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But the military was plentiful in Hawaii, and, primarily to ease the strain on local police forces, military personnel arrested for civilian crimes were usually turned over to the military authorities. This custom continued after the War until the present day. Hence, there exists a possibility that if this case occurred on the continental United States, it would never have arisen since the civilian courts would have exercised immediate jurisdiction over the accused. The potential consequences of the decision are staggering. Possibly as many as 500,000 courts-martial convictions could be affected, and it could change the military's control over its personnel while they are off-base.[46] It should be noted that the Court did not define the term "service-connected;" accordingly, the decision will be subject to varying interpretations, ranging from all crimes committed off-base, including crimes routinely handled by the military, such as drunkenness, to crimes with almost identical circumstances as the instant case.[47] Also of interest is whether or not the decision will be applied retroactively. It remains for the future and for the second wave of cases to reach the courts for these questions to be answered and to see what direction the lower courts will take in their interpretation of *O'Callahan*. Probably, as a matter of practicality and administrative feasibility, the courts will narrowly interpret *O'Callahan* to avoid being swamped with future cases.

BRUCE R. FENWICK

CONSTITUTIONAL LAW—WARRANTLESS SEARCH INCIDENT TO A LAWFUL ARREST MUST BE LIMITED TO AREA WITHIN SUSPECT'S CONTROL

Police officers went to the home of defendant, Chimel, with a warrant for his arrest for burglarizing a coin shop. No search warrant had been issued. The officers waited for his return and presented him with the arrest warrant. Notwithstanding Chimel's objection, the officers searched his house. During the search, under the direction of the police officers, Chimel's wife opened drawers and moved the contents thereof so that the officers might view any items that might have been taken during the burglary. The search included Chimel's three-bedroom home, as well as his attic, garage and small workshop. After the search, which lasted for more than forty-five minutes, the officers seized coins, medals and tokens which were found in Chimel's home. At petitioner's subsequent trial on two counts of burglary, the items taken from his house were admitted into evidence against him over his objection that they had been unconstitutionally seized, and he was convicted. The judgment of conviction was affirmed by both the California District Court of Appeals[1] and the California Supreme Court.[2]

46. *See* The National Observer, Sept. 22, 1969, at p. 2, col. 4.
47. *Id.*

1. 61 Cal. Rptr. 714 (1967).
2. 68 Cal. 2d 436, 67 Cal. Rptr. 421, 439 P.2d 333 (1968).

The Supreme Court of the United States, per Mr. Justice Stewart, reversed. *Held,* the warrantless search of defendant's entire three-bedroom house, incident to a lawful arrest, is unreasonable as extending beyond defendant's person and the area within which he might either obtain a weapon or destroy evidence that could be used against him. *Chimel v. California,* 395 U.S. 752 (1969).

The fourth amendment protects the individual against unreasonable searches and seizures by requiring that searches must be made pursuant to a warrant and that search warrants will be issued only when based on probable cause. Items seized during an unreasonable search cannot be used as evidence against the defendant at his trial in either a federal[3] or state[4] proceeding. In addition, the fruits of such illegally seized items are similarly excluded from the evidence at his trial.[5] The function of a search warrant is to interpose a neutral magistrate between the police and the citizen; in each case, the magistrate determines whether there is probable cause to support the issuance of a warrant. This requirement acts as a deterrent to illegal police activity.[6] Probable cause is based on more than mere rumor or suspicion.[7] There must be reliable and trustworthy information to convince a reasonably cautious man, the neutral magistrate, that the criminal evidence sought will be found at the place to be searched.[8] The policeman must convince the magistrate of probable cause based upon reliable facts and underlying circumstances.[9] The search warrant not only must be based on probable cause but also must particularly describe "the place to be searched and the persons or things to be seized."[10] Before a warrant is issued there must be sufficient evidence to show that the items sought are seizable. That is, the official seeking the warrant must demonstrate that the items are connected with criminal activity as either evidence of crime or contraband.

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3. Weeks v. United States, 232 U.S. 383 (1914).
4. Mapp v. Ohio, 367 U.S. 643 (1961).
5. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).
6. McDonald v. United States, 335 U.S. 451 (1948); *see also* Note, 78 YALE L.J. 433 at 436-37 (1969); Johnson v. United States, 333 U.S. 10, 13 (1947).
7. Aguilar v. Texas, 378 U.S. 108 (1964); Nathanson v. United States, 290 U.S. 41 (1933).

> Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from *facts or circumstances* presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough.

290 U.S. at 47 (emphasis added).
8. United States v. Ventresca, 380 U.S. 102 (1965); Aguilar v. Texas, 378 U.S. 108 (1964). In *Aguilar* the affidavit contained the following:

> Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbituates and other narcotic paraphernalia are being kept at the above described premises . . . .

