0410

TO: U. S. DEPARTMENT OF JUSTICE
OFFICE OF LAW ENFORCEMENT ASSISTANCE

FROM: Arnold Markle, State's Attorney - Grantee
New Haven County at New Haven
121 Elm Street
New Haven, Connecticut 06510

RE: GRANT NO. 191 - FINAL REPORT

Submitted herewith is the Grantee's Final Report.

Arnold Markle

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APPLICANT AGENCY

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FINAL REPORT

> "The Court's decisions have come in such rapid succession, and some are so technical, that many criminal lawyers have not yet mastered them. This threatens the average policeman with procedural paralysis - he's afraid that anything he does may be wrong. * * * ."
> The Law - Crime Before The Court, by Fred P. Graham, New York Times, October 1, 1967.

The above quotation from the New York Times very accurately describes the law enforcement officer's dilemma as far as the pronouncements of the Supreme Court of the United States are concerned. Certainly, with the advent of Mapp v. Ohio. 367 U.S. 643, the law enforcement officer at the local and state level has been faced with the necessity of becoming familiar with all of the applicable rules of law as they have developed over the many years concerning the Fourth, Fifth and Sixth Amendment, and as they continue to develop on a day-by-day basis.

Thus, one of the main aims and the true thrust of the law enforcement training program conducted under Grant No. 191, Law Enforcement Assistance Act, was to properly train the local and state law enforcement officer to fully understand the historical background of the Bill of Rights as well as the development of present day interpretations of the relevant Articles of said Bill of Rights. In addition, once the officer understood the background of the Bill of Rights, the current decisions were discussed within this framework.

The officers attending the course of instruction were found to be extremely bright and were receptive to the method of instruction. In point of fact, in many instances [too many to satisfy this writer] this course of instruction was the first formal training offered to these experienced officers in this crucial field of police training, and their hunger and rate of absorption was astounding. To emphasize

their desire to become really knowledgeable and professional, one must bear in mind that these officers traveled great distances to attend the course, coming from almost every organized police department in the State and from the very borders of the State, attending at night after a full day of duty and without extra compensation.

The author is also quick to point out that the law enforcement officer who was selected and attended the course of instruction was, in the majority of instances, an experienced officer who had spent many years in his department.

NUMBER OF GRADUATES

During the two years of the Grant's life, the number of officers and prosecutors who graduated came to six hundred and fourteen men and women. The Grant reached every major police department in the State and the vast majority of the small departments. In sum total, the graduates represented the following number of police departments and/or allied agencies throughout the State, to wit: 83.

PERSONNEL AND METHOD OF INSTRUCTION

The classes themselves were conducted by two men, the Project Director and author of this report, Arnold Markle, Esq., and Leander Gray, Esq., who also acted as Financial Officer. Mr. Markle was, during the life of the Grant, the Chief Prosecuting Attorney* and the State's Attorney** for New Haven County. Mr. Gray was an Assistant Chief Prosecuting Attorney for the State of Connecticut and later a private attorney in the City of New Haven. The project was conducted under a contract with the grantee, the Connecticut Municipal Police Training Council, whose Executive Director gave unstintingly of his time and efforts.

Classes were conducted for a period of six weeks, one night per week, with each session lasting three hours. If an officer missed two or more classes, he failed to graduate. If the officer graduated, then he was given a diploma signifying that he had successfully completed the course of instruction. One re-training

seminar was held midway through the Grant and approximately two hundred and twelve officers attended the same. The classes were held at the Yale Law School, which graciously extended us the privilege of using its facilities. It is interesting to note that the law enforcement officers attending the classes preferred to utilize this facility over the many others offered as the Grant became accepted.

MEMORANDA OF LAW AND TRAINING HANDOUTS

The Project Director wrote sixty-nine Memoranda of Law and designed numerous training aids that were used to supplement the lectures. The Memoranda of Law were also mailed to all graduates to keep them abreast of the decisions and court procedures that confronted the law enforcement officer. If a new decision, such as Terry, Sibron and Peters [stop-and-frisk] was announced, a Memorandum of Law was written by the Project Director and immediately used in the class then in session and mailed to past graduates so that they could keep abreast of such decisions. As word spread to various police departments in neighboring states concerning the Memoranda of Law, we received numerous requests for the same. Thus, the Memoranda of Law are being utilized at the present time by members of the judiciary, prosecution and law enforcement. We have also received requests from as far away as Florida and Vermont and from several federal law enforcement agencies. An Index of the Memoranda of Law is attached hereunto and gives one the range of subjects covered. In addition, several Memoranda are attached hereunto so that the reader will understand the value of the same. Training aids were found helpful and usually consisted of one page handouts that were used to emphasize the subject under consideration. Copies of the same are attached hereunto for consideration by the reader.

COURSE CONTENT AND SUBJECTS COVERED

The course content and material covered the following areas: The historic development of the Bill of Rights as it applies to law enforcement; the writ of assistance under the British system as opposed to the requirement of probable cause under the Fourth Amendment; an explanation of what constitutes probable cause for an arrest without a warrant, an arrest warrant affidavit and/or a search warrant affidavit; how to spell out the facts and circumstances in an affidavit or on the witness stand, so as to show the issuing judge that there is probable cause in accord with the dictates of Aguilar and Spinelli; how to draw affidavits for search and/or arrest warrants; how to convert fact situations from an arrest warrant into facts for a search warrant; a check list for the officer to bear in mind when drawing an affidavit in an arrest and/or search warrant situation; the seizure of mere evidence incident to an arrest under the edict of Warden v. Hayden, and the limitation on the seizure of mere evidence under the existing statute pertaining to search warrants in the State of Connecticut; permissible areas of search as incident to service of arrest and/or search warrant; the method of entry to effectuate the service of an arrest and/or search warrant or to make an arrest without a warrant; search of the person and the motor vehicle; a discussion of the import of Preston and the requirement that the search be contemporaneous in place and time with the arrest, as well as the exceptions to the Preston rule, including emergency situations and the right to inventory a seized or impounded vehicle under the Cooper case; officers are encouraged to have their departments adopt a general order requiring the inventory of seized or impounded vehicles, etc.; fact situations that do not constitute a search under the Fourth Amendment, to wit: plain view, abandonment, on property to investigate a complaint and/or suppress a breach of peace, etc.; consent to search; how to obtain consent; the burden of proof where consent is involved; who can validly give consent; the dangers of relying on consent; entrapment as a legal defense; how to avoid

the defense of entrapment; evidence necessary to protect against the claim of entrapment; recent statutory enactments pertaining to criminal discovery as well as the case law applicable to the same as set forth in Brady; preparation of the prosecutive file; the officer and the pre-trial; the officer as an investigator and his duties when seizing evidence to assure a proper chain of custody for introduction into evidence; the officer as a witness and his demeanor on the witness stand; the proper use of photography as an investigative tool; the use of electronic equipment; when the use is legal and when it is illegal; the import of the recent decisions pertaining to the use of electronic equipment; a practical exhibition of electronic equipment, indicating what is available and practical; [the historical development of the reason that the Supreme Court reviews confession cases]; the totality of circumstances as effecting the admissibility of a confession; a discussion of the Wylie Murder case; the scope and development of the law pertaining to confessions as reflected by Massiah, Escobedo and Miranda; a discussion of the proper warnings as required by Miranda and when the same must be given to the subject; how to live with Miranda; where and when the warnings must be given; the requirement of counsel at lineups as set forth in Wade; how to live with Wade; the impact of Simmons upon identification by the victim or witness where the police department is utilizing photographs; how to comply and live with Simmons; the requirements of the Connecticut Statutes pertaining to arraignment; the requirements of the Connecticut Statutes relative to retroactive seizure warrants in liquor and gambling cases; the Connecticut Statutes pertaining to juvenile offenders are discussed as well as the requirements of In Re Gault; how to research a case citation and/or an actual case is discussed as well as how to read the Memoranda of Law that are issued; consciousness of guilt as substantive evidence is also discussed as well as the proper use of a prior felony conviction to impeach the credibility of a witness and/or defendant.

Other subjects were discussed as they were raised by the officers during the class sessions. If they were deemed of sufficient importance, they were added to the subject matter for subsequent classes.

EVALUATION

As the course of instruction progressed and evaluations were completed by Wayne Mucci, the Project Evaluation Officer, an interesting, but important concern revealed itself. That concern was the fact that the law enforcement officer receives little instruction from the prosecuting officers with whom he is in constant contact. As a result, there is a great deal of mistrust or misunderstanding of the prosecutor by the law enforcement officer. On the other hand, when a prosecuting attorney was included in a class as a student, and there were several prosecutors who attended the course, the officers were quick to note that presence and appreciate the same. Thus, if another such Grant were to be undertaken, the inclusion of prosecuting officials should be encouraged.

CONCLUSIONS

There should be more instruction given by those responsible for the prosecution to law enforcement officers so that there will be an interchange of trust and understanding by both branches of the enforcement arm of government. The prosecution should be made to understand the problems of the law enforcement officer as they actually exist on the street and in actual confrontations. If they do not so partake, they will never be adequate to lead law enforcement.

The size of the classes were fixed at a minimum of twenty-five officers, and in the future, consideration should be given to reducing this number to approximately fifteen. The reason for the smaller class is that the officers will participate more fully in

smaller, intimate groups than they will if they are part of a larger group. In actual experience, the author found that the officers would not freely participate until they had attended the first two or three classes and only at that stage would they feel free to commence to ask questions, etc.

It might be noted that we attempted to furnish each class with a roster of its class members so that they might contact each other as years passed. We found that graduates would utilize this list to seek help from other departments when the criminal problem reached across city or town lines. Members of the classes quickly formed a select group of officers and still rely upon each other in much the same way that members of the same business organization will use one another.

The author feels that this type of program should be encouraged throughout the United States. If we, as prosecutors, are to be effective in court, we must depend upon the officer in the field. If that law enforcement officer is not properly trained and fails to act properly, then the prosecution will fail. As the Supreme Court of the United States continues to change the rules of law pertaining to the important field of police procedures, the officer is left in a morass of confusion unless he is immediately instructed in the full import of the decisions.

Not without significance is the fact that since we have had to cease class room instruction, two constitutional decisions have been ennunciated by the Supreme Court of the United States which have drastically effected the law enforcement officer in the performance of his duties. I have in mind the Spinelli and the Chimel decisions. Fortunately, the Grant was able to reach the graduates of the classes and keep them apprised of the developing concepts of constitutional law as effected by Spinelli and Chimel, by virtue of the Memoranda of Law which were immediately issued to all graduates.

It is the author's feeling that it is of the utmost importance that the local and state law enforcement officer, who are daily

confronted with on-the-crime scene decisions, have the finest legal training available, since they are the "front-line troops" in the constant fight against crime. Their decisions at the crime scene does effect subsequent prosecution of major criminal offenders.

The officer wants to be a true professional; he is ready to be a true professional; and he has the ability, talent and brains to act as such, if we give him the appropriate tools, which are in the main, a proper education and training in the law of arrest, search and seizure, confessions and other constitutional mandates which now control their actions.

It is heartwarming to note that although the Grant has terminated in terms of time, we have on hand and continue to receive, numerous requests from individual officers and various departments for the acceptance of personnel if the class room instruction were to be resumed. The only sadness attached to the entire program has been that we have had to terminate what has been probably the most fruitful program ever commenced in this State in the field of the proper training of law enforcement officers to understand and comply with the new demands made upon them by the Supreme Court through its most recent decisions.

* The Chief Prosecuting Attorney for the Circuit Court, State of Connecticut, has jurisdiction over the 18 Circuit Courts throughout the State of Connecticut and approximately 80 prosecuting attorneys and assistant prosecuting attorneys who staff said Court. This Court has a misdemeanor jurisdiction and does conduct probable cause hearings to bind over felons to the Superior Court.

