U.S. Constitution: Fourth Amendment

Fourth Amendment - Search and Seizure

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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 persons or things to be seized.

Annotations

Searches and Seizures Pursuant to Warrant

Emphasis upon the necessity of warrants places the judgment of an independent magistrate between law enforcement officers and the privacy of citizens, authorizes invasion of that privacy only upon a showing that constitutes probable cause, and limits that invasion by specification of the person to be seized, the place to be searched, and the evidence to be sought. 87 While a warrant is issued ex parte, its validity may be contested in a subsequent suppression hearing if incriminating evidence is found and a prosecution is brought. 88

Issuance by Neutral Magistrate .--In numerous cases, the Court has referred to the necessity that warrants be issued by a "judicial officer" or a "magistrate." 89 "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." 90 These cases do not mean that only a judge or an official who is a lawyer may issue warrants, but they do stand for two tests of the validity of the power of the issuing party to so act. "He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search." 91 The first test cannot be met when the issuing party is himself engaged in law enforcement activities, 92 but the Court has not required that an issuing party have that independence of tenure and guarantee of salary which characterizes federal judges. 93 And in passing on the second test, the Court has been essentially pragmatic in assessing whether the issuing party possesses the capacity to determine probable cause. 94

Probable Cause .--The concept of "probable cause" is central to the meaning the warrant clause. Neither the Fourth Amendment nor the federal statutory

provisions relevant to the area define "probable cause;" the definition is entirely a judicial construct. An applicant for a warrant must present to the magistrate facts sufficient to enable the officer himself to make a determination of probable cause. "In determining what is probable cause . . . [w]e are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit . . . for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant." 95 Probable cause is to be determined according to "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." 96 Warrants are favored in the law and utilization of them will not be thwarted by a hypertechnical reading of the sup porting affidavit and supporting testimony. 97 For the same reason, reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant." 98 Courts will sustain the determination of probable cause so long as "there was substantial basis for [the magistrate] to conclude that" there was probable cause. 99

Much litigation has concerned the sufficiency of the complaint to establish probable cause. Mere conclusory assertions are not enough. 100 In United States v. Ventresca, 101 however, an affidavit by a law enforcement officer asserting his belief that an illegal distillery was being operated in a certain place, explaining that the belief was based upon his own observations and upon those of fellow investigators, and detailing a substantial amount of these personal observations clearly supporting the stated belief, was held to be sufficient to constitute probable cause. "Recital of some of the underlying circumstances in the affidavit is essential," the Court said, observing that "where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause," the reliance on the warrant process should not be deterred by insistence on too stringent a showing. 102

Requirements for establishing probable cause through reliance on information received from an informant has divided the Court in several cases. Although involving a warrantless arrest, Draper v. United States 103 may be said to have begun the line of cases. A previously reliable, named informant reported to an officer that the defendant would arrive with narcotics on a particular train, and described the clothes he would be wearing and the bag he would be carrying; the informant, however, gave no basis for his information. FBI agents met the train, observed that the defendant fully answered the description, and arrested him. The Court held that the corroboration of part of the informer's tip established probable cause to support the arrest. A case involving a search warrant, Jones v. United States, 104 apparently utilized a test of considering the affidavit as a whole to see whether the tip plus the corroborating information provided a substantial basis for finding probable cause, but the affidavit also set forth the reliability of the informer and sufficient detail to indicate that the tip was based on the informant's personal observation. Aguilar v. Texas 105 held insufficient an affidavit which merely asserted that the police had "reliable information from a credible person" that narcotics were in a certain place, and held that when the affiant relies on an informant's tip he must present two types of evidence to the magistrate. First, the affidavit must indicate the informant's basis of knowledge--the circumstances from which the informant concluded that evidence was present or that crimes had been committed--and, second, the affiant must present information which would permit the magistrate to decide whether or not the informant was trustworthy. Then, in Spinelli v. United States, 106 the Court applied Aguilar in a situation in which the affidavit contained both an informant's tip and police information of a corroborating nature.