378 U.S. at 109.
9. Spinelli v. United States, 393 U.S. 419 (1969); Aguilar v. Texas, 378 U.S. 109 (1964). Probable cause for an arrest warrant also requires facts and circumstances based upon reliable information but, in the arrest situation, the magistrate must be convinced that a crime has been or is being committed. Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925).
10. U.S. CONST. amend. IV; *see also* Comment, 28 U. CHI. L. REV. 664 (1961).

Search warrants may be issued on the basis of information obtained by the police from an informer.[11] In situations involving tips by informants, the official seeking the search warrant must demonstrate the reliability of his informant to the issuing magistrate. In addition, such official must indicate how his informant acquired the information.[12]

Although in most cases a search warrant is required to effect a reasonable search, there are exceptions produced by special circumstances which enable the police to perform a search without obtaining a warrant.[13] The police do not need a warrant when they are in hot pursuit of an individual who is believed to have just committed a crime; taking time out at this point to secure a warrant might impede the apprehension of a criminal and endanger innocent bystanders.[14] Similarly, motor vehicles may often be searched without a warrant because they can easily be moved. Thus, the courts hold that it is not practical to require the officers to take time out to obtain a warrant.[15] Another exception to the requirement that the police obtain a warrant before performing a search is the "stop and frisk" situation[16] which arises in the course of street encounters between the police and the citizen and enables the police officer to intrude upon the individual's freedom and make a limited search for weapons.[17] Such a situation arises after the police officer observes conduct which leads him to reasonably believe that criminal activity is present and the suspect may be armed. In order to protect himself and others in the vicinity, the police officer may pat down the outer clothing of the suspect in a limited search for weapons.[18] The most important exception to the search warrant requirement is the search performed incident to a lawful arrest.

The concept of search incident to arrest was first established when the Court recognized a right to search a person "to discover and seize the fruits or evidences of crime."[19] This right was later expanded to include the place "where the arrest was made."[20] Subsequently, limitations were placed upon the scope of the search. Searches incident to arrest were held invalid where the arresting

11. McCray v. Illinois, 386 U.S. 300 (1967).
12. Spinelli v. United States, 393 U.S. 410 (1969).
13. Border searches, authorized by statute, require neither a warrant nor probable cause. These searches may be conducted on the basis of suspicion and the searches are considered to be incident to crossing an international boundary. Witt v. United States, 287 F.2d 389 (9th Cir. 1961); *see* Rivas v. United States, 368 F.2d 703 (9th Cir. 1966); *see also*, Comment, 10 ARIZ. L. REV. 457 (1968).
14. Warden v. Hayden, 387 U.S. 294 (1967).
15. Carroll v. United States, 267 U.S. 132 (1925); *see* United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y. 1960). *But see* People v. Watkins, 19 Ill. 2d 11, 166 N.E.2d 433 (1960), *cert. denied* 364 U.S. 833 (1960) wherein the Court reasoned that the nature of the offense and surrounding circumstances must be taken into consideration in order to determine whether a search was reasonable.
16. N.Y. CODE OF CRIM. PROC. § 180-a (McKinney Supp. 1968).
17. Terry v. Ohio, 392 U.S. 1 (1968).
18. *Id.* at 30.
19. Weeks v. United States, 232 U.S. 383 (1914) (dictum).
20. Agnello v. United States, 269 U.S. 20, 30 (1925) (dictum); Carroll v. United States, 267 U.S. 132, 158 (1925) (dictum); Marron v. United States, 275 U.S. 192, 199 (1927).

officer had the time and information sufficient to obtain a search warrant[21] and where the arrest was used as a mere pretext to a search.[22] When a particular limitation would apply, however, remained unclear. Although the time limitation was ignored in at least one subsequent case,[23] it became the basis upon which the Court invalidated the search in *Trupiano v. United States*.[24] In that case, the Court reasoned that the right to search incident to arrest grew out of the necessities of the situation at the time of arrest. However, there must be something more in the way of necessity than merely a lawful arrest. Thus, if the officer had time to secure a search warrant, there was no necessity to search without a warrant. Recognizing that the time limitation was an inflexible criterion upon which to test in retrospect the legality of a search, the Court in *United States v. Rabinowitz*[25] expressed disapproval of *Trupiano* and announced a different criterion.