** The State's Attorney's Office [Superior Court] has felony jurisdiction for the County of New Haven which encompasses 15 towns. There are four Assistant State's Attorneys and five County Detectives attached to said office.

PART B

This section of the report is an attempt to assess, with as much precision as possible, the benefits of the project. It, thus, summarizes the results of questionnaires that were sent to participants, such results having been analyzed in greater detail in previous reports. Included in the assessment, and perhaps the most important part of it, are recommendations as to future training in this area, and a set of policy issues which, upon consideration and resolution, should govern the action of the State in the coming years.

It is apparent, from the review of training efforts currently underway in Connecticut, that there is room for substantial improvement in law enforcement efforts. One of the major needs is the provision of high quality legal training, such as has been provided by the present course. The major issue is how to continue the work already done under this OLEA grant. It is likely that funds under the Safe Streets and Crime Control Act of 1968 can pick up the slack.

Part B covers briefly four areas: (1) the relation of legal training to professionalization of the police, (2) the participants' response to the course, (3) an assessment of its value, and (4) implications for future training. In the latter section, recommendations are made.

Professional Values and Legal Training

The need for additional training of police officers and officials has become clearly apparent over the past several years. In this regard, Connecticut is no different from other states. The scope of training required to professionalize the police is broad: from training in human relations and understanding of minority groups on the one hand, to training in the meaning of our legal heritage and requirements of the constitution on the other.

The police have often become the focal point of violent controversy. Much of the resentment would perhaps be best directed at other agents of our society, yet the police, being the most visable, may find themselves the most convenient scapegoat. Yet, in some cases, police actions cause the controversy, particularly in the area of relations with minority groups. But an area of equal importance, and one which has as great a potential for misunderstanding and adverse consequences, is lack of training in the law, particularly the constitutional standards as have been established by the Supreme Court during the sixties. Lack of training in the criminal law may lead not only to increased tension with minority groups, but also to losing a case through improper investigation or lack of following the rules.

One of the major purposes of the Chief Prosecuting Attorney's Training Program (now the State's Attorney's Law Enforcement Training Program) conducted with federal funds was to explain (a) what the rules are, and (b) the reasons for the rules. It can be stated with little hesitation that these purposes were accomplished, at a level at once more sophisticated, but at the same time more understandable than anything heretofor done in Connecticut.

It is more difficult to determine whether the explanation of the reasons for current decisions in constitutional law leads to agreement with them. Yet, that is not the relevant issue. As long as the police, having been taught the legal bounds on their behavior, can and do conduct themselves within those limits, there is no particular reason why they should agree with the limits. One of the distinguishing marks of a professional is his ability to separate his personal inclinations, biases or preferences from the conduct of his professional responsibilities.

The 614 officers throughout the State who participated in the program should, in the evaluator's opinion, be far better equipped to make this professional distinction than they were in the past.

Response to the Course

Response to the course, on the part of both those attending it and their superiors, has been uniformly favorable. The degree of recognition attained is perhaps illustrated by the number of police chiefs who attended. In Connecticut, the chiefs have traditionally kept their policies and procedures separate from close integration with policies of prosecuting officials. As a matter of fact, there has generally been a barrier between the police and the prosecutor. Such a barrier should, of course, never exist for law enforcement to be most effective. This course shows the first real promise in Connecticut of breaking down this barrier. For Connecticut, this is of great importance, and the momentum built up should not be allowed to falter.

One interesting and important finding with respect to the response to the course is given in the Table below. The percentages are based on 855 responses to the question "What subject was of most benefit to you?". It provides a quick and probably quite accurate indication of the needs of police, and the focus of legal training. Questions relating to search and seizure and probably cause are by a wide margin seen as the most important for those officers attending the course, accounting for over one half of the responses.

Area	Rank	Percent Responses (Number = 855)
Search and Seizure	1	37
Probable Cause	2	20
Miranda	3	12

Area	Rank	Percent Responses (Number = 855)
Arrest	4	9
Affidavits	5	7
Gault	6	5
Policeman as Witness	7	3
Entrapment	8	2
All other	9	2
Total	---	100

When asked about changes in the class, the great majority of respondents suggested that classes should either (a) extend for a period of greater than 6 weeks, or (b) be called back into session from time to time as new decisions are handed down. Other recommendations for greater emphasis are listed below, although it is the opinion of the evaluator that, under the present format, little in the way of accommodation can be made. Slightly less than 50 percent of the respondents (249) made suggestions.

Suggestions for greater emphasis	Number of Officers
Search and Seizure	47
Probable Cause	33
Miranda	27
Gault	19
Methods of Obtaining Confessions	17
Prosecutor's File	15
Arrest Warrants	14
Entrapment	10
Relations with Prosecutor	9
How to prove intent	8
Interrogation of juveniles	6
Homicide Investigations	5
Drug Investigations	5
Use of equipment (photography, electronic surveillance)	5
All others	29

Search and seizure, probable cause and Miranda unsurprisingly lead the list

Perhaps the most vivid means of transmitting the response to the course is to give the participants in the course an opportunity to speak. Their comments show, better than abstract analysis, the meaning of the course for the practicing police officer. Typically enthusiastic reactions to the seminars were as follows:

> The choice of subjects is excellent, and I would not eliminate any. All were important and I would like more time devoted to each. I would (also) like to see a one-day refresher course offered every two to three months.

> The course is excellent. It presents the present day problems the police have with court interpretations of the law as well as the rights of the accused. These have been made and must be adhered to. This can only be done through knowledge and cooperation (with the Prosecutor).

> It is a very instructive and informative course. Speaking for myself, it makes me think like a defense attorney, checking the who-what-where-when and why of every arrest to see what, if any loop hole is left for the defense attorney to file his motions on. In my opinion, this course is a must for every police officer involved in investigations of organized crime.

> The knowledge received from this course has been used in two criminal investigations since the conclusion of the course. It has helped greatly.

A practical benefit is illustrated by the following response made by a patrolman grade II at the time of answering the questionnaire:

> The course is certainly most helpful. It cleared up several questions regarding Federal decisions. Also, the course was very helpful in a recent examination for police sergeant. As a result of having attended the class, I was able to answer several questions at the oral exam that had been discussed in class.

Excellent summary statements were given by the following officers:

> I would like to add that this course was a step in the right direction, but only a step. If the course is to be continued, and I hope it will, it should be expanded to cover laws of arrest and rules of evidence. From attending this course it was evident that the police officers throughout the state did not have a good understanding of the new Supreme Court rulings. This course certainly helped to enlighten the police on these new rulings, but I feel that continual training and courses are necessary to just keep even with changing laws and rules. The criminals have the best universities in the country - Sing Sing, Somers, etc., and these criminals are in training 24 hours a day, 7 days a week. The police must have some type of continued training just as the criminals do!

> This is the first time in my career that a lawyer has spoken to a group of policemen in their language, it shows you what can be done and done legally. This should have happened years ago and it should continue until each and everyone has had the chance to gain this knowledge.

Finally, a long time detective further suggested the benefits of bringing police and prosecution together:

> For the first time in fifteen years of police work we have a full-time prosecutor (Markle) who can work with us and is aware of our problems and difficulties. If we got nothing else out of the course we at least gained by establishing a rapport with the Chief Prosecutor and became acquainted. Believe this should be done more often with the Chief Prosecutor meeting with the police administrators and the circuit prosecutors meeting with all the police officers in their circuits.

Assessment

Periodic questionnaires have been distributed to participants in the training sessions. In addition, the course was attended, at various times throughout its operation, by the project evaluator. The findings derived from both the questionnaires and observations have been previously reported. When combined with an assessment of the written content of the material, the following conclusions are warranted:

(1) No material of comparable quality or scope was available to law enforcement officers before the materials made possible through the grant.

(2) The method of presenting the material through the use of visual aids, case illustration and other techniques readily were understandable to the working policeman. Much, however, depended upon the rapport that the project director has established over a substantial period of time with local police.

(3) A particular advantage of the course is the fact that a large number of officers from different departments were able to come together and discuss,

with knowledgeable legal guidance, particular methods and procedures. This appeared to create not only a growing esprit de corps, but also a set of law enforcement officers throughout the State who hopefully can remain in constant communication. This course has also led to a fair degree of self-analysis and criticism of individual departmental practices, i.e. the way Miranda warnings are handled. The knowledge of how other departments had dealt, or failed to deal with, such problems helped break down barriers.

(4) The distribution of all memoranda to each participant helps maintain the informal structure created in the training sessions.

(5) The discussion and analysis of the respective roles of police and prosecution lead to a greater understanding as to why, in terms of obtaining a conviction, certain procedures must be followed or particular information gathered. Again, while there might not be any philosophical agreement that such "technical" matters help efficient law enforcement, greater understanding of the prosecutor's role in law enforcement is necessary for establishment of a satisfactory working relationship.

(6) In the simplest terms, many participants were taught, for the first time, what the Supreme Court decisions mean in regard to actual police practice.

These six points, taken as a whole, indicate that the project was extremely successful. It is difficult to comprehend the reasons for the extent of the neglect of such training for local police in Connecticut. Prior to this course, there was no systematic way in which police could be taught (a) the legal requirements of the complex and rapid changes in the criminal law, or (b) how to adapt their practice to meet these requirements. Consequently, it can be of little wonder that practice did not sometimes meet these standards, or that prosecutors might lack sufficient tools to obtain strong convictions.

This evaluation should not be taken to imply that the existence of this course and its success has resolved all the problems in legal training for the police. Such is not the case, although a major start has been made.

One of the most serious problems which faced law enforcement in Connecticut remains the lack of communication - perhaps basic understanding - between police and the prosecuting attorneys. It is clear that the project director enjoys a close working relationship with a large segment of the major investigative officers in the State. Yet, such relations, as might be expected, are not so close between police and other prosecuting officials. An increasingly intensive effort must be made by police and prosecutors to diminish any barriers which exist. Continual training of this nature is one answer.

As will be pointed out in the subsequent section, legal training of a quality equivalent to that provided under the grant is necessary for all police officers. To have maximum impact, such training should be of a continuing nature and preferably conducted by prosecuting officials. The impact of the present course will be minimized if training cannot be continued to reach an ever increasing number of police. In terms of long range objectives, prosecutors should work closely with police departments during the course of important investigations. In too many cases, this is not now the case. It is unlikely to ever be the case without the stimulus that an effort such as that supported by the grant is continued.

In summary, then, two points are of particular importance. First, the course was highly successful, according to: (a) its content, (b) police response, and (c) its uniqueness in establishing or laying the groundwork for closer police-

prosecutor relations. Second, to be of substantial impact to law enforcement within the State, training of this nature must be continued. The second point is not a criticism of the course, but an admonition that once begun, a project of proven worth should be continued.

Implications for Future Training

Review of the course indicates the nature of future efforts which must now be undertaken.

(1) Long Term Legal Training

The rapidity of change in the criminal law, as well as its complexity, clearly indicates that training should be continuous, and that all police officers with substantial investigative responsibility should receive such training periodically. Training should be given by a lawyer, preferably a prosecutor. Further, those conducting the training should be carefully selected for their ability to relate to the police. This latter point is important, as it is often the case that the teacher will have to criticize current practice. In the evaluator's opinion, law enforcement officers are far more ready to accept constructive criticism from someone who is viewed as sympathetic to their problems than otherwise. This was one of the particular assets of the project director.

Spread

Eventually, all police officials, from the newest recruit to the chief, should receive high quality legal training. The way training should be offered deserves consideration, as different personnel may require varying types of training. Recruits could be trained at the Municipal Police Training Academy by prosecuting officials. Advanced training for higher level personnel could be conducted in

much the same way as the present. Provisions for continuous updating through memoranda as well as additional classes would have to be made.

