COMMENT

SEARCH AND SEIZURE IN OHIO

I. INTRODUCTION

The fourth amendment to the Constitution of the United States guarantees the right of the people to be secure "against unreasonable searches and seizures," and that "no warrants shall issue, but upon probable cause,"[1] and the language contained in article I of the Ohio Constitution is substantially the same.[2] Formerly, evidence obtained under an illegal search and seizure was admissible in the Ohio courts if it was pertinent to the main issue in the case, and the courts did not concern themselves with the collateral issue of how it was obtained,[3] while the federal courts followed the exclusionary rule which made such evidence inadmissible.[4] However the United States Supreme Court held in *Mapp v. Ohio*[5] that the exclusionary rule was applicable to the states regardless of the reliability of the evidence obtained. There followed much speculation as to whether federal or state standards should be applied to determine the legality of the search and seizure.[6] This question was decided in *Ker v. California*,[7] where the Supreme Court stated that the substantive standards of the fourth amendment apply to the states. In so holding, the Court said that the demands of federalism compel a distinction between that evidence held inadmissible under the Supreme Court's supervisory power over the federal courts and that which is held inadmissible under the fourth amendment. The implication of the opinion was that there *are* certain areas in which the standards of the federal courts need not be applied, but the Court proceeded to apply the federal standard of reasonableness anyway. Also a recent Supreme Court decision can be read as saying that a state's procedural rules are unconstitutional if they pre-

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1 U.S. Const. amend. IV.

2 Ohio Const. art. I, § 14.

3 State v. Mapp, 170 Ohio St. 427, 166 N.E.2d 387 (1960); State v. Lindway, 131 Ohio St. 166, 2 N.E.2d 490, *cert. denied*, 299 U.S. 506 (1936); State v. Sabo, 108 Ohio St. 200, 140 N.E. 499 (1923); Rosanski v. State, 106 Ohio St. 442, 140 N.E. 370 (1922). For a brief period following the decision in Nicholas v. Cleveland, 125 Ohio St. 474, 182 N.E. 26 (1932) the Ohio courts followed the exclusionary rule.

4 Wolf v. Colorado, 338 U.S. 25 (1949).

5 367 U.S. 643 (1961).

6 See Comment, "The Federal Standard of Search and Seizure," 13 Drake L. Rev. 65 (1963).

7 374 U.S. 23 (1963).

vent a vindication of the defendant's federal rights unless the rule serves a legitimate state interest.[8]

The meaning of these cases is not entirely clear but it is obvious that the Ohio courts will be required to decide future cases with reference to the federal standards. Thus, the federal cases involving the standards of probable cause and reasonableness and the later Ohio cases are of great importance to Ohio criminal lawyers. Primary emphasis here will be given to the later Ohio cases and how they have been influenced by the federal standards.

First, some general problems of searches and arrests, probable cause, reasonableness, and determining the fruits of an illegal search will be investigated. Consideration will then turn to the more specific problems involved in searches pursuant to warrants, searches without warrants, searches incident to arrests, arrests pursuant to warrants, and arrests without a warrant. Emphasis will be given to the Ohio statutory procedures and how they should be changed in light of the federal standards. Lastly, the procedure to attack a search as illegal will be discussed.

II. Probable Cause

Searches and seizures are not generally lawful under the Ohio or federal constitutions unless made upon probable cause. Thus a search warrant may not be issued until it is shown that there is probable cause to believe that the item sought is present where the search is to be conducted.[9] The fourth amendment applies to the area of arrest as well as search.[10] Both Ohio and the federal courts allow an officer to arrest with probable cause,[11] and the Ohio statute allows an arrest to be made without a warrant where there are reasonable grounds to believe that a crime has been committed.[12] The term "reasonable grounds" is used interchangeably with "probable cause."[13] The concept of probable cause is also relevant where there is a search made incident to a valid arrest. A search is valid when incident to an arrest which is made with probable cause.[14]

Hence, probable cause is the legal criterion for determining when

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[8] Henry v. Mississippi, 379 U.S. 443 (1965).

[9] Jones v. United States, 362 U.S. 257 (1960); Hudson v. State, 35 Ohio App. 87, 172 N.E. 301 (1929); Ohio Rev. Code Ann. § 2933.22 (Page 1954).

[10] See Albrecht v. United States, 273 U.S. 1 (1927).

[11] See Carroll v. United States, 267 U.S. 132 (1925); Dixon v. Maxwell, 177 Ohio St. 20, 201 N.E.2d 592 (1964).

[12] Ohio Rev. Code Ann. § 2935.04 (Page 1954).

[13] State v. Rogers, 27 Ohio Op. 2d 105, 198 N.E.2d 796 (C.P. 1963).

[14] See United States v. Lefkowitz, 285 U.S. 452 (1932); State v. Beck, 175 Ohio St. 73, 191 N.E.2d 825 (1963), *rev'd on other grounds*, Beck v. Ohio, 379 U.S. 89 (1964).

a search may be made or a person arrested. It has been said that it exists when the facts and circumstances within the knowledge of the arresting officer, and of which he had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been committed.[15] The evidence used to establish probable cause need not be admissible in a jury trial,[16] and can be much less than would be necessary to convict the defendant.[17] An analysis will be attempted here of the later cases involving probable cause to determine the factors which are considered in deciding the legality of searches and seizures as well as arrests.

A. *Area*

One factor that may be important in determining probable cause is the geographic area in which the defendant is arrested or searched. For example, the defendant might be found in surroundings which would indicate his having committed the crime. In *Carroll v. United States*,[18] an automobile was stopped and searched without a warrant. In upholding the search, the Court emphasized the fact that defendants were suspected of transporting liquor and that they were driving in an area which was known as an active center for bootlegging.[19] In the Ohio case of *State v. Young*,[20] the police had received information that there was a "numbers ticket" violation at a certain address. After watching the premises for a period of time, the officers secured a search warrant (the validity of which was apparently not questioned) which named "John Doe" as the person to be seized. Inside the house the officers found defendant talking on the phone. In the room they also discovered an adding machine, a shotgun, some paper and carbon paper some of which bore indentations of numbers marked thereon. They thereupon arrested and searched defendant and seized a record of "clearing house" or "numbers ticket" bets. The court held the arrest and search of defendant to be lawful, noting that one, while bearing contraband articles such as those which were the object of the search, cannot stand in the presence of an officer making a lawful search of the

[15] Carroll v. United States, *supra* note 11.

[16] See Draper v. United States, 358 U.S. 307 (1959); State v. Waldbillig, 1 Ohio St. 2d 50, 203 N.E.2d 361 (1964).

[17] Brinegar v. United States, 338 U.S. 160 (1949), followed in State v. Rogers, 27 Ohio Op. 2d 105, 198 N.E.2d 796 (C.P. 1963).

[18] *Supra* note 11.

[19] Similarly, the United States Supreme Court has emphasized the territory in other cases. Brinegar v. United States, *supra* note 17; The Appollon, 22 U.S. (9 Wheat.) 361 (1824).

[20] 91 Ohio L. Abs. 21, 185 N.E.2d 33 (1962), *appeal dismissed*, 174 Ohio St. 329, 189 N.E.2d 151 (1963).

premises and be secure from arrest and subsequent seizure of those items.[21]

This case, at first, seems factually similar to the United States Supreme Court case of *United States v. DiRe*,[22] where an informer pointed to an occupant of a car as the seller of counterfeit gasoline coupons. The defendant was also in the car but the informant made no reference to him. The Court held that even if the search of the car was justified, the arrest of the defendant was made without probable cause since his mere presence in the car proved nothing. The Supreme Court rejected the argument, which prevailed in *Young*, that common sense demands the occupants can be searched "where the contraband sought is a small article which could easily be concealed on the person."[23] Despite the holding in *DiRe*, the Ohio court in *Young* seems correct. The basic reasoning of *DiRe* was that an arrest and search could not be made incident to a search of an automobile or premises. But the result in *Young* need not rest on this reasoning. The officers had reason to believe that a numbers ticket violation was being carried out on the premises. Items were found there which would further corroborate this fact, and the defendant was discovered on the premises. Thus there was independent probable cause, as distinguished from a mere arrest and search of the individual as incident to a search of the premises.

B. *Previous Criminal Activity*

Another factor, sometimes mentioned by the courts as affecting a finding of probable cause, is previous criminal activity.[24] In *State v. Smith*,[25] police received information from informants concerning narcotics activity in defendant's room. The court, in upholding the arrest and search incident thereto, emphasized the fact that the officers had seen a known addict in the window of the room. Although this factor would not constitute probable cause of itself, the Supreme Court of the United States has recognized it several times as tending to show probable cause.[26]

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[21] *Id.* at 24.

[22] 332 U.S. 581 (1947).

[23] *Id.* at 586.

[24] Comment, "Probable Cause: The Federal Standard," 25 Ohio St. L.J. 502, 507 (1964).

[25] 94 Ohio L. Abs. 271, 202 N.E.2d 215 (C.P. 1964).

[26] Brinegar v. United States, *supra* note 17; Husty v. United States, 282 U.S. 694 (1931); Carroll v. United States, *supra* note 11.

C. *Suspicious Conduct*

Many times an officer will observe the premises in an attempt to discover suspicious activity which would tend to establish probable cause. In some prohibition cases, the Ohio courts have emphasized the fact that men entered into the premises sober, and some time thereafter returned in a state of intoxication.[27] Also the fact that the defendant was driving around in his automobile very late at night has been a factor tending to create probable cause.[28] However, such observations must be of greater force than to give the officers a mere suspicion of illegal activities. In *State v. Keeling*,[29] the arresting officers testified that they had a "weak suspicion" that a numbers game was being conducted at a certain apartment but did not know who the occupants were. The officers entered the stairway of the apartment building by ringing the doorbell of an apartment other than the one suspected of harboring the violators. At the door of the suite, they overheard the operation of an adding machine. Without announcing their presence, the officers kicked open the door and proceeded to search, the result being the discovery of a clearing house operation and the arrest of the six occupants of the premises. The court held that there was no probable cause when the police acted merely upon a weak suspicion and upon hearing an adding machine in the apartment.

In *Dixon v. Maxwell*,[30] the petitioner in a habeas corpus action in the Ohio Supreme Court claimed he had been arrested without probable cause and that the search incident thereto was hence unlawful. The police had come to the vicinity of the building in which petitioner was arrested in answer to a complaint that one of the apartments was being used as a house of prostitution. From about 100 feet away they observed petitioner remove a large quantity of clothing from the trunk of an automobile. The police saw the petitioner and his companions carry the clothing into the building where he was subsequently arrested. The search which followed resulted in the seizure of the clothing which was the basis of petitioner's conviction. The arrest was held to have been lawful. This result, on the basis of the facts given in the opinion, is probably incorrect by federal standards. If the case held that there was probable cause to believe that someone was committing the crime of prostitution in the apartment, such holding was on the

[27] Babika v. Cleveland, 40 Ohio App. 45, 177 N.E. 914 (1931); Hudson v. State, 35 Ohio App. 87, 172 N.E. 301 (1929).

[28] South Euclid v. Pallidino, 28 Ohio Op. 2d 280, 193 N.E.2d 560 (Munic. Ct. South Euclid 1963).

[29] 182 N.E.2d 60 (Ohio C.P. 1962).

[30] 177 Ohio St. 20, 201 N.E.2d 592 (1964).

basis of information given by an informant alone, which so far as the opinion shows was uncorroborated. Such evidence cannot be the basis of probable cause in the federal courts unless the informant is known by the officers to be reliable.[31] On the other hand, if the court held that the officers had probable cause to believe that the clothing had been stolen, the only evidence within the officers' knowledge was that the petitioner carried twenty-nine suits into the apartment.

The United States Supreme Court's decision in *Henry v. United States*[32] would seem to dictate a different result. In that case agents had been given information "concerning the implication of the defendant Pierotti with the interstate shipments" which had been stolen, but the informer had not told the agents he actually suspected Pierotti of the theft. The officers observed the petitioner and Pierotti leave a tavern and get into their automobile. The agents followed the car and saw it enter an alley and stop. The petitioner entered a gangway leading to residential premises and returned with some cartons. As they drove off, the agents were unable to follow the car but later found it parked near the same tavern. When the petitioner proceeded again to the alley, the officers arrested him. In holding that there was no probable cause the Court noted, "riding in a car, stopping in an alley, picking up packages, driving . . ." were all acts of the outwardly innocent. As in the *Dixon* case, there were no facts within the knowledge of the officers, except outwardly innocent actions, to support the arrest. Therefore the *Dixon* case would probably have been decided differently upon a motion to suppress in a federal court.

Two additional Ohio lower court decisions deserve attention because of their apparently conflicting results. In *South Euclid v. Pallidino*,[33] police observed defendant and his companion driving in an automobile. The police thought they recognized defendant as the driver of the car. They also knew that defendant's name was included on the police department's list of known criminals. After identifying defendant's license number and "positively identifying" him, they stopped his car. Defendant was unable to give an explanation of what he was doing in the area at 2:50 A.M., other than to state that he and his friend had "just wanted to ride around and talk." While talking to defendant the officer observed a part of a leather glove sticking out from under the front seat. When another officer arrived at the scene he recognized defendant's companion as having a previous criminal record. The police suggested that they were "suspicious persons" and

31 See Wong Sun v. United States, 371 U.S. 471 (1963).

32 361 U.S. 98 (1959).