> A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search. . . . The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.[26]

Until *Chimel v. California*,[27] the *Rabinowitz* test had been applied without significant change or refinement.[28]

In *Chimel* the Court indicates that the fourth amendment was a reaction to the abuse inherent in both general and warrantless searches.[29] Thus, the amendment requires that, with exceptions noted above,[30] a warrant must be obtained before a search may legally be performed. The burden of fitting within the exceptions is upon those who seek to search and seize without a warrant. The warrantless search incident to a lawful arrest became an exception to the warrant required by the fourth amendment, because of the emergency situation presumably created by an arrest. The Court reasoned that when the arrest is made, it is reasonable for the arresting officer to search the arrestee in order to remove any weapons that the latter might use in order to resist arrest or to effect his escape.[31] In addition, it is reasonable to search and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. Bal-

21. Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).
22. United States v. Lefkowitz, 285 U.S. 452 (1932).
23. Harris v. United States, 331 U.S. 145 (1947).
24. 334 U.S. 699 (1948).
25. 339 U.S. 56 (1950).
26. *Id.* at 65, 66.
27. Instant case at 761.
28. *Compare* Ker v. California, 374 U.S. 23 (1963); Abel v. United States, 362 U.S. 217 (1960); and Draper v. United States, 358 U.S. 307 (1959), *with* Kremen v. United States, 353 U.S. 346 (1957). *See* Chapman v. United States, 365 U.S. 610 (1961); Jones v. United States, 357 U.S. 493 (1958).
29. Instant case at 761.
30. *See supra* notes 14 to 18 and accompanying text.
31. Instant case at 763.

ancing the evils of a warrantless search against the desirability and necessity of a warrantless search when impelling circumstances exist, the Court arrived at a narrowly defined area which may lawfully be searched without a warrant incident to a lawful arrest. The same reasoning was applied in *Terry v. Ohio*[32] wherein the Court stated that the police must obtain a warrant wherever practical and that the scope of a search must be tied to the circumstances which rendered it permissible. *Terry* allowed no more than a limited protective search —a patting down of the suspect's outer clothing for weapons. This principle was followed in *Sibron v. New York*[33] wherein the Court did not uphold the search of petitioner's pockets because the officer was not searching for weapons. Therefore, the protection of the police officer was not involved. *Chimel* uses a similar analysis to delimit the proper extent of a search incident to an arrest. The police can search the person arrested to remove weapons; they can search and seize any evidence on defendant's person to prevent concealment or destruction thereof. In addition, they can search the area within which the arrestee might reach in order to grab a weapon or evidence (*e.g.* a table or drawer in front of the arrestee). Thus, the area within defendant's immediate control is defined as "the area from within which he might gain possession of a weapon or destructible evidence."[34] In order to search in areas beyond the defendant's reach the police must obtain a warrant. The Court rejects the argument that it is "reasonable" to search a man's home when he is arrested. Such reasonableness merely relates to the convenience of performing such a search and to the acceptability of certain police practices. Convenience, however, is not a determinative factor.[35] The dissent construed the facts of the instant case differently and found that the search was reasonable[36] on the ground there was "independent probable cause."[37] In addition, the dissent reasoned that where an arrest occurs in an individual's home a search of the home should be permitted even though no search warrant has been obtained; an emergency situation existed because Chimel's wife would have had an opportunity to destroy or remove the evidence. Furthermore, the arrestee would have an opportunity for judicial scrutiny of the search after the search through a motion to suppress any evidence seized during the search.

After *Chimel*, an invasion of privacy in the form of a search of premises will only be permitted when such search is performed pursuant to a search

32. 392 U.S. 1 (1968).
33. 392 U.S. 40 (1968).
34. Instant case at 763.
35. *Id.* at 763.
36. *Id.* at 783.
37. Mr. Justice White pointed out in his dissent that
[t]here was doubtless probable cause not only to arrest petitioner, but to search his house. He had obliquely admitted both to a neighbor, and to the owner of the burglarized store, that he had committed the burglary. In light of this, and the fact that the neighbor had seen other admittedly stolen property in petitioner's house, there was surely probable cause on which a warrant could have been issued to search the house for the stolen coins. Instant case at 774-75.