No definite recommendation is made because there are several alternatives and combinations which should be considered. Whatever plan is followed should contain certain elements, however:

(1) the training should be under the direct supervision of a prosecuting official;

(2) the training should be centralized, so as to avoid duplication of effort, and to establish uniform policy and interpretation statewide;

(3) training should eventually include all police officials.

Meaning to Police

The President's Commission on Law Enforcement and Administration of Justice suggested succinctly the meaning of the present effort:

> The struggle to maintain a proper balance between effective law enforcement and fairness to individuals pervades the entire criminal justice system. It is particularly crucial and apparent in police work because, as has been noted, every police action can impinge directly, and perhaps hurtfully, in a citizens freedom of action.

The "proper balance" is a particularly delicate one. The recent shift in the balance, through the intervention of the Supreme Court has occasioned a good deal of contraversy, and lengthy debate on the merits of particular decisions. What is important, in terms of the police, however, is the fact that the Supreme Court has attempted to lay down the standards, and the police must respect them. Where police officials do not have the requisite training, it can hardly be expected that practice will meet the standards. Yet, whether or not they have such training, they are accountable to the public they serve for their actions. The Supreme Court decisions illustrate this accountability. Where it is felt, by segments of

the public, that the police do not follow the appropriate codes of conduct, it seems inevitable that respect for law, and the police, will diminish. It seems a fair hypothesis that, particularly among inner city minority groups, respect for law and police has diminished. The extent to which lack of police training broadly, and more specifically legal training, has contributed to any decline in respect is naturally problematic, as there is no handy measure available. But, there is likely a direct and substantial relationship.

This means, then, that the police, if anything, should represent exemplary standards of conduct, insofar as that is possible. That they have an extremely difficult job to perform is undeniable. That they should do it with more care, more skill and precision would also seem undeniable.

The quality of the present program is an example of the kind of training which must be offered to enable the police to meet this standard.

It can and should be used as a model for future programs.

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MEMORANDA OF LAW

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FOR OFFICIAL
USE ONLY

State of Connecticut

CIRCUIT COURT

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MEMORANDUM OF LAW — JUNE 7, 1968 — NO. 50

RE PRIMARY ILLEGAL ACT DOES NOT NECESSARILY REQUIRE

[A] DISMISSAL OF INFORMATION/INDICTMENT NOR

[B] SUPPRESSION OF EVIDENCE

The defense will often advance the claim that the Information should be dismissed and the incriminating evidence suppressed because the law enforcement officers have secured the return of the Information and seized the evidence by violating the defendant's constitutional rights.

The prosecution should be alert to meet these claims and to defeat the same by reference to the following decisions.

[A] DISMISSAL OF THE INFORMATION OR INDICTMENT

In United States v. Blue, 384 U.S. 251 (1965), the defendant was indicted for wilfully attempting to avoid personal income taxes. Blue filed a pretrial motion seeking to have the indictment dismissed, claiming that he had been forced to incriminate himself because prior to the return of the indictment, the Government had forced Blue to file petitions in a civil action in the Tax Court, which action pertained to the same years for which he was under indictment. The Supreme Court held:

> "Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial. * * * Our numerous precedents ordering

the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.
We remand this case to the District Court to proceed on the merits, leaving Blue free to pursue his Fifth Amendment claim through motions to suppress and objections to evidence."

In footnote 3 of Blue, supra, the Court further observed:

"3 It does not seem to be contended that tainted evidence was presented to the grand jury; but in any event our precedents indicate this would not be a basis for abating the prosecution pending a new indictment, let alone barring it altogether. See Costello v. United States, 350 U.S. 359; Lawn v. United States, 355 U.S. 339; 8 Wigmore, Evidence § 2184a, at 40 (McNaughton, rev. 1961)."

In State v. Corrigan, 4 Conn. Cir. Ct. 190, 228 A.2d 568, 571, the defense contended that the defendant's request for counsel was denied by the arresting officers. The Court found otherwise and further stated:

"Even if evidence was acquired by the state in violation of the defendant's rights under the constitution, he would at most be entitled to suppress, exclude or otherwise object to the evidence and its fruits if they were sought to be used against him at trial. United States v. Blue, 384 U.S. 251, 255, 86 S.Ct. 1416, 16 L.Ed.2d 510."

[B] INDEPENDENT SOURCE OF INFORMATION UNTAINTED BY ILLEGALITY ON THE PART OF OFFICERS

There are occasions when law enforcement officers act in violation of the defendant's constitutional rights resulting in the suppression of otherwise relevant evidence. Before a prosecution should abandon the question of suppression, there should be a close examination made of the information that the officer had on hand either prior to or subsequent to his so-called illegal activity. Often there will be evidence on hand that is untainted by the illegality and thus the arrest and/or seizure will be sustained. The following cases are good teaching examples of this theory.

In State v. Darwin, 155 Conn. 124, 140, 230 A.2d 573, 581-582 (1967) reversed on other grounds ____ U.S. ____ , 3 CrL 4074 (1968), the Court stated:

"Darwin makes much of the fact that the Chevrolet front-seat cushion was again returned to Dr. Stolman after the issuance of the search warrant of February 20 calling for the seizure of the Chevrolet, as well as of the fact that sweepings from the Chevrolet floor were again taken and sent to him. Dr. Stolman testified that a test was made on a stain not previously tested, and this stain, also, was found to be human blood. It is Darwin's claim that neither the bloodstain on the seat cushion nor the sweepings would have ever been thought of or any test of them made but for the prior illegal search. The court did not agree and concluded that the state had sustained its burden of proof that the evidence seized under the search warrant had an origin independent of the original illegal seizure. United States v. Paroutian, 319 F.2d 661, 663 (2d Cir.), cert. denied, 375 U.S. 981, 84 S.Ct. 494, 11 L.Ed.2d 426. We can find nothing unreasonable or illegal in that conclusion which could reasonably have been reached on the virtually undisputed subordinate facts found by the court. More important among these facts, known long before Darwin's arrest on the coroner's warrant on December 6, or the illegal search on that and the following day, were that there was a human bloodstain on the shirt which Darwin had worn on the night in question and that blood had been found on Hope's clothes and around her body when it was discovered on the ground. It is virtually inconceivable that even the most inexperienced police officer, with such information, would not think it necessary to examine the Chevrolet, which Darwin admitted he had used on the night in question, for human bloodstains and other incriminating evidence. The same motivation for the original seizure and examination of the car under the purported authority of the coroner would also dictate its seizure and examination under the search warrant issued under date of February 20. The reason for the search antedated, and was independent of, anything found or learned as a result of the search of December 6 or that of December 7 . . . "

In United States ex rel. Suarez v. Follette (2 Cir., 1967) 371 F.2d 426, police officers terminated the flow of electricity to the defendant's hotel room by loosening the fuse for it, but the defendant was not in the room at that time and was therefore not impelled to leave his room. The Court held:

"It is clear from the undisputed facts in the present case that no evidence was obtained as the result of

any trespass. * * * Moreover, there is no evidence in this record that the fuse tampering impelled Suarez to leave his room with the burglar tools. His detention in the hallway, the subsequent discovery of the cocaine, and the attempt at bribery, appear totally unrelated to the action of the officers in cutting off the room's supply of electricity." (371 F.2d at 427)

In United States v. Radford, (4 Cir., 1966) 361 F.2d 777, the claim was made that two F.B.I. agents had illegally entered the defendant's car during the night and after the defendant's arrest. However, any information obtained as a result of the illegal entry was not communicated to the third F.B.I. agent who secured a valid search warrant. The Court held that the search warrant was not tainted, stating:

"* * * [t]he District Court found that the two agents who improperly entered defendant's car, had not communicated that fact to Agent Dowling or anyone else, and that even if it be assumed that they did see defendant's gun in his car, it would make no difference, because they had not communicated any information which they had obtained to Agent Dowling or anyone else. The District Court found that the information that defendant's gun was in the car came from an independent source, that is, from the statement made by the defendant himself at the time of his arrest." (361 F.2d at 782)

In United States v. Beigel, (2 Cir., 1966) 254 F.Supp. 923, 931, affirmed 370 F.2d 751 (2d Cir., 1967), it was claimed that narcotics agents had illegally entered the defendant's apartment and attempted to open, without success, a suitcase. The Court held:

"Even if they did (illegally enter the apartment one or two days before the arrest), the testimony of the superintendent brought forth by Beigel, established that the claimed search yielded no evidence or leads and that the search made on the occasion of Beigel's arrest was in no way the fruit of any prior search. Accordingly, there is no basis for suppressing the evidence which was seized. See United States v. Paroutian, 319 F.2d 661-663 (2d Cir., 1963), cert. denied, 375 U.S. 981, 84 S.Ct. 494, 11 L.Ed.2d 426 (1964) Cf. United States v. D'Angiolillo, 340 F.2d 453, 456 (2d Cir.), cert. denied, 380 U.S. 955, 85 S.Ct. 1090, 13 L.Ed.2d 972 (1965)."

In United States v. Barrow, (3 Cir., 1966) 363 F.2d 62, 66, the Court held:

"The information as to Smith's identity was gained from personal observation and did not become unusable merely

because the same information was subsequently discovered during the illegal search. Burke v. United States, 382 F.2d 399, 420 (1st Cir., 1964), cert. denied 379 U.S. 849, 85 S.Ct. 91, 13 L.Ed.2d 52; Coplon v. United States, 89 U.S. App. D.C. 103, 191 F.2d 749 (1951), cert. denied 342 U.S. 926, 72 S.Ct. 363, 96 L.Ed. 690. Absent any exploitation of the illegality, the testimony of Smith was clearly admissible."

In McGarry's, Inc. v. Rose, (1 Cir., 1965) 344 F.2d 416, 419, the Court held that the fact that some of the books and records had been the subject of an illegal seizure and had been ordered returned to the taxpayers did not, under Fourth or Fifth Amendments, preclude the enforcement of summonses for their production, under order providing that the government was not barred from obtaining such of the books and records as were known to the government to exist prior to and independently of any knowledge gained from the previous illegal search and seizure.

See also: Anderson v. United States, (10 Cir., 1965) 344 F.2d 792, 793-794;
United States v. Hoffman, (7 Cir., 1967) 385 F.2d 501, 503-504.

The leading case in the United States on this subject is United States v. Paroutian, 319 F.2d 661 (2 Cir., 1963), cert. denied 375 U.S. 981 (1964), cited with approval, as noted herein, in State v. Darwin, supra. In Paroutian, supra, the Government had originally won the case at the trial level in the United States District Court for the Eastern District of New York only to have the Circuit Court of Appeals reverse and remand the case in United States v. Paroutian, (2d Cir., 1962) 299 F.2d 486. In the 1962 decision, the United States Court of Appeals found that Federal Bureau of Narcotics Agents, having been alerted by Interpol that one Graziani, a French subject, was suspected of engaging in the drug traffic and that he maintained an apartment in New York, entered the apartment on April 18 and April 20, 1958, without a search warrant or permission of Graziani. During the April 18th visit, the agents observed a new cedar closet and attempted to remove the cedar lining without success. On May 19, 1958, the apartment owners evicted Graziani for non-payment of rent. On June 19, 1968, the agents entered the subject apartment, with permission of the apartment house owner, and found that the cedar closet contained a secret compartment. When the compartment was opened, the agents found a cache of heroin and a letter, which they seized. The question presented was whether the evidence which was seized in the third search, when Graziani and Paroutian (whom an informant had advised the agents shared the apartment with Graziani) were out of possession of the premises was tainted by the first two illegal searches. The Court stated as follows:

"An unlawful search taints all evidence obtained at the search or through leads uncovered by the search. This rule, however, extends only to facts which were actually discovered by a process initiated by the unlawful act. If information which could have emerged from an unlawful search in fact stems from an independent source, the evidence is admissible... [Citations omitted] * * * Had the government shown that it had knowledge of the secret compartment from an independent source, the evidence would of course have been admissible. Parts Mfg. Corp. Lynch, 2 Cir., 129 F.2d 841, 842, 143 A.L.R. 132, cert. denied 317 U.S. 674, 63 S.Ct. 79, 87 L.Ed. 541. As the prosecution failed to show any source for its information other than the illegal search, however, we hold that the failure to suppress this evidence was prejudicial error." (299 F.2d at 489)

The Government, upon retrial, proved that the agents had received independent information, aside from the illegal search, pertaining to the secret compartment and the third search was held to be valid in United States v. Paroutian, 319 F.2d 661, 662-663, (2 Cir., 1963), cert. denied 375 U.S. 981, stating:

"After this court had remanded the case to the district court for a new trial, the district judge permitted the Government to prove that the information which led it to discover the heroin in the cedar-lined closet during the third search had a source -- a special employee who acted as an informer -- independent of any information obtained during the first two, unlawful searches. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920); Parts Mfg. Corp. v. Lynch, 129 F.2d 841, 143 A.L.R. 132 (2 Cir.), cert. denied, 317 U.S. 674, 63 S.Ct. 79, 87 L.Ed. 541 (1942). The district judge credited the Government's presentation and accordingly denied defendant's motion to suppress.

