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# Constitutional Law - Search and Seizure - Hot Pursuit

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## CONSTITUTIONAL LAW—SEARCH AND SEIZURE—HOT PURSUIT

Following armed robbery of Diamond Cab Company police were notified that two employees had followed suspect Hayden to a certain house. Within minutes, officers converged on the house and undertook without a warrant an extensive search of the entire premises. When Hayden was located in an upstairs bedroom, an officer in the basement had already seized clothing found in a washing machine.<sup>1</sup> The clothing was admitted into evidence as matching the description of that worn by the robber. The court of appeals reversed the district court's denial of habeas corpus relief, ruling that the clothing seized during the course of the lawful search was mere evidence and inadmissible.<sup>2</sup> The United States Supreme Court *held*, the fourth amendment<sup>3</sup> does not prohibit the seizure of mere evidence. The instant search was lawful, although without a warrant, because it was made in "hot pursuit" of an armed felon. *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967).

While the opinion in the instant case deals largely with abolishing the mere evidence rule,<sup>4</sup> this Note shall concentrate on the "hot pursuit" ruling which raises new and interesting aspects of warrantless search.

Although there is no general rule as to when search without warrant is proper, the Supreme Court has allowed it in certain situations.<sup>5</sup> For example, the search of a moving vehicle is

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1. The indication is, although it is unclear from the opinion, that this seizure took place *before* the arrest. The Court referred to an officer's testimony that he had seized the clothing by the time he knew a man was in the house, and it refused to apply *Harris v. United States*, 331 U.S. 145 (1947), because the suspect there was in custody before the search began. The Court noted that the instant seizures were "prior to or immediately contemporaneous with" the arrest. 387 U.S. 294, 299 (1967). It can be inferred that the clothing was not seized *after* the arrest.

2. *Hayden v. Warden, Maryland Penitentiary*, 363 F.2d 647 (4th Cir. 1966).

3. U.S. CONST. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

4. In abrogating the mere evidence rule established in *Gouled v. United States*, 255 U.S. 298 (1921), the Court made it clear that the "principal object" of the fourth amendment is to protect privacy, not property, and that a seizure of evidentiary material, if otherwise reasonable, is no more disruptive of privacy than a search for fruits, instrumentalities, or contraband. 387 U.S. 204, 301-02 (1967). For a comprehensive treatment of the mere evidence rule from its common law beginning, see Comment, 27 LA. L. REV. 53 (1966).

5. See generally, J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 87 (1966).

permissible when there is probable cause to believe it is carrying contraband,<sup>6</sup> as is the search of a person and the premises under his immediate control when incidental to lawful arrest.<sup>7</sup> Under certain circumstances, a warrant is not necessary if the delay required to obtain one threatens destruction of the evidence.<sup>8</sup> But *Hayden* fits into none of the precedents. Since the officers were searching the premises before arrest, the cases on search incidental to arrest were inapplicable.

While reversing on the mere evidence rule, the court of appeals sustained the legality of the search of Hayden's home by relying on *Harris v. United States*.<sup>9</sup> In *Harris*, an intensive five-hour apartment search resulting in the seizure of evidence totally unrelated to the offense for which the suspect was arrested was upheld as incidental to lawful arrest. On appeal, petitioner argued that the search itself was illegal because it exceeded the limitations of *Harris*, and urged re-examination of that case. The Supreme Court upheld the search and seizure, but did not rely on *Harris* because the suspect there was in custody *prior* to inception of the search. Rather than rest its decision on the incidental nature of the search, the Court stressed the fact that the police were pursuing an armed felon, and reasoned that speed was essential. The fourth amendment does not require the police to delay when doing so endangers lives.<sup>10</sup> Therefore, the warrantless entry and search were justified because, "the exigencies of the situation made that course imperative."<sup>11</sup> The Court stated that,

"The permissible scope of search must, therefore, at the least, be as broad as may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape."<sup>12</sup>

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

7. *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Marron v. United States*, 275 U.S. 192 (1927); *Agnello v. United States*, 269 U.S. 20, 30 (1925). These cases involved fact situations where arrest preceded search.