warrant. The Court has finally set forth a precise definition of the area which can reasonably be searched incident to a lawful arrest. That is, only the area within which the arrestee can gain access to weapons or evidence may now legally be searched. Any broader search will require a warrant. The Court has stabilized the scope of a search incident to an arrest which has previously been marked by vague and inconsistent opinions.[38] By specifically limiting the permissible scope of such a search, the Court is deterring police abuse of an individual's right of privacy. This limitation seems to be consistent with recent Supreme Court decisions involving confessions,[39] "stop and frisk,"[40] informants,[41] wiretapping,[42] and police detentions.[43] This restriction placed upon police in searching incident to arrest could foster some changes in police practices. *Rabinowtiz* and *Harris* gave policemen the opportunity to engage in searches not justified by probable cause by the simple expedient of arranging to arrest the suspect at his home rather than elsewhere. Under this permissive approach the police were also able to arrest an individual on a minor charge, such as a traffic violation or a vagrancy offense, and use the arrest "to justify a search for evidence of a more serious crime."[44] Before a warrant will be issued authorizing the search of a broader area than that which was set forth in *Chimel*, the magistrate must be convinced that probable cause exists for the search. It may be difficult to obtain a search warrant because, under the Court's recent rulings,[45] the officer must show that the information upon which he is basing his belief in the existence of probable cause is reliable and trustworthy. Before *Chimel*, the police would arrest an individual for crime *X* and then search the place of arrest in the hope of obtaining evidence of crime *X*. In addition, they may have arrested the individual for crime *X* but in the course of their search incident to that arrest the arresting officers may have found evidence of crime *Y*. In either case, under the *Rabinowtiz* test the search would probably be deemed reasonable. Therefore, the evidence seized would be admissible at trial. The evidence that was discovered in either of these situations would never have been discovered but for the fact that an arrest occurred at that particular place. This type of search does not seem to be consistent with the fourth amendment protection against warrantless searches. By specifically limiting the search incident to arrest, a system may develop whereby police obtain a search warrant (satisfying all the requirements relating thereto), perform the search, seize the evidence specified in the search warrant at the place specified in the search warrant, and on the basis of the items seized obtain probable cause for arresting the defen-

38. *See supra* notes 19-26 and accompanying text.
39. Miranda v. Arizona, 384 U.S. 436 (1966).
40. Terry v. Ohio, 392 U.S. 1 (1968).
41. Spinelli v. United States, 393 U.S. 410 (1969).
42. Katz v. United States, 389 U.S. 347 (1967).
43. Davis v. Mississippi, 393 U.S. 821 (1969).
44. Comment, 69 COLUM. L. REV. 866 at 877 (1969).
45. *See, e.g.*, Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

dant for committing the crime relating to these items, and arrest the suspect. This sequence of events would be entirely consistent with the fourth amendment. Moreover, the system which may be promulgated is consistent with recent Supreme Court decisions establishing definite and effective guidelines for police activity including invasions of privacy (*e.g.* "stop and frisk"[46] and wiretapping situations[47]). In all of these cases the Court is limiting the extent to which the police can invade an individual's privacy without prior judicial approval. Since "the number of searches made incident to arrest far surpasses the number of searches made under authority of a search warrant,"[48] *Chimel* may have a profound effect on police practices.

SUSAN LEVENBERG

CRIMINAL LAW—ELECTRONIC EAVESDROPPING-STANDING TO OBJECT TO THIRD PARTY CONVERSATIONS

Petitioners, Alderman and Alderisio, were convicted of conspiring to transmit murderous threats in interstate commerce in violation of federal law.[1] The court of appeals affirmed their convictions,[2] and the Supreme Court denied certiorari.[3] On petition for rehearing, the petitioners alleged that they had recently discovered that Alderisio's place of business had been the subject of electronic surveillance by the Government. The Government denied that it had intercepted any conversations relevant to the prosecution.[4] The Court, however, reading the Government's response as admitting that Alderisio's conversations had been overheard by unlawful electronic surveillance, granted the petition for rehearing, vacated the judgment of the court of appeals and remanded the case to the district court to determine whether the convictions were tainted.[5] Thereafter, the Government filed a motion to modify the order—the record of such illegal surveillance should be inspected by the trial judge *in camera* turning over to petitioners only those materials relevant to their prosecution. Upon hearing argument on that motion, the Supreme Court agreed to hear the case again.[6] The Court further directed the parties to brief the

46. Terry v. Ohio, 392 U.S. 1 (1968).
47. Katz v. United States, 389 U.S. 347 (1967).
48. Comment, 1966 U. ILL. L.F. 255 at 278.

1. 18 U.S.C. §§ 371, 875(c) (1964).
2. Kolod v. United States, 371 F.2d 983 (10th Cir. 1967).
3. Kolod v. United States, 389 U.S. 834 (1967).
4. In its brief for reargument, the Government asserted that no electronic surveillance was conducted at places owned by Alderisio, but rather was carried out only at premises owned by his associates or by firms which employed him; that Alderisio himself did not have desk space at the subject premises; and finally, that Alderman neither participated in any of the recorded conversations nor had any interest in the premises where the conversations were recorded. Alderman v. United States, 394 U.S. 165, 168 n.1 (1969).
5. Kolod v. United States, 390 U.S. 136 (1968).
6. Alderman v. United States, 392 U.S. 919 (1968).