Appellant contends that it was error for the district court even to consider the question of the admissibility of the evidence taken during the third search because the opinion of this court on the first appeal ordered the suppression of that evidence. We disagree. The opinion of the court went no further than to hold that 'the prosecution failed to show any source for its information other than the illegal search.' 299 F.2d at 489. There is nothing in the opinion to suggest that this court intended to preclude the Government from proving upon retrial the existence of an independent source of information. We read the court's opinion as it was read by Judge Moore who, dissenting because he did not believe that the evidence taken during the third search was tainted, noted

that 'the majority concedes that this evidence can be introduced if on a new trial the government can present additional proof that the excluded evidence had an independent source.' 299 F.2d at 492."

The Supreme Court stated: "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." Wong Sun v. United States, 371 U.S. 471 at 487-488 (1963). Evidence obtained by the State "from an independent source" should not be excluded. Cf. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). Further, where law enforcement officers have acted wrongfully, evidence should not be excluded where the connection between the evidence and the misconduct is "so attenuated so as to dissipate the taint." See Nardone v. United States, 308 U.S. 388, 341 (1939).

In short, where the evidence has been discovered by independent means or would have been discovered in the normal course of police activities by legal means, the State should be entitled to show this rather than having the Court dismiss the case and suppress the evidence.

See: United States v. Paroutian, supra, 319 F.2d at 662.

For Further Research See Criminal Law Key Number 394.1(3) - 394.5(4)

[Chief Prosecuting Attorney's Law Enforcement Training Program
OLEA GRANT #191 - United States Department of Justice]

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MEMORANDUM OF LAW JULY 15, 1968 VOL. II, NO.1

RE RIGHT OF OFFICER TO ACT REASONABLY TO PROTECT THE PUBLIC AND/OR HIMSELF - TERRY & SIBRON & PETERS

There has been much discussion in legal circles of the New York Statute pertaining to "stop-and-frisk," N.Y. Code Crim. Proc. § 180-a. It is to be noted at the outset, that the Supreme Court of the United States avoided passing on the constitutionality of the New York Statute in Sibron v. State of New York, and Peters v. State of New York, U.S. 88 S.Ct. , but rather treated the right of the officer, investigating a subject under suspicious circumstances, to make an investigatory stop-and-frisk of the outer clothing of the subject for weapons.

THE ISSUE

The main treatment of this subject was in Terry v. State of Ohio, U.S. 8 S.Ct. (1968), where the issue presented was stated by the Supreme Court of the United States to be as follows:

> " . . . whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest," (88 S.Ct. at)

The Court stated that the officer may seize and search a person for weapons, where he has less than probable cause to arrest,

when he has observed suspicious conduct on the part of the subject and upon approaching the subject becomes apprehensive of his [the officer's] safety or that of the public, because he reasonably believes that the subject is armed. The law enforcement officer, who makes such a stop-and-frisk, must be prepared to tell the trial court in exquisite detail the exact reasons [i.e., "facts and circumstances"] that prompted him to so act.

FACTUAL SITUATION

In Terry, supra, the Court found the fact situation allowing a stop-and-frisk to be as follows:

> "He [Officer McFadden] had observed Terry, Chilton, and Katz go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation. * * * But the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identified route, pausing to stare in the same window roughly 24 times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men follow the third and rejoin him a couple of blocks away. It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further."
> (88 S.Ct. at)

"FACTS & CIRCUMSTANCES" AS THEY APPEARED TO THE OFFICER

In Terry, supra, the Court stated:

> "We must now examine the conduct of Officer McFadden in this case to determine whether his search and seizure of petitioner were reasonable, both at their inception and as conducted. He had observed Terry, together with Chilton and another man, acting in a manner he took to be preface to a 'stick-up.' We think on the facts and circumstances Officer McFadden detailed before the trial judge a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior. The actions of Terry and Chilton were

consistent with McFadden's hypothesis that these men were contemplating a daylight robbery -- which, it is reasonable to assume, would be likely to involve the use of weapons -- and nothing in their conduct from the time he first noticed them until the time he confronted them and identified himself as a police officer gave him sufficient reason to negate that hypothesis. Although the trio had departed the original scene, there was nothing to indicate abandonment of an intent to commit a robbery at some point. Thus, when Officer McFadden approached the three men gathered before the display window at Zucker's store he had observed enough to make it quite reasonable to fear that they were armed; and nothing in their response to his hailing them, indentifying himself as a police officer, and asking their names served to dispel that reasonable belief. We cannot say his decision at that point to seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so." (88 S.Ct. at) [Emphasis Added]

Thus, the officer who makes an on-the-street "stop" and then "frisks" the subject for weapons must be prepared to advise the court, from the witness stand, the reason that he was suspicious of the subject's activity in the first instance, and secondly, why he was apprehensive of his own safety or that of the public and therefore decided to search for a weapon.

JUSTIFICATION FOR RIGHT TO STOP AND FRISK

The purpose of the "frisk" was stated by the court in Terry, supra, to be as follows:

"Suffice it to note that such a search unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance of destruction of evidence. See Preston v. United States, 376, U.S. 364, 367 (1964). The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." (88 S.Ct. at) [Emphasis Added]

TYPE OF SEARCH

The type of search permitted by Terry, supra, is a limited one, whereby the officer must follow the guide lines setforth therein where the Court stated:

> "The scope of the search in this case presents no serious problem in light of these standards. Officer McFadden patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns. He never did invade Katz's person beyond the outer surfaces of his clothes, since he discovered nothing in his pat down which might have been a weapon. Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find." (88 S.Ct. at) [Emphasis Added]

THE TEST THE OFFICER WILL BE REQUIRED TO MEET TO JUSTIFY HIS CONDUCT IN MAKING A STOP-AND-FRISK

> "And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard; would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? Cf. Carroll v. United States, 267 U.S. 132 (1925); Beck v. Ohio, 379 U.S. 89, 96-97 (1964). Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial

than inarticulate hunches, a result this Court has consistently refused to sanction. See, e.g., Beck v. Ohio, supra; Rios v. United States, 364 U.S. 253 (1960); Henry v. United States, 361 U.S. 98 (1959). And simple 'good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." Beck v. Ohio, supra, at 97. (88 S.Ct. at) [Emphasis Added]

THE RATIONALE & SCOPE OF THE TERRY RULE

The rationale of the Terry rule is as follows:

"Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. Cf. Beck v. Ohio, 370 U.S. 89, 91 (1964); Brinegar v. United States, 338 U.S. 160, 174-176 (1949); Stacey v. Emery, 97 U.S. 645 (1878). And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. Cf. Brinegar v. United States, supra." (88 S.Ct. at) [Emphasis Added]

RATIONALE & SCOPE OF SIBRON & PETERS

Next, the Supreme Court turned to the Sibron and Peters cases, wherein the Court ignored the New York Statute concerning "stop-and-frisk" and defined the issue in each case as follows:

"The question is rather whether the search was reasonable under the Fourth Amendment." (88 S.Ct. at)

In Sibron, supra, the officer observed Sibron on his beat from 4:00 p.m. to 12:00 midnight. He saw Sibron talk to six or eight persons whom the officer knew to be drug addicts. Sibron later entered a restaurant where he was observed speaking to three more known addicts. Sibron started eating when the officer approached him and told him to come outside, which he did. The officer told Sibron, "You know what I am after." Sibron mumbled something and reached into his pocket. The officer thrust his hand into the pocket and discovered several glassine envelopes which contained heroin.

It is important to note: during all of the observations by the officer of Sibron, he never saw anything pass between the addicts and Sibron; the officer never seriously suggested that he was in fear of bodily harm or that he searched Sibron in self-protection to find weapons.

In Sibron, supra, the State, in the State Court, introduced the narcotics seized from Sibron's pocket on the ground that the officer had probable cause for an arrest. Section 180-a, the "stop-and-frisk" statute was not mentioned in the trial court. On appeal, the State sought to justify the search on the basis of the statute [§ 180-a] and the Supreme Court of the United States rejected this claim. The State also abandoned the claim that the officer had probable cause to arrest and make a search incident thereto and the Supreme Court agreed. The Court went on to state:

> "If Patrolman Martin lacked probable cause for an arrest, however, his seizure and search of Sibron might still have been justified at the outset if he had reasonable grounds to believe that Sibron was armed and dangerous. Terry v. Ohio, ante, p. . * * * The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate reasonable grounds for doing so. In the case of the self-protective search of weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous. Terry v. Ohio, supra. * * * Even assuming arguendo that there was adequate grounds to search Sibron for weapons, the nature and scope of the search conducted by Patrolman Martin were so clearly unrelated to that justification as to render the heroin inadmissible. The search for weapons approved in Terry consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. Only when he discovered such objects did the officer in Terry place his hands in the pockets of the men he searched. In

this case, with no attempt at an initial limited exploration for arms, Patrolman Martin thrust his hand into Sibron's pocket and took from him envelopes of heroin. His testimony shows that he was looking for narcotics, and he found them. The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception -- the protection of the officer by disarming a potentially dangerous man. Such a search violates the guarantee of the Fourth Amendment, which protects the sanctity of the person against unreasonable intrusions on the part of all government agents." (88 S.Ct. at)

The reader is invited to compare the actions of the officer in Terry as compared to that of the officer in Sibron. In Terry, the officer was truly apprehensive of the subject's being armed and his search was directed and limited to finding and neutralizing the use of any such weapons. In Sibron, the officer obviously was looking for any contraband, and his search was both too extensive and plainly exploratory.

In Peters, supra, the defendant was convicted of possession of burglar's tools, which had been seized at the time of his arrest. In this case, the officer, while off-duty and in his apartment at 1:00 p.m. heard a noise at his front door. The officer observed through his peephole two men tiptoeing toward the stairway. He called the police, armed himself and again observed the two men through his peephole. The officer testified he had lived in the 120 unit building for twelve years and he did not recognize either of the men as tenants. The officer testified he had happened upon two men in the course of an attempted burglary. The officer entered the hallway armed with his service revolver, slamming his apartment door loudly. Both men immediately started down the stairs, with the officer in pursuit in civilian clothes. He caught Peters two floors below where the chase had started. He could not catch the second man. Peters claimed he had been visiting his girl friend in the building, but refused to name her. The officer patted Peters down for a weapon. He felt a hard object in his pocket which he testified did not feel like a gun, but it might have been a knife. The officer removed the object from Peters' pocket and it was an opaque plastic envelope, containing burglar's tools.

In Peters, supra, the Court found the search to be reasonable under the Fourth Amendment.