33 *Supra* note 28.

should be taken in for investigation. The car was searched and two sets of channel locks, screwdrivers, wirecutter, and another pair of gloves were found. The defendants were later charged under a "suspicious person" ordinance which made it a misdemeanor to have in possession tools designed to be employed in the commission of a felony, misdemeanor, or violation of any other ordinance, or to wander about in the streets at late or unusual hours in the night without any lawful business, while not being able to give a satisfactory account of himself. Also any person who was known to be a companion and associate of criminals or other dissolute persons was also in violation of the ordinance.[34] The court held that since the defendant was violating the suspicious person ordinance at the time of arrest, such arrest was lawful under Ohio Revised Code section 2935.03, providing that an officer shall arrest a person "found violating" any law of the state which shall constitute a misdemeanor. Therefore, the search was held to be incident to such arrest. The court continued that even if such arrest was invalid, the search was valid since there was probable cause to believe a crime had been committed, that crime being burglary. In so holding the court misconceived the test for determining probable cause for a search without an arrest. The test is not that there must be probable cause that a crime has been committed, but rather that there is probable cause to search, *i.e.*, whether the officers have a good reason to believe that contraband, weapons, fruits of the crime, or instrumentalities of the crime were in the car.

State v. Rogers[35] involved the legality of an arrest and search incident thereto. The facts were substantially similar to *Pallidino* but the court reached the opposite result concerning probable cause. The defendant was observed at 2:20 A.M. in an automobile. The officer noticed that the driver of the automobile was not familiar with the area and had a license number from another county. There had been a burglary a few nights before which aroused the suspicion of the officers. Upon questioning the occupants, the officer learned that the car had been loaned by the owner to a third person who in turn loaned it to the driver. The defendant and the two occupants gave conflicting

[34] South Euclid, Ohio, Ordinance No. 573.01 (1952). This ordinance is similar in many ways to the vagrancy statutes. This type of statute can be seriously questioned when used to justify an arrest without a warrant which would otherwise not be lawful. Douglas, "Vagrancy and Arrest on Suspicion," 70 Yale L.J. 1, 12-13 (1960); Foote, "The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?" 51 J. Crim. L., C. & P.S. 402, 407 (1960). However counsel for defendants did not argue the constitutionality of the ordinance as here applied. Therefore in ruling on this motion the court assumed it to be constitutional.

[35] 27 Ohio Op. 2d 105, 198 N.E.2d 796 (C.P. 1963).

stories as to the reason for their presence. Upon searching the automobile, the officers found a gun which one of the passengers said belonged to the defendant. The court held that the officers were justified in being "strongly suspicious," but that there was not quite probable cause to arrest.

It is possible to reconcile the different results reached in the two cases discussed above. In *Rogers*, the fact that the occupants gave conflicting stories as to the reason for their presence, coupled with the lateness of the hour, was not enough to justify an arrest. But in *Pallidino*, it is arguable that the additional factor that one of the occupants of the automobile was known to have a prior criminal record was enough to constitute probable cause. However, it is more likely that the cases are simply at variance, thus indicating the difficulty which the courts have had in applying the probable cause standard.

D. *Hearsay*

A much litigated question in recent years has been to what extent information given to officers by informants can be considered in determining whether such officer had probable cause to arrest or search. Although there are often disputes as to the sufficiency of corroboration necessary, it has been held that hearsay may be considered as a factor tending to establish probable cause, both in Ohio,[36] and in the federal courts.[37] However if the officers make an arrest or search in response to a complaint by a person not known by them to be reliable, and under circumstances not tending to show the present reliability of the informant, such arrest or search is illegal in the absence of some facts within the knowledge of the officers which tend to corroborate the information given. The problem can be illustrated by the facts of *State v. Waldbillig*.[38] About 11:00 P.M. police were called about a break-in at a laundromat. Upon their arrival, they found that several money containers had been broken and some money had apparently been taken. The police were advised that several individuals had been breaking into coin boxes, and they were given the descriptions of those individuals and of their get-away car and license number. Shortly thereafter, an automobile fitting the description was seen as it was being backed out of defendant's driveway by defendant. The defendant was

[36] See Akron v. Williams, 175 Ohio St. 186, 196 N.E.2d 63 (1963); Johnson v. Reddy, 163 Ohio St. 347, 126 N.E.2d 911 (1955); State v. Ball, 1 Ohio App. 2d 297; 204 N.E.2d 557, *appeal dismissed*, 176 Ohio St. 481, 200 N.E.2d 335 (1964); State v. Bartlett, 119 Ohio App. 483, 200 N.E.2d 660 (1964); State v. Smith, 94 Ohio L. Abs. 271, 202 N.E.2d 215 (C.P. 1964).

[37] Draper v. United States, *supra* note 16.

[38] 1 Ohio St. 2d 50, 203 N.E.2d 361 (1964).

arrested and searched, and the car was searched. The court assumed without discussion that the arrest was lawful. This case was clearly decided correctly according to the federal standard of probable cause. There was corroborative evidence within the knowledge of the officers that the crime actually took place since they observed the broken money containers. Furthermore, the officers had evidence of the present reliability of their informers that the defendant had committed the crime because the same information was given them by more than one informant. The federal cases have been reluctant to declare an arrest or search void if two informers give the same information, thus tending to corroborate each other.[39]

Since the United States Supreme Court's decision in *Draper v. United States*,[40] probable cause may be established without any corroboration of the crime itself. There an arrest was made on the strength of a tip from an informer who had told police that the defendant had gone to Chicago by train and would return to Denver with three ounces of heroin. He also said that Draper would arrive in Denver on either the eighth or ninth of September and gave a complete description of him. Moreover he said that Draper would be carrying a tan zipper bag and usually walked quite fast. The police went to the station on the morning of the arrest and all the information as to appearance and time of arrival was verified. The Court held the arrest to be lawful. The informant had a record of past reliability as to information given to the police. Furthermore his present reliability was verified because the detailed description of the activities of the defendant was observed to be correct before the arrest was made. Similarly, an Ohio case has held that probable cause was established to arrest for illegal possession of narcotics where the officers received information from more than one informer, proven reliable in the past, to the effect that narcotics activity was taking place in defendant's room.[41] The only corroboration other than hearsay was that the officers observed a known addict in defendant's room.

The recent Ohio Supreme Court case of *State v. Beck*[42] deserves attention because the facts as characterized by the court were similar to *Draper*. The defendant was arrested for possession of clearing house slips in violation of a state statute. The police knew that the defendant had been previously convicted of the same offense. Information was

[39] McDermott v. John Baumgarth Co., 286 F.2d 864 (7th Cir. 1961); United States v. Rundle, 216 F. Supp. 41 (E.D. Pa. 1963); United States v. Murphy, 174 F. Supp. 823 (D.D.C. 1959).

[40] *Supra* note 16.

[41] State v. Smith, *supra* note 36.

[42] 175 Ohio St. 73, 191 N.E.2d 825 (1963).

given to the police by an informer that defendant would be in a certain locality at a certain time pursuing his unlawful activities. When he was found in that locality, as predicted, driving an automobile, he was stopped and searched. At the police station the clearing house slips were at last discovered in defendant's clothing. Defendant's motion to suppress this evidence was overruled. He was found guilty, and the Ohio State Supreme Court affirmed.[43]

The United States Supreme Court reversed the conviction[44] but it is not clear whether it did so on the law or the facts. The Court, noting that the trial court made no finding of fact concerning probable cause, found on the basis of the record that the officers did not have information as to the defendant's specific location. Thus the arrest was merely on the basis of hearsay uncorroborated by any past or present reliability of the informant.

However, assuming the facts to be as characterized by the Ohio court, its finding of probable cause may have been correct. In *Draper* there was no corroboration of the crime itself, while here the officer knew that the defendant had previously been convicted of the same offense. Unlike *Draper*, the officers in *Beck* had no evidence of the past reliability of the informants, but some lower federal courts have held that it is unnecessary to present evidence of past reliability or corroboration of the crime itself, if evidence corroborative of present reliability is presented.[45] It should be noted, however, that the facts as stated in the opinion show only that information had been given to police by the informer that defendant would be "in a certain locality at a certain time,"[46] while the information given in *Draper* was much more detailed.

Although the information of a single informant is generally not sufficient, unless corroborated or unless evidence of present reliability is presented, some exceptions are given by the cases. Some lower federal courts have held that if the information comes from a paid informer or one employed for the purpose of uncovering such information, and such informer has a record of past reliability, such information is sufficient to constitute probable cause.[47] Also where an

[43] Two judges dissented on the theory that the offense was a misdemeanor rather than a felony as characterized by the majority. Thus the arrest was not valid under the Revised Code unless the defendant was "found violating a law." Ohio Rev. Code Ann. § 2935.03 (Page 1953).

[44] Beck v. Ohio, 379 U.S. 89 (1964).

[45] Naples v. United States, 307 F.2d 618 (D.C. Cir. 1962); McDermott v. John Baumgarth, *supra* note 39.

[46] State v. Beck, *supra* note 42, at 74, 191 N.E.2d at 827.

[47] Williams v. United States, 273 F.2d 781 (9th Cir. 1959); Butler v. United States, 273 F.2d 436 (9th Cir. 1959).

officer receives information through some mode of communication from another officer, he may rely on it for an arrest or search of the person implicated.[48] Many times the cases fail to discuss whether or not the informing officer had probable cause; however, at least one federal court has correctly held that an FBI agent, upon receiving telephone information from another agent, can acquire no greater authority than could have been exercised by the co-agent if he had been in the arresting agent's position.[49] The courts should continue to allow police to rely on statements made by fellow officers since the statements of policemen would appear to have a sufficient likelihood of being correct.

The concept of inherent reliability of information of certain informants could conceivably have application in other situations. In *Wong Sun v. United States*,[50] the informer was under arrest when he told of his purchase of heroin from one of the defendants. Mr. Justice Clark, arguing for the dissent, said that the officers had good reason to rely on the information given since the informant implicated himself as well as defendant by such information. Thus the statement was a declaration against interest, worthy of belief.[51]

Furthermore, in a recent case involving the sufficiency of a complaint in a tax evasion case, the Supreme Court suggested that unlike the narcotics informant in the arrest cases, whose credibility may often be suspect, the sources in the instant case were less likely to produce false or untrustworthy information.[52] Therefore the Court may be moving toward the position of permitting officers to rely on certain informants without corroboration where the situation indicates a particular reliability of such informants.

III. Reasonableness

A. *Standards of Reasonableness*

In addition to the probable cause requirement, both the fourth amendment and the Ohio constitution assure to the people the right to be free against *unreasonable* searches and seizures. The factors which have been considered as relevant to the reasonableness of a search are many. It has been said that "these factors include the scope of the search in area covered and in terms of the nature and number of

[48] United States v. Ventresca, 380 U.S. 102 (1965); Johnson v. Reddy, *supra* note 36; State v. Ball, *supra* note 36.

[49] United States v. Bianco, 189 F.2d 716 (3d Cir. 1951).

[50] 371 U.S. 471 (1963).

[51] *Id.* at 500.

[52] Jaben v. United States, 381 U.S. 214 (1965).

items to be seized, the time the search occurs, the place to be searched, whether the arrest is merely a pretext for search, immediate necessity to search, and consent of the accused."[53]

A search does not include the reasonable observations of an officer. Thus if an officer is lawfully on the premises, he is not required to shut his eyes to incriminating evidence which is in plain sight. An example is presented in *State v. Waldbillig*,[54] where police arrested the defendant and took his automobile to the police station. While driving the automobile, the officer hit a steel object with his foot which later turned out to be a revolver. The revolver was admissible as evidence at the trial even though the search of the car at the police station was too remote in time to the arrest to have been sustained as incident thereto.

Generally, a search which covers too large an area and in which no particular object is sought will be unreasonable.[55] The number of items seized probably has a bearing on the question of whether the search is merely exploratory with no definite object being sought. Therefore in *Kreman v. United States*,[56] the Supreme Court of the United States reversed a conviction which was based on many items of evidence obtained in a general ransack of an entire cabin.

Furthermore, according to federal law, only certain items may be the object of a search. *Boyd v. United States*[57] is the leading case on this subject. The Supreme Court in that case drew a distinction between a search for stolen goods, or goods liable to duties and concealed to avoid payment thereof, and a search for and seizure of a man's private papers for the purpose of obtaining information to be used against him. The Court said, "In one case the government is entitled to the possession of the property; in the other it is not."[58] The Supreme Court has since said that items properly seizable are limited to the following: the instrumentalities and means by which the crime is committed, the fruits of the crime, weapons by which escape of the person arrested might be affected, and contraband.[59] "Mere evidence" may not be seized unless it falls into one of the defined categories. The items which fall within these classes may, if found during an otherwise

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[53] Comment, 25 Ohio St. L.J. 538, 553 (1964).

[54] *Supra* note 38.

[55] See Bock v. Cincinnati, 43 Ohio App. 257, 183 N.E. 119, *appeal dismissed*, 124 Ohio St. 667, 181 N.E. 888 (1931).

[56] 353 U.S. 346 (1957).

[57] 116 U.S. 616 (1886).

