arrest); Steeber v. United States, 198 F.2d 615 (10th Cir. 1952) (Where the defendant was arrested away from his home on a charge other than moonshining, a search discovering a still was not incident to a lawful arrest); United States *ex rel* Holloway v. Reincke, 229 F. Supp. 132 (D. Conn. 1964) (Once an accused is under arrest and in custody, search made in another place without a warrant is not incident to the arrest.)

101. Abel v. United States, 362 U.S. 217 (1960); Agnello v. United States, 269 U.S. 20 (1925); Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961).

102. Carroll v. United States, 267 U.S. 132 (1925); Collins v. United States, 289 F.2d 129 (5th Cir. 1961).

103. See, *e.g.*, McDonald v. United States, 335 U.S. 451 (1948).

must exist for the search, but such cause is not sufficient standing alone.[104]

The most important situation involving immediate necessity is where the goods sought are in an automobile.[105] The great mobility of the automobile makes it very possible that the object sought will be permanently removed, and a search without a warrant is justified.[106] Such a search is lawful even if the automobile is stopped on a routine check and there is contraband within the view of the officer.[107]

If there is no immediate necessity the search is not justified. If there is time to obtain a warrant,[108] or when there is no danger of losing the object sought,[109] immediate necessity ceases to exist and the search can be conducted only pursuant to a warrant.

3. *Consent or Waiver.* When the defendant consents to or invites an inspection, he waives his constitutional right.[110] This consent must be voluntarily given and cannot be obtained by coercion, either actual or implied.[111] Actual coercion has been found from an officers badge,[112] a demand rather than a request to search,[113] and fear for one's family.[114] Implied coercion has

104. See, *e.g.*, Jones v. United States, 357 U.S. 493 (1958); Catalanotte v. United States, 208 F.2d 264 (6th Cir. 1953).

105. See notes 57 to 62 *supra* and accompanying text.

106. Brinegar v. United States, 338 U.S. 160 (1949); United States v. O'Leary, 201 F. Supp. 296 (E.D. Tenn. 1962).

107. Petteway v. United States, 261 F.2d 53 (4th Cir. 1953). But see Kershner v. Boles, 212 F. Supp. 9 (N.D. W. Va. 1963) where the opening and searching of a locked automobile trunk after a routine check for a driver's license was held to be illegal.

108. See, *e.g.*, Cervantes v. United States, 263 F.2d 800 (9th Cir. 1959).

109. See, *e.g.*, Johnson v. United States, 333 U.S. 10 (1948); Patenotte v. United States, 266 F.2d 647 (5th Cir. 1959).

110. Ruud v. United States, 347 F.2d 321 (9th Cir. 1965); Nelson v. California, 346 F.2d 73 (9th Cir. 1965); Chapman v. United States, 346 F.2d 383 (9th Cir. 1965); Davis v. California, 341 F.2d 982 (9th Cir. 1965); United States v. Saka, 339 F.2d 541 (3d Cir. 1964); Grillo v. United States, 336 F.2d 211 (1st Cir. 1964); United States v. Rivera, 321 F.2d 704 (2d Cir. 1963); United States v. Lane, 230 F. Supp. 950 (S.D.N.Y. 1964); Simmons v. Bomar, 230 F. Supp. 226 (M.D. Tenn. 1964).

111. United States v. Como, 340 F.2d 891 (2d Cir. 1965); United States v. Page, 302 F.2d 81 (9th Cir. 1962); Conida v. United States, 250 F.2d 822 (5th Cir. 1958); Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951); Nelson v. Hancock, 239 F. Supp. 857 (D.N.H. 1965); United States v. Katz, 238 F. Supp. 689 (S.D.N.Y. 1965). For a case where the psychological compulsion was not so present as to vitiate consent to search and seize, see Rees v. Peyton, 341 F.2d 859 (4th Cir. 1965).

112. See, *e.g.*, Johnson v. United States, 333 U.S. 10 (1948); Amos v. United States, 255 U.S. 313 (1921).

113. See, *e.g.*, United States v. DeCiccio, 190 F. Supp. 487 (E.D.N.Y. 1961).

114. See, *e.g.*, United States v. Alberti, 120 F. Supp. 171 (S.D.N.Y. 1954).

been found when the defendant, knowing the item sought to be on the premises, consented to the search.[115] Moreover, the consent must be unequivocal, specific, and freely and intelligently given.[116] This means that the accused must know the searcher's identity and purpose.[117] Therefore there can be no consent if the officer obtains permission to search by deception.[118] Neither can an agent waive the constitutional rights of his principal,[119] but a wife who is in sufficient charge of the premises can consent for her husband.[120]

Using consent as the basis for a search without a warrant is a dangerous practice, and law enforcement officials should resort to it only in cases of extreme necessity. Logic makes it clear that anyone who has anything to hide will probably not voluntarily consent, and the federal courts have taken a hard look at evidence obtained by an alleged waiver of the constitutional right. Any officer making such a search must be prepared to support it with clear proof that consent was voluntarily given.