8. *Schmerber v. United States*, 384 U.S. 757 (1966).

9. 331 U.S. 145 (1947). This case represents the upper limit in a line of decisions allowing warrantless search incidental to lawful arrest.

10. 387 U.S. 294, 298-99 (1967).

11. *Id.* at 298. The Court was quoting from *McDonald v. United States*, 335 U.S. 451, 456 (1948), which held, ironically, that the fourth amendment was violated because the officers had time to secure a warrant and failed to do so.

12. *Id.* at 299. The quoted language refers to a *suspect at large*. This contributes to the conclusion, reached in note 1 *supra*, that the seizure took place before arrest.

In the past, the term "hot" or "fresh" pursuit has been associated with the making of arrests,<sup>13</sup> while the connection between arrest and warrantless search has been to allow search incidental to arrest. In the instant case the Court faced for the first time the hybrid situation of a warrantless search made during the course of pursuit. It is likely that *Hayden* will be the fountainhead of a series of cases dealing with questions, such as the following.<sup>14</sup> Is the scope of the search in hot pursuit limited to the suspect and his weapons? What other evidence can be seized in the course of that search?<sup>15</sup> Can any evidence that connects the suspect to the crime for which he is pursued be seized if it appears that the evidence was found while looking for the suspect or his weapons?<sup>16</sup> If so, can evidence of an earlier, unrelated crime committed by the suspect, or even a third person, be seized? Since the Court allowed the seizure of clothing in the instant case, it can be said that the seizures are not limited strictly to the suspect, his weapons, fruits of the crime, and contraband. However, the ruling can hardly be interpreted as allowing indiscriminate seizures of evidence whenever the police are closing in on a suspect, even if the search itself is valid.

There are at least two underlying reasons for excusing lack of a warrant for searches in hot pursuit. First, the danger posed to policemen who deal with armed felons requires that they be allowed to protect themselves by securing weapons that may be

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13. See 5 AM. JUR. 2d *Arrest* § 52 (1962).

14. One question the Court expressly declined to consider, in that part of the opinion dealing with mere evidence, is whether the seizure of evidence of a testimonial or communicative nature compels a person to become a witness against himself in violation of the fifth amendment. 387 U.S. 294, 302-03 (1967).

15. The Court narrowly averted consideration of this question in *Gilbert v. California*, 388 U.S. 263, 269 (1967). In this robbery case, the California Supreme Court upheld the seizure of a notebook containing drawings of a robbed bank and a photograph of one of the defendants on the ground that the seizing officers were in "fresh pursuit" of escaping felons. However, the United States Supreme Court vacated certiorari as improvidently granted on the basis that the facts were not clear enough to decide the question. Justice Douglas felt the search and seizure issue should have been met, and that it was sufficient reason for reversing the conviction. He noted that even if the circumstances justified the search for the suspect, there was no reason to open the envelope containing the photograph since it could contain neither a suspect nor a weapon. *Id.* at 290.

16. On whom is the burden of proof? The Court said: "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." 387 U.S. 294, 299 (1967).

used against them. Secondly, an immediate entry and search of the premises is necessary to prevent escape of the suspect. What is the effect on a seizure if the suspect *does* escape the attempt to apprehend him? It seems that belief on the part of the pursuing officers as to whether the suspect is within the premises would be of prime importance. If, for example, officers arrive at the suspected location and immediately learn that the felon has fled, they seemingly have no justification for a warrantless search. On the other hand, if they reasonably believe that the suspect is still within the premises, then a search should be proper and seizures made before discovering that the suspect is absent should be upheld.<sup>17</sup> The police should not have to be absolutely certain of the armed felon's location before they are privileged to take measures designed to prevent resistance or escape.