[58] *Id.* at 623.

[59] Harris v. United States, 331 U.S. 145 (1947).

reasonable search, be used as evidence in a prosecution even if they are unrelated to the original purpose of the search.[60]

The Ohio statute dealing with search warrants states several items for which a warrant may issue.[61] The enumerated items are said not to affect or modify other laws for search and seizure. Because all of the items listed would be properly seizable in the federal courts, it can be argued that the statute contemplates that the mere evidence rule be followed, and an early Ohio case appears to assume in dicta that such is the rule.[62] But even assuming that the rule applies to searches made pursuant to a warrant, the question could still be undecided as to a warrantless search, and no Ohio case has been found which specifically decides this question.

It is also unclear as to whether the mere evidence rule is a constitutional requirement which is binding on the states. Recently two different states have held the rule to be inapplicable to the states,[63] while another has limited it to apply only to private papers and books, and

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[60] *Ibid.*

[61] Ohio Rev. Code Ann. § 2933.21 (Page 1953):

A judge of the court or a magistrate may, within his jurisdiction, issue warrants to search a house or place:

(A) For property stolen, taken by robbers, embezzled, or obtained under false pretense;

(B) For weapons, implements, tools, instruments, articles or property used as a means of the commission of a crime, or when any of such objects or articles are in the possession of another person with the intent to use them as a means of committing crime;

(C) For forged or counterfeit coins, stamps, imprints, labels, trade-marks, bank bills, or other instruments of writing, and dies, plates, stamps, or brands for making them;

(D) For books, pamphlets, ballads, or printed papers containing obscene language, prints, pictures, or descriptions manifestly tending to corrupt the morals of youth, and for obscene, lewd, indecent or lascivious drawings, lithographs, engravings, pictures, daguerreotypes, film or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition, films or glass slides either in negatives or positive form designed for exhibition by projection on the screen, stereoscopic pictures, models, or casts, and for instruments or articles of indecent or immoral use, or instruments, articles, or medicines for procuring abortions, the preventing of conception, or self-pollution;

(E) For gaming table, establishment, device, or apparatus kept or exhibited for unlawful gaming, or to win or gain money or other property, and for money or property won by unlawful gaming.

The enumeration of certain property and materials in this section shall not affect or modify other laws for search and seizure.

[62] Rosanski v. State, 106 Ohio St. 442, 140 N.E. 370 (1922).

[63] People v. Thayer, — Ca.2d —, 408 P.2d 108, 47 Cal. Rptr. 780 (1965); People v. Carroll, 38 Misc. 2d 630, 238 N.Y.S.2d 640 (Sup. Ct. 1963).

not to tangible objects such as a pair of shoes.[64] Thus tangible objects could be seized even though they did not fit into the recognized types of seizable items.[65] In *People v. Thayer*,[66] Chief Justice Traynor, of the California Supreme Court, stated that although the United States Supreme Court in *Gouled v. United States*[67] purported to rest its holding in favor of the rule on the fourth and fifth amendments, it did not rely on specific constitutional language. Furthermore, the Court could not have known the later significance of basing its decision on the Constitution rather than its supervisory power over the lower federal courts. It was also noted that the rule has been condemned as unsound by most modern writers.[68] It is also extremely arbitrary in that after the search has been made, some items are allowed to be used as evidence at trial while others are rejected as "merely evidence." The restriction does not protect the privacy of the individual by preventing unreasonable searches, but rather prevents the use of certain reliable evidence obtained in an otherwise reasonable search.

Another factor which may affect the reasonableness of a search is the time of day that such search is made. Congress has recognized that searches pursuant to warrants at night should require a greater standard of probable cause than searches conducted during the daytime.[69] In Ohio, it is provided that the "command of the warrant shall be that the search be made in the daytime, unless there is urgent necessity for a search in the night in which case a search in the night may be ordered."[70] The cases construing this provision have generally been procedural,[71] hence, not dealing with the facts

[64] State v. Bisaccia, 45 N.J. 504, 213 A.2d 185 (1965).

[65] It is true that most of the federal cases have involved searches of private books, records, and papers. But some federal courts have applied the rule to tangible physical objects. An example is Morrison v. United States, 262 F.2d 449 (D.C. Cir. 1958), where a bloody handkerchief was held to be mere evidence.

[66] *Supra* note 63.

[67] 255 U.S. 298 (1921).

[68] Kaplan, "Search and Seizure: A No Man's Land in the Criminal Law," 49 Calif. L. Rev. 474 (1961); Traynor, "Mapp v. Ohio At Large in the Fifty States," 1962 Duke L.J. 319, 330-31; Comment, 25 Ohio St. L.J. 538, 557 (1964).

[69] Fed. R. Crim. P. 41(c) provides in part:

> The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or place to be searched, they may direct that it be served anytime.

[70] Ohio Rev. Code Ann. § 2933.24 (Page 1953).

[71] State v. Sabo, 108 Ohio St. 200, 140 N.E. 499 (1923), held that a search actually made in the daytime was not made unlawful by the failure to cross out the words "in the daytime" or "in the nighttime," from the warrant; Kovacs v. State, 24 Ohio N.P. (n.s.) 1 (C.P. 1921) held that a search must be made in the daytime unless otherwise specified.

necessary to show a need for a night search. However, an early case said that it must be shown that it would be *impossible* to serve the warrant in the daytime before a night search warrant could be issued.[72]

Whatever the standard, it is clear that at least with respect to searches pursuant to warrants, something more must be shown to justify a search made at night than one made during the day. Whether this reasoning is constitutional doctrine and therefore applicable to warrantless searches is not clear. In a recent Supreme Court case[73] involving a search incident to an arrest made at night, the Court did not discuss time as a factor in upholding the search, and similar cases may be found in Ohio.[74] However, it is obvious that a night search involves a greater invasion of privacy, thus indicating that time should be a factor in determining the reasonableness of a search regardless of whether or not the search is made pursuant to a warrant.

Also, the place of the search is a factor which tends to establish its reasonableness. The Constitution of Ohio preserves to the people the right "to be secure in their persons, houses, papers, and possessions against unreasonable searches and seizure," and the fourth amendment to the Constitution of the United States is similarly worded. Searches of the defendant's automobile,[75] garage in the rear of his home,[76] club of which he is a member,[77] office,[78] and apartment or hotel[79] have all been held to be within the privilege. Some federal courts have held that buildings outside the curtilage are not within the constitutional protection,[80] nor is a large pasture area,[81] even if owned by the defendant. These cases are difficult to justify on the language of the constitutional provisions creating the right to be free from search and seizure. The fourth amendment says that the right shall enable the people to be secure in their "persons, houses, papers, and effects," while the Ohio Constitution uses the word "possessions." A literal reading of these provisions indicates that all possessions of the individual should be

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72 Columbus v. Buehler, 23 Ohio N.P. (n.s.) 589 (Munic. Ct. Columbus 1921).

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

74 Dixon v. Maxwell, 177 Ohio St. 20, 201 N.E.2d 592 (1964); State v. Smith, 29 Ohio Op. 2d 437, 202 N.E.2d 215 (C.P. 1964).

75 State v. Rogers, 27 Ohio Op. 2d 105, 198 N.E.2d 796 (C.P. 1963).

76 Antoszewski v. State, 5 Ohio Op. 264, 31 N.E.2d 881 (Ct. App. 1936).

77 State v. Cooper, 28 Ohio Op. 2d 361, 196 N.E.2d 160 (Munic. Ct. Bellefontaine 1963).

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

79 Saulsbury v. Green, 175 Ohio St. 433, 195 N.E.2d 787, *cert. denied*, 377 U.S. 912 (1964); State v. Keeling, 182 N.E.2d 60 (Ohio C.P. 1962).

80 Brock v. United States, 256 F.2d 55 (5th Cir. 1958); Hodges v. United States, 243 F.2d 281 (5th Cir. 1957).

81 Hodges v. United States, *supra* note 80.

within the privilege even though certain items are of a more private nature. If this reading were adopted, searches of the more private possessions could be subject to greater safeguards. This view is supported by the cases, discussed later in detail, holding that a warrantless search may be made of an automobile upon probable cause,[82] while such a search generally may not be made of a private dwelling.[83]

B. *Consent*

A search made with the consent of the defendant is not unreasonable, because the privilege is for his own protection. But if a consent is given for reasons which are unacceptable to the courts, such as coercion, such consent is not effective and the evidence obtained is inadmissible. The difficult problem is to determine the meaning of coercion. Obviously it does not mean that the consenter must desire the officer to make the search upon his premises, as few people would ever be deemed to have effectively consented. On the other hand, the consent should be freely and intelligently given since the courts may indulge in reasonable presumptions against waiver of constitutional rights.[84] The Ohio Supreme Court has held that a consent is not effective under circumstances indicating it was given in submission to authority.[85] However, where the defendant confesses and then allows the police to search,[86] or assists them in such search, the consent is said to be effective.[87] In *State v. Lett*[88] officers went to defendant's apartment on information that he had been having parties and possessed a number of obscene pictures. The door to the apartment was open and the defendant was seated in the kitchen. After being admitted, the officers disclosed the nature of their business, to which the defendant replied, "Well, there's nothing here. You can feel free to look around; help yourself." During the search, the police requested

82 South Euclid v. Pallidino, 28 Ohio Op. 2d 280, 193 N.E.2d 560 (Munic. Ct. South Euclid 1963).

83 State v. Vuin, 89 Ohio L. Abs. 193, 185 N.E.2d 506 (C.P. 1962).

84 Wion v. United States, 325 F.2d 420, 423 (10th Cir. 1963); United States v. Page, 302 F.2d 81, 84 (9th Cir. 1963); State v. Lindway, 131 Ohio St. 166, 2 N.E.2d 490, *cert. denied*, 299 U.S. 506 (1936). See also Nagle v. Cleveland, 10 Ohio L. Abs. 539 (Ct. App. 1930), *rev'd on other grounds*, 124 Ohio St. 59, 176 N.E. 886 (1931), where it was held that the mere lack of objection to a search by police was not an effective consent.

85 State v. Lindway, 131 Ohio St. 166, 2 N.E.2d 490, *cert. denied*, 299 U.S. 506 (1936).

86 Gilmore v. State, 15 Ohio App. 432 (1921).

87 United States v. Smith, 308 F.2d 657 (2d Cir. 1962) (dictum), *cert. denied*, 372 U.S. 906 (1963); United States v. MacLeod, 207 F.2d 853, 856 (7th Cir. 1953) (dictum); Carmosino v. State, 6 Ohio L. Abs. 688 (Ct. App. 1928).

88 114 Ohio App. 414, 178 N.E.2d 96 (1961).

the defendant to unlock a closet, which he did, and a small bank night deposit pouch was found. As the officers began to inspect the pouch, which contained obscene photographs, the defendant said, "do you have a search warrant?" On these facts the court determined that the defendant voluntarily and expressly invited and agreed to a search. The very short opinion should not be read to say that a consent once given cannot be revoked, since this finds no support in the law. Rather the court said that the question asked by the defendant regarding a search warrant did not constitute such a revocation but was merely a recognition of his right to be free from search. Arguably the defendant consented under at least some degree of coercion since the officers were uniformed and did not inform the defendant of his right not to consent to the search. However, this is a matter of degree. Too restricted a view of consent would have the undesirable result of making all consents ineffective and should therefore be avoided.

Two cases decided recently in the Ohio Supreme Court indicate an inconsistency as to the quantum of coercion necessary to make a consent ineffective. In *O'Bannon v. Haskins*,[89] petitioner was convicted for concealing stolen property. Police had previously asked petitioner whether he had purchased some tires. When he indicated that he had, they told him to remove them from his car and put them away. This he did, storing them in his basement. On the occasion of the search, the police came to petitioner's home and asked him where the tires were, to which he replied that they were in the basement. The police proceeded to the basement and seized the tires. The court held that the seizure was made with the consent of the petitioner. From the facts as reported, it is difficult to justify this result. It would seem that in view of the officers' prior contact with the petitioner, he was left with no real alternative but to allow the search. In contrast, the United States Supreme Court has held that when officers identified themselves prior to entry and said, "I want to talk to you a little bit," entry was granted in submission to authority rather than pursuant to an understanding and intentional waiver of a constitutional right.[90]

In defense of the Ohio Court, it should be noted that *O'Bannon* was a habeas corpus case. The court has been reluctant to grant habeas corpus in search and seizure cases[91] or other cases involving errors which do not pertain to the jurisdiction of the court.[92] This fact helps

89 1 Ohio St. 2d 110, 205 N.E.2d 16 (1965).