*D. Warrants—Acquisition and Execution*

The fourth amendment provides that no warrant shall be issued but upon probable cause, supported by oath or affirmation, and that such warrant shall particularly describe the place to be searched and the thing to be seized. In *Aguilar v. Texas*[121]

115. Higgins v. United States, 209 F.2d 819 (D.C. Cir. 1954); United States v. Martin, 176 F. Supp. 487 (E.D.N.Y. 1961). However, if the defendant does not know of the contraband there is no implied coertion. United States v. DeCiccio, 190 F. Supp. 487 (E.D.N.Y. 1961).

116. Maxwell v. Stephens, 348 F.2d 325 (8th Cir. 1965); Weed v. United States, 340 F.2d 827 (10th Cir. 1965); United States v. Page, 302 F.2d 81 (9th Cir. 1962); United States v. Minor, 117 F. Supp. 697 (E.D. Okla. 1953). The presumption against waiver of a constitutional right makes it necessary to show consent by clear and positive proof. United States v. Como, 340 F.2d 891 (2d Cir. 1965); United States v. Katz, 238 F. Supp. 689 (S.D.N.Y. 1965).

117. See, *e.g.*, United States v. Reckis, 119 F. Supp. 687 (D. Mass. 1954).

118. Gouled v. United States, 255 U.S. 298 (1921); Gatewood v. United States, 209 F.2d 789 (D.C. Cir. 1953); United States v. Martin, 176 F. Supp. 262 (S.D.N.Y. 1959). But see United States v. Lane, 230 F. Supp. 750 (S.D.N.Y. 1964).

119. United States v. Ruffner, 51 F.2d 579 (D. Md. 1931).

120. Stein v. United States, 166 F.2d 851 (9th Cir. 1948); United States v. Sergio, 21 F. Supp. 553 (E.D.N.Y. 1938). But if the wife is merely acting as the agent of the husband she cannot consent. Cofer v. United States, 37 F.2d 677 (5th Cir. 1930); United States v. Derman, 66 F. Supp. 511 (S.D.N.Y. 1946). If voluntary consent was given by the accused's mother to search home that she owned, consent was binding on the defendant. Rees v. Peyton, 341 F.2d 859 (4th Cir. 1965); United States *ex rel* McKenna v. Myers, 232 F. Supp. 65 (E.D. Pa. 1964). *But see* Reeves v. Warden, Maryland Penitentiary, 346 F.2d 915 (4th Cir. 1965).

121. 378 U.S. 108 (1964).

the Supreme Court held that the standard for obtaining a search warrant is the same under the fourth and fourteenth amendments. Thus the federal standard is made applicable to the states in still a further way.

1. *Probable Cause.* The constitutional requirement for probable cause for the issuance of a search warrant has been judicially expanded to require probable cause for a search without a warrant. In both cases, however, the standards are the same.[122]

Probable cause is a fact question to be determined from the standpoint of the officer, with his skill and knowledge, rather than from the standpoint of the average citizen under similar circumstances.[123] In construing the term the United States Supreme Court has said:

> In dealing with probable cause, however, as the name implies, we deal with probabilities. They are not technical; they are factual and practical considerations of everyday life on which prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.
>
> The substance of all definitions of probable cause is a reasonable ground for belief of guilt. . . . Probable cause exists where the facts and circumstances within... [the officers] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense had been committed.[124]

Mere suspicion that a crime has been committed is not sufficient.[125] However, the facts establishing probable cause need not

122. United States v. Peisner, 311 F.2d 94 (4th Cir. 1962). See also Smith v. United States, 254 F.2d 751 (D.C. Cir. 1958); United States v. Bosch, 209 F. Supp. 15 (E.D. Mich. 1962).

123. United States v. Sebo, 101 F.2d 889 (7th Cir. 1939).

124. Brinegar v. United States, 338 U.S. 160 (1949). See also Flores v. United States, 234 F.2d 604 (5th Cir. 1956); United States v. Egorov, 222 F. Supp. 862 (E.D.N.Y. 1963); United States v. Cooperstein, 221 F. Supp. 522 (D. Mass. 1963); United States v. Phelps, 203 F. Supp. 180 (N.D. Fla. 1962); United States v. O'Leary, 201 F. Supp. 926 (E.D. Tenn. 1962).