For guidance in limiting hot pursuit searches and seizures, the Court might consider other search situations. A well-established rule allows a search without warrant, when incidental to a lawful arrest, of a suspect and the premises under his immediate control.<sup>18</sup> In one case, the Court upheld an hour-long search of the defendant's desk, safe, and file cabinet.<sup>19</sup> And in another, it approved a five-hour search resulting in the seizure of draft cards from among the suspect's personal papers, even though he was arrested for an unrelated offense.<sup>20</sup> In contrast to this is the indication in the cases (especially those dealing with books and papers) that where there is a search under a valid search warrant, absent an arrest, only evidence particularly described in the warrant may be seized.<sup>21</sup> This reflects the Court's

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17. Once the police become fully aware that the suspect is not within the premises, it is difficult to justify any subsequent search and seizure. The suspect poses no danger to them, and, obviously, it is too late to prevent his escape. *But see* *People v. Gilbert*, 408 P.2d 365 (Calif. 1965), in which the California Supreme Court upheld seizures made in the suspect's apartment *after* the pursuing officers learned that he was not there. The court said: "[T]hey could properly look through the apartment for anything that could be used to identify the suspects or to expedite the pursuit." *Id.* at 375. The United States Supreme Court did not pass on this issue in its consideration of the case. See note 15 *supra*.

18. *Abel v. United States*, 362 U.S. 217 (1960); *Marron v. United States*, 275 U.S. 192 (1927); *Agnello v. United States*, 269 U.S. 20 (1925).

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

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

21. In *Steele v. United States*, 267 U.S. 498 (1925), the Court allowed the seizure of cases of gin under a warrant that specified "cases of whiskey." But in *Marron v. United States*, 275 U.S. 192 (1927), the Court held that a warrant authorizing a search for liquor and articles of its manufacture would not sustain the seizure of a ledger and bills relating to the running of defendant's business (although the seizure was upheld as being incidental

great concern with the specificity requirement. A third possibility is to develop a new category of limitations exclusively for search in hot pursuit.

The judicial history of the fourth amendment reveals a balancing of the need for effective law enforcement against the right of the people to be free from unreasonable intrusions by the state. To completely deny the right of search in hot pursuit situations would appear to unduly hamper efforts to apprehend escaping felons. This the Court did not do. But while the principle is a desirable one, considerable uncertainties remain to be clarified, some of which have perhaps been indicated in this Note.

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CRIMINAL PROCEDURE—DUE PROCESS IN  
JUVENILE DELINQUENCY PROCEEDINGS

Gerald Gault, a fifteen year old on juvenile court probation, was arrested pursuant to a neighbor's verbal allegation that she had received an obscene phone call from him. His parents were not informed of his arrest, nor were they notified of an informal hearing held the next day. After spending four days in a detention home, Gault was released. Mrs. Gault then received a note informing her that further hearings concerning her son's "delinquency" were pending. At the second hearing Gault was adjudged a delinquent and committed to the State Industrial School for the duration of his minority. The offended neighbor was not present at either hearing nor were records made of the

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to lawful arrest). The Court said: "The requirement that warrants shall particularly describe the things to be seized . . . prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Id.* at 196. In *Stanford v. Texas*, 379 U.S. 476, 486 (1965), the Court, citing *Marron* with approval, held that officers who seized a large quantity of the petitioner's private books and papers under a warrant authorizing the search for written instruments concerning the Communist Party had violated the fourth amendment, because the warrant did not describe, with sufficient particularity, that which was to be seized. A similar holding is found in *Marcus v. Search Warrant*, 367 U.S. 717, 732 (1961), involving the seizure of obscene publications. *But see* lower federal court cases upholding the seizure of evidence not described in the warrant: *Seymour v. United States*, 369 F.2d 825 (10th Cir. 1966), *cert. denied*, 368 U.S. 987 (1967); *Porter v. United States*, 335 F.2d 602 (9th Cir. 1964), *cert. denied*, 379 U.S. 983 (1965); *United States v. Myers*, 329 F.2d 280 (3d Cir. 1964); *United States v. Eisner*, 297 F.2d 595 (6th Cir. 1962), *cert. denied*, 369 U.S. 859 (1962); *Johnson v. United States*, 293 F.2d 539 (D.C. Cir. 1961).