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

91 See Poe v. Maxwell, 177 Ohio St. 28, 201 N.E.2d 703 (1964); Dixon v. Maxwell, 177 Ohio St. 20, 201 N.E.2d 592 (1964).

92 Note, 26 Ohio St. L.J. 496 (1965).

to explain the apparently conflicting result reached in *Lakewood v. Smith*.[93] There the officers knocked upon the door of defendant's home, and when he answered, they stated their desire to enter and ask some questions. After entering, the officers observed a "consensus sheet," a scratch pad, lead pencils and a daily racing form. Shortly thereafter, the telephone rang and one of the officers answered. The person calling tried to make a bet on a horse with the officer. The officer then dared defendant to empty his pockets. He did empty one but refused to empty the other. At that point the defendant was placed under arrest "on suspicion that the evidence is in that pocket," and the police forcibly examined the other pocket, finding betting slips. The court held the entrance into the apartment to be illegal since it was acquiesced in only in submission to the authority of the police officers, rather than a conscious waiver. Thus, the answering of the phone was a trespass and an invasion of defendant's privacy. Furthermore, it was held that without the information obtained from the telephone call, the arrest and search incidental thereto were made without probable cause. Finally it was held that even though the defendant emptied one pocket, the officer was not justified in forcibly searching the other. In so doing the court followed a federal case which held that a consent to a search of a portion of one's premises is not a consent to search the whole premises.[94]

Especially troubling are the problems involved in effective consent to entry, as indicated by the facts of *Lakewood*. Questions arise as to the identity of the person seeking entry. For example, the defendant may invite an officer to enter without being aware of his identity. In Illinois it has been held that the police must disclose their identity and the nature of the visit before entry.[95] However, in a related but not identical situation, the Supreme Court of the United States in *Ker v. California*[96] held an arrest which is otherwise lawful is not made unlawful by the officer's failure to give notice. Furthermore, in *On Lee v. United States*[97] an old acquaintance of defendant, who was a police officer, entered the suspect's place of business, without revealing his occupation, and recorded the ensuing conversation with a microphone concealed on his person. The evidence thereby obtained was held to be admissible. The Court distinguished the cases which had held that there was no consent where entry was effected by affirmatively fraudu-

93 1 Ohio St. 2d 128, 205 N.E.2d 16 (1965).
94 Strong v. United States, 46 F.2d 257 (1st Cir. 1931).
95 People v. Dent, 371 Ill. 33, 19 N.E.2d 1020 (1939).
96 374 U.S. 23 (1963).
97 343 U.S. 747 (1952).

lent action.[98] Thus, the implication is that where no affirmative deceit exists, the evidence is admissible, as where the defendant invites the officers in without knowing their identity.

A further problem suggested by the facts of some cases is whether the consent must be made with knowledge of the right to refuse permission to search. It has been suggested that police officers seeking consents to search should be required to inform the suspects of such rights,[99] but no Ohio or federal cases have been found which make such a requirement.

The question sometimes arises as to who may consent to a search. The leading federal case on this point is *Stoner v. California*.[100] A hotel clerk allowed the police to search a guest's room, in which were found articles like those associated with a recent crime. It was held that the clerk could not consent to the search even though he may have had "apparent authority" according to agency principles. Consent was said to depend on the actual authority of the night clerk. Recently *Stoner* was followed by the Ohio Supreme Court in *State v. Bernius*,[101] where the person to whom defendant loaned his car consented to a search of the car. Such consent was held to be ineffective, despite an earlier contrary ruling by the fourth circuit,[102] because there was no express consent of the owner. Although the case involved a bailee giving his consent rather than a hotel clerk, as in *Stoner*, the court felt that agency concepts, *i.e.*, apparent authority, could not be used to find consent.

Despite the absolute language found in *Stoner*, the lower federal courts hold that where third persons have a sufficient level of control over the premises to be searched, they can make an effective consent. A wife has been held to be able to make an effective consent,[103] as has a co-tenant,[104] a partner,[105] or the parent of an adult child living in the father's house.[106] In *Chapman v. United States*[107] a landlord's con-

98 United States v. Jeffers, 342 U.S. 48 (1951); Gouled v. United States, 255 U.S. 298 (1921). In Gatewood v. United States, 209 F.2d 789 (D.C. Cir. 1953), an entry was held unlawful where the officer stated: "From Western Union."

99 Comment, 113 U. Pa. L. Rev. 260, 268 (1964).

100 376 U.S. 483 (1964).

101 177 Ohio St. 155, 203 N.E.2d 241 (1964).

102 United States v. Eldridge, 302 F.2d 463 (4th Cir. 1962). In *Eldridge* the court termed the consenter a bailee who had sufficient interest in the goods to consent.

103 Stein v. United States, 166 F.2d 851 (9th Cir.), *cert. denied*, 344 U.S. 844 (1948); United States v. Sergio, 21 F. Supp. 553 (E.D.N.Y. 1937).

104 United States v. Goodman, 190 F. Supp. 847 (N.D. Ill. 1961).

105 United States v. Sferas, 210 F.2d 69 (7th Cir.), *cert. denied*, Skally v. United States, 347 U.S. 935 (1954).

106 State v. Kinderman, — Minn. —, 136 N.W.2d 577 (1965).

107 365 U.S. 610 (1961).

sent was not effective to permit a search of the tenant's premises, because under state law the landlord could not have entered to search for distilling equipment. However, in the recent case of *Burge v. United States*[108] it was held that when defendant was a guest in a rented apartment, the lessee could effectively consent to a search of defendant's room.[109] While at first these cases may seem inconsistent, the consenter in *Burge* had the right to be in the apartment since it was leased in her name. The amount of control which she could exercise over the premises was more substantial than the landlord in *Chapman*.

Burge illustrates another problem involved where a third party consents. The consent was given while the consenter was herself in jail. This fact indicates that the consent may have been given under coercion.[110] Although the court did not discuss this point, the better view would be that the consent given by the third party must also be free of coercion.[111]

The case has one further significance in that it was decided after the Supreme Court's decision in *Stoner*, thus indicating that *Stoner* should be read to reject the theory of apparent authority to consent, but not as rejecting all cases involving third party consent.[112] Therefore the Ohio Supreme Court's decision in *Bernius*, discussed above, could be incorrect. Instead of holding the consent to be ineffective because there can be no apparent authority to consent, citing *Stoner*, the court should have determined whether or not a bailee of an automobile has sufficient control over the property to consent to a search. The facts in *Bernius* are quite dissimilar to the facts in *Stoner*, where a hotel clerk gave permission to search defendant's room, there being no question that the clerk lacked the requisite control over the room.

IV. Fruits of an Illegal Search

The exclusionary rule requires that no evidence be admitted which was obtained because of an unlawful search and seizure. This prohibition relates not only to evidence secured during the search, but also to evidence discovered which is the "fruit of an illegal search." One example of the tainting of evidence because of a prior illegal search is the situation where the information obtained in the search is later used

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108 342 F.2d 408 (9th Cir. 1965).

109 A similar ruling was made in Woodard v. United States, 254 F.2d 312 (D.C. Cir.), *cert. denied*, 357 U.S. 930 (1958).

110 Channel v. United States, 285 F.2d 217 (9th Cir. 1960).

111 Roberts v. United States, 332 F.2d 892 (8th Cir. 1964).

112 This reading has been given to *Stoner* by other writers. See Note, 12 U.C.L.A.L. Rev. 614 (1965); Comment, 113 U. Pa. L. Rev. 260, 272 (1965).

to supply probable cause for an arrest or search. This use of the information has been declared illegal.[113] In *Lakewood v. Smith*,[114] officers entered defendant's residence without probable cause or the consent of the defendant. Since the entry was illegal, a telephone call which the police took while in the residence was inadmissible, and moreover the information gained was not considered by the court as contributing to probable cause for a subsequent arrest of defendant.

Not all evidence obtained through illegal searches becomes "sacred and inaccessible."[115] Generally, some sort of cause requirement is imposed on its admissibiilty. Thus, in *Silverthorne Lumber Co. v. United States*,[116] the Supreme Court of the United States stated that it is necessary for the prosecution to prove that the evidence had a source independent of the unlawful act. Therefore, the evidence is admissible if the knowledge of it would have been gained regardless of the unlawful search. It has been said that if the illegal act is the indispensable or sole cause of the discovery of the evidence, the exclusionary rule applies.[117] In *State v. Rogers*,[118] officers arrested defendant and searched his automobile without probable cause. A passenger in the car was questioned and said that the gun was in the possession of the defendant. The motion to suppress sought to render the testimony of the passenger at the trial inadmissible. The court granted the motion seemingly on a "but for" test. Presumably, if the prosecution could have learned of the witness through some other means, independent of the search, such testimony would have been admissible even though such passenger was present during the search.

The fourth amendment principle of exclusion has also had an impact on the admissibility of confessions. The leading federal case is *Wong Sun v. United States*,[119] where federal agents broke into the house of petitioner without probable cause. While in his bedroom, petitioner was interrogated, and thereafter he led the agents to narcotics. Several days later he was again interrogated and made incriminating statements. The Supreme Court reversed the conviction because of the admission of the narcotics, and of the statements made in the bedroom. There has been some disagreement as to the impact of

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113 McGinnis v. United States, 227 F.2d 598 (1st Cir. 1955).

114 *Supra* note 93.

115 Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

116 *Ibid.*

117 Maguire, "How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule," 55 J. Crim. L., C. & P.S. 307, 313 (1964). See Monroe v. United States, 234 F.2d 49 (D.C. Cir.), *cert. denied*, 352 U.S. 893 (1956); Warren v. Hawaii, 119 F.2d 936 (9th Cir. 1941).

118 27 Ohio Op. 2d 105, 198 N.E.2d 796 (C.P. 1963).

119 371 U.S. 471 (1963).

Wong Sun.[120] One view is that the test of inadmissibility depends on the confession's being "involuntary." Thus even if the confession is made after an illegal arrest or search, it is admissible if there was no coercion.[121] Other courts have held confessions to be inadmissible merely because they followed an illegal search.[122] This seems to be an unsatisfactory solution, since it is not difficult to conceive of a situation where the defendant would have confessed regardless of the unlawful search or arrest. The better view would make the causal connection between the illegal act and the confession the crucial factor. If the confession relates directly to the possession of goods found during an illegal search, or to the offense for which the suspect was illegally arrested, there would be little problem in determining that the illegal act caused the confession. But where the two are unrelated, and the confession is otherwise voluntary, the confession should be admissible.

The *Wong Sun* doctrine is applicable to the states through the fourteenth amendment.[123] There are, however, no Ohio cases dealing with precisely the same problem.[124] In *State v. Davis*,[125] a search was made of defendant's home without a warrant, and stolen property was found. When shown the property, defendant admitted the robbery and made a written confession. Apparently no objection was made to the use of the confession as the fruits of an illegal search. The Ohio Supreme Court held the confession admissible because there was no evidence to support the conclusion that it was not a voluntary statement. However, if the question had been properly raised, the court may have held the confession inadmissible since it probably would not have been obtained absent the illegal search.[126]

V. Problems Involved in Specific Classes of Cases

A. *Searches Pursuant to Warrant*

In Ohio, searches pursuant to a warrant are governed by the criminal code. Section 2933.21 deals generally with the property for

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120 *Wong Sun* and the cases construing it are discussed in Herman, "The Supreme Court and Restrictions on Police Interrogation," 25 Ohio St. L.J. 449, 460 (1964).

121 See Hollingsworth v. United States, 321 F.2d 342 (10th Cir. 1963).

122 United States v. Marrese, 336 F.2d 501 (3d Cir. 1964); Gatlin v. United States, 326 F.2d 666 (D.C. Cir. 1963).

123 Traub v. Connecticut, 374 U.S. 493 (1963); Herman, *supra* note 120, at 459.

124 In Akron v. Williams, 175 Ohio St. 186, 192 N.E.2d 63 (1963), the Ohio Supreme Court held that a confession did not make a prior search lawful, but did not discuss the admissibility of the confession itself.

125 1 Ohio St. 2d 28, 203 N.E.2d 357 (1964).

126 Although the court held the search to be illegal, the property was admitted into evidence because a motion to suppress such evidence was not made prior to the trial.

which a search warrant may be issued.[127] Searches may be made of a "house or place." Presumably the term "place" contemplates all locations other than a home. Also the code provides that a search warrant shall issue only upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the property and things to be seized.[128]

Former Ohio law held that the affiant determined whether or not there was probable cause for the search. The warrant would issue upon his filing an affidavit stating that he "believed and had good cause to believe" there was a concealment of property in connection with a crime.[129] Since the warrant issued as a matter of right, its issuance was merely a ministerial transaction which the clerk of court could perform.[130] Presently however, the statute provides that only a judge or magistrate may issue the warrant, and it is clear that he must be satisfied that probable cause exists for the search.[131] The discretion rests with the judge and not the officer, and the judge may demand further evidence before issuing the warrant.

The procedural requirements concerning the affidavit for a search warrant, and the contents and form of the warrant itself, are spelled out specifically in the statute. A warrant shall not issue unless there is filed with the judge or magistrate an affidavit, which "describe[s] the house or place to be searched, the person to be seized, the things to be searched for and seized, and [alleges] . . . substantially the offense in relation thereto. . . ."[132] Not only must the affiant allege that he believes and has good cause to believe that the items for which the search is to be made are concealed therein, but he must also state the facts upon which such belief is based.[133] In *Aguilar v. Texas*,[134] the Supreme Court of the United States raised this principle to the level of constitutional doctrine. The affidavit in that case gave as its fact basis,

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127 The forms of property enumerated within this section include all forms of: (a) stolen property, (b) weapons, and tools used to commit crimes, (c) forged or counterfeited documents and instruments, (d) obscene and immoral articles, and (e) gambling operations. This statute is similar to the federal statute, Fed. R. Crim. P. 41(b). Also there is little doubt that these items may be searched for and seized under federal law, assuming such search to be reasonable and made upon probable cause.