The Court rejected the "totality" test derived from Jones and held that the informant's tip and the corroborating evidence must be separately considered. The tip was rejected because the affidavit contained neither any information which showed the basis of the tip nor any information which showed the informant's credibility. The corroborating evidence was rejected as insufficient because it did not

establish any element of criminality but merely related to details which were innocent in themselves. No additional corroborating weight was due as a result of the bald police assertion that defendant was a known gambler, although the tip related to gambling. Returning to the totality test, however, the Court in United States v. Harris 107 approved a warrant issued largely on an informer's tip that over a two-year period he had purchased illegal whiskey from the defendant at the defendant's residence, most re cently within two weeks of the tip. The affidavit contained rather detailed information about the concealment of the whiskey, and asserted that the informer was a "prudent person," that defendant had a reputation as a bootlegger, that other persons had supplied similar information about him, and that he had been found in control of illegal whiskey within the previous four years. The Court determined that the detailed nature of the tip, the personal observation thus revealed, and the fact that the informer had admitted to criminal behavior by his purchase of whiskey were sufficient to enable the magistrate to find him reliable, and that the supporting evidence, including defendant's reputation, could supplement this determination.

The Court expressly abandoned the two-part Aguilar-Spinelli test and returned to the "totality of the circumstances" approach to evaluate probable cause based on an informant's tip in Illinois v. Gates. 108 The main defect of the two-part test, Justice Rehnquist concluded for the Court, was in treating an informant's reliability and his basis for knowledge as independent requirements. Instead, "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." 109 In evaluating probable cause, "[t]he task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." 110

Particularity .--"The requirement that warrants shall particularily describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." 111 This requirement thus acts to limit the scope of the search, inasmuch as the executing officers should be limited to looking in places where the described object could be expected to be found. 112

First Amendment Bearing on Probable Cause and Particularity .-- Where the warrant process is used to authorize seizure of books and other items entitled either to First Amendment protection or to First Amendment consideration, the Court has required government to observe more exacting standards than in other cases. 113 Seizure of materials arguably protected by the First Amendment is a form of prior restraint that requires strict observance of the Fourth Amendment. At a minimum, a warrant is required, and additional safeguards may be required for large-scale seizures. Thus, in Marcus v. Search Warrant, 114 the seizure of 11,000 copies of 280 publications pursuant to warrant issued ex parte by a magistrate who had not examined any of the publications but who had relied on the conclusory affidavit of a policeman was voided. Failure to scrutinize the materials and to particularize the items to be seized was deemed inadequate, and it was further noted that police "were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity." 115 A state procedure which was designed to comply with Marcus by the presentation of copies of books to be seized to the magistrate for his scrutiny prior to issuance of a warrant was nonetheless found inadequate by a plurality of the Court, which concluded that "since the warrant here authorized the sheriff to seize all copies of the specified titles, and since [appellant] was not afforded a hearing on the question of the obscenity even of the seven novels [seven of 59 listed titles were reviewed by the magistrate] before the warrant issued, the procedure was . . . constitutionally deficient." 116 Confusion remains, however, about the necessity for and the character of prior adversary hearings on the issue of obscenity. In a later decision the Court held that, with

adequate safeguards, no pre-seizure adversary hearing on the issue of obscenity is required if the film is seized not for the purpose of destruction as contraband (the purpose in Marcus and A Quantity of Books), but instead to preserve a copy for evidence. 117 It is constitutionally permissible to seize a copy of a film pursuant to a warrant as long as there is a prompt post- seizure adversary hearing on the obscenity issue. Until there is a judicial determination of obscenity, the Court advised, the film may continue to be exhibited; if no other copy is available either a copy of it must be made from the seized film or the film itself must be returned. 118

The seizure of a film without the authority of a constitutionally sufficient warrant is invalid; seizure cannot be justified as incidental to arrest, inasmuch as the determination of obscenity may not be made by the officer himself. 119 Nor may a warrant issue based "solely on the conclusory assertions of the police officer without any inquiry by the [magistrate] into the factual basis for the officer's conclusions." 120 Instead, a warrant must be "supported by affidavits setting forth specific facts in order that the issuing magistrate may 'focus searchingly on the question of obscenity.'" 121 This does not mean, however, that a higher standard of probable cause is required in order to obtain a warrant to seize materials protected by the First Amendment. "Our reference in Roaden to a 'higher hurdle . . . of reasonableness' was not intended to establish a 'higher' standard of probable cause for the issuance of a warrant to seize books or films, but instead related to the more basic requirement, imposed by that decision, that the police not rely on the 'exigency' exception to the Fourth Amendment warrant requirement, but instead obtain a warrant from a magistrate . . . ." 122