125. Aguilar v. Texas, 378 U.S. 108 (1964); Brinegar v. United States, 338 U.S. 160 (1949); Nathanson v. United States, 290 U.S. 41 (1933); United States v. Dixon, 334 F.2d 322 (6th Cir. 1964); Plazola v. United States, 291 F.2d 56 (9th Cir. 1961); Smith v. United States, 264 F.2d 469 (8th Cir. 1959); United States v. Pepe, 209 F. Supp. 329 (D. Del. 1962); United States v. Betz, 205 F. Supp. 927 (E.D. Mich. 1962); United States v. Sims, 201 F. Supp. 405 (M.D. Tenn. 1962); United States v. Law, 190 F. Supp. 100 (S.D. Cal. 1960); United States v. Schwartz, 151 F. Supp. 399 (W.D. Pa. 1957).

be within the personal knowledge of the arresting officer; a combination of information and personal knowledge may raise an inference beyond opinion, suspicion, and conjecture to the reasonable probability required for the warrant.[126] All evidence within the officer's knowledge may be considered in determining probable cause, although the evidence is not legally competent in the trial.[127] Thus, hearsay is sufficient support,[128] provided it is corroborated[129] by facts within the officers knowledge tending to credit the hearsay or lead a reasonably cautious individual to believe that it was true.[130] The corroboration may be from the information of a reliable informant.[131] If such is the case it is necessary to establish only that he is reliable, and failure to name him has been upheld by the Supreme Court.[132]

Probable cause is, then, a reasonable belief in the guilt of the accused. Although any reliable information that would lead a reasonably cautious man to believe that an offense is being or has been committed is sufficient, law enforcement officials must be aware of possible pitfalls that would be grounds for holding a warrant illegally obtained for lack of probable cause.

2. *Affidavit.* The issuance of a search warrant must be supported by an affidavit which states facts showing probable cause.[133] Although it is not necessary that these facts be legally competent evidence, they must be more than a surmise of which

126. United States v. Hill, 114 F. Supp. 441 (D.D.C. 1953).

127. Draper v. United States, 358 U.S. 307 (1959). This case overruled Grau v. United States, 287 U.S. 124 (1932) which had established the rule that probable cause had to be based on legally competent evidence. A recent case in line with the *Draper* decision is Biondo v. United States, 348 F.2d 272 (8th Cir. 1965).

128. Jones v. United States, 362 U.S. 257 (1960); Trevino v. Texas, 326 F.2d 403 (5th Cir. 1964); Jackson v. United States, 302 F.2d 194 (D.C. Cir. 1962); United States v. Cooperstein, 221 F. Supp. 522 (D. Mass. 1963); United States v. Haskins, 213 F. Supp. 551 (E.D. Tenn. 1962).

129. United States v. Ventresca, 380 U.S. 102 (1965); Jones v. United States, 362 U.S. 257 (1960); Chin Kay v. United States, 311 F.2d 317 (9th Cir. 1962); Gilliam v. United States, 189 F.2d 321 (6th Cir. 1951).

130. United States v. Joseph, 278 F.2d 504 (3d Cir. 1960); Gilliam v. United States, 189 F.2d 321 (6th Cir. 1951); United States v. Conway, 217 F. Supp. 853 (D. Mass. 1962); United States v. Jordan, 216 F. Supp. 310 (S.D. Ill. 1963); United States v. Malugin, 200 F. Supp. 764 (M.D. Tenn. 1961).

131. Napolitano v. United States, 340 F.2d 313 (1st Cir. 1965); Ventresca v. United States, 324 F.2d 864 (1st Cir. 1963); Overton v. United States, 275 F.2d 897 (D.C. Cir. 1960); United States v. Jordan, 216 F. Supp. 310 (S.D. Ill. 1963). *But see* Worthington v. United States, 166 F.2d 557 (6th Cir. 1948).

132. Jones v. United States, 362 U.S. 257 (1960); Draper v. United States, 358 U.S. 307 (1959).

133. United States v. Lassoff, 147 F. Supp. 944 (E.D. Ky. 1957).

the affiant has no personal knowledge.[134] The test of the affidavit is its validity on its face; extrinsic evidence cannot be used to support it.[135] Only facts showing probable cause need appear in the affidavit, and the place to be searched or the things to be seized need not be shown. It is hard to imagine, however, a showing of probable cause without including these facts.[136]

3. *Description of Place To Be Searched.* The requirement that the place to be searched be particularly described is satisfied if the description identifies the place with sufficient clarity to enable the officer to identify and locate it with a reasonable degree of effort.[137]

Some confusion has arisen with regard to apartments. The rule apparently is that if a search of a number of apartments in one building is desired, there must be a warrant based on probable cause for each apartment, unless the building is occupied by only one family.[138]

Although the amendment states that the persons and items to be seized must be described, the courts have not interpreted this to mean that the owner or occupant of the premises be named. If the premises are described with sufficient particularity, the warrant is not invalid for failure to name the resident.[139]

4. *Description of Items To Be Seized.* The general rule is that unless the item seized is described in the warrant the seizure is illegal and the evidence inadmissible.[140] General exploratory searches are prohibited.[141] As a practical matter it is not always possible to describe the items to be seized with absolute certainty. The courts have recognized this problem and have allowed some generality, requiring only that the items be identifiable under

134. Marderosian v. United States, 337 F.2d 759 (1st Cir. 1964); United States v. Dixon, 334 F.2d 322 (6th Cir. 1964); United States v. Lassoff, 147 F. Supp. 944 (E.D. Ky. 1957); United States v. Nichols, 89 F. Supp. 953 (W.D. Ark. 1950).