128 Ohio Rev. Code Ann. § 2933.22 (Page 1953).

129 Rosanski v. State, 106 Ohio St. 442, 140 N.E. 370 (1922).

130 *Id.* at 451, 140 N.E. at 372.

131 Ohio Rev. Code Ann. § 2933.23 (Page Supp. 1965).

132 Ohio Rev. Code Ann. § 2933.23 (Page Supp. 1965).

133 Akron v. Williams, 175 Ohio St. 186, 192 N.E. 63 (1963); State v. Bartlett, 119 Ohio App. 483, 200 N.E.2d 660 (1964); State v. Watson, 117 Ohio App. 333, 192 N.E.2d 253 (1962).

134 378 U.S. 108 (1964).

"affiants have received reliable information from a credible person and do believe that heroin, marijuana . . . are being kept at the above described premises. . . ."[135] Such statement was held to be merely a conclusion rather than facts upon which the judge could base a decision about probable cause.

A further refinement of this doctrine was made in *United States v. Ventresca*,[136] where the affidavit was submitted to a United States Commissioner by an investigator for the Internal Revenue Service, stating that he had good reason to believe that an illegal distillery was in operation in Ventresca's house. The grounds for his belief were set forth in the affidavit, prefaced by the following statement:

> Based upon observations made by me, and based upon information received officially from other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of their observations and investigation, this request for the issuance of a search warrant is made.[137]

The basis of the objection was that the affidavit did not state that the officers had personal knowledge of the facts which were set out in detail therein. The court of appeals, though recognizing that an officer may rely on statements made by fellow officers to establish probable cause, held that nothing in the affidavit showed that the investigators from whom the affiant received his information had first hand knowledge of the facts stated, and therefore the affidavit was insufficient.[138] The Supreme Court reversed, holding that by reading the affidavit in a common-sense manner, rather than technical, it was obvious that insofar as the facts stated were not within the personal knowledge of the affiant, they were based on the observations of the fellow investigators. Thus, although the facts must be stated in detail in the affidavit, the courts will not give it an unduly technical and restrictive meaning.

The question of whether the affidavit must disclose the names of informers will be discussed later. Suffice it to say here that the state may find it necessary to make the disclosure in order to convince the judge or magistrate that his information has been properly corroborated.[139]

The search warrant must contain all the material facts alleged in the affidavit, and must describe the things to be searched for, the

135 *Id.* at 109.

136 380 U.S. 102 (1965).

137 *Id.* at 113.

138 Ventresca v. United States, 324 F.2d 864 (1st Cir. 1963).

139 State v. Bartlett, *supra* note 133.

house or place to be searched, and the person to be searched and seized.[140] It has been said that the house to be searched need only be described sufficiently for the officers to locate it on the basis of such description,[141] and that a person can be described sufficiently by using means other than his name.[142] There appears to be a practice among the courts of Ohio to issue search warrants naming "John Doe" as the "person to be seized."[143] This practice was questioned in *State v. Young*,[144] where Emerson Young and others had been seen going in and out of a building where a "numbers ticket" operation was suspected of being located. When the police obtained the warrant, John Doe, rather than Emerson Young, was named as the person to be seized. Upon entering the house, police found Young talking on the telephone, and arrested him and searched his person. The court, in a rather confusing opinion, held both the arrest and search to be proper because, "Here there was a warrant against one 'John Doe' who, in this instance, happened to be Emerson Young."[145] There seems to be little to indicate that the legislature meant this section to serve as a provision for the issuance of warrants to arrest, as well as to search, since arrests are governed by a different section of the code. However, assuming the arrest was reasonable and made upon probable cause, such a reading of the statute probably will not create constitutional problems.

A recent common pleas decision[146] indicates an unreasonable preoccupation with the technicalities of the procedural search warrant statutes. The affidavit stated all the facts upon which the officers based their belief that probable cause existed, and the warrant was issued. However the order of execution on the warrant was not signed by the issuing judge. The court held that the warrant was void for failure to comply with the applicable statute,[147] providing for the form of a search warrant. The court reasoned that search warrants are creatures of statute and accordingly the form and contents must be strictly construed. This is, of course, not a constitutionally required formality. The judge decided that probable cause existed upon facts placed before

140 Ohio Rev. Code Ann. § 2933.24 (Page Supp. 1965).

141 Cincinnati v. Bush, 24 Ohio N.P. (n.s.) 81 (Munic. Ct. Cincinnati 1922).

142 Kovacs v. State, 24 Ohio N.P. (n.s.) 1 (C.P. 1922).

143 See, *e.g.*, Akron v. Williams, *supra* note 133; State v. Young, 91 Ohio L. Abs. 21, 185 N.E.2d 33 (1962), *appeal dismissed*, 174 Ohio St. 329 (1963); Kovacs v. State, *supra* note 142.

144 *Supra* note 143.

145 State v. Young, *supra* note 143, at 25, 185 N.E.2d at 36.

146 State v. Vuin, 89 Ohio L. Abs. 193, 185 N.E.2d 506 (C.P. 1962).

147 Ohio Rev. Code Ann. § 2933.25 (Page Supp. 1965).

him by affidavits sufficient under both the statute and the constitution. Furthermore, it is doubtful that such a decision was made necessary by prior case law. The Ohio Supreme Court had said, in an earlier case, that an error in the form of a search warrant which was "purely technical" would not invalidate an otherwise valid warrant.[148] The procedure of the search warrant statutes should be followed by the courts and the police in order to carry out the policy of the statutes. But there is not enough danger of harm resulting from a failure to follow this particular procedure to warrant the exclusion of valid evidence which is relevant to the issues of the case. On the other hand, the requirement of setting forth in the affidavit all the facts, so that the magistrate may determine probable cause, is a very important provision which the courts will enforce strictly.

B. *Search Incident to Arrest*

The general rule, subject to some exceptions, is that a search may not be made without a warrant. One exception is that a search incident to a lawful arrest will, under certain circumstances, be sustained.[149] The basic roots of this doctrine lie in necessity, its purposes being to protect the arresting officer and to deprive the arrested prisoner of a potential means of escape through the use of weapons, and to avoid destruction of evidence by the arrested person.[150] The fact that evidence of an additional crime is discovered during the search does not make it illegal, nor does it prevent prosecution for such additional offense.[151]

From the purposes, it necessarily follows that officers may seize not only things physically on the person arrested, but those within his immediate control.[152] The area within defendant's control has been construed by the Supreme Court of the United States to include de-

148 State v. Sabo, 108 Ohio St. 200, 140 N.E. 499 (1923). The phrase in the warrant, "in the nighttime" was not stricken from the warrant, thus appearing to give the officers the authority to search at night. However, the words were deleted in the affidavit, and the search was in fact made in the daytime. See also Frederich v. State, 1 Ohio L. Abs. 553 (Ct. App. 1923), where a variance in the affidavit of 51st to 50th Street where the liquor was actually found was not of sufficient importance to overturn a conviction.

149 *E.g.*, Marron v. United States, 275 U.S. 192 (1927); Weeks v. United States, 232 U.S. 383 (1914); Dixon v. Maxwell, 177 Ohio St. 20, 201 N.E.2d 529 (1964); Saulsbury v. Green, 175 Ohio St. 433, 195 N.E.2d 787, *cert. denied*, 377 U.S. 912 (1964); State v. Beck, 175 Ohio St. 73, 191 N.E.2d 825 (1963), *rev'd on other grounds*, 379 U.S. 89 (1964); Williams v. Eckle, 173 Ohio St. 410, 183 N.E.2d 365 (1962).

150 United States v. Rabinowitz, 339 U.S. 56 (1950) (Mr. Justice Frankfurter dissenting).

151 Williams v. Eckle, *supra* note 149; State v. Hatfield, 1 Ohio App. 2d 346, 204 N.E.2d 574 (1965).

152 Harris v. United States, 331 U.S. 145 (1947); Williams v. Eckle, *supra* note 149.

fendant's entire house.[153] These cases, however, appear to go beyond the rule of necessity. Another example of this is *United States v. Rabinowitz*,[154] where police officers arrested defendant in his office, and over his objection, searched the desk, safe, and file cabinets for about an hour and a half, finding and seizing evidence which was later used against him at trial. The Court held that even if the officers had time to procure a search warrant, they were not bound to do so. The arrest was valid, and the search was confined to the area within the control of the defendant; thus the evidence was admissible. In his dissent, Mr. Justice Frankfurter contended that the purposes of the rule did not require this result. There was no danger that the evidence would be destroyed or that the safety of the officers was in jeopardy. Therefore, there was no reason to make an exception to the requirement that an independent magistrate determine the existence of probable cause.[155]

Several recent cases indicate a weakening of the *Rabinowitz* doctrine in favor of encouraging officers to obtain search warrants. In *Aguilar v. Texas*,[156] Mr. Justice Goldberg, in holding an affidavit for a search warrant to be insufficient, said that where a search is based on the magistrate's determination of probable cause, rather than that of the officer, the reviewing court will accept evidence of a less judicially competent or persuasive character to sustain such search.[157] Also in a similar case, the same Justice noted that "doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."[158]

Further limiting the *Rabinowitz* doctrine is the recent Supreme Court case of *Preston v. United States*.[159] After the defendant had been arrested and booked at the police station, the officers returned to the automobile in which he had been seated at the time of the arrest. There they found two loaded revolvers in the glove compartment. The Court held that the search was too remote in time and place to the arrest to be incident thereto. At this point there was no danger that any

153 Ker v. California, 374 U.S. 23 (1963); Harris v. United States, *supra* note 152. *But see* Kremen v. United States, 353 U.S. 346 (1957), where the court held a search of the defendant's entire cabin to be unreasonable. However, an additional factor in this case was that many items had been taken, indicating a general ransack with no particular item being the object of the search.

154 *Supra* note 150.

155 *Supra* note 154 (dissenting opinion).

156 *Supra* note 134.

157 *Id.* at 111.

158 United States v. Ventresca, *supra* note 136, at 109.

159 376 U.S. 364 (1964).

of the men arrested could have used any of the weapons in the car or have destroyed any of the evidence.

Preston has been followed in Ohio under similar facts on several occasions.[160] The most interesting of these cases is *State v. Waldbillig*,[161] where defendant and four other occupants of a car were arrested and searched. At that time, a machete knife on the floor of the back seat was clearly visible from outside the vehicle, and was seized by the arresting officer. Thereafter, defendant and his companions, as well as the automobile, were taken to the police station. After reaching the station, the car was searched with the result that several other incriminating items were found, including some "homemade knuckles." Defendant's motion to suppress as evidence all the items found in the car was overruled, and he was convicted of concealing dangerous weapons. The Ohio Supreme Court determined that the evidence discovered during the search at the police station was inadmissible on the authority of *Preston*. However, the machete knife was not found as a result of an illegal search since it was clearly visible at the time of the arrest, and was seized at that time. This is clearly within the purposes of the search incident to arrest exception. Where the knife was visible on the back seat of the automobile, the officers were justified in seizing it for their own safety. However, after the defendant had been arrested and taken into custody, there was no justifiable reason for searching the automobile without first securing a search warrant.

C. *Search Without a Warrant*

Absent a valid arrest, a search without a warrant is usually held to be illegal even if made upon probable cause. An exception to this generalization is that where the search is made of a vehicle which has been stopped, it may under certain circumstances be upheld. This exception was first applied to cases decided under the National Prohibition Act and revenue statutes, where it was held that searches of automobiles prior to arrest were justified when the officers had probable cause to believe that intoxicating liquor was being transported therein.[162] The justification was that goods in the course of transportation could be concealed in a movable vessel where they were out of the reach of a warrant.

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[160] State v. Davis, 1 Ohio St. 2d 28, 203 N.E.2d 357 (1964); State v. Waldbillig, 1 Ohio St. 2d 50, 203 N.E.2d 361 (1964); State v. Bernius, 177 Ohio St. 155, 203 N.E.2d 241 (1964).

[161] *Supra* note 160.

[162] Brinegar v. United States, 338 U.S. 160 (1949); Husty v. United States, 282 U.S. 694 (1931); Carroll v. United States, 267 U.S. 132 (1925).

The Ohio Supreme Court reached this result in *Hauck v. State*.[163] A town marshall had information that defendant was engaged in bootlegging. One evening he observed defendant's automobile parked on the street, and without a search warrant examined the car finding whiskey concealed in violation of the law. The court held that the marshall acted in good faith and on information which he believed to be true, thus he could lawfully search the automobile without first obtaining a warrant. While the *Hauck* case was decided under a statute authorizing officers who discover persons unlawfully transporting intoxicating liquor in a vehicle to seize the liquor and arrest the person in charge thereof, other cases have allowed warrantless searches of an automobile where no such provision exists, and the exception now seems to be firmly established.[164]

One troublesome aspect of the Ohio cases involving searches of automobiles without a warrant is the language in *Hauck*, which is often cited, stating that a search under circumstances in which the police officers acted "in good faith and upon such information as induces the honest belief that the person in charge of the automobile is in the act of violating the law," is valid.[165] If this language means that mere suspicion plus the good faith of the officer is sufficient to justify an arrest or search, it is clearly incorrect by constitutional standards which require probable cause to be found. However, it is clear that the Ohio cases do not follow this language, and at least one recent case has specifically rejected it as no longer the law.[166]

Although the courts will sustain a search without a warrant of an automobile, they usually will not, except in an emergency, sustain such a search of a private dwelling. The dominant theme of the cases involving a search of a home is the protection of the right of privacy. Thus the Ohio courts have held that a search made pursuant to an invalid warrant may not be upheld even though there may have been probable cause to believe the items were concealed in the house.[167]

In *State v. Keeling*,[168] police entered the stairway of the apart-

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163 106 Ohio St. 195, 140 N.E. 112 (1922).