In Stanford v. Texas, 123 a seizure of more than 2,000 books, pamphlets, and other documents pursuant to a warrant which merely authorized the seizure of books, pamphlets, and other written instruments "concerning the Communist Party of Texas" was voided. "[T]he constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. . . . No less a standard could be faithful to First Amendment freedoms." 124

However, the First Amendment does not bar the issuance or execution of a warrant to search a newsroom to obtain photographs of demonstrators who had injured several policemen, although the Court appeared to suggest that a magistrate asked to issue such a warrant should guard against interference with press freedoms through limits on type, scope, and intrusiveness of the search. 125

Property Subject to Seizure .--There has never been any doubt that search warrants could be issued for the seizure of contraband and the fruits and instrumentalities of crime. 126 But in Gouled v. United States, 127 a unanimous Court limited the classes of property subject to seizures to these three and refused to permit a seizure of "mere evidence," in this instance defendant's papers which were to be used as evidence against him at trial. The Court recognized that there was "no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure," 128 but their character as evidence rendered them immune. This immunity "was based upon the dual, related premises that historically the right to search for and seize property depended upon the assertion by the Government of a valid claim of superior interest, and that it was not enough that the purpose of the search and seizure was to obtain evidence to use in appre hending and convicting criminals." 129 More evaded than followed, the "mere evidence" rule was overturned in 1967. 130 It is now settled that such evidentiary items as fingerprints, 131 blood, 132 urine samples, 133 fingernail and skin scrapings, 134 voice and handwriting exemplars, 135 conversations, 136 and other demonstrative evidence may be obtained through the warrant process or without a warrant where "special needs" of government are shown. 137

However, some medically assisted bodily intrusions have been held impermissible, e.g., forcible

administration of an emetic to induce vomiting, 138 and surgery under general anesthetic to remove a bullet lodged in a suspect's chest. 139 Factors to be weighed in determining which medical tests and procedures are reasonable include the extent to which the procedure threatens the individual's safety or health, "the extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity," and the importance of the evidence to the prosecution's case. 140

In Warden v. Hayden, 141 Justice Brennan for the Court cautioned that the items there seized were not "'testimonial' or 'communicative' in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. . . . This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." This merging of Fourth and Fifth Amendment considerations derived from Boyd v. United States, 142 the first case in which the Supreme Court considered at length the meaning of the Fourth Amendment. Boyd was a quasi-criminal proceeding for the forfeiture of goods alleged to have been imported in violation of law, and concerned a statute which authorized court orders to require defendants to produce any document which might "tend to prove any allegation made by the United States." 143 That there was a self-incrimination problem the entire Court was in agreement, but Justice Bradley for a majority of the Justices also utilized the Fourth Amendment.

While the statute did not authorize a search but instead compulsory production, the Justice concluded that the law was well within the restrictions of the search and seizure clause. 144 With this point established, the Justice relied on Lord Camden's opinion in Entick v. Carrington 145 for the proposition that seizure of items to be used as evidence only was impermissible. Justice Bradley announced that the "essence of the offence" committed by the Government against Boyd "is not the breaking of his doors, and the rummaging of his drawers . . . but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other." 146

While it may be doubtful that the equation of search warrants with subpoenas and other compulsory process ever really amounted to much of a limitation, 147 the present analysis of the Court dispenses with any theory of "convergence" of the two Amendments. 148 Thus, in Andresen v. Maryland, 149 police executed a warrant to search defendant's offices for specified documents pertaining to a fraudulent sale of land, and the Court sustained the admission of the papers discovered as evidence at his trial. The Fifth Amendment was inapplicable, the Court held, because there had been no compulsion of defendant to produce or to authenticate the documents. 150 As for the Fourth Amendment, inasmuch as the "business records" seized were evidence of criminal acts, they were properly seizable under the rule of Warden v. Hayden; the fact that they were "testimonial" in nature, records in the defendant's handwriting, was irrelevant. 151 Acknowledging that "there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers," the Court's response was to observe that while some "innocuous documents" would have to be examined to ascertain which papers were to be seized, authorities, just as with electronic "seizures" of conversations, "must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy." 152

