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Requisite Particularity in Search Warrant Authorizations

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REQUISITE PARTICULARITY IN SEARCH WARRANT AUTHORIZATIONS*

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While the generalized language of the fourth amendment has resulted in varied permutations of constitutional reasonableness,[1] in one respect the standard is quite precise: Once probable cause is established to justify the issuance of a search warrant, the warrant must particularly describe "the place to be searched, and the person or things to be seized."[2] The historical motivation for this constitutional mandate was a fear of "general warrants", giving the bearer an unlimited authority to search and seize.[3] The present article is concerned with several aspects of this requirement of particularity. First, attention will be directed to problems regarding the description of the place to be searched. Second, consideration will be given to the itemization of the objects to be seized, and the possibility of seizing additional items not enumerated. Finally, the unique problems presented by the application of this language of the fourth amendment to electronic eavesdropping will be explored.[4]

I. THE PLACE TO BE SEARCHED

The leading decision concerning the sufficiency of the description of the place to be searched is *Steele v. United States*[5] where the affidavit referred to a "garage located in the building at 611 West Forty-Sixth Street," and requested authority "to search said building at the above address, any building or rooms connected or used in connection with said garage, the basement or subcellar beneath the same." The Court

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1. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968) (field detentions and frisks); Chambers v. Maroney, 399 U.S. 42 (1970) (vehicles); Schmerber v. California, 384 U.S. 757 (1966) blood tests); Warden v. Hayden, 387 U.S. 284 (1967) (exigent circumstances); Camara v. Municipal Court, 387 U.S. 523 (1967) (administrative inspections).
2. U.S. CONST. AMEND. IV.
3. *See* Boyd v. United States, 116 U.S. 616 (1886); Olmstead v. United States, 277 U.S. 438 (1928); Henry v. United States, 361 U.S. 98 (1959). *See generally* Barrett, *Personal Rights, Property Rights and the Fourth Amendment,* 1960 SUP. CT. REV. 46.
4. A further dimension of particularity in warrants—the specificity required in alleging probable cause [*see* Aguilar v. Texas, 378 U.S. 108 (1964) *and* Spinelli v. United States, 393 U.S. 410 (1969)]—is not a part of the present inquiry.
5. 267 U.S. 498 (1925).

held that the warrant clearly authorized the officer to search the entire building, including all rooms which were connected to the garage by means of an elevator. Simply stated, the Court concluded: "It is enough if the description is such that the officer with a search warrant can, with reasonable effort ascertain and identify the place intended."[6] It follows that an error as to the number of the address will not of itself render the warrant void if from the totality of facts alleged there is no ambiguity as to the premises intended.[7] Nor is it necessary that the owner or occupant of the premises be named where the warrant is merely to search a designated place.[8]

On the other hand, if an improper address is used in the warrant description and the executing officer searches the described premises, the search will be illegal, not for failure to comply with the warrant but simply because probable cause has not been established to search these premises.[9] A single warrant authorizing the search of more than

6. *Id.* at 503. *See also* United States v. Hassell, 427 F.2d 348 (6th Cir. 1970); Irwin v. United States, 89 F.2d 678 (D.C. Cir. 1937) (Search warrant described premises as occupied by defendant known as the "Humidor," at a designated address. The ground floor was occupied by a cigar store of that name, but the building contained four floors, all occupied by the defendant, and a search was made of the entire building. The court found the warrant adequate for such a search); Carney v. United States, 79 F.2d 821 (6th Cir. 1935); Chiaravolloti v. United States, 60 F.2d 192 (7th Cir. 1932) (incorrect designation of premises as within city inconsequential); Rose v. United States, 45 F.2d 459 (8th Cir. 1930); Fall v. United States, 33 F.2d 71 (9th Cir. 1929); Giacalone v. United States, 13 F.2d 108 (9th Cir. 1926); United States v. Ortiz, 311 F. Supp. 880, 883 (D. Colo. 1970) ("Mountain cabins ordinarily have no specific address number and must be identified by a description of the physical features of the cabin and its general location. We do not deem it necessary for the warrant to incorporate the United States Geological Survey Map or to contain a legal description of the property."); United States v. Thomas, 216 F. Supp. 942 (N.D. Cal. 1963); United States v. Neadeau, 2 F.2d 148 (N.D. Wash. 1924); United States v. Chin On, 297 F. 531 (D. Mass. 1924); Easley v. State, 459 S.W.2d 410 (Ark. 1970); Cole v. State, 237 So. 2d 443 (Miss. 1970).