164 Porello v. State, 121 Ohio St. 280, 168 N.E. 135 (1929); State v. Coleman, 91 Ohio L. Abs. 191, 186 N.E.2d 93 (Ct. App. 1962), *appeal dismissed*, 174 Ohio St. 574 (1963); South Euclid v. Pallidino, 28 Ohio Op. 2d 280, 193 N.E.2d 560 (Munic. Ct. South Euclid 1963); State v. Rogers, 27 Ohio Op. 2d 105, 198 N.E.2d 796 (C.P. 1963).

165 Hauck v. State, *supra* note 163, syllabus 2; *cited in* Porello v. State, *supra* note 164, and 48 Ohio Jur. 2d *Search and Seizure* § 10 (1961).

166 State v. Rogers, *supra* note 164.

167 Nicholas v. Cleveland, 125 Ohio St. 474, 182 N.E. 26 (1932); State v. Vuin, 89 Ohio L. Abs. 193, 185 N.E.2d 506 (C.P. 1962).

168 182 N.E.2d 60 (Ohio C.P. 1960).

ment building where defendant resided on a suspicion that a numbers game was being conducted in the building. Inside the building the police heard the sound of an adding machine emanating from defendant's apartment, and forceably entered without a warrant. The state sought to justify the entry, claiming that the police had reasonable grounds to believe a crime was being committed and all evidence of crime would be destroyed unless the police moved quickly. The court observed that there was ample time for the police to obtain a search warrant from one of the several judges whose offices were only eight to ten minutes away from the scene. It is interesting to compare this case to the decision of the United States Supreme Court in *Rabinowitz*,[169] discussed above, where it was held that in a search incident to an arrest, the practicability of obtaining a search warrant is not a factor in determining reasonableness. *Keeling* indicates an increased awareness on the part of the courts in the last few years of the desirability of requiring a warrant to be issued whenever practicable.

The federal courts are similarly reluctant to uphold a search without a warrant which is not incident to, but the cause of, an arrest.[170] An example is the Supreme Court case of *Jones v. United States*,[171] where the officers proceeded to defendant's house, armed with a daytime search warrant, but did not exercise it immediately. After dark a truck drove into the yard in view of the agents and became stuck. The agents arrested the occupants of the truck and seized 413 gallons of non-taxpaid whiskey. Defendant was arrested when he returned about an hour after a search of his house had been completed. It was conceded that the daytime search warrant had expired, but the motion to suppress was denied on the theory that there was probable cause for the search of the dwelling. On appeal, it was contended that the officers had authority to enter the house to make an *arrest*, and while they were searching for the suspect, they could seize all contraband in plain sight. However, the Supreme Court felt that the real purpose of entering the home was to make a search and not to arrest, and that such search could not be made without a valid warrant.[172]

Where there is probable cause for both an arrest and a search, many courts will sustain the search even if it technically precedes the

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169 *Supra* note 150, at 64.

170 See Steeber v. United States, 198 F.2d 615 (10th Cir. 1952); Walker v. United States, 125 F.2d 394 (5th Cir. 1942); United States v. Novero, 58 F. Supp. 275 (D.C. Mo. 1944).

171 357 U.S. 493 (1958).

172 Similar rulings have been made by the Court on other occasions. Chapman v. United States, 365 U.S. 610 (1961); Johnson v. United States, 333 U.S. 10 (1948).

arrest. In a recent federal case,[173] petitioner in a habeas corpus case admitted while being questioned in her home that she had burned her baby and placed it in the furnace. The police immediately, without announcing her arrest, proceeded to the basement and discovered the body. The court held that the search without a warrant was justified, noting that the fact that the search precedes the formal arrest is immaterial when the arrest and search are nearly simultaneous. It should be noted that even under these circumstances, the police could have arrested the woman without a warrant, as permitted by the law of arrest,[174] and come back later with a warrant to search for the body. However, during the extra time it would have taken to secure a warrant, it is possible that the body could have been further destroyed in the furnace.

This case points up several problems in the area of warrantless searches. One can question the wisdom of the distinction made between searches of a dwelling made without a warrant, and cases involving warrantless searches of automobiles, since in any case the search must be reasonable. Furthermore, an arrest may constitutionally be made without a warrant, and a reasonable search made incident thereto is valid even though the search is made of a dwelling.[175] However there is a greater need for privacy in a home, which the law should protect. It may therefore be a wise policy to require a warrant to enter a home where the only purpose is to search, and there is no immediate danger of destruction of the evidence. But where there is probable cause to arrest, as well as to search, *i.e.*, where there is a reasonable belief that a crime has been committed, there may be a greater danger that the evidence will be lost or used to commit a crime. This may justify a search and arrest without a warrant.

D. *Arrests Pursuant to Warrant*

Since searches made incident to a lawful arrest are valid under Ohio and federal law, the question of the legality of arrests is frequently litigated. Arrests, with or without a warrant, may be legal. Arrests pursuant to a warrant are governed by sections 2935.09 and 2935.10 of the criminal code. Section 2935.09 requires a peace officer or a private citizen having knowledge of the facts to file with the judge or clerk of court of record, or with a magistrate an affidavit charging the offense committed.[176] No warrant may issue without the filing of such

173 Holt v. Simpson, 340 F.2d 853 (7th Cir. 1965).

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

175 *Ibid.*

176 Ohio Rev. Code Ann. § 2935.09 (Page Supp. 1965).

affidavit.[177] Upon the filing of the affidavit charging the commission of a felony, the judge, clerk, or magistrate is required by 2935.10 to issue a warrant for the arrest of the person charged (unless he has reason to believe that it was not filed in good faith or the claim is not meritorious).[178] The duty to issue the warrant is mandatory and ministerial;[179] thus even a clerk can issue such a warrant.[180]

The above described arrest procedure is clearly not within the federal constitutional standard. First, the literal phrasing of the statute does not seem to import a probable cause requirement, and if it does not, it is unconstitutional.[181] There have been no cases found which decide this precise question, but it would appear that no court would read this part of the statute literally. There must be reasonable cause to believe the person arrested *without* a warrant is guilty of the offense; therefore, there is no reason why the same standard would not be read to apply to arrests *with* a warrant.

A more serious objection to the Ohio statute is that a judge or magistrate need not decide probable cause before issuing the warrant. The affidavit is required only to state the offense committed and need not set out facts upon which probable cause is based. This is repugnant to the fourth amendment. In *Giordenello v. United States*,[182] the United States Supreme Court held the inference that probable cause exists must be drawn by a neutral and detached magistrate instead of the officers engaged in the apprehension of suspects. The purpose of the affidavit is to enable the magistrate to determine if the warrant should issue, hence it must contain facts constituting probable cause.

It has been argued that *Giordenello* was based entirely upon rules 3 and 4 of the Federal Rules of Criminal Procedure and not upon constitutional grounds.[183] However, the more recent decision in *Aguilar v. Texas*[184] indicates the rule is based upon the fourth amendment. That case held a warrant issued pursuant to Texas law was insufficient where the affidavit gave a mere conclusion as to probable cause, rather than facts upon which the judge could base a decision about the pro-

177 Kaptur v. Kaptur, 50 Ohio App. 91, 197 N.E. 496 (1934).

178 Ohio Rev. Code Ann. § 2935.10 (Page Supp. 1965).

179 Nicholas v. Cleveland, 125 Ohio St. 474, 182 N.E. 26 (1932); see State *ex rel.* Goodman v. Redding, 87 Ohio St. 388, 101 N.E. 275 (1913), where it was held that the issuance of an arrest warrant may be compelled by mandamus.

180 State *ex rel.* Focke v. Price, 73 Ohio L. Abs. 214, 137 N.E.2d 163 (Ct. App. 1955); Hornack v. State, 39 Ohio App. 203, 177 N.E. 244 (1931); Molitor v. State, 6 Ohio C.C.R. 263 (Ct. App. 1892).

181 Aguilar v. Texas, 378 U.S. 108 (1964).

182 357 U.S. 480 (1958).

183 Note, 27 Geo. Wash. L. Rev. 395 (1959).

184 *Supra* note 181.

priety of the search. Concededly *Aguilar* involved a search warrant rather than an arrest warrant, but the Court quoted at length from *Giordenello* and referred to the search and arrest warrants interchangeably.[185]

In light of these recent decisions, the Ohio procedure on arrest warrants should be revised to require the affidavit to state facts upon which a judge or magistrate can base probable cause similar to present procedure on the issuance of search warrants. Furthermore, since the issuance of an arrest warrant will constitute a judicial act, and the duties of a clerk are considered ministerial, the act should be amended to provide that only a judge or magistrate may issue the warrant.

E. *Arrest Without a Warrant*

Although a search without a warrant is not generally permissible, a different rule is applied to arrests. The Supreme Court of the United States has held that, assuming probable cause exists for an arrest, it makes no difference whether the officer acted with or without a warrant.[186] Although one might wonder what factors justify an invasion of privacy in arrest cases but do not justify it for searches, this principle is now firmly established.[187]

In Ohio, by statute, any person may make an arrest "when a felony has been committed, or there is reasonable ground to believe that a felony has been committed. . . ."[188] Thereafter, the person arrested must be taken before a court or magistrate having jurisdiction over the arrest, and the arresting person shall make an affidavit stating the offense for which the arrest was made.[189] Such affidavit must be filed either with the court or magistrate, or with the prosecuting attorney who must file a complaint based upon it.[190] It has been held that the failure of the police to comply with the section requiring prompt presentation before a judge does not invalidate a subsequent conviction made on proper and sufficient evidence.[191] Also, the question of the point in time at which the affidavit was filed has been held not to affect the validity of the arrest.[192] Therefore it would appear that evidence seized during a search which is incident to an otherwise lawful

185 For the effect of *Aguilar* on Texas law, see McClung, "Recent Developments in Search and Seizure," 28 Texas B. J. 93 (1965).

186 Wilson v. Schnettler, 365 U.S. 381 (1961).

187 See Comment, 25 Ohio St. L.J. 538, 549 (1965).

188 Ohio Rev. Code Ann. § 2935.04 (Page 1954).

189 Ohio Rev. Code Ann. § 2935.06 (Page Supp. 1965).

190 Ohio Rev. Code Ann. § 2935.06 (Page Supp. 1965).

191 Cato v. Alvis, 288 F.2d 530 (6th Cir. 1961).

192 Columbus v. Glen, 60 Ohio L. Abs. 449, 102 N.E.2d 279 (Ct. App. 1950).

arrest would be admissible despite the failure of the arresting officer to file a prompt affidavit.

Arrests for misdemeanors are more restricted than for felonies. Only an officer of the law can arrest for a misdemeanor,[193] and then only if the person arrested is "found violating a law of this state or an ordinance of a municipal corporation. . . ."[194] The cases have generally held that in order for the arrest to be valid, the misdemeanor must be committed within the presence of the arresting officer,[195] and that the arrest must take place shortly thereafter.[196] The application of this standard creates problems in certain types of cases. For example, in the concealed possession cases, the offense may occur in the officer's presence but not within his perception. In *State v. Smith*,[197] it was decided that an arrest made under such circumstances was illegal. This result is correct by fourth amendment standards, since the arrest was probably made without probable cause.

A problem also occurs where the officer believes an offense is being committed in his presence, when in fact it is not. There is language in several early Ohio cases which seems to indicate that if the officer has reasonable grounds to believe that the offense is being committed in his presence, the arrest is valid.[198] Therefore, evidence seized incident to such an arrest would be admissible in another suit against the defendant. However, not all cases would agree with such a rule. In *Columbus v. Holmes*,[199] defendant was arrested for disorderly conduct in attempting to resist a prior arrest. The facts were that she was in possession of the keys and certificate of title naming H. H. Huff as owner of a car which she claimed had been given to her by Mr. Huff. Mr. Huff called the police asking them to seize the certificate and keys from Mrs. Holmes. The court held that Mrs. Holmes had in fact committed no misdemeanor, and that the action of the officers in ordering her to return the property was improper; therefore, she was justified

193 Fitscher v. Rollman and Sons Co., 31 Ohio App. 340, 167 N.E. 469 (1929); Lester v. Albers Super Markets, Inc., 61 Ohio L. Abs. 360 (C.P. 1951), *rev'd on other grounds*, 94 Ohio App. 313, 114 N.E.2d 529 (1952).

194 Ohio Rev. Code Ann. § 2935.03 (Page 1954).

195 State v. Lewis, 50 Ohio St. 179, 33 N.E. 405 (1893); Cincinnati v. O'Neil, 3 Ohio App. 2d 139, 209 N.E.2d 635 (1965); Huth v. Woodard, 108 Ohio App. 135, 161 N.E.2d 230 (1958); Columbus v. Glen, *supra* note 192; Clark v. DeWalt, 65 Ohio L. Abs. 193, 114 N.E.2d 126 (C.P. 1953).