Although Andresen was concerned with business records, its discussion seemed equally applicable to "personal" papers, such as diaries and letters, as to which a much greater interest in privacy most certainly exists. The question of the propriety of seizure of such papers continues to be the subject of reservation in opinions, 153 but it is far from clear that the Court would accept any such exception

should the issue be presented. 154

Execution of Warrants .--The manner of execution of warrants is generally governed by statute and rule, as to time of execution, 155 method of entry, and the like. It was a rule at common law that before an officer could break and enter he must give notice of his office, authority, and purpose and must in effect be refused admittance, 156 and until recently this has been a statutory requirement in the federal system 157 and generally in the States. In Ker v. California, 158 the Court considered the rule of announcement as a constitutional requirement, although a majority there found circumstances justifying entry without announcement. In Wilson v. Arkansas, Supp.2 the Court determined that the common law "knock and announce" rule is an element of the Fourth Amendment reasonableness inquiry. The rule does not, however, require announcement under all circumstances. The presumption in favor of announcement yields under various circumstances, including those posing a threat of physical violence to officers, those in which a prisoner has escaped and taken refuge in his dwelling, and those in which officers have reason to believe that destruction of evidence is likely. Recent federal laws providing for the issuance of warrants authorizing in certain circumstances "no-knock" entries to execute warrants will no doubt present the Court with opportunities to explore the configurations of the rule of announcement. 159 A statute regulating the expiration of a warrant and issuance of another "should be liberally construed in favor of the individual." 160 Similarly, inasmuch as the existence of probable cause must be established by fresh facts, so the execution of the warrant should be done in timely fashion so as to ensure so far as possible the continued existence of probable cause. 161

In executing a warrant for a search of premises and of named persons on the premises, police officers may not automatically search someone else found on the premises. 162 If they can articulate some reasonable basis for fearing for their safety they may conduct a "patdown" of the person, but in order to search they must have probable cause particularized with respect to that person. However, in Michigan v. Summers, 163 the Court held that officers arriving to execute a warrant for the search of a house could detain, without being required to articulate any reasonable basis and necessarily therefore without probable cause, the owner or occupant of the house, whom they encountered on the front porch leaving the premises. Applying its intrusiveness test, 164 the Court determined that such a detention, which was "substantially less intrusive" than an arrest, was justified because of the law enforcement interests in minimizing the risk of harm to officers, facilitating entry and conduct of the search, and preventing flight in the event incriminating evidence is found. 165 Also, under some circumstances officers may search premises on the mistaken but reasonable belief that the premises are described in an otherwise valid warrant. 166

Although for purposes of execution, as for many other matters, there is little diffence between search warrants and arrest warrants, one notable difference is that the possession of a valid arrest warrant cannot authorize authorities to enter the home of a third party looking for the person named in the warrant; in order to do that, they need a search warrant signifying that a magistrate has determined that there is probable cause to believe the person named is on the premises. 167

Footnotes

[Footnote 87] While the exceptions may be different as between arrest warrants and search warrants, the requirements for the issuance of the two are the same. Aguilar v. Texas, 378 U.S. 108, 112 n.3 (1964). Also, the standards by which the validity of warrants are to be judged are the same, whether federal or state officers are involved. Ker v. California, 374 U.S. 23 (1963).

[Footnote 88] Most often, in the suppression hearings, the defendant will challenge the sufficiency of the evidence presented to the magistrate to constitute probable cause. Spinelli v. United States, 393 U.S.

410 (1969); United States v. Harris, 403 U.S. 573 (1971). He may challenge the veracity of the statements used by the police to procure the warrant and otherwise contest the accuracy of the allegations going to establish probable cause, but the Court has carefully hedged his ability to do so. Franks v. Delaware, 438 U.S. 154 (1978). He may also question the power of the official issuing the warrant, Coolidge v. New Hampshire, 403 U.S. 443, 449 -53 (1971), or the specificity of the particularity required. Marron v. United States, 275 U.S. 192 (1927).

[Footnote 89] United States v. Lefkowitz, 285 U.S. 452, 464 (1932); Giordenello v. United States, 357 U.S. 480, 486 (1958); Jones v. United States, 362 U.S. 257, 270 (1960); Katz v. United States, 389 U.S. 347, 356 (1967); United States v. United States District Court, 407 U.S. 297, 321 (1972); United States v. Chadwick, 433 U.S. 1, 9 (1977); Lo-Ji Sales v. New York, 442 U.S. 319, 326 (1979).