7. *See, e.g.,* Wangrow v. United States, 399 F.2d 106 (8th Cir.), *cert. denied* 393 U.S. 933 (1968); United States v. Luckman, 127 F.2d 529 (3d Cir. 1942); United States v. Falcone, 109 F.2d 579 (2d Cir.), *aff'd* 311 U.S. 205 (1940); Martin v. United States, 99 F.2d 236 (10th Cir. 1938); Fry v. United States, 9 F.2d 38 (9th Cir. 1925); State v. Reynolds, 11 Ariz. App. 532, 466 P.2d 405 (1970); Tidwell v. Superior Court, 95 Cal. Rptr. 213 (App. 1971); State v. Lemon, 212 So. 2d 322 (Fla. 1968); Adams v. State, 180 S.E.2d 282 (Ga. 1971); People v. Watson, 26 Ill. 2d 203, 186 N.E.2d 326 (1962); State v. Doust, 285 Minn. 336, 173 N.W.2d 337 (1969); State v. Daniels, 46 N.J. 428, 217 A.2d 610 (1966). *Cf.* People v. Royse, 477 P.2d 380 (Colo. 1970); State v. Lee, 247 La. 553, 172 So. 2d 678 (1965).

8. *See, e.g.,* Townsend v. United States, 253 F.2d 461 (5th Cir. 1958); United States v. Bell, 17 F.R.D. 13 (D.C. Cir. 1955); Carney v. United States, 79 F.2d 821 (6th Cir. 1935); United States v. Fitzmaurice, 45 F.2d 133 (2d Cir. 1930); Gandreau v. United States, 300 F. 21 (1st Cir. 1924); Perez v. State, 463 S.W.2d 394 (Ark. 1971); Samuel v. State, 222 So. 2d 3 (Fla. 1969); People v. Foster, 72 Ill. App. 2d 387, 219 N.E.2d 683 (1966).

9. United States v. Sands, 14 F.2d 670 (9th Cir. 1926); United States v. Kenney, 164 F. Supp. 891 (D. D.C. 1958); People v. Young, 100 Ill. App. 2d 20, 241 N.E.2d 587 (1968).

one premises is permissible, so long as probable cause exists as to each.[10] A few cases have held an inadequate description contained in a warrant remedied by the description set out in the affidavit, if the latter is attached.[11] In any event, in executing a warrant the search cannot legitimately extend beyond the premises described,[12] although a few decisions have sustained the search of the curtilage as within the ambit of the warrant.[13]

Problems of particularity frequently arise as to warrants to search multi-dwelling or multi-office buildings.[14] Unless there is probable cause to search the entire building,[15] it is necessary that the warrant specifically indicate the premises to be searched.[16] A novel problem was presented in *People v. Coulon*,[17] where a warrant was obtained for the search of a 640 acre ranch communally occupied by a group of hippies. The officers were searching for various types of narcotics. Conceding that normally the place to be searched is a single living unit, the court

10. *See Annot.*, 31 A.L.R.2d 864 (1953).
11. United States v. Ortiz, 311 F. Supp. 880 (D. Colo. 1970); State v. Tramanto, 28 Conn. Supp. 325, 260 A.2d 128 (1969); United States v. Moore, 263 A.2d 652 (D.C. App. 1970); State v. Castanzo, 76 Idaho 19, 276 P.2d 959 (1954); Tucker v. State, 244 Md. 488, 224 A.2d 111 (1966); Frey v. State, 8 Md. App. 38, 237 A.2d 774 (1968); Commonwealth v. Pope, 241 N.E.2d 848 (Mass. 1968); People v. DeLago, 16 N.Y.2d 289, 213 N.E.2d 659, 266 N.Y.S.2d 353 (1965), *cert. denied* 383 U.S. 963 (1966). *But see* United States v. Kaye, 432 F.2d 647 (D.C. Cir. 1970).
12. Poldo v. United States, 55 F.2d 866 (9th Cir. 1932); United States v. Thomas, 216 F. Supp. 942 (N.D. Cal. 1963). *Cf.* State v. Derainger, 73 Wash. 2d 563, 567, 439 P.2d 971, 973 (1968), *cert. denied* 393 U.S. 1102. (1969): "Where, during the lawful search of a building, the physical senses of the officers lawfully on the premises apprise them that occupants of the searched premises have, during or immediately preceding the search, thrown or removed something from the particular premises, if an article is found and taken during the search in such a place and under such circumstances as to leave a reasonable inference that it had been thrown or placed there during or immediately prior to the search, it constitutes a seizure on or within the premises designated in the warrant."
13. Fine v. United States, 207 F.2d 324 (6th Cir. 1953), *cert. denied* 346 U.S. 923 (1954); Moon v. State, 120 Ga. 141, 169 S.E.2d 632 (1969); State v. Broucher, 237 A.2d 418 (Me. 1967); State v. Stewart, 274 A.2d 500 (Vt. 1971).
14. *See generally* Annot., 11 A.L.R.2d 1330 (1950).
15. *See, e.g.*, Hanger v. United States, 398 F.2d 91 (8th Cir. 1968), *cert. denied* 393 U.S. 1119 (1969); United States v. Hinton, 219 F.2d 324 (7th Cir. 1955); Tynan v. United States, 297 F. 177 (9th Cir. 1924); People v. Estrada, 234 Cal. App. 2d 136, 44 Cal. Rptr. 165 (1965); State v. Sheppard, 46 N.J. 526, 218 A.2d 156 (1966); People v. Montanaro, 34 Misc. 2d 624, 229 N.Y.S.2d 677 (1962); Commonwealth v. Copertino, 209 Pa. Super. 63, 224 A.2d 228 (1966).
16. *See, e.g.*, United States v. Hinton, 219 F.2d 324 (7th Cir. 1965); Giles v. United States, 284 F. 208 (1st Cir. 1922); Perez v. State, 463 S.W.2d 394 (Ark. 1971); People v. Avery, 478 P.2d 310 (Colo. 1970); Fance v. State, 207 So. 2d 331 (Fla. 1968); Thompson v. State, 154 N.E.2d 278 (Ind. 1926); State v. Ratushny, 82 N.J. Super. 499, 198 A.2d 131 (1964); People v. DeLago, 16 N.Y.2d 289, 213 N.E.2d 659, 266 N.Y.S.2d 353 (1965), *cert. denied* 383 U.S. 963 (1966); Commonwealth v. Smyser, 205 Pa. Super. 599, 211 A.2d 59 (1965); State v. Costakos, 101 R.I. 692, 226 A.2d 695 (1967).
17. 273 Cal. App. 2d 148, 78 Cal. Rptr. 95 (1969).

noted that "a group of adults . . . may share a dwelling unit as a common residence, and the warrant describing that unit as the 'place' to be searched is constitutionally adequate."[18] Such was the case there, and therefore it was unrealistic to expect the warrant to specify the portion of the premises occupied by particular individuals.[19]

If the exact address of an individual occupant of the premises is unknown, the requirement may be satisfied by describing it as the premises of a certain occupant.[20] A failure to particularize the premises has been excused by some courts where the police could not reasonably know that the building was composed of multiple units.[21] Where premises are jointly occupied by two or more people, probable cause as to one will support the issuance of a search warrant.[22]

The sufficiency of description of a vehicle in a search warrant is unlikely to arise, at least where the vehicle is readily accessible, since probable cause to believe the vehicle contains seizable property will support a search without a warrant.[23] Where a warrant has been obtained, the issue is simply whether the identity of the vehicle can reasonably be determined, and some inaccuracies may be tolerated.[24]

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18. *Id.* at 152, 78 Cal. Rptr. at 97. "[T]he People argue that the activities of the hippies on the ranch 'indicate a back-to-nature type of communal living,' which qualified the entire ranch as a single living unit or household." *Id.*
19. "There was no reason to assume that the narcotics remained in the ranch house or that the persons who had taken it into the ranch house continued to inhabit that particular structure. Rather, there was probable cause to believe that the contraband, either in bulk, or in distributed portions, might be found anywhere on the ranch. To trace the narcotics to compressed spheres of suspicion within the general confines of the ranch would have entailed an elaborate undercover investigation or a self-frustrating giveaway." *Id.* at 156, 76 Cal. Rptr. at 100.
20. *See, e.g.,* United States v. Hinton, 219 F.2d 324 (7th Cir. 1955); Kenney v. United States, 157 F.2d 442 (D.C. Cir. 1946); People v. Estrada, 234 Cal. App. 2d 136, 44 Cal. Rptr. 165 (1965); Adams v. State, 180 S.E.2d 262 (Ga. App. 1971); People v. Hatfield, 94 Ill. App. 2d 421, 237 N.E.2d 193 (1968); Commonwealth v. Lillis, 349 Mass. 422, 209 N.E.2d 186 (1965); People v. Johnson, 49 Misc. 2d 244, 267 N.Y.S.2d 301 (1966); Commonwealth v. Fiorini, 202 Pa. Super. 88, 195 A.2d 119 (1963); Morales v. State, 44 Wis. 2d 96, 170 N.W.2d 684 (1969) (attachment of defendant's picture to warrant was sufficient).
21. Hanger v. United States, 398 F.2d 91 (8th Cir. 1968), *cert. denied* 393 U.S. 1119 (1969); United States v. Santone, 290 F.2d 51 (2d Cir. 1960), *cert. denied* 365 U.S. 834 (1961); Owens v. Scafati, 273 F. Supp. 428 (D. Mass. 1967); United States v. Poppitt, 227 F. Supp. 73 (D. Del. 1964); United States v. Nagle, 34 F.2d 952 (N.D.N.Y. 1929); United States v. White, 29 F.2d 294 (D. Neb. 1928); People v. Lucero, 483 P.2d 968 (Colo. 1971); Fance v. State, 207 So. 2d 331 (Fla. 1968); State v. Aiello, 91 N.J. Super. 457, 221 A.2d 40 (1966), *cert. denied* 388 U.S. 913 (1967); Commonwealth v. Copertino, 209 Pa. Super. 63, 224 A.2d 228 (1966).
22. People v. Gorg, 157 Cal. App. 2d 515, 321 P.2d 143 (1958).
23. *See* Chambers v. Maroney, 399 U.S. 42 (1970). *And see generally* Hotis, *Search of Motor Vehicles,* 73 DICK. L. REV. 363 (1969); Annot., 47 A.L.R.2d 1444 (1956).
24. Wangrow v. United States, 399 F.2d 106 (8th Cir. 1968) (mistake of one letter in license tag description insignificant); Bowling v. State, 219 Tenn. 224, 408 S.W.2d 660 (1966) (warrant was correct as to auto license number, incorrect as to color and year model of car).

Normally a warrant to search stated premises does not authorize the search of a vehicle parked on the street.[25]

Where the warrant is for the search of a person[26] it is necessary that the individual be adequately identified,[27] although again this does not necessarily require that his name be included.[28] Some courts have held that a warrant authorizing the search of particular premises does not provide authority to search persons found on those premises.[29] However, several recent narcotics cases have found such searches reasonable because of the potential for secretion and destruction of evidence.[30] Similarly, an occupant will not be allowed to frustrate a search by holding an object in his hand.[31] A few decisions have upheld warrant authorizations to search all persons found on given premises which were being used for an unlawful purpose.[32]

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25. State v. Penna, 4 Conn. Cir. 421, 233 A.2d 708 (1967); Haley v. State, 7 Md. App. 18, 253 A.2d 424 (1969); State v. Parsons, 83 N.J. Super. 430, 200 A.2d 340 (1964). *Cf.* People v. Fitzwater, 260 Cal. App. 2d 478, 67 Cal. Rptr. 190, *cert. denied* 393 U.S. 953 (1968); Commonwealth v. Fancey, 349 Mass. 196, 207 N.E.2d 276 (1965).

26. *But see* Comment, 26 LA. L. REV. 802, 805 n. 23 (1966): "It is interesting to note that the first clause of the fourth amendment protects '*persons*, papers, and effects' from unreasonable searches, whereas the second clause concerning the issuance of warrants refers to 'the *place* to be *searched*, and the persons or things to be seized.' Unless we are to consider a person as a place, this syntax would seem to leave the search of persons outside the ambit of search warrants."

27. *See* Annot., 49 A.L.R.2d 1209 (1956).

28. United States v. Kaplan, 286 F. 963 (S.D. Ga. 1923); Webster v. State, 6 Md. App. 163, 250 A.2d 279 (1969). But a John Doe warrant without description of the individual is inadequate. People v. Staes, 92 Ill. App. 2d 156, 235 N.E.2d 882 (1968).

29. United States v. Haywood, 284 F. Supp. 245 (E.D. La. 1968); United States v. Festa, 192 F. Supp. 160 (D. Mass. 1960); Willis V. State, 122 Ga. App. 455, 177 S.E.2d 487 (1970); State v. Fox, 283 Minn. 176, 168 N.W.2d 260 (1969); State v. Bradbury, 109 N.H. 105, 243 A.2d 302 (1968); State v. Carufel, 263 A.2d 686 (R.I. 1970).

A search of "premises" would include a search of the defendant's purse not in her physical possession. United States v. Teller, 397 F.2d 494 (7th Cir.), *cert. denied* 393 U.S. 937 (1968); United States v. Riccitelli, 259 F. Supp. 665 (D. Conn. 1966).

30. State v. Sais, 476 P.2d 515 (Ariz. 1970); Nicks v. United States, 273 A.2d 256 (D.C. App. 1971); Poole v. State, 247 So. 2d 443 (Fla. App. 1971); People v. Pugh, 69 Ill. App. 2d 312, 217 N.E.2d 557 (1966); Johnson v. State, 440 S.W.2d 308 (Tex. Crim. App. 1969). *See also* People v. Nesceger, 476 P.2d 995 (Colo. 1970), where the appearance of the defendant at the premises being searched justified a frisk, in the process of which a quantity of marijuana was revealed, *and* People v. MacDonald, 480 P.2d 555 (Colo. 1971), where the defendant was arrested when he arrived at the scene of the search, and an incident search of his person was sustained. *Cf.* People v. Lujan, 484 P.2d 1238 (Colo. 1971).

31. Walker v. United States, 327 F.2d 597 (D.C. Cir. 1963), *cert. denied* 377 U.S. 956 (1965).

32. Samuel v. State, 222 So. 2d 3 (Fla. 1969); Willis v. State, 122 Ga. App. 455, 177 S.E.2d 487 (1970); People v. Nicolette, 60 Misc. 2d 108, 302 N.Y.S.2d 618 (1969); Hernandez v. State, 437 S.W.2d 831 (Tex. Crim. App. 1968), *cert. denied* 395

It will be noted that in all these cases, the issue is the relation of the description in the warrant to the place to be searched. The fact that the officers did not make use of the over-reaching language of the warrant and confined themselves to an area in regard to which they had probable cause for a search is immaterial. The lack of requisite particularity renders the warrant void, and any