> "We think, however, that for purposes of the Fourth Amendment the search was properly incident to a lawful arrest. By the time Officer Lasky caught up with Peters on the stairway between the fourth and fifth floors of the apartment building, he had probable cause to arrest him for attempted burglary. The

officer heard strange noises at his door which apparently led him to believe that someone sought to force entry. When he investigated these noises he saw two men, whom he had never seen before in his 12 years in the building, tiptoeing furtively about the hallway. They were still engaged in these maneuvers after he called the police and dressed hurriedly. And when Officer Lasky entered the hallway, the men fled down the stairs. It is difficult to conceive of stronger grounds for an arrest, short of actual eyewitness observation of criminal activity. As the trial court explicitly recognized, deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest. Brinegar v. United States, 338 U.S. 160 (1949); Husty v. United States, 282 U.S. 694 (1931); see Henry v. United States, 361 U.S. 98, 103 (1959). * * * When the policeman grabbed Peters by the collar, he abruptly 'seized' him and curtailed his freedom of movement on the basis of probable cause to believe that he was engaged in criminal activity. See Henry v. United States, supra, at 103. At that point he had the authority to search Peters, and the incident search was obviously justified 'by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime.' Preston v. United States, 376 U.S. 364, 367 (1964). Moreover, it was reasonably limited in scope by these purposes. Officer Lasky did not engage in an unrestrained and thoroughgoing examination of Peters and his personal effects. He seized him to cut short his flight, and he searched him primarily for weapons. While patting down his outer clothing, Officer Lasky discovered an object in his pocket which might have been used as a weapon. He seized it and discovered it to be a potential instrument of the crime of burglary.

We have concluded that Peters' conviction fully comports with the commands of the Fourth and Fourteenth Amendments and must be affirmed."

(88 S.Ct. at)

CONCLUSION

The law enforcement officer must be taught that under the case law, as expounded in Terry - Sibron - Peters, he must be prepared to testify, in detail, as to:

[1] Why the conduct of the subject under observation was of the type that made the officer suspicious that the subject was about to engage in a particular kind of crime, and

[2] Why the officer, upon approaching the subject, had reason to believe that the subject might be armed and dangerour to the officer or the public.

The officer must also be instructed that the initial "frisk" must be directed to discovering weapons or means of harm and should be limited to that purpose.

Note well, that in Peters, supra, the search for weapons turned up contraband that was subsequently used at trial. Justice Harlan, in his concurring opinion, observed:

> "The frisk made incident to that stop was a limited one, which turned up burglar's tools. Although the frisk is constitutionally permitted only in order to protect the officer, if it is lawful the State is of course entitled to the use of any other contraband that appears." (88 S.Ct. at)

[See also: Memorandum of Law, VOL. I, NO. 17]

If the rule of the Terry case is abused so as to harass minority groups, the Supreme Court has warned that the right to "stop-and-frisk" may be lost.

It is well to note, in concluding this Memorandum, that the Supreme Court recognized the dangers inherent in carrying out the duties of a law enforcement officer in the field, when it stated as follows:

> "American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousand more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives. In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed

and presently dangerous to the officer or to others, it would be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm."
Terry v. State of Ohio,

[Emphasis Added]

This Memorandum of Law should be read in conjunction with Memorandum of Law, VOL. I, NO. 22.

[Chief Prosecuting Attorney's Law Enforcement Training Program
OLEA GRANT #191 - United States Department of Justice]

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MEMORANDUM OF LAW February 28, 1969 VOL.II, NO. 8,Sec. 3

RE: ESTABLISHING THE CHAIN OR CUSTODY OF AN ARTICLE - SOME SUGGESTED PROCEDURES TO INSURE ADMISSIBILITY

When law enforcement officers seize or take into their possession an article which they know will be utilized at trial as real evidence, they should be acquainted with those steps that are necessary to properly preserve the evidence for such use. Toward that end this Memorandum is offered.

[A] PROVING THE CHAIN OF POSSESSION

In State v. Parker, 3 Conn. Cir. 598, 222 A.2d 582 (1966), the Court held:

> "It is a rule of evidence in criminal proceedings that an object must be shown to be in substantially the same condition when offered as it was when the crime was committed. 2 Wharton, Criminal Evidence (12th Ed.) § 674. 'Factors to be considered in making this determination include THE NATURE OF THE ARTICLE, THE CIRCUMSTANCES SURROUNDING THE PRESERVATION AND CUSTODY OF IT, AND THE LIKELIHOOD OF INTERMEDDLERS TAMPERING WITH IT. If upon the consideration of such factors the trial judge is satisfied that in REASONABLE PROBABILITY the article has not been changed in important respects, he may permit its introduction in evidence.' Gallego v. United States, supra, 276 F.2d 917. * * * The rule therefore does not require the prosecution to exclude all possibility that the article has not been changed in any important respects. United States v. S. B. Penick & Co., supra, (2d Cir. 1943) 136 F.2d (413) 415."
> [Emphasis added]

In accord: State v. Nagel, 4 Conn. Cir. 121, 123.

In Rosemond v. United States, (10th Cir. 1967) 386 F.2d 412, 413, a bank was robbed and when the home of the defendant was searched, the F.B.I. agents recovered a dollar bill that was identified by a teller as having been in her possession prior to the robbery. The identification by the teller was based originally upon the fact that the bill had a yellow sticky substance on it. The Court stated:

> "After some of the stolen money was recovered from the home of the appellant, the bank teller identified a one dollar bill among the money by a yellow sticky substance contained thereon. At the time of this identification the teller placed her initials on the bill, which was then in the possession of the F.B.I. The F.B.I. later transmitted the money to a laboratory for further tests. At the time of its admission into evidence the yellow sticky substance was gone and only the teller's initials remained as an identifying mark. * * * This court has recognized the admission of marked currency. Calderon v. United States, 269 F.2d 416, 419 (10th Cir. 1959). Here, there can be no doubt the exhibit was properly identified by the initials of the witness through whom it was offered. The money was properly identified and has been in the possession of the F.B.I. since it was found. Therefore, the fact that it was in a somewhat different condition at the time of its introduction in evidence does not prevent its admissibility. Evans v. United States, 122 F.2d 461, 466 (10th Cir. 1941). This court has recently said: 'The law applicable to admissibility of physical exhibits is clearly stated in Brewer v. United States, 8 Cir., 353 F.2d 260, to the effect that if, upon consideration of the nature of the article, the circumstances surrounding the preservation and custody of it and the likelihood of intermeddlers tampering with it, the trial judge deems the article to be in substantially the same condition as when the crime was committed, he may admit it into evidence, and his determination 'that the showing as to identification and nature * * * is sufficient to warrant reception of an article in evidence may not be overturned except for clear abuse of discretion,' Id., 262, quoting and citing Gallego v. United States, 9 Cir., 276 F.2d 914, 917; see also

N.B. THE VALUE OF HAVING THE WITNESS INITIAL THE ARTICLE IS PROVEN BY THIS CASE

West v. United States, 8 Cir., 359 F.2d 50, 55 (cert. denied 385 U.S. 867 [1966]) 'Reed v. United States, 377 F.2d 891, 893 (10th Cir. 1967)." [Emphasis added]

See also: Barquera v. People, (9th Cir.) 374 F.2d 171, 180, cert. denied 389 U.S. 879 (1967); United States v. Rowlette, (7th Cir. 1968) 397 F.2d 475, 477.

In United States v. Marks, (D.Conn. 1940) 32 F.Supp. 459, 460, the Court discussed the situation where the Government offered the testimony of the Connecticut State Police Officer who seized the evidence, but not that of the Federal Bureau of Narcotics agent who had delivered the articles seized to the United States Chemist for analysis. The Bureau of Narcotics agent had died. The testimony of the United States Chemist and another State Narcotic Officer however was offered by the Government. The Court, (Anderson, J.) held:

> "To uphold the defendant's contention, the Court would have to assume that Narcotic Agent Gray did not perform his duty. He was a public officer and was required under the rules and regulations to deliver the packages seized from the defendants, without physical alteration of the contents, to the United States Chemist. It is presumed that public officers perform their public duty as such. [Citations omitted]. It is therefore presumed that Narcotic Agent Gray performed his duty and that in the performance of his duty he delivered the packages intact as he was required to do, to the United States Chemist. Therefore the packages were properly admitted in evidence. [Citations omitted]."

In Marks, supra, the Connecticut State Police Officer, who seized the evidence in the first instance, was able to testify that he had taken possession of the four packages and that he placed his initials, badge number and the date on each of the four seized packages. He further testified that each of the four packages was in the same condition as they were on the day of the arrest. This was excellent police procedure and should be encouraged and followed by the seizing officer.

Compare this above procedure with the comments of the Court in State v. Ferrone, 97 Conn. 258, 264 (1922), where the seized evidence was improperly admitted into evidence. In Ferrone, supra, only the officer who was in command of the case was called to testify as to the seizure of the articles and the Court stated:

> "The officers who made the search should have been required to testify as to the search, as to the articles taken from the car, and as to what was done with them; and if these were handed to Lieutenant Weltner, he could identify them and they might have been properly laid in evidence."

[B] SUGGESTED POLICE PROCEDURES TO AID IN PROPER COURT PRESENTATION OF ARTICLES SEIZED OR OBTAINED DURING THE CRIMINAL INVESTIGATION

The law enforcement officer who seizes the article that will be subsequently introduced into evidence against the defendant should be trained to either mark the actual article or the evidence envelope in which it is placed with his initials and the date of the seizure. It is preferable that the article itself be so marked whenever possible. In addition, the officer should attach an evidence card to the article or place on the evidence envelope information stating the exact location of the evidence when seized [for instance, from the left rear hand pocket of the accused]. A photograph should be taken, when feasible, of the article seized in the exact location and condition in which it was found before it is moved.

On trial, the prosecution should mark the article for identification and then have the seizing officer identify it, after examining it, as being exactly the same item that he took into his possession on a given date.

To avoid having to produce at trial numerous officers who handled the seized articles, it is strongly recommended that one officer be designated as the "seizing officer." This officer should be the only one who takes the article into his possession at the crime scene and the one who subsequently turns it over to the property clerk. The property clerk should place the article into an envelope and initial the same. The seizing officer should obtain a receipt for the articles turned over and he should be prepared to produce the evidence with the property clerk at the time of trial.

In State v. Brown, 99 N.J. Super. 22, 238 A.2d 482, 485 (1968), the Court made the following significant comments:

> "Evidence in the form of money should be initialed or otherwise identified wherever possible, and should be placed in envelopes which are dated, identify the contents, and bear the signature or initials of the person who placed it there. Such envelopes should be sealed and if, during the period of custody, the seal is broken, it is highly preferable that an explanation thereof should be affixed or otherwise furnished by the person breaking the seal, after which the envelope should be resealed. * * * "
> [Emphasis added]

For Further Research: Criminal Law Key Numbers 404(3)(4)

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MEMORANDUM OF LAW APRIL 28, 1969 VOL.II, NO. 10

RE: SPINELLI - A RESTATEMENT CONCERNING THE PROPER METHOD OF ESTABLISHING PROBABLE CAUSE

Contrary to popular and current comment, Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584 (1969), actually established no startling changes in the principles of law relevant to the proper manner of establishing probable cause.

The affidavit in Spinelli was badly defective in several important aspects, because the affiant failed to establish: [1] sufficient underlying facts and circumstances to show the issuing judge or magistrate why the affiant had reason to believe the informant to be reliable; [2] sufficient underlying facts and circumstances to show the issuing judge or magistrate that the informant was speaking from personal knowledge and/or from information that the reliable informant had a legitimate basis for crediting; [3] the significance of the pertinent activities of the defendant as they relate to the criminal activity under investigation based upon the affiant's experience and training as a police officer.

[1] ESTABLISHING THE INFORMANT'S RELIABILITY

In Spinelli, supra (89 S.Ct. at page 588), the affidavit stated as follows:

> "The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136."