[Footnote 90] Johnson v. United States, 333 U.S. 10, 13 -14 (1948).

[Footnote 91] Shadwick v. City of Tampa, 407 U.S. 345, 354 (1972).

[Footnote 92] Coolidge v. New Hampshire, 403 U.S. 443, 449 -51 (1971) (warrant issued by state attorney general who was leading investigation and who as a justice of the peace was authorized to issue warrants); Mancusi v. DeForte, 392 U.S. 364, 370 -72 (1968) (subpoena issued by district attorney could not qualify as a valid search warrant); Lo-Ji Sales v. New York, 442 U.S. 319 (1979) (justice of the peace issued open-ended search warrant for obscene materials, accompanied police during its execution, and made probable cause determinations at the scene as to particular items).

[Footnote 93] Jones v. United States, 362 U.S. 257, 270 -71 (1960) (approving issuance of warrants by United States Commissioners, many of whom were not lawyers and none of whom had any guarantees of tenure and salary); Shadwick v. City of Tampa, 407 U.S. 345 (1972) (approving issuance of arrest warrants for violation of city ordinances by city clerks who were assigned to and supervised by municipal court judges). The Court reserved the question "whether a State may lodge warrant authority in someone entirely outside the sphere of the judicial branch. Many persons may not qualify as the kind of 'public civil officers' we have come to associate with the term 'magistrate.' Had the Tampa clerk been entirely divorced from a judicial position, this case would have presented different considerations." Id. at 352.

[Footnote 94] Id. at 350-54 (placing on defendant the burden of demonstrating that the issuing official lacks capacity to determine probable cause). See also Connally v. Georgia, 429 U.S. 245 (1977) (unsalaried justice of the peace who receives a sum of money for each warrant issued but nothing for reviewing and denying a warrant not sufficiently detached).

[Footnote 95] Dumbra v. United States, 268 U.S. 435, 439 , 441 (1925). "[T]he term 'probable cause'. . . means less than evidence which would justify condemnation." Lock v. United States, 11 U.S. (7 Cr.) 339, 348 (1813). See Steele v. United States, 267 U.S. 498, 504 -05 (1925). It may rest upon evidence which is not legally competent in a criminal trial, Draper v. United States, 358 U.S. 307, 311 (1959), and it need not be sufficient to prove guilt in a criminal trial. Brinegar v. United States, 338 U.S. 160, 173 (1949). See United States v. Ventresca, 380 U.S. 102, 107 -08 (1965).

[Footnote 96] Brinegar v. United States, 338 U.S. 160, 175 (1949).

[Footnote 97] United States v. Ventresca, 380 U.S. 102, 108 -09 (1965).

[Footnote 98] Jones v. United States, 362 U.S. 257, 270 -71 (1960). Similarly, the preference for

proceeding by warrant leads to a stricter rule for appellate review of trial court decisions on warrantless stops and searches than is employed to review probable cause to issue a warrant. Ornelas v. United States, 116 S. Ct. 1657 (1996) (determinations of reasonable suspicion to stop and probable cause to search without a warrant should be subjected to de novo appellate review).

[Footnote 99] Aguilar v. Texas, 378 U.S. 108, 111 (1964). It must be emphasized that the issuing party "must judge for himself the persuasiveness of the facts relied on by a [complainant] to show probable cause." Giordenello v. United States, 357 U.S. 480, 486 (1958). An insufficient affidavit cannot be rehabilitated by testimony after issuance concerning information possessed by the affiant but not disclosed to the magistrate. Whiteley v. Warden, 401 U.S. 560 (1971).

[Footnote 100] Byars v. United States, 273 U.S. 28 (1927) (affiant stated he "has good reason to believe and does believe" that defendant has contraband materials in his possession); Giordenello v. United States, 357 U.S. 480 (1958) (complainant merely stated his conclusion that defendant had committed a crime). See also Nathanson v. United States, 290 U.S. 41 (1933).

[Footnote 101] 380 U.S. 102 (1965).

[Footnote 102] Id. at 109.