135. Poldo v. United States, 55 F.2d 866 (9th Cir. 1932); United States v. Sims, 201 F. Supp. 405 (M.D. Tenn. 1962).

136. Lowery v. United States, 161 F.2d 30 (8th Cir. 1947); United States v. Wroblewski, 105 F.2d 444 (7th Cir. 1939).

137. United States v. Thomas, 216 F. Supp. 942 (N.D. Cal. 1963).

138. United States v. Hinton, 219 F.2d 424 (7th Cir. 1955).

139. Dixon v. United States, 211 F.2d 547 (5th Cir. 1954); United States v. Leach, 24 F.2d 866 (9th Cir. 1932).

140. Stanford v. Texas, 379 U.S. 476 (1965); Cofer v. United States, 37 F.2d 677 (5th Cir. 1930); United States v. Spallino, 21 F.2d 567 (W.D.N.Y. 1927).

141. Stanford v. Texas, 379 U.S. 476 (1965); cases cited note 80, *supra.*

the description.[142] Recently, however, the Supreme Court considerably restricted this rule. In *Stanford v. Texas*[143] the Court held that the constitutional requirement that warrants must particularly describe the items to be seized is to be accorded the most scrupulous exactitude when the items are books, and the basis for their seizure is the ideas which they contain. The Court did not decide whether a generalized description would have been invalid if the items seized had been narcotics or liquor, but merely held that a warrant generally describing such non-contraband articles as books and pamphlets was constitutionally intolerable. In view of the increased protection which the Court has extended in recent years, it is likely that the rule will become one of strict description to all items, and *any* generality will render the warrant invalid.

There are exceptions to the rule requiring that the items to be seized be described: fruits of the crime, instrumentalities by which the crime was committed, weapons and means by which the accused may escape or do harm to the arresting officer, or property the possession of which is a crime may always be seized if the search was otherwise legal. Objects that are subjects of another crime may also be seized for use in a subsequent prosecution.[144]

5. *Manner of Entry Pursuant To A Warrant.* Forced entries are authorized under a federal statute, provided the officer announces his name and purpose and is refused admittance. The statute further provides that the officer may break any door or window if necessary for his own liberation.[145]

As for a non-forceful but unannounced entry there is some conflict. If there is an immediate necessity because the goods sought might be destroyed, such an entry may be permissible.[146]

142. Steele v. United States, 267 U.S. 498 (1928); United States v. Joseph, 174 F. Supp. 539 (E.D. Pa. 1959).

143. 379 U.S. 476 (1965).

144. Harris v. United States, 331 U.S. 145 (1947); Porter v. United States, 335 F.2d 602 (9th Cir. 1964); United States v. Eisner, 297 F.2d 595 (6th Cir. 1962); Johnson v. United States, 293 F.2d 539 (D.C. Cir. 1961); Palmer v. United States, 203 F.2d 66 (D.C. Cir. 1953).

145. 18 U.S.C. § 3109 (1950): The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

See also Miller v. United States, 357 U.S. 301 (1958).

146. Ker v. California, 372 U.S. 23 (1963); United States *ex rel* Turco v. Dross, 224 F. Supp. 142 (S.D.N.Y. 1963). In *Ker* the agents desired to search the apartment of one suspected of violation of the narcotics laws. Acting under

The usual situation of this type is when the items sought are narcotics. Such an unannounced entry is on the fringes of the statute, and undoubtedly the courts will rigidly scrutinize the search. The rule requiring announcement is based on a federal statute and not on the constitution, and is therefore not binding on the states. The states can set their own standard and such standard will not be overturned unless it violates fundamental standards of fairness and reasonableness.[147] The better view, however, is to prohibit such a search except in unusual situations.

### *E. Applicability To The States*

Since 1961 the Supreme Court has moved toward total application of the federal standard to the states. *Mapp v. Ohio*[148] was the first giant step. *Aguilar v. Texas*[149] made the federal standard for acquisition of a search warrant applicable to the states. *Beck v. Ohio*[150] held the federal standard of probable cause to be controlling. And finally, *Stanford v. Texas*[151] made the particularity of the description binding on the states. This trend is not likely to reverse and it therefore becomes imperative that the state courts look to and follow the federal law, regardless of what the previous state law may have been.

## II. THE SOUTH CAROLINA STANDARD

Since the federal standard of search and seizure is now applicable to the states, it is necessary to examine South Carolina law, rules, and practices in order to determine wherein constitutional rights might be violated. In so doing an analysis of the statutory and case law is essential, as well as an examination of the law as interpreted and applied by local law enforcement agencies.

### *A. Statutory Law*

The language used in the state constitution prohibiting unreasonable searches and seizures is identical to that used in the

a warrant issued for probable cause, they obtained a pass key from the landlord and entered the apartment taking the tenants by surprise, and found a brick of marijuana on the kitchen counter. The search was held valid and the evidence admissible.