The Supreme Court observed:

> "Though the affiant swore that his confident was 'reliable' he offered the magistrate no reason in support of this conclusion." (89 S.Ct. at page 589)

Thus, in drawing an affidavit or testifying in court concerning the reliability of the informant, the law enforcement officer should be instructed to follow the teaching of the Court in United States v. Freeman, (2 Cir. 1966) 358 F.2d 459, 463, where the Court stated that the affidavit would have been stronger concerning the reliability of the informant if the affiant had presented to the issuing authority facts and circumstances reflecting:

> " * * * the length of time that Agent Benjamin had known and dealt with the informant, the number of times information had been received from the informant, and a statement as to the accuracy of such statement * * * * ."

See also: McCreary v. Sigler, (8 Cir. 1969) ____ F.2d ____, 4 Crl 2491-2.

In this way, the affiant offers the issuing authority ". . . some of the underlying circumstances supporting the affiant's conclusion and his belief that any informant involved . . . was 'credible' . . ." McCray v. Illinois, 386 U.S. 300, 311 (1967). It is to be noted that in McCray, supra, where the Court held that the arresting officers had established the reliability of their informant, the Court stated with approval the manner in which the officers had established the previous reliability of their informant, to wit:

> "Jackson testified that he had been acquainted with the informant for approximately a year, that during this period the informant had supplied him with information about narcotics activities 'fifteen, sixteen times at least,' that the information had proved to be accurate and had resulted in numerous arrests and convictions. On cross examination, Jackson was even more specific as to the informant's previous reliability, giving the names of people who had been convicted of narcotics violations as the result of information the informant had supplied. * * * " (386 U.S. at page 303)

[2] ESTABLISHING WHY THE AFFIANT BELIEVED THAT THE INFORMANT WAS SPEAKING FROM PERSONAL KNOWLEDGE OR IF THE INFORMANT CAME BY HIS INFORMATION INDIRECTLY, WHY HIS SOURCE WAS RELIABLE

When one examines the "tip" received from the informant as set forth

in the Spinelli affidavit, all that it really says is that the informant gave information that " * * * Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136." The Court observed as follows:

> " * * * The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. * * * We are not told how the FBI's source received his information - it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him." (89 S.Ct. 589)

Thus, the affiant failed to ask himself the author's recommended proverbial question concerning the information received from the informant, to wit: "Was you 'dere Charlie?" (Meaning, was the informant either in a position to see the criminal activity or hear something concerning the same). If the affiant can answer the proverbial question in the affirmative, after examining the informant's information as set forth in the affidavit, or by the affiant's testimony on the witness stand (in an arrest warrant or arrest without a warrant situation), then probable cause has been properly established where reliance is being placed on the informant's personal observation and/or knowledge. It is important to note that when the cases require personal knowledge of the informant they mean either that the informant has seen the facts he is reporting, taken part in the criminal activity (such as placing a bet with the defendant over the telephone), or that he has heard the defendant say something which reveals the criminal activity (which "hearing" can be either by the overhearing of a conversation in which the defendant has participated or the informant has himself been involved in a conversation with the defendant.)

The officer should be instructed to secure from his informant as much detail as possible concerning the manner in which the criminal activity is being carried out, so the officer can surveil the activity under investigation and thus corroborate and protect the informant. See McCray v. Illinois, 386 U.S. 300, 304 (1967), where the Court stated:

> "There can be no doubt, upon the basis of the circumstances related by Officers Jackson and Arnold, that there was probable cause to sustain the arrest and incidental search in this case. Draper v. United States, 358 U.S. 307. Unlike the situation in Beck v. Ohio, 379 U.S. 89, each of the officers in the case described with specificity 'what the informer actually said, and why the officer thought the information was credible.' 379 U.S. at 97. The testimony of each of the officers informed the court of the 'underlying

> circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.' Aguilar v. Texas, 378 U.S. 108, 114. See United States v. Ventresca, 380 U.S. 102. Upon the basis of those circumstances, along with the officers' personal observations of the petitioner, the court was fully justified in holding that at the time the officers made the arrest 'the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. Brinegar v. United States, 338 U.S. 160, 175-176; Henry v. United States, 361 U.S. 98, 102.' Beck v. Ohio, supra, at 91."

The Court in Spinelli, supra, also stated:

> "In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail so that the magistrate may know that he is relying on something more than a mere casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." (89 S.Ct. at page 589)

Thus, "detailed" information concerning the criminal activity from a previously reliable informant, would be sufficient to establish probable cause. The information should reflect the fullest details possible so that it will be apparent to the court that the same could only have come from an informant who has made the observation personally. See Spinelli, supra, 89 S.Ct. at page 589, where the Court stated:

> "A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way."

The Court further observed that "hearsay on hearsay" will be acceptable when received from a reliable informant whose previous reliability is established. The Court stated in Spinelli, supra, 89 S.Ct. at page 589:

> "Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable. Compare Jaben v. United States, 381 U.S. 214, 85 S.Ct. 1365, 14 L.Ed.2d 354 (1965)."

One would assume that this means that if one officer were to receive information from a second officer who advises that the second officer's informant, whom the second officer had known for a year and who had been reliable ten times in the past, supplied relevant information concerning criminal activity under investigation by the first officer, this information could be used by the first officer, if he stated that he had received the same from the second officer who had advised him of the facts pertaining to the informant's reliability and the same facts were set forth in the affidavit. Cf. People v. Scott, 66 Cal.Rptr. 257, 263-264 (Ct. of Appeals, 1968)

RECENT DECISION RELATING TO SPINELLI

In United States v. Acarino, (2 Cir. 1969) ____F.2d ____, 5 Crl 2028, the defendant was arrested without a warrant for a narcotics violation, and when the car in which he was arrested was searched incident to the arrest, narcotics were found. The defense tried to raise the claim that the information received by the arresting agent from his informant failed to meet the requirements of Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli, supra. The Court in upholding the probable cause for the arrest found that the agents had been watching the defendant for several months and had seen him meet with suspected and known traffickers in the field of narcotics. The officers were then advised that the accused was expected to deliver narcotics within a given time at a certain area in Brooklyn. This information was received from an informant who had previously been proven reliable. The agents trailed the defendant, who drove evasively, to the designated area,where they arrested him. The Court held as to the showing concerning the PREVIOUS RELIABILITY of the INFORMANT, as follows:

> "Appellant's brief in this court concedes that on the basis of the agent's testimony before Judge Mushler, they properly regarded the informer as reliable. INDEED, THE INFORMER HAD FURNISHED INFORMATION WHICH LED TO CONVICTIONS FIVE TIMES BEFORE. * * * [Emphasis added]

As to the SPECIFICITY OF THE INFORMATION RECEIVED FROM THE INFORMANT INDICATING THAT HE SPOKE FROM PERSONAL KNOWLEDGE [Was you 'dere, Charlie?], the Court stated:

> " * * * [T]he informer here, as in Draper, gave the agent a precise prediction of a crime about to occur, unlike Spinelli where the information was a more generalized description of criminal activity. Moreover, agent Telb testified that the informer HAD SAID THAT HE 'PERSONALLY KNEW' that the described delivery

was to be made. This emphasis, along with the DETAILED NATURE OF THE INFORMATION GIVEN, suggests that the informer was disclosing FIRSTHAND KNOWLEDGE, rather than a 'suspicion,' 'belief' or 'mere conclusion.' Aguilar, 378 U.S. at 114, or 'a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.' * * * Finally, in Spinelli, not only was no statement made as to the source of the informer's information but no reason was given for the agent's assertion that the informant was generally reliable, a fact conceded here. Therefore, we do not find impressive the argument that Aguilar and Spinelli require us to reverse this conviction." [Emphasis added]

The Court, in Acarino, supra, went on to observe as follows:

"However, as in Cunningham and Soyka, supra, we need not decide whether the informer's report, standing alone, would have constituted probable cause for the arrest. For it is soundly established that an informer's report which itself fails to establish probable cause may be sufficiently corroborated by independent observation of a suspect's conduct, if the latter tends to confirm the information in the report or otherwise to support a conclusion that the suspect is engaged in committing a crime. * * * In the present case, the credibility of the informer's report was reinforced by appellant's conduct both before and after the informer's urgent telephone call."

The instant Memorandum of Law should be read in conjunction with Memorandum of Law, Vol. I, No. 19. On pages 4 through 8 of No. 19 there is set forth a suggested Affidavit. The Affidavit can be improved upon in view of Spinelli in the second paragraph on page 5 and it should be made to read as follows:

2. That the undersigned received information on September 30, 1966, from an informant, who has been known to the affiant for a period of three years, during which period of time the informant has given the affiant information pertaining to policy playing activities on at least ten occasions, which information has led to ten successful arrests and convictions of policy playing operators or violators, to the effect that during the past two weeks the informant has been on the premises known as Joe's Grocery, 34 Zero Street, Y City, Connecticut, and while there on several occasions he observed that Joe Jones, the person running the store, during the late morning hours and early afternoon hours, would accept numbers action from people who

would walk into the store, hand him a piece of paper with their action written thereon and money, and then leave, and that Jones would then go to the telephone and call out reading from the piece of paper, which he would then put away in a cigar box with the money received from the people.

In conclusion, the statement of the Court in Spinelli, supra, 89 S.Ct. at pages 590-591, bears repeating:

> "In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. Beck v. Ohio, 379 U.S. 89, 96, 85 S.Ct. 223, 228, 13 L.Ed.2d 142 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at a trial. McCray v. Illinois, 386 U.S. 300, 311, 87 S.Ct. 1056, 1062 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense. United States v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741, 745 (1964); and that their determination of probable cause should be paid great deference by reviewing courts. Jones v. United States, 362 U.S. 257, 270-271, 80 S.Ct. 725, 735-736 (1960). * * * "

As the law develops with regard to Spinelli, additional Memoranda of Law will issue.

FOR FURTHER RESEARCH SEE:

COURTS, Key Number 383(1)
Searches and Seizures, Key Number 3.6(1,3)

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MEMORANDUM OF LAW JUNE 30, 1969 VOL. II, NO. 12

RE: PERMISSIBLE AREA OF SEARCH INCIDENT TO AN ARREST WITH OR WITHOUT AN ARREST WARRANT = A NEW AND SEVERE LIMITATION ON THE PERMISSIBLE AREA OF SEARCH

The Supreme Court of the United States in Chimel v. State of California, ____ U.S. ____, ____ S.Ct. ____ (1969) [5 CrL. 3131], has imposed a new and severe limitation on the permissible area that a law enforcement officer may search as incident to an arrest.

In view of the fact that the Court, in Chimel v. State of California, supra, ___ U.S. at page ___, ___ S.Ct. at page ____, 5 CrL. at page 3136, has overruled previous decisions [Harris v. United States, 331 U.S. 145 (1947), and United States v. Rabinowitz, 339 U.S. 56 (1950)], as far as they relate to the permissible area of search incident to an arrest, it is of the utmost importance that the new and severe limitations on the permissible area of search be explained to law enforcement officers as soon as possible.

The thrust of Chimel, supra, is that the officer, absent "well-recognized exceptions" [which will be dealt with subsequently], must obtain a search warrant if he has to make an extensive search of premises occupied or used by the defendant.

> "Even in the Agnello case the Court relied upon the rule that '[b]elief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.' 269 U.S. at 33. Clearly, the general requirement that a search warrant be obtained is not lightly to be dispensed with, and 'the burden is on those seeking [an] exemption [from the requirement] to show the need for it . . .' United States v. Jeffers, 342 U.S. 48.

> Only last Term in Terry v. Ohio, 392 U.S. 1, we emphasized that 'the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure,' id., at 20, and that [t]he scope of [a] search must be strictly tied to and justified by the circumstances which rendered its initiation permissible.' Id., at 19." Chimel, supra, ___ U.S. at page ____ ; ____ S.Ct. at page ____ ; 5 CrL. at page 3134.