[Footnote 103] 358 U.S. 307 (1959). For another case applying essentially the same probable cause standard to warrantless arrests as govern arrests by warrant, see McCray v. Illinois, 386 U.S. 300 (1967) (informant's statement to arresting officers met Aguilar probable cause standard). See also Whitely v. Warden, 401 U.S. 560, 566 (1971) (standards must be "at least as stringent" for warrantless arrest as for obtaining warrant).

[Footnote 104] 362 U.S. 257 (1960).

[Footnote 105] 378 U.S. 108 (1964).

[Footnote 106] 393 U.S. 410 (1969). Both concurring and dissenting Justices recognized tension between Draper and Aguilar. See id. at 423 (Justice White concurring), id. at 429 (Justice Black dissenting and advocating the overruling of Aguilar).

[Footnote 107] 403 U.S. 573 (1971). See also Adams v. Williams, 407 U.S. 143, 147 (1972) (approving warrantless stop of motorist based on informant's tip that "may have been insufficient" under Aguilar and Spinelli as basis for warrant).

[Footnote 108] 462 U.S. 213 (1983) (Justice Rehnquist's opinion of the Court was joined by Chief Justice Burger and by Justices Blackmun, Powell, and O'Connor. Justices Brennan, Marshall, and Stevens dissented.

[Footnote 109] 462 U.S. at 213 .

[Footnote 110] 462 U.S. at 238 .

[Footnote 111] Marron v. United States, 275 U.S. 192, 196 (1927). See Stanford v. Texas, 379 U.S. 476 (1965). Of course, police who are lawfully on the premises pursuant to a warrant may seize evidence of crime in "plain view" even if that evidence is not described in the warrant. Coolidge v. New Hampshire, 403, U.S. 443, 464-71 (1971).

[Footnote 112] "This Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. Kremen v. United States, 353 U.S. 346 (1957); Go-Bart Importing Co. v. United States, 282 U.S. 344, 356 -58 (1931); see United States v. Di Re, 332 U.S. 581, 586 -87 (1948). The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible. Warden v. Hayden, 387 U.S. 294, 310 (1967) (Mr. Justice Fortas concurring); see, e.g., Preston v. United States, 376 U.S. 364, 367 -368 (1964); Agnello v. United States, 296 U.S. 20, 30 -31 (1925)." Terry v. Ohio, 392 U.S. 1, 18 -19, (1968). See also Andresen v. Maryland, 427 U.S. 463, 470 -82 (1976), and id. at 484, 492-93 (Justice Brennan dissenting). In Stanley v. Georgia, 394 U.S. 557, 569 (1969), Justices Stewart, Brennan, and White would have based decision on the principle that a valid warrant for gambling paraphernalia did not authorize police upon discovering motion picture films in the course of the search to project the films to learn their contents.

[Footnote 113] Marcus v. Search Warrant, 367 U.S. 717, 730 -31 (1961); Stanford v. Texas, 379 U.S. 476, 485 (1965).

[Footnote 114] 367 U.S. 717 (1961). See Kingsley Books v. Brown, 354 U.S. 436 (1957).

[Footnote 115] Marcus v. Search Warrant, 367 U.S. 717, 732 (1961).

[Footnote 116] A Quantity of Books v. Kansas, 378 U.S. 205, 210 (1964).

[Footnote 117] Heller v. New York, 413 U.S. 483 (1973).

[Footnote 118] Id. at 492-93. But cf. New York v. P.J. Video, Inc., 475 U.S. 868, 875 n.6 (1986), rejecting the defendant's assertion, based on Heller, that only a single copy rather than all copies of allegedly obscene movies should have been seized pursuant to warrant.

[Footnote 119] Roaden v. Kentucky, 413 U.S. 496 (1973). See also Lo-Ji Sales v. New York, 442 U.S. 319 (1979); Walter v. United States, 447 U.S. 649 (1980). These special constraints are inapplicable when obscene materials are purchased, and there is consequently no Fourth Amendment search or seizure. Maryland v. Macon, 472 U.S. 463 (1985).

[Footnote 120] Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636, 637 (1968) (per curiam).

[Footnote 121] New York v. P.J. Video, Inc., 475 U.S. 868, 873 -74 (1986) (quoting Marcus v. Search Warrant, 367 U.S. 717, 732 (1961)).

[Footnote 122] New York v. P.J. Video, Inc., 475 U.S. 868, 875 n.6 (1986).