147. Ker v. California, 372 U.S. 23 (1963).
148. 367 U.S. 643 (1961).
149. 378 U.S. 108 (1964).
150. 379 U.S. 89 (1964).
151. 379 U.S. 476 (1965).

federal constitution.[152] The state statute is, however, more restrictive than the provisions of either constitution:

> Magistrates may issue warrants to make search and seizure of suspected places and to arrest suspected persons and seize their property. *Such warrants shall issue only for stolen property.* Such warrants must be supported by oath or affirmation of the party applying for the warrant, and shall set forth fully and particularly all the facts upon which application is based, and shall *specially designate the place*, the object of the search, and the *name of the person suspected and who is to be arrested.*
>
> No such warrant shall issue except in the cases and with the formalities herein provided.[153]

The limitation that a warrant may issue only for stolen merchandise is not exclusive. Another statute provides that contraband liquor may be the subject of a search and seizure.[154] But this statute is also restrictive in that it makes a search of a dwelling house for liquor illegal if it is conducted at night, without regard to the reasonableness of the search. The better rule would seem to be that the time the search is conducted should be only a factor in the determination of reasonableness, and should not, per se, invalidate an otherwise reasonable search. A recent enactment, contained in section 32-1455 of the South Carolina Code, allows for search and seizure of narcotics, bartiturates or other drugs which require a prescription. Other than these three categories, a search warrant can be issued in South Carolina only in several minor and relatively unimportant situations.[155]

These restrictive limitations on the permissive areas of search are unnecessary and place an undue hardship on law enforcement agencies concerned with crimes other than those in which stolen goods, contraband liquors or narcotics are involved. Thus there is no authority in the state for the issuance of a warrant to

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152. S.C. CONST. art. I, § 16: 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 warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.

153. S.C. CODE ANN. § 43-201 (1962) (Emphasis added.)

154. S.C. CODE ANN. § 4-414 (1962).

155. S.C. CODE ANN. § 6-15 (1962) (Cruelty to animals); S.C. CODE ANN. § 54-353 (1962) (Missing seamen); S.C. CODE ANN. § 58-615 (1962) (Explosives kept on railroads).

search the premises of a suspected murderer or distributor of pornographic literature, or the premises of offenders in which a search for the fruits of the crime would be permitted under the federal statute,[156] provided probable cause existed.

The state statute further expands the constitutional protection by requiring that the warrant must "specially designate the place" to be searched. Although the term has never been construed by the court, it apparently means that the exact place, with no generality, must be named. The state and federal constitutions require that the warrant "particularly describe the place," and the federal courts have interpreted this to mean a description that would enable an executing officer to locate it with a reasonable degree of certainty.

The statutes are more restrictive of law enforcement than is required under either the state or federal constitutions. They should be amended to allow searches in a great variety of situations other than stolen goods, contraband liquors or narcotics and to allow more generality in the description of the place to be searched. Law enforcement would be facilitated and the public would benefit, without a correspondingly detrimental effect to the rights of the individual. Adequate safeguards of his rights are provided by the constitution.

### *B. South Carolina Case Law*

Prior to *Mapp v. Ohio*, South Carolina was one of the majority of states which held that the fourth and fourteenth amendments did not impose the federal exclusionary rule on the states, and that evidence obtained in an illegal search and seizure was admissible.[157] There have been no cases on the issue since *Mapp*, but the South Carolina Supreme Court has recognized the rule that evidence so obtained is inadmissible.[158]

The most recent case in this state on search and seizure is *State v. Hill*,[159] a case dealing with probable cause. Here a warrant to search for contraband liquor was issued on the basis

156. FED. R. CRIM. P. 41 (b) provides the grounds for issuance of a search warrant. This section allows for search and seizure of "fruits of the crime". There are other special situations where search warrants are issued.

157. State v. Prescott, 125 S.C. 22, 117 S.E. 637 (1923); State v. Kanellos, 122 S.C. 351, 115 S.E. 636 (1923); State v. Harley, 107 S.C. 351, 92 S.E. 1034 (1917).

158. State v. Morris, 243 S.C. 225, 133 S.E.2d 744 (1963) in which the search was held legal and therefore the *Mapp* rule was not applicable.

159. 245 S.C. 76, 138 S.E.2d 829 (1964).

of an affidavit which stated only that the affiant was informed by an informer and had reason to believe that defendant's residence contained illegal whisky. In reversing the conviction the court held that an affidavit of information and belief must set forth the sources of affiant's information, and that the affidavit here was devoid of factual allegations necessary to support a finding of probable cause. The court recognized and agreed with the rationale that an informant need not be named, but stated that it was necessary that the affidavit set forth facts that the affiant knew as a matter of personal knowledge. Specifically, the affidavit must show what the affiants had been told by the informers, and enough information about the informers for the magistrate to form an opinion as to their credibility. The court's holding is on all fours with the federal rule, and aligns South Carolina with the federal standard regarding probable cause.

The remaining case law is of little importance. The cases are far from numerous, and most of them turn upon well established points in which there is no conflict between the state and federal standards.