196 State v. Marshall, 61 Ohio L. Abs. 568, 105 N.E.2d 891 (Munic. Ct. Piqua 1952).

197 19 Ohio Op. 454 (C.P. 1940).

198 Ballard v. State, 43 Ohio St. 340, 345, 1 N.E. 76, 79 (1885); Ryan v. Conover, 59 Ohio App. 361, 364, 18 N.E.2d 277, 279 (1937); Bock v. Cincinnati, 43 Ohio App. 257, 261, 183 N.E. 119, 121, *appeal dismissed*, 124 Ohio St. 667, 181 N.E. 888 (1931).

199 107 Ohio App. 391, 152 N.E.2d 301 (1958).

in resisting arrest. The opinion states that an arrest for a misdemeanor is invalid if the offense was not actually committed, even though the arresting officer may have had a good faith and honest belief that there was a violation. Thus, it is not clear whether, in Ohio, the misdemeanor must actually have been committed before an arrest without a warrant can be made. Furthermore, the decisions of other jurisdictions are of little help, since they are generally in disagreement.[200]

What constitutes an arrest is another source of confusion and disagreement. Some have argued that an arrest takes place when there is a stopping, restraining, or interfering with the freedom of movement of an individual.[201] But the term has been more commonly used to signify a more formal detention involving an actual taking into custody.[202] Regardless of the legal definition of arrest, police will commonly stop an individual without probable cause when the individual seems, because of his conduct or appearance, to be suspicious.[203] In addition, after stopping the suspect, the police often "frisk" him, *i.e.*, pat his outer clothing in order to detect concealed weapons.[204]

It should be noted that this practice was recently upheld by an Ohio court of appeals.[205] The court reasoned that the police have authority to stop and question a suspicious person without probable

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200 Cases holding that the offense must actually have been committed: Edgin v. Talley, 169 Ark. 662, 276 S.W.2d 591 (1925); Price v. Tehan, 84 Conn. 164, 79 Atl. 68 (1911); Muniz v. Mehlman, 327 Mass. 353, 99 N.E.2d 37 (1951). Cases holding that the offense need not have been committed if the officer had reasonable grounds to believe there was a violation in his presence: Coverstone v. Davies, 38 Cal. 2d 315, 239 P.2d 876, *cert. denied*, 344 U.S. 840 (1952); Cave v. Cooley, 48 N.M. 478, 152 P.2d 886 (1944).

201 United States v. Festa, 192 F. Supp. 160 (D. Mass. 1960); United States v. Mitchell, 179 F. Supp. 636 (D.D.C. 1959). In Henry v. United States, 361 U.S. 98 (1959), the prosecution conceded that the arrest of defendant took place when the federal agents stopped the car. The Court accepted this view for the purpose of the case.

202 United States v. Vita, 294 F.2d 524 (2d Cir. 1961), *cert. denied*, 369 U.S. 823 (1962); United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y.), *rev'd on other grounds*, United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960); People v. Simon, 45 Cal. 2d 645, 290 P.2d 531 (1955); People v. Entrialgo, 19 App. Div. 2d 509, 245 N.Y.S.2d 850 (1963). See Bator and Vorenberg, "Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions," 66 Colum. L. Rev. 61, 67 (1966). The distinction between arrest and detention has been pointed out by several authorities: Leagre, "The Fourth Amendment and the Law of Arrest," 54 J. Crim. L., C. & P.S. 393, 406 (1963); Warner, "The Uniform Arrest Act," 28 Va. L. Rev. 315, 318-19 (1942).

203 LaFave, "Detention for Investigation by the Police: An Analysis of Current Practices," 1962 Wash. U.L.Q. 331, 335-38; Remington, "The Law Relating to 'On the Street' Detention, Questioning and Frisking of Suspected Persons and Police Privileges in General," 51 J. Crim. L., C. & P.S. 386, 389 (1960); Note, "Philadelphia Police Practice and the Law of Arrest," 100 U. Pa. L. Rev. 1182, 1204-05 (1952).

204 LaFave, *supra* note 203, at 335-38; Remington, *supra* note 203, at 391.

205 State v. Terry, 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966).

cause because such a stopping does not constitute an arrest. Moreover, the police could frisk, incident to such a stopping, to insure their own safety against dangerous weapons. The scope of the frisk was limited, however, in that it could not include a search for contraband or evidential material. Finally, the court held that after a weapon is found, it may be used by the officers to furnish probable cause for a subsequent formal arrest. This result is in line with the majority of cases which have considered the problem.[206]

VI. Procedure to Object to Use of Illegally Seized Evidence

A. *Motion to Suppress*

In the federal courts, the use of illegally seized evidence can be attacked through a motion to suppress under rule 41(e) of the Federal Rules of Criminal Procedure. There is no such statutory procedure in Ohio, but many reported cases can be found where the issue was raised by a motion made before trial,[207] or a motion seeking the return of the

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[206] The situation described has been the subject of much litigation, legislation and comment. Some of the leading cases are as follows: People v. Simon, 45 Cal. 2d 645, 290 P.2d 531 (1955); People v. Jones, 176 Cal. App. 2d 265, 1 Cal. Rptr. 210 (Dist. Ct. App. 1959); People v. Pugach, 15 N.Y.2d 65, 204 N.E.2d 176, 255 N.Y.S.2d 833 (1964), *cert. denied*, 380 U.S. 936 (1965); People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), *cert. denied*, 379 U.S. 978 (1965). People v. Rivera, *supra* involved facts strikingly similar to the Ohio case. Three New York City detectives observed two men walking to the front of a business establishment, looking inside, and generally acting suspicious. The police stopped the men, patted their clothing and discovered a loaded weapon. The New York Court of Appeals held that despite the lack of probable cause, police may nevertheless stop and frisk suspicious persons.

Also, several statutes have been enacted, modeled more or less after the Uniform Arrest Act, which allow the police to stop a suspicious person on less than probable cause. Among them are: Del. Code Ann. tit. 11, §§ 1901-12 (1953); Mass. Ann. Laws ch. 41, § 98 (1961); N.H. Rev. Stat. Ann. § 594:1-25 (1955); N.Y. Code Crim. Proc. § 180(a) (Supp. 1965); R.I. Gen. Laws Ann. §§ 12-7-1 to -13 (1956). The New York statute was upheld in People v. Pugach, *supra*.

For a complete discussion of the principles involved in stop and frisk statutes, see Leagre, *supra* note 202, at 406-19; Remington, *supra* note 203; Comment, "Police Power to Stop, Frisk and Question Suspicious Persons," 65 Colum. L. Rev. 848 (1965).

[207] State v. Beck, 175 Ohio St. 73, 191 N.E.2d 825 (1963), *rev'd on other grounds*, Beck v. Ohio, 379 U.S. 89 (1964); State v. Thompson, 1 Ohio App. 2d 533, 206 N.E.2d 5 (1965); State v. Hatfield, 1 Ohio App. 2d 346, 204 N.E.2d 699 (1965); State v. Bartlett, 119 Ohio App. 483, 200 N.E.2d 660 (1964); State v. Young, 93 Ohio L. Abs. 24, 193 N.E.2d 560, *appeal dismissed*, 174 Ohio St. 329, 189 N.E.2d 151 (1964); State v. Smith, 29 Ohio Op. 2d 437, 202 N.E.2d 215 (C.P. 1964); South Euclid v. Pallidino, 28 Ohio Op. 2d 280, 193 N.E.2d 560 (Munic. Ct. South Euclid 1963); State v. Cooper, 28 Ohio Op. 2d 361, 196 N.E.2d 160 (Munic. Ct. Bellefontaine 1963); State v. Rogers, 27 Ohio Op. 2d 105, 198 N.E.2d 796 (C.P. 1963).

property.[208] Several early lower courts ruled that the issue of whether evidence was obtained by an illegal search and seizure should be raised in the trial court.[209] Recently however, the supreme court in *State v. Davis*[210] ruled that the motion must be made before trial. The opinion says that if the counsel knows about the unlawful search and seizure in ample time to prepare and file a motion to suppress prior to the trial, his failure to do so will amount to a waiver by the accused.[211] Thus, the court also gave its sanction to the motion to suppress as the approved method of raising the issue as well as requiring that such motion be made timely. The *Davis* rule is similar to rule 41(e) which states: the motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.[212] The recent United States Supreme Court case of *Henry v. Mississippi*,[213] could conceivably cast some constitutional doubt on state procedural rules such as the one espoused in *Davis*. Mississippi had a rule requiring contemporaneous objection to the introduction of illegal evidence. The defendant did not make a timely objection to the introduction of evidence seized during a search, but did raise the question of its illegality in a motion for a directed verdict at the close of the state's case. The Mississippi Supreme Court upheld the defendant's conviction and defendant appealed. The Supreme Court of the United States stated the familiar rule that Supreme Court review of a state case cannot be had where there is adequate state ground to support the decision, even where federal questions are also decided.[214] The Court then said a state procedural rule cannot prevent the vindication of a federally protected right, unless it serves a legitimate state interest. The contemporaneous objection rule, it was said, serves a legitimate state interest by apprising the trial judge of the objection, so that he is given opportunity to conduct the trial without using the tainted evidence. However this purpose "may have been substantially served" by the motion for a directed verdict.[215] The case was remanded to the

208 State v. Clauson, 118 Ohio App. 535, 196 N.E.2d 144 (1962).

209 Howe v. State, 39 Ohio App. 58, 177 N.E. 46 (1931): Manley v. State, 7 Ohio L. Abs. 45 (Ct. App. 1928); Gilmore v. State, 15 Ohio App. 432, (1921); Hendershot v. State, 14 Ohio App. 430 (1921).

210 1 Ohio St. 2d 28, 203 N.E.2d 357 (1964).

211 The court had previously stated this to be the rule in dictum in Nicholas v. Cleveland, 125 Ohio St. 474, 182 N.E. 26 (1932).

212 Fed. R. Crim. P. 41(e).

213 379 U.S. 443 (1964).

214 *Id.* at 446.

215 *Id.* at 448.

state court with instructions to determine whether counsel deliberately bypassed the opportunity to make a timely objection, in which case he would be deemed to have waived his constitutional rights. It is arguable that another purpose of the remand was to allow the state court to determine if the purposes of the rule were served by a motion for a directed verdict. Even if the purposes were the same, the court could still find that the defendant consciously waived the right to exclude the evidence by not objecting at the time of its admission.

In any event, it seems reasonably clear that the *Davis* rule serves a legitimate state interest in that if the objection is made before trial, the court will not be required to interrupt the proceedings to determine the issue of the legality of the search. Furthermore, the Supreme Court of the United States has given its sanction to the rule by approving the federal rule which is substantially similar.

B. *Standing to Object*

Early practice in Ohio, as well as in the federal courts, held that a person who was not a "victim" of an illegal search could not object to the admission of illegally seized evidence. The privilege was limited to the laws of property; thus the person raising the question of an illegal search and seizure had to claim ownership in the premises[216] or the property seized.[217] In Ohio, the supreme court rationalized that upon a motion for the return of property, no principle of law allows the courts to deliver to a person personal property which does not belong to him.[218] The problem arose in possession cases; in such cases, to claim ownership of the property would in effect be to admit commission of the offense charged.[219] In *Jones v. United States*,[220] the United States Supreme Court, for the first time, specifically approved of the standing requirement, and in so doing greatly liberalized it to alleviate some former problems. Defendant had been given the use of an apartment by a friend but had slept there only occasionally. When defendant moved to suppress evidence obtained from a search of the apartment, the government challenged his standing on the ground that he did not allege either ownership in the seized articles or an interest greater than that of an invitee or guest in the apartment searched. The

216 Shurman v. United States, 219 F.2d 282 (5th Cir. 1955); Hahn v. State, 38 Ohio App. 461, 176 N.E. 164 (1930).

217 Connolly v. Medalie, 58 F.2d 629 (2d Cir. 1932); Rosanski v. State, 106 Ohio St. 442, 140 N.E. 370 (1922); Hahn v. State, *supra* note 216.

218 Rosanski v. State, *supra* note 217, at 456, 140 N.E. at 374.

219 The problem was recognized and discussed by Judge Learned Hand in Connolly v. Medalie, *supra* note 217, at 630.

220 362 U.S. 257 (1960).

Court rejected the earlier common law property distinctions to determine standing. Where evidence obtained in a search is being used against the defendant, he may challenge its legality if he was "legitimately on the premises" where the search occurred, and was in such proximity to the article as to be able to exercise immediate control over it.[221] But where the defendant is not charged with a possessory offense, and the search is not directed against him, there is no invasion of his privacy, and he has no standing to object.[222]

Since *Jones*, the Ohio cases have retained the requirement of standing,[223] but it is unclear whether or not they are following the more liberalized doctrine of the federal courts. In *State v. Keeling*,[224] police searched the premises where one of the defendants resided. They smashed open the door, discovering the six defendants and a clearing house operation inside. The court said: "To establish such standing, an accused must claim ownership or possession of the seized property or a substantial possessory interest in the premises searched or a legitimate presence on the premises."[225] As to the defendant lessee, who resided on the premises, the court determined that she had standing by virtue of her residence, in spite of the fact that she was engaged in illegal activity on the premises. This determination was correct under the *Jones* rationale. But as to four other defendants, whom the court said "were engaged in unlawful activities on the premises," it was decided that there was no standing. In so holding the court purported to apply *Jones*, but this result is patently incorrect by that standard. Although the *Jones* Court said that the defendant must be "legitimately on the premises," this language was meant to prevent a trespasser from having standing. Obviously, if the defendant must not be carrying on illegal activities upon the premises in order to have standing, there is no basis for the court's distinction between the lessee and the persons on the premises with the lessee's permission, since one was engaged in illegal activity as much as the other. Furthermore, the facts of *Jones* offer no support to the judge's distinction. There the defendant did not reside at the apartment but merely had permission

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221 *Id.* at 267.