[Footnote 123] 379 U.S. 476 (1965).

[Footnote 124] Id. at 485-86. See also Marcus v. Search Warrant, 367 U.S. 717, 723 (1961).

[Footnote 125] Zurcher v. Stanford Daily, 436 U.S. 547 (1978). See id. at 566 (containing suggestion mentioned in text), and id. at 566 (Justice Powell concurring) (more expressly adopting that position). In the Privacy Protection Act, Pub. L. No. 96-440, 94 Stat. 1879 (1980), 42 U.S.C. Sec. 2000aa, Congress provided extensive protection against searches and seizures not only of the news media and news people but also of others engaged in disseminating communications to the public, unless there is probable cause to believe the person protecting the materials has committed or is committing the crime

to which the materials relate.

[Footnote 126] United States v. Lefkowitz, 285 U.S. 452, 465 -66 (1932). Of course, evidence seizable under warrant is subject to seizure without a warrant in circumstances in which warrantless searches are justified.

[Footnote 127] 255 U.S. 298 (1921). United States v. Lefkowitz, 285 U.S. 452 (1932), applied the rule in a warrantless search of premises. The rule apparently never applied in case of a search of the person. Cf. Schmerber v. California, 384 U.S. 757 (1966).

[Footnote 128] Gouled v. United States, 255 U.S. 298, 306 (1921).

[Footnote 129] Warden v. Hayden, 387 U.S. 294, 303 (1967). See Gouled v. United States, 255 U.S. 298, 309 (1921). The holding was derived from dicta in Boyd v. United States, 116 U.S. 616, 624 -29 (1886).

[Footnote 130] Warden v. Hayden, 387 U.S. 294 (1967). Justice Douglas dissented, wishing to retain the rule, id. at 312, and Justice Fortas with Chief Justice Warren concurred in the result while apparently wishing to retain the rule in warrant cases. Id. at 310, 312.

[Footnote 131] Davis v. Mississippi, 394 U.S. 721 (1969).

[Footnote 132] Schmerber v. California, 384 U.S. 757 (1966). Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (warrantless blood testing for drug use by railroad employee involved in accident).

[Footnote 133] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (warrantless drug testing of railroad employee involved in accident).

[Footnote 134] Cupp v. Murphy, 412 U.S. 291 (1973) (sustaining warrantless taking of scrapings from defendant's fingernails at the stationhouse, on the basis that it was a very limited intrusion and necessary to preserve evanescent evidence).

[Footnote 135] United States v. Dionisio, 410 U.S. 1 (1973); United States v. Mara, 410 U.S. 19 (1973) (both sustaining grand jury subpoenas to produce voice and handwriting exemplars; no reasonable expectation of privacy with respect to those items).

[Footnote 136] Berger v. New York, 388 U.S. 41, 44 n.2 (1967). See also id. at 97 n.4, 107-08 (Justices Harlan and White concurring), 67 (Justice Douglas concurring).

[Footnote 137] Another important result of Warden v. Hayden is that third parties not suspected of culpability in crime are subject to the issuance and execution of warrants for searches and seizures of evidence. Zurcher v. Stanford Daily, 436 U.S. 547, 553 -60 (1978). Justice Stevens argued for a stiffer standard for issuance of warrants to nonsuspects, requiring in order to invade their privacy a showing that they would not comply with a less intrusive method, such as a subpoena. Id. at 577 (dissenting).

[Footnote 138] Rochin v. California, 342 U.S. 165 (1952).

[Footnote 139] Winston v. Lee, 470 U.S. 753 (1985).

[Footnote 140] Winston v. Lee, 470 U.S. 753, 761 -63 (1985). Chief Justice Burger concurred on the basis of his reading of the Court's opinion "as not preventing detention of an individual if there are reasonable grounds to believe that natural bodily functions will disclose the presence of contraband materials secreted internally." id. at at 767. Cf. United States v. Montoya de Hernandez, 473 U.S. 531 (1985).

[Footnote 141] 387 U.S. 294, 302 -03 (1967). Seizure of a diary was at issue in Hill v. California, 401 U.S. 797, 805 (1971), but it had not been raised in the state courts and was deemed waived.

[Footnote 142] 116 U.S. 616 (1886).

[Footnote 143] Act of June 22, 1874, Sec. 5, 18 Stat. 187.