### *C. State Practice and Procedure*

In order to determine the actual practices used in South Carolina a survey of various law enforcement agencies was conducted by the writer.[160] This survey revealed various discrepancies in

160. The survey was sent out to the police chiefs of the ten largest cities and the sheriffs of the forty-six counties. Thirty of the surveys were answered and returned. The author wishes to express his appreciation to the cooperating agencies. The survey is set out below with a compilation of results in the appropriate column.

SURVEY OF SEARCH AND SEIZURE PROCEDURES IN SOUTH CAROLINA

PART I—The questions in this part are objective and require only yes or no answers. Please do not qualify your answers. Provision is made in Parts II and III for qualifications.

| Yes | No | |
|---|---|---|
| 6 | 24 | 1. Do officers/agents in your department search the premises when making an arrest under a valid arrest warrant? |
| 1 | 29 | 2. Are officers/agents allowed to carry around blank warrants of arrest or search? |
| 28 | 2 | 3. Must the person to be searched or arrested under the warrant be named? |
| 2 | 28 | 4. Is "occupants" a sufficient naming in the warrant? |
| 28 | 2 | 5. Is the officer allowed to enter by force if he possesses a valid search warrant? |
| 30 | 0 | 6. If yes, must he announce his name and purpose before forcing his way in? |
| 15 | 15 | 7. Can the officer enter by force under a valid search warrant if no one is at home? |

the application of the rules, and some of the practices followed would definitely provide grounds for constitutional objections. In other situations the state agencies were unduly restricting themselves. The responses may not have been completely accurate due to the inherent limitations of the survey, but they provide an adequate basis for study.

The rules discussed in the following material are based on the federal standard, but in South Carolina these rules are limited by the statute which restricts issuance of warrants to searches for stolen goods, contraband liquors or narcotics.

Under the federal rules, a limited search without a warrant that is incident to a lawful arrest is legal. A lawful arrest exists

| | | |
|---|---|---|
| 9 | 20 | 8. Are non-forceable but unannounced entries permitted under authority of a search warrant? |
| 29 | 1 | 9. Is a search warrant required when the building to be searched is not the home but outbuildings such as barns, greenhouses, etc.? |
| 27 | 3 | 10. Is a search warrant required when the place to be searched is a hotel or motel room? |
| 23 | 7 | 11. Is a search warrant required when the building to be searched is a business establishment rather than a home? |
| 19 | 10 | 12. Do officers in your department stop and search automobiles without a warrant? |
| 3 | 27 | 13. Can the officer search without a warrant on the sole grounds that it would not be practical for him to obtain one? |
| 6 | 24 | 14. Is the officer ever allowed to search without a warrant even though he could easily obtain one? |
| 15 | 15 | 15. Can arrests be delayed by officers in your department until a suspect is in a particular location so that a search incidental to the arrest can be made. |

PART II—The following broad questions should be answered on the attached sheets. You do not have to limit your answers to the questions asked. Please be specific and add any details you desire.

1. What is the procedure for officers/agents in your department for obtaining warrants of search or arrest? Is the officer required to make an affidavit? Must he sign it? What must the affidavit contain? Who issues the warrant? Please enclose an affidavit and warrant form if available.
2. If a warrant is desired after normal working hours, what is the procedure for obtaining it?
3. What information must the officer have before he can obtain a search warrant? Is the information of an informant sufficient? Must the informant be named?
4. What must the warrant contain? Name of persons to be searched or arrested? Place? Items to be seized?
5. Upon what reason is the officer allowed to search without a warrant? Is suspicion sufficient?
6. If a person is arrested in his home, can the officer search the premises incidental to the arrest? How extensive may this search be? Are any limitations imposed on the search? What items may be seized?
7. What is the procedure in your department for searching the person of a suspect. Must a warrant be obtained?

PART III—Add any statements or facts regarding search and seizure procedures in your department even though they have not been specifically raised by the above questions. Also, any questions you may have in this regard will be appreciated. Your questions and answers will be used in stating a constitutional standard for search and seizure in South Carolina.

when it is pursuant to a properly executed arrest warrant, or if there is probable cause for the arrest. In either case, a search incident thereto can be conducted provided it does not violate the limitations as to time, place, or items seized. The survey revealed that a majority of the responding agencies do not allow such a search. A recognition of the federal rule would greatly increase the permissible scope of searches in this state because a search incident to a lawful arrest would not be limited to stolen articles, liquor or narcotics. Adoption of the "search incident to arrest" rule is therefore highly desirable.

A blank warrant, signed and completed as to formalities, but with space for necessary particulars to be filled in by the officer when he desires to search is clearly unconstitutional. Such a warrant is invalid because it substitutes a decision of the searching officer for the impartial judgment of a judge or magistrate. The federal courts have many times held that the judgment of the latter is the only permissible determination of probable cause.[161] Only one South Carolina agency reported allowing this practice, but it is clearly a violation of the federal standard.