FACTUAL SITUATION IN CHIMEL

Three law enforcement officers went to the defendant's house to serve an arrest warrant. The defendant was not home and the three officers waited at the defendant's house until he came home from work. They then served the arrest warrant and incident thereto, searched the entire three bedroom house including the attic, garage and a small workshop. The Supreme Court held that the search was beyond the permissible scope of a search incident to a lawful arrest under the Fourth Amendment.

NEW PERMISSIBLE SCOPE OF SEARCH INCIDENT TO AN ARREST UNDER CHIMEL

The Supreme Court of the United States in Chimel, supra, fixed the permissible scope of a search incident to an arrest as follows:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' - construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." Chimel, supra, at page ___ , ___ S.Ct. at page ___ , 5 CrL. at page 3134.

The Court further observed:

> "Application of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. The scope of the search was, therefore, 'unreasonable' under the Fourth and Fourteenth Amendments, and the petitioner's conviction cannot stand."
> Chimel, supra, ___ U.S. at page ____, ___ S.Ct. at page ____ , 5 CrL. at page 3136.

LIMITATIONS ON THE SCOPE OF PERMISSIBLE SEARCH

The Court in Chimel, supra, ___ U.S. at page ____ , S.Ct. at page ____ , 5 CrL. at page 3134, observed as follows:

> "There is no comparable justification, however, for routinely searching rooms other than that in which an arrest occurs - or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-organized exceptions, may be made only under the authority of a search warrant. The 'adherence to judicial processes' mandated by the Fourth Amendment requires no less."

SCOPE OF SEARCH STILL TURNS ON REASONABLENESS OF ALL THE FACTS AND CIRCUMSTANCES

The Court stated:

> "Thus, although '[t]he recurring questions of the reasonableness of searches' depend upon 'the facts and circumstances - the total atmosphere of the case,' id. [Sibron v. New York, 392 U.S. 40 & Peters v. New York, 392 U.S. 40, 66-67], at 63, 66 (opinion of the Court), those facts and circumstances must be viewed in the light of established Fourth Amendment principles." Chimel, supra, ____ U.S. at page ____ , ____ S.Ct. at page ____ , 5 CrL. 3135.

EXCEPTIONS TO RULE UNDER CHIMEL REQUIRING SEARCH WARRANT IN ALL CASES WHERE EXTENSIVE SEARCH INCIDENT TO ARREST IS NECESSITATED

As to vehicles which can be moved rapidly out of the jurisdiction, the Court in footnote 9 [Chimel, supra, ____ U.S. at page ____ , ____ S.Ct. at page ____ , 5 CrL. at page 3135], stated:

> "Our holding today is of course entirely consistent with the recognized principle that assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants 'where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.' Carroll v. United States, 267 U.S. 132, 153; See Brinegar v. United States, 338 U.S. 160."

However, the Court admonishes the officer in dealing with vehicles and all searches incident to arrest to comply with the holding of Preston v. United States, 376 U.S. 376 U.S. 376 U.S. 364, and conduct the search at the time and place of the arrest. See Chimel, supra ____ U.S. at page ____ , ____ S.Ct. at page ____, 5 CrL. at pages 3134-3135.

As to other emergency situations or "well-recognized exceptions" to the requirement of securing a search warrant, the Court in Chimel, supra, ____ U.S. at page ____ , footnote 8, ____ S.Ct. at page ____ , footnote 8, 5 CrL. at page 3134, footnote 8 refers to Katz v. United States, 389 U.S. 347 and more particularly pages 357-358. An examination of Katz, supra,at the relevant pages indicates the Court therein, inter alia, stating:

> " * * * Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes, United States v. Jeffers, 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions. [Footnote 19. See, e.g., Carroll v. United States, 267 U.S. 132, 153, 156; McDonald v. United States, 335 U.S. 451, 454-456; Brinegar v. United States, 338 U.S. 160, 174-177; Cooper v. California, 386 U.S. 58; Warden v. Hayden, 387 U.S. 294, 298-300.]"

In Carroll, supra, and Brinegar, supra, the search incident to an arrest and without a search warrant was proper because of the mobility of the vehicle as noted in footnote 8 above cited.

In McDonald v. United States, 335 U.S. 451 at pages 454-456, the Court held that unless officers were responding to an emergency, "there must be compelling reasons to justify the absence of a search warrant." Since the defendants had been under surveillance for months and there was no showing that the defendants had been ready to flee or escape, the Court held there was no justification for failing to secure a search warrant. The Court stated:

> "And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."

In Cooper v. California, 386 U.S. 58, the examination of a legally impounded car absent a search warrant was proper since the police were acting to secure the contents of a vehicle.

In Warden v. Hayden, 387 U.S. 294, 298-300, the Court allowed a warrantless search of a house which an armed robber had just entered, stating:

> "We agree with the Court of Appeals that neither the entry without warrant to search for the robber, nor the search for him without warrant was invalid. Under the circumstances of this, "the exigencies of the situation made that course imperative." McDonald v. United States, 335 U.S. 451, 456. The police were informed that an armed robbery had taken place, and that the suspect had entered 2111 Cocoa Lane less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.

It is argued that, while the weapons, ammunition, and cap may have been seized in the course of a search for weapons, the officer who seized the clothing was searching neither for the suspect nor for weapons when he looked into the washing machine in which he found the clothing. But even if we assume, although we do not decide, that the exigent circumstances in this case made lawful a search without warrant only for the suspect or his weapons, it cannot be said on this record that the officer who found the clothes in the washing machine was not searching for weapons. He testified that he was searching for the man or the money, but his failure to state explicitly that he was searching for weapons, in the absence of a specific question to that effect, can hardly be accorded controlling weight. He knew that the robber was armed and he did not know that some weapons had been found at the time he opened the machine. In these circumstances the inference that he was in fact also looking for weapons is fully justified."

C O N C L U S I O N

The law enforcement officer, when he effectuates an arrest, with or without an arrest warrant and without a search warrant, may search, incident to that arrest, the following limited areas:

[1] the person of the defendant for a weapon;
[2] the person of the defendant for evidence that he might conceal or destroy;
[3] the immediate area where the defendant was arrested and only those areas where the defendant might be able to secure a weapon to harm the officers, or others, or destroy evidence;
[4] where the defendant is pursued, the area wherein he might be hiding [See Memorandum of Law Vol. I, No. 34];
[5] if the vehicle of a defendant is impounded, the contents of the vehicle may be inventoried [See Memorandum of Law, Vol. I. No. 29];
[6] if a vehicle is involved, the vehicle may be searched without a warrant, if the officer has probable cause to believe that the same contains contraband [See Memorandum of Law, Vol. I, No. 16].

Absent one of the above exceptions, the law enforcement officer should obtain a search warrant if a more extensive search of the area is desired.

The law enforcement agencies should prepare to hire stenographic help that will be available around the clock to prepare search warrant affidavits. The prosecution will have to arrange for members of the judiciary to be available at all hours also. In short, the thrust of this decision requires search warrants whenever there is any question as to the scope of the search.

To law enforcement personnel: If you wonder why decisions such as Chimel, supra, are decided to the detriment of police, bear in mind the following comment that appeared in the New York Times on December 1, 1968, in an article written by Fred P. Graham concerning the fact that the Supreme Court of the United States was about to consider Chimel, supra:

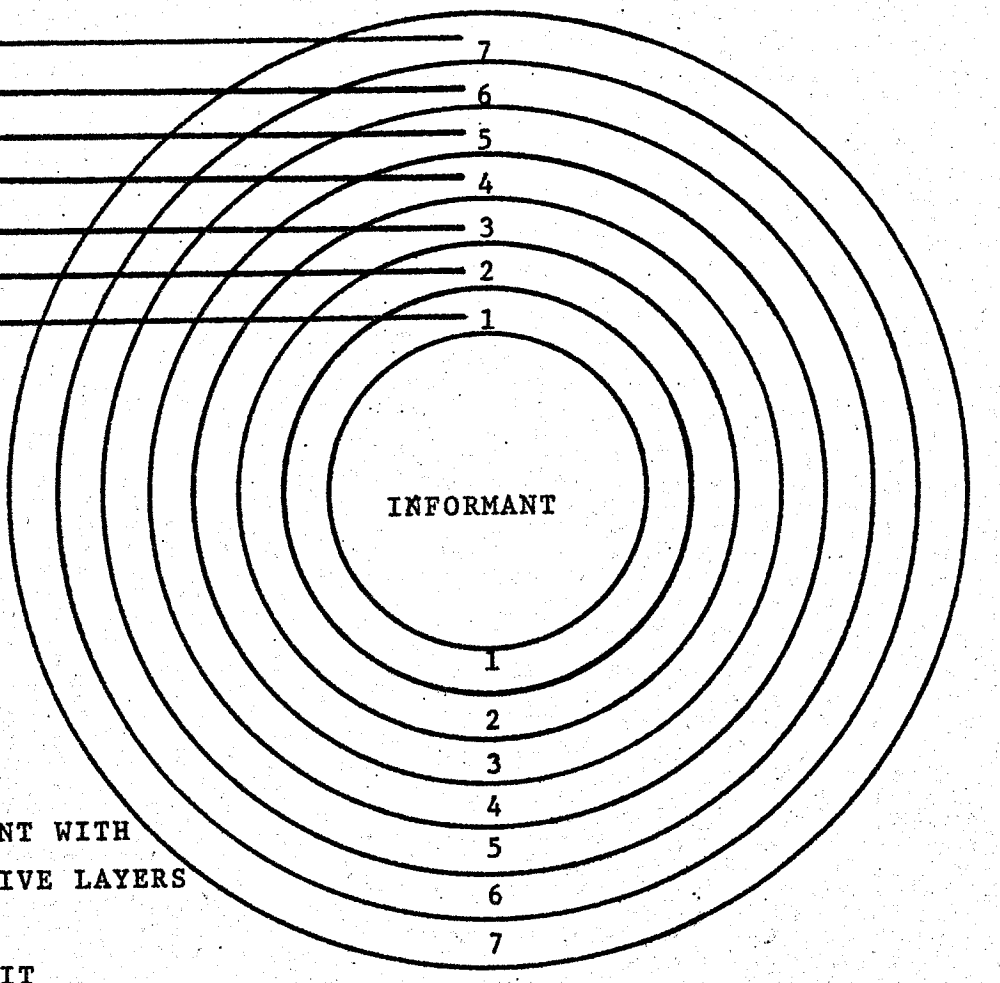
> "A recent check of San Francisco's court files, for instance, showed that in that city of three-quarters of a million people, only 17 search warrants were issued to the police in all of 1966, a year in which 29,084 serious crimes were reported by the police to the F.B.I."

As this area of the law developes further, additional Memoranda will issue.

MEMORANDUM OF LAW, VOL. II, NO. 9, should be marked as "OUTDATED" in view of the holding in Chimel, supra.

FOR FURTHER RESEARCH SEE:
Arrest Key Numbers 71(1)-(8)

N.B. The question of retroactivity of Chimel, supra, was left open, in the benign wisdom of the Supreme Court.
See: Shipley v. California, ____ U.S. ___ , S.Ct. ___ , 5 CrL. 4080.