[Footnote 144] Boyd v. United States, 116 U.S. 616, 622 (1886).

[Footnote 145] Howell's State Trials 1029, 95 Eng. Rep. 807 (1765).

[Footnote 146] Boyd v. United States, 116 U.S. 616, 630 (1886).

[Footnote 147] E.g., Oklahoma Press Pub Co. v. Walling, 327 U.S. 186, 209 - 09 (1946).

[Footnote 148] Andresen v. Maryland, 427 U.S. 463 (1976); Fisher v. United States, 425 U.S. 391, 405 -14 (1976). Fisher states that "the precise claim sustained in Boyd would now be rejected for reasons not there considered." Id. at 408.

[Footnote 149] 427 U.S. 463 (1976).

[Footnote 150] Id. at 470-77.

[Footnote 151] Id. at 478-84.

[Footnote 152] Id. at 482 n.11. Minimization, as required under federal law, has not proved to be a significant limitation. Scott v. United States, 425 U.S. 917 (1976).

[Footnote 153] E.g., United States v. Miller, 425 U.S. 435, 440 , 444 (1976); Fisher v. United States, 425 U.S. 391, 401 (1976); California Bankers Ass'n v. Shultz, 416 U.S. 21, 78 -79 (1974) (Justice Powell concurring).

[Footnote 154] See Note, Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments, 90 Harv. L. Rev. 945 (1977).

[Footnote 155] Rule 41(c), Federal Rules of Criminal Procedure, provides, inter alia, that the warrant shall command its execution in the daytime, unless the magistrate "for reasonable cause shown" directs in the warrant that it be served at some other time. See Jones v. United States, 357 U.S. 493, 498 -500 (1958); Gooding v. United States, 416 U.S. 430 (1974). The rule is more relaxed for narcotics cases. 21 U.S.C. Sec. 879(a).

[Footnote 156] Semayne's Case, 5 Coke's Rep. 91a, 77 Eng. Rep. 194 (K.B. 1604).

[Footnote 157] 18 U.S.C. Sec. 3109. See Miller v. United States, 357 U.S. 301 (1958); Wong Sun v.

United States, 371 U.S. 471 (1963).

[Footnote 158] 374 U.S. 23 (1963). Ker was an arrest warrant case, but no reason appears for differentiating search warrants. Eight Justices agreed that federal standards should govern and that the rule of announcement was of constitutional stature, but they divided 4-to-4 whether entry in this case had been pursuant to a valid exception. Justice Harlan who had dissented from the federal standards issue joined the four finding a justifiable exception to carry the result.

[Footnote 2 (1996 Supplement)] 115 S. Ct. 1914 (1995).

[Footnote 159] In narcotics cases, magistrates are authorized to issue "no-knock" warrants if they find there is probable cause to believe (1) the property sought may, and if notice is given, will be easily and quickly destroyed or (2) giving notice will endanger the life or safety of the executing officer or another person. 21 U.S.C. Sec. 879(b). See also D.C. Code, Sec. 23-591.

[Footnote 160] Sgro v. United States, 287 U.S. 206 (1932).

[Footnote 161] Id.

[Footnote 162] Ybarra v. Illinois, 444 U.S. 85 (1979) (patron in a bar), relying on and reaffirming United States v. Di Re, 332 U.S. 581 (1948) (occupant of vehicle may not be searched merely because there are grounds to search the automobile).

[Footnote 163] 452 U.S. 692 (1981).

[Footnote 164] Supra, p.1208. See Michigan v. Summers, 452 U.S. 692, 696 - 701 (1981).

[Footnote 165] Id. at 701-06. Ybarra was distinguished on the basis of its greater intrusiveness and the lack of sufficient connection with the premises. Id. at 695 n.4. By the time Summers was searched, police had probable cause to do so. Id. at 695. The warrant here was for contraband, id. at 701, and a different rule possibly may apply with respect to warrants for other evidence.

[Footnote 166] Maryland v. Garrison, 480 U.S. 79 (1987) (officers reasonably believed there was only one "third floor apartment" in city row house when in fact there were two).

[Footnote 167] Steagald v. United States, 451 U.S. 204 (1981). An arrest warrant is a necessary and sufficient authority to enter a suspect's home to arrest him. Payton v. New York, 445 U.S. 573 (1980).

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