The federal courts have held it unnecessary to name the owner or occupant of a dwelling house. Since the language of the state constitution is identical to that of the federal, no different rule should be applied on a constitutional basis. The South Carolina statute, however, provides that the search warrant shall "set forth... the name of the person suspected and who is to be arrested." The statute seems to combine two different procedures, search and arrest, and to presume that one necessarily leads to and is an integral part of the other. This is not necessarily true. Under the federal law a search warrant can be based on evidence not legally competent at a trial, and competent evidence discovered in such a search is admissible. But an officer cannot *arrest* a suspect on hearsay or other incompetent evidence. The statute could constitutionally allow for a search of a dwelling without naming the occupant if the search is not necessarily calculated to lead to an arrest. The evidence so discovered may or may not be a ground for an arrest, but if the search is conducted subject to the proper safeguards of probable cause, the rights of the individual are not violated and the process of law enforcement is greatly facilitated.

161. See, *e.g.*, Biondo v. United States, 348 F.2d 272 (8th Cir. 1965); Hollins v. United States, 338 F.2d 227 (9th Cir. 1964).

The statute in this instance is extremely ambiguous. There are no state cases dealing with the issue of naming the owner, but there is apparently substantial uniformity among state agencies in believing that such a requirement exists. The better rule, however, is that followed in the federal courts. Under this "name unnecessary" rule a search can be conducted under the term "occupants" or "John Doe" as long as the place is described with sufficient particularity. A different rule might be desirable with regard to arrest, but the distinction between these two procedures should be maintained. The ambiguity of the statute makes it impossible to state whether a search warrant could or could not be issued without naming the occupants, and the safest practice would be to name him when possible.

The procedure followed in this state with regard to the use of force in executing a search warrant is consistent with the federal standard. The South Carolina statute[162] is similar to the federal law, and most state agencies follow the rule that the officer must announce his name and purpose before forcing his way in. A further federal limitation is that he must allow sufficient time for response by the party to be searched and his entry must be refused.

The survey revealed substantial conflict among both state and local agencies as to whether an officer can enter by force if all occupants are absent. The federal rule is that an agent or officer cannot enter peacefully or by force if the residents are not at home or if the house is vacant. Despite the fact that a violation of this rule renders the search invalid, fifteen state agencies permit such a search.

The local officials were likewise divided on the issue of non-forceable but unannounced entries when the occupants are at home. The federal rule may allow such an unannounced entry where the goods might be destroyed or there is some other immediate necessity. In any case, the United States Supreme Court has upheld such a state search if it is otherwise reasonable.

State agencies are in substantial agreement as to the necessity of the warrant when the building is an outbuilding, with only one county holding that a warrant is not required. The federal standard is explicit that outbuildings as well as dwellings are protected. Of course, a building "within the curtilage" can be searched pursuant to a lawful search of the dwelling house. The problem is minimized in this state by a provision in the warrant

162. S.C. Code Ann. § 10-1712 (1962).

used by most local agencies allowing a search of the dwelling house and buildings appurtenant thereto.

Three state agencies do not require a warrant if the place to be searched is a hotel or motel room. This is clearly contrary to the federal standard. A search so conducted without a warrant, or not in one of the three situations where the search is justified without a warrant, is invalid. If the room has been vacated, however, the owner of the establishment can consent to the search and no objection can be made.

Where the building to be searched is a business rather than a home, a number of state agencies do not require a warrant. The federal rule invalidating such a search, unless such business is open to the public, is the sounder procedure.

Considerable uncertainty exists among law enforcement divisions as to searches of automobiles. Although a search warrant should be procured whenever possible, officers are not precluded from reasonably stopping automobiles on routine checks. The requirements as to reasonable search with regard to automobiles is not as stringent as it is to dwelling houses.[163]

The impracticality of obtaining a warrant is not, of itself, a basis for searching without a warrant. It may be considered in the determination of reasonableness, but an officer should never search without a warrant on the sole ground that it would not be practical for him to obtain one. If the officer could easily obtain a warrant he should always do so, even though search without a warrant might be justified under the circumstances.

Whether an arrest can be delayed by officers until a suspect is in a particular location so that a search incidental to the arrest can be made created a sharp division of opinion among local agencies in those few jurisdictions that allow such a search. The federal rule is clear that such a delay makes the search invalid, and any contrary procedure should be avoided by state officials.

A search of the person of a suspect cannot be conducted without a warrant unless the person is arrested. If he is arrested, the necessity for the warrant is extinguished and evidence found on him is admissible provided the arrest was lawful. This rule is recognized and followed by the majority of the agencies surveyed.

In regard to a search for contraband liquor, the printed warrant forms of a number of agencies permit the search to be made

163. See notes 57 to 62 *supra* and accompanying text.

by day or night. This is a direct violation of South Carolina Code section 4-414. Although this statutory provision is considered unsound because of its unnecessary restrictiveness, it is the law, and searches of dwellings for contraband whiskey at night are illegal per se.