HOW TO PROTECT INFORMANT WITH PROTECTIVE LAYERS IN THE AFFIDAVIT

1. POLICE TRAINING & EXPERIENCE SET FORTH
2. FACTS & CIRCUMSTANCES OF DETAILS RECEIVED FROM INFORMANT ESTABLISHING HIS PAST RELIABILITY AND THAT HE HAS PERSONAL KNOWLEDGE OF CRIMINAL CONDUCT/ACTIVITY TAKING PLACE [WAS YOU 'DERE, CHARLIE?] AND HIS KNOWLEDGE IS CURRENT [WHEN WAS YOU 'DERE, CHARLIE?]
3. POLICE SURVEILLANCE WHICH CORROBORATES INFORMANT'S INFORMATION AS GIVEN
4. PAST POLICE RECORD - PARTICULARLY CONVICTIONS FOR SIMILAR CRIMES & DATES OF SAME
5. OTHER INFORMATION THAT IS RELEVANT THAT POLICE MAY KNOW
6. EXPLANATION & SIGNIFICANCE OF FACTS & CIRCUMSTANCES AS RELATED TO POLICE EXPERIENCE AND TRAINING - STRESS SIGNIFICANCE OF PARTICULAR ACTS/CONDUCT/HOURS/ACTIVITY
7. ANY OTHER INFORMATION CONCERNING THE MATTER

MANDATORY POLICE PROCEDURE IN CONDUCTING A LINEUP OF AN ARRESTED PERSON

The law enforcement officer can no longer utilize a lineup or show up where the witness observes only one person and whom the officer has indicated the police suspect. The officer should be advised that he must follow these rules as set forth herein:

STAGE ONE: ARREST OF DEFENDANT & WARNING OF RIGHT TO PRESENCE OF COUNSEL AT TIME OF LINEUP

Once a subject has been arrested and the police desire to exhibit the arrested person to the view of an identifying witness, the arrested subject must be advised of his right to the presence of counsel at the time of the lineup.

STAGE TWO: THE POLICE MUST WARN THE DEFENDANT OF HIS RIGHT TO THE PRESENCE OF COUNSEL AT THE TIME OF THE LINEUP & OBTAIN HIS INTELLIGENT WAIVER OF HIS RIGHT, OR DELAY THE LINEUP UNTIL COUNSEL IS PRESENT

The arrested subject must knowingly and intelligently waive his right to have an attorney present at the time of the lineup and if he refuses to waive this right, the lineup must be delayed until counsel is obtained for the arrested subject. A written or recorded consent to waive the right to the presence of counsel should be obtained from the arrested subject, if possible.

STAGE THREE: IF THE ARRESTED SUBJECT'S COUNSEL CANNOT BE PRESENT AND THERE IS SOME REASON THAT THE LINEUP SHOULD BE HELD QUICKLY, SUBSTITUTE COUNSEL MAY BE OBTAINED TO BE PRESENT AT THE TIME OF THE LINEUP

The Supreme Court wants an independent witness to view the lineup who can represent the arrested subject's interests at the lineup and at trial. Therefore, they have said that if the defendant's attorney is not available, or there are other reasons that the lineup cannot be delayed, a substitute attorney may be obtained to be present at the lineup.

STAGE FOUR: WITH THE ATTORNEY FOR THE ARRESTED SUBJECT PRESENT, OR IF HE HAS WAIVED THIS RIGHT TO COUNSEL, THE LINEUP CAN NOW BE HELD

If you have complied with the three above-mentioned stages, the lineup can now be held. The best procedure would be to record the proceedings and it is mandatory that the police photograph the lineup to preserve, for the trial court, the picture of the fairness of the lineup as conducted by the police, in case the fairness of the same is attacked.

STAGE FIVE: THE "DOS" AND "DON'TS" NECESSARY TO PROTECT A LINEUP IDENTIFICATION FOR COURT USE

1. Do not have participants in the lineup who are grossly dissimilar in appearance from the suspect, i.e., age, race, dress, or other physical characteristics;
2. Do not tell the witness to the lineup who the suspect is;
3. Do not have the suspect viewed in jail and/or in handcuffs;
4. Do not point out the suspect before, during, or after the lineup;
5. Do not have the participants in the lineup try on clothing which fits only the suspect;
6. Do not have potential witnesses sit next to each other or talk over their identification before, during, or after the lineup; do not allow the witnesses to sit so close to each other that they are able to overhear the identifications made by one another;
7. Do have a photograph taken of the lineup exactly as viewed by the witness so that it may be shown later in Court, if the fairness of the lineup is challenged;
8. Do have, if possible, the entire lineup recorded on a recording device so that there is no question as to what was said;
9. Do advise the witness that while in the lineup room, said witness does not have to speak to, or make any statement to, defense counsel unless the witness so chooses. However, defense counsel is entitled to hear the witness make the identification;
10. Do cover the face of the witness, if you are afraid that harm may come to said witness, because of the nature of the crime involved or the persons involved;
11. Do set up a procedure whereby "substitute counsel" is available in the event that the defendant's attorney is not available, or has not as yet been appointed;
12. Do not have only one individual in the lineup make a body movement, gesture, or verbal statement, unless you have all others in the lineup do the same;
13. Do accept reasonable suggestions from defense counsel which will improve the fairness of the lineup;
14. Once the accused has been arrested, do not have the witnesses view photographs of the accused prior to holding the lineup;
15. While presence of defense counsel, unless waived, is essential at the time of the lineup, do not permit defense counsel to interfere unreasonably with the lineup; and the consent of the accused and/or his counsel is not required to hold the lineup;
16. Do log the names of all participants in the lineup, their positions in the lineup and any changes in lineup during viewing;
17. Do consult your Prosecuting Attorney and/or Office of the State's Attorney if there is any question about procedure to be followed, either in the method of conducting a lineup, or as to the advisability of holding the same.

[Chief Prosecuting Attorney's Law Enforcement Training Program - OLEA, DEPARTMENT OF JUSTICE - GRANT #191]

AFFIDAVIT - UNITED STATES v. HALSEY (S.D.N.Y.1966) 257 F.Supp. 1002

On March 10, 1966, Commissioner Bishopp issued a search warrant authorizing a search of Apartment 2F, 470 West 150th St., New York City, for "a quantity of loose heroin and bundles of heroin * * * *." In support of the warrant, Narcotic Agent Leo Thomas had made an affidavit which said:

"During Friday, March 4, 1966, I, Leo Thomas, received information that John Doe, a/k/a Lem was involved in the illicit traffic of heroin and kept a ready supply of heroin on hand in the aforementioned apartment. The source of this information stated that he had purchased heroin from Lem during the week of February 28, on several occasions and that Lem had brought him the heroin from the aforementioned apartment. On each occasion the source of this information stated he had telephoned Lem at the aforementioned apartment. I personally conducted surveillance of the aforementioned apartment on Tuesday and Wednesday, March 8 and 9, 1966 in the early evening hours and off and on during the course of those nights. I have been an Agent of the Federal Bureau of Narcotics for the past 2 and ½ years. During the course of these surveillances I saw an unusually large number of people enter and leave apartment 2F. I recognized some of those people as being addicts. On the night of Tuesday, March 8, 1966 I approached the apartment door and was able to see through the peephole and saw assorted paraphernalia which I recognized to be used in the mixing and bagging of heroin. This included glassine envelopes, rubber bands, a sifter, measuring spoons and what appeared to be a quantity of milk sugar. Agent Hampe on the same night was able to overhear a conversation inside the apartment concerning "one half ounce." The source of my information has given information to me on several previous occasions and on each occasion that information was correct by my own personal knowledge. I have checked the ownership of the above premises and it is listed to a Gertrude Gravenburg. Agent Gruden called the telephone number for the above apartment, which was also listed under the name Gravenburg and was informed that Lem was not in and there was nothing doing until tomorrow.

"For the above reasons I believe there is now a quantity of heroin secreted in the above apartment by John Doe a/k/a Lem."

Note the specific reference to the apartment number as well as the address of the building.

Note that the information from the informant was received on the 4th and the affiant indicates that fact and the Warrant issued on the 10th. This clearly indicates to the Court that the information is of recent date.

Note that the information obtained by the affiant from the informant was detailed , thus clearly indicating that the informant spoke from personal knowledge. This satisfies the "WAS YOU 'DERE CHARLIE" requirement. In short, it shows that the informant had been on the premises to be searched and seen the m.o.

Note the surveillance dates of the agent are clearly set forth and they are right to the date of making the application.

Note that the agent sets forth his training & experience so that the Judge can see the facts through the agent's eyes, i.e. through the "police colored eye glasses"

Note that the agent fixes the particular apartment entered by the people mentioned by him so as to remove any doubt of where they might be going in a multi-dwelling house.

Note that the agent mentions the fact that several of the people have criminal reputations, i.e. are known addicts.

Note that the agent notes his personal observations and the paraphenelia seen by him.

Note the second agent's observations through the use of his sense of hearing and the relevance of the overhead conversation to drugs.

Note that the affiant establishes the reliability of his informant based upon past experience.

Note the fact that the name "Lem" was tied in from the informant's information then to the apartment's inhabitants by the agent's efforts. This corroborated information received from the informant.

USE OF SENSES. . . by Police Officer to establish probable cause
also POLICE EXPERIENCE

In United States v. Young, (4 Cir. 1963)
322 F.2d 433, the Court said:

> "From their vantage point in the woods, the agents OBSERVED the comings and goings of several cars at night. They SAW the defendants leave and return. They WITNESSED the unloading by the defendants of cardboard cartons, WHICH THEY RECOGNIZED AS CONTAINING HALF-GALLON FRUIT JARS USED IN THE ILLICIT WHISKEY BUSINESS, their RECOGNITION being based upon the labels upon the cartons and the occasional TINKLING SOUND OF THE JARS striking each other as the cartons were being handled. They OBSERVED the loading of propane gas cylinders upon a truck at a point near the barn, CYLINDERS WHICH THEY KNEW TO BE FREQUENTLY USED TO SUPPLY FUEL IN THE OPERATION OF ILLICIT DISTILLERIES. They HEARD sounds emanating from the lighted barn and SMELLED the odor of illicit whiskey coming from it. * * *
> From what they SAW, HEARD and SMELLED while concealed within the woodlands, the agents had abundant cause to believe that the defendants were then engaged in the packaging and handling moonshine whiskey."
> [Emphasis Added - See pps. 444-445]

NOTE

The Use of Sight
[This Sense is
Used Throughout]

The Use of Past
Police Experience
and Training to
Explain the Signifi-
cance of certain
materials in a
criminal operation

The Use of Hearing

The Use of Smell

A SECOND LOOK AT MIRANDA - ARE WE TOO RESTRICTIVE IN ITS INTERPRETATION?

Not too long ago, I was asked by a law enforcement officer if I did not think that we [the prosecution] were taking too cautious an approach to the application of Miranda. Upon due reflection, it would appear that we are applying a standard that is more restrictive than required by said case.

Basically, in Miranda the Court was speaking of "incommunicado" interrogation that took place in a "police-dominated atmosphere." The following conditions must be existent before the Miranda Warnings are required:

Is the defendant in police custody or is he being deprived of his freedom of action by the police?

Is the in-custody defendant being subjected to questioning initiated by law enforcement officers?

Is the questioning directed toward obtaining a confession?

Absent an affirmative answer to any one of the three above mentioned questions, then the Miranda warnings are not necessary.

Thus, the law enforcement officer must examine, in his own mind, the totality of circumstances that surround his talking to a person. First of all, if the questioning is done in a police station, the question arises where am I conducting the interview? Is it in the backroom [clearly here the Miranda flag would be waving] or in the reception room, where other people are seated. Secondly, have I advised the subject that he is free to leave at any time and can he just get up and walk out or is he so enclosed within the confines of the police station that he would truly be afraid to leave without permission and/or a guide. [If its in the latter situation, the Miranda flag would again be up.] If the questioning is done on the street or in the field, so to speak, have I ordered the subject into the police car or are we merely conversing on the street, in full view of the public. Again, can the subject leave or have I placed him under some restraint? In terms of the questioning of the subject, the law enforcement officer must ask himself if the type of questioning is the "grilling" type question or were you merely trying to secure the facts? Did you initiate the questioning and if so, where [you must constantly review the place where the questioning occurred].

You must ask yourself: [1] why am I questioning the subject and [2] where am I questioning the subject. From these two questions [6] will come the answers that will govern the situation.

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CIRCUIT COURT
STATE OF CONNECTICUT

MAY 1, 1967