222 Wong Sun v. United States, 371 U.S. 471, 492 (1963); United States v. Granello, 243 F. Supp. 325 (S.D.N.Y. 1965).

223 State v. Coleman, 91 Ohio L. Abs. 191, 186 N.E.2d 93 (Ct. App. 1962), *appeal dismissed*, 174 Ohio St. 574, 191 N.E.2d 58 (1963); State v. Liosi, 91 Ohio L. Abs. 161, 185 N.E.2d 790 (Ct. App. 1962), *appeal dismissed*, 174 Ohio St. 552, 190 N.E.2d 689 (1963); State v. Rogers, *supra* note 207; State v. Keeling, 182 N.E.2d 60 (C.P. 1962).

224 *Supra* note 223.

225 *Supra* note 222, at 67.

to use it. He testified that he slept in the apartment "maybe a night." The Court assumed throughout the argument that his "interest in the apartment was no greater than that of an 'invitee or guest.' "[226] In addition, like the defendants in *Keeling*, the defendant was engaged in an illegal activity upon the premises, *viz.*, possession of narcotics. Finally, assuming for the moment that the Ohio courts are not bound to follow *Jones*, the distinction made in *Keeling* is unreasonable. The right to question the use of evidence obtained in a search and seizure should not depend on whether the defendant was committing a crime at the time of the seizure. The effect of such a rule would be to completely undermine the exclusionary rule itself.

In *State v. Rogers*,[227] a search was made of a car in which defendant was an occupant, and a weapon was found which led to a criminal action for possession of a concealed weapon. The court, citing *Jones*, held that defendant had standing to object. This is a correct application of *Jones*. In both cases, the defendant was being prosecuted for possession of contraband. If the defendant is required to admit such possession in order to object to the introduction of such evidence, he would in effect be confessing to the crime for which he was being tried. Furthermore, the defendant was legitimately in the searched vehicle at the time of the search.

Although the court in *Rogers* applied the federal rule, it observed that the Ohio Supreme Court could, if it wished, change the rule to require an allegation of a possessory interest in the property before standing would exist to challenge its introduction into evidence. The question of whether the states must follow *Jones* is undecided. It is reasonably clear that the states need not adopt any standing requirement. For example, California has not.[228] But whether the states may adopt a stricter standard than the federal courts is a different question. The language of *Jones* is mostly in terms of who is a "person aggrieved" under rule 41(e) of the Federal Rules of Criminal Procedure. This indicates the possible absence of constitutional significance of the case. On the other hand, there is discussion in the opinion to the effect that the defendant must establish that he was himself the victim of an invasion of privacy. Thus it is arguable that if a person is rightfully on a premises which has been searched and property over which he has some control has been seized, his constitutionally guaranteed right to privacy has been invaded.

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226 Jones v. United States, *supra* note 220, at 259.

227 *Supra* note 207.

228 People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955).

C. *Burden of Proof*

In close cases, the question of who has the burden of proof with respect to probable cause may be of some importance. Neither the Supreme Court of the United States nor that of Ohio has specifically decided this question, and the lower court decisions are in seemingly hopeless conflict. One writer has attempted to resolve the conflicting results among the federal cases by making a distinction between arrests or searches made pursuant to a warrant, and those made without a warrant.[229] Where a warrant has been issued most lower federal courts have placed the burden on the defendant to prove the search or arrest to have been invalid.[230] This result would seem to follow from the language of several Ohio courts saying that where a warrant has been issued, there is a presumption of its regularity.[231] However, in warrantless arrests or searches, most of the federal courts have said that the burden is on the government to show that the officer had knowledge upon which to base probable cause,[232] while a few hold otherwise.[233] The recent Supreme Court case of *Beck v. Ohio*[234] may lend some support to this position. The Court in discussing the necessity for a disclosure of the names of informants seemed to assume that the burden was on the prosecution to show probable cause.[235]

The Ohio cases concerning the burden of proof on a warrantless search or arrest are indecisive. No supreme court cases have been found which discuss the point directly.[236] However the Court of Appeals for Franklin County recently placed the burden upon the defendant.[237] The court said:

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229 Comment, 25 Ohio St. L.J. 502, 527-29 (1964).

230 Chin Kay v. United States, 311 F.2d 317 (9th Cir. 1962); Batten v. United States, 188 F.2d 75 (5th Cir. 1951). In Jones v. United States, 362 U.S. 257 (1960), a case involving a search pursuant to warrant, the Supreme Court indicated that the party challenging the search should bear the burden of establishing its invalidity.

231 Rosanski v. State, *supra* note 217, at 446, 140 N.E. at 371; Howe v. State, *supra* note 209, at 61, 177 N.E. at 47; Kovacs v. State, 24 Ohio N.P. (n.s.) 1, 9 (C.P. 1921).

232 United States v. Rivera, 321 F.2d 704 (2d Cir. 1963); Plazola v. United States, 291 F.2d 56 (9th Cir. 1961); Cervantes v. United States, 263 F.2d 800 (9th Cir. 1959).

233 Hardin v. United States, 324 F.2d 553 (5th Cir. 1963); Wilson v. United States, 218 F.2d 754 (10th Cir. 1955).

234 379 U.S. 89 (1964).

235 In Brinegar v. United States, 338 U.S. 160 (1949), a case involving a search without a warrant, the court impliedly assumed that the government had the burden.

236 Williams v. Eckle, 173 Ohio St. 410, 183 N.E.2d 365 (1962), was a habeas corpus case in which the court stated that the burden was upon the petitioner to show that he was deprived of his constitutional rights, *i.e.*, that the search made was not incident to a lawful arrest. However, the fact that this was a habeas corpus case partially explains the result, since the petitioner in such cases must show that he is entitled to the remedy.

237 State v. Ball, 1 Ohio App. 2d 297, 204 N.E.2d 557, *appeal dismissed*, 176 Ohio St. 481, 200 N.E.2d 325 (1964).

> Defendant in the case before us elected not to deny by his own testimony, or other evidence, the case presented by the state, and made no attempt by way of cross-examination, or otherwise, to show that the police officers had no reasonable cause to believe that a felony had been committed. Such burden rested squarely on the defense. Any doubts as to the reasonableness of the information upon which the police officers acted is resolved, therefore, in their favor.[238]

Two other recent lower courts have discussed the problem briefly, one assuming that the burden of proving the validity of the search is on the defendant,[239] while the other has language which would seem to indicate the burden is on the state.[240]

It should be noted that the distinction made above between warrantless searches and searches pursuant to warrants cannot be found in any of the cases, but is merely a theory which rationalizes the results of most of the cases. An argument for the theory is that where the police have made the effort to obtain a warrant from a judge or magistrate, there should be a presumption of regularity. This would serve as an added inducement to officers to secure warrants whenever possible. Another difference between the two situations is that where there is no warrant the defendant may not know the facts upon which the police based probable cause. Therefore it may be unfair to require him to prove the lack of probable cause.

But there is some justification for placing the burden on the state in all cases, whether or not a warrant was issued. This would require the prosecution to call the arresting officers as its witnesses, thus allowing defendant's counsel to cross-examine them concerning probable cause. Also, in certain instances the affidavit for a search warrant need not disclose the names of informers.[241] Under these circumstances, even where a warrant was issued, it would be extremely difficult for the defendant to prove a lack of probable cause.

D. *Disclosure of the Identity of Informers*

Several situations must be distinguished in dealing with the requirement of disclosure of the identity of informers in the face of a plea of privilege on the part of the state. Where the officers seek a search warrant, they must by the statute file with the judge or magistrate an affidavit stating that the complainant believes and has good

238 *Id.* at 301, 204 N.E.2d at 560.

239 State v. Rogers, *supra* note 207.

240 State v. Thompson, 1 Ohio App. 2d 533, 539, 206 N.E.2d 5, 9 (1965). The court said "the record fails to show evidence of a substantial credible or probative nature to warrant the finding that the police officers had reasonable grounds or probable cause to believe that the defendant had committed or was in the act of committing a felony. . . ."

241 For analysis of this problem, see text accompanying note 246, *infra.*

cause to believe that certain items are concealed, and state the facts upon which such belief is based.[242] These facts may consist of statements made to the officers by informers. If so, the names may be required to be disclosed.[243] The statute says that the judge may demand further information before issuing the warrant. Therefore, a logical solution would seem to be that if the police wish to keep the identity of the informant anonymous, they may do so. The judge could then require additional facts to be brought forth orally until he feels that probable cause has been shown.[244]

Where the search was made without a warrant, and the defendant challenges it by the use of a motion to suppress, the rule should be the same. The Ohio Supreme Court in *State v. Beck*[245] appeared to hold that the identity of the informer need not be disclosed unless such disclosure would be helpful to the defendant in making a *defense*. The Supreme Court of the United States, in reversing, set forth the better rule. If the state cannot show probable cause except by disclosing the identity of the informants, it may deem it necessary to do so.[246] This rule is completely consistent with the majority of the federal cases which require the government to assume the burden of proof to show the validity of a warrantless search.

Under certain circumstances, knowledge of the identity of an informant may be necessary in order to insure the defendant the "fair trial" to which he is entitled under the fourteenth amendment. This consideration is entirely apart from the issue of probable cause. An example of this is the case of *Roviaro v. United States*.[247] There, federal narcotics agents were notified by an informer that he intended to purchase narcotics from the defendant at a given time. They met the informer, and one of the agents secreted himself in the trunk of the informer's auto. The agent heard part of the conversation between the defendant and the informer and observed the defendant throw a package into the car. The lower court did not require the government to disclose the identity of the informer, nor would it permit the defendant to question witnesses about the informant's identity. The Supreme Court first addressed itself to the disclosure requirement as it

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242 Ohio Rev. Code Ann. § 2933.23 (Page Supp. 1965).

243 State v. Watson, 117 Ohio App. 333, 192 N.E.2d 253 (1962). See Akron v. Williams 175 Ohio St. 186, 192 N.E.2d 63 (1963), where an affidavit which stated that the affiant had "personal knowledge or knowledge from a reliable source" was held insufficient.

244 Such a procedure was suggested in State v. Bartlett, 119 Ohio App. 483, 200 N.E.2d 660 (1964).

245 175 Ohio St. 73, 191 N.E.2d 825 (1963).

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

247 353 U.S. 53 (1957).

relates to *probable cause;* it said that the government must disclose the identity of the informant, "unless there was sufficient evidence apart from his confidential communication."[248] This is in essence the same test as the Court later gave in *Beck*.

The Court then proceeded to the question of fair trial. Here the emphasis switched to the fact that the informant was present at the scene of the crime. The informant was the only material witness, and if defendant could not be apprised of who was present when the alleged crime took place, he would be deprived of the opportunity to examine him. Impeachment at trial is thus made difficult or impossible.

The opinion of the Supreme Court of Ohio in *Beck* indicates a confusion of the distinctions made above. The court, though considering the issue of probable cause, stated in its second syllabus that the identity of an informer need not be disclosed if such disclosure "would not be helpful and beneficial to the accused in making a defense to a criminal charge lodged against him."[249] This is in reality the test for determining the necessity of disclosure for the purposes of a "fair trial," and not probable cause. Furthermore, the court attempted to distinguish *Roviaro* by saying that here the informer took no part in "trapping and apprehending the defendant."[250] This factor is not relevant for determining whether or not the identity should be disclosed for purposes of probable cause, but is relevant as a factor tending to show that the defendant would be denied a fair trial if there was no opportunity to examine him on the witness stand.

CONCLUSION

Until *Mapp v. Ohio*, there were comparatively few Ohio cases involving search and seizure. In the many cases decided since then, the Ohio courts have been, for the most part, successful in applying the federal standards of probable cause and reasonableness. The Ohio cases on consent to search are conflicting in result; but the better reasoned cases appear to follow the federal standard which requires that the consent be given freely and intelligently.

Search and arrest warrants are governed in Ohio by statute. The statutory arrest procedure does not require a judge or magistrate to decide probable cause, as in demanded by the fourth amendment. Hence, the Ohio procedure should be revised to conform to the constitutional standards.

Ohio lawyers should be careful to raise all issues concerning illegal

248 *Id.* at 61.

249 *Supra* note 245, syllabus 2.

250 *Supra* note 245, at 277, 191 N.E.2d at 828.

searches by a pre-trial motion to suppress the evidence. The rules regarding standing to object and burden of proof to establish probable cause are not well defined in Ohio. The federal cases have been given considerable weight. In areas where there are no Ohio cases, it is likely that the courts will look in the future to the federal law.

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