### *D. Affidavits and Warrants*

The printed affidavit forms used by most of the agencies responding to the survey are weak and should be revised. The federal rule, and the rule of the state by statute,[164] is that the affidavit must set forth sufficient *facts* within the personal knowledge of the officer to show probable cause for the issuance of the warrant. A mere statement that the officer is informed or has reason to believe is insufficient; reasons for this belief must be set forth. These facts do not have to constitute evidence that would be competent at a trial, but to justify issuance they must be more than mere suspicion or conjecture. This requirement was apparently not enforced in South Carolina until the case of *State v. Hill*,[165] where the court held invalid a warrant in which the affidavit was based solely on "information and belief." A printed affidavit form very similar to the one in this case is used by most of the counties and cities questioned.[166] There are, however, a few notable exceptions. The decision of the *Hill* case prompted Greenville County to draft an excellent new affidavit form which provides a space in which the requesting officer

164. S.C. CODE ANN. § 4-415 (1962).

165. 245 S.C. 76, 138 S.E.2d 829 (1964).

166. A typical affidavit for a warrant to search and seize illegal whiskey is shown here:

Personally Appeared _____, who being duly sworn, deposes and says that he is informed by _____ and verily believes from such information, and his own observation, that in the premises known as _____ in _____ County, S. C., there is now deposited, stored and kept contraband liquors, in violation of law, to wit: a lot of Whiskey, Brandy, Wine, Rum, Gin and Beer, in barrels, demijohns, bottles and other vessels, and that said intoxicating and contraband liquors are kept stored and deposited by _____ his aiders and abettors, without a permit in violation of the laws of the State.

Wherefore, dependent prays that a search warrant may issue, commanding the search of said premises and their appurtenances, and that such contraband liquors may be brought before this Court, and such action taken concerning the same, as authorized by law.

may set forth the facts showing probable cause.[167] Similar outstanding forms are used by Spartanburg and Marion Counties. Since the old form does not conform to constitutional require-

167. Greenville County uses separate forms for stolen goods and liquor. The affidavit for stolen goods is as follows:

PERSONALLY appeared before me _____
who, first being duly sworn, on oath deposes and says that the following goods and chattels, to-wit: _____
_____
_____,
the property of _____,
have within ____ days past, or were on _____, 19___, by _____
_____
stolen and taken out of possession of _____
_____
in the County aforesaid; and also that the said affiant believes that such goods, or a part thereof, are concealed in or about the _____ of _____ at _____ in said County;
The facts on which such belief is based are _____
_____
[9 additional lines omitted]
_____
Affiant

Sworn to before me this
the _____ day of _____
19____.
_____
Magistrate

The search warrant for stolen goods is as follows:

WHEREAS, Complaint on oath has been made to me,
_____ by _____
that certain personal property, to-wit: _____
_____
was stolen and taken out of possession of _____
_____
in the County aforesaid by _____
on the _____ day of _____, 19___, and that the said _____
_____
has probable cause to believe that the said property, or a part thereof, is concealed in or about the _____ of _____

These are, therefore, to command you in the name of the State of South Carolina, with the necessary and proper assistance to enter in the day or night time the place where the said property is suspected to be concealed, and there diligently search for the said property, and that you bring the same, or any part thereof, found on search forthwith before me to be disposed of and dealt with according to law.

GIVEN under my hand this _____ day of _____, 19____.
_____
Magistrate

The affidavit and search warrant for liquor is as follows:

PERSONALLY appeared before me, _____
(officer or deponent)
who being sworn, says that he is informed by _____
(source of information)
and has good cause to believe that _____
(person or occupant)
has concealed on his person, on his premises, or in his dwelling, or in a motor vehicle or other vehicle used or operated by him at or near _____
_____
(location and description)

ments, these new affidavit forms are commended to the attention of state law enforcement agencies.

## III. Conclusion

It is probable that the federal standard of search and seizure is now enforceable against the states in its entirety. If not, the law is unquestionably moving in that direction and adherence to that standard would be highly desirable. Subject to the further limitations of the South Carolina statutes restricting searches to stolen goods, contraband liquors or narcotics the constitutional standard for the state is that established by the federal courts. The additional protection established by the state statutes, however, are believed not to be commensurate with the public need. The interests of law enforcement would best be served by an amendment increasing the permissive scope of lawful searches; individual rights would not be substantially impaired because of the protection guaranteed by the state constitution.

Howard P. King

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a quantity of contraband whiskey.
The facts on which such belief is based are these:

(state information. Use back of page to complete statement if necessary)
[9 additional lines omitted]

Deponent

Sworn to before me this the
_____ day of _____, 19____.

Magistrate

TO THE SHERIFF OR ANY CONSTABLE OF GREENVILLE COUNTY:

You are hereby authorized and empowered to search the person, premises, dwelling and vehicle above mentioned and described and if you find thereon or therein any quantity of contraband alcoholic liquors you will seize the same and bring the responsible person or persons before me for examination.

Given under my hand and seal at Greenville, S. C. this _____ day of _____, 19____.

_____(SEAL)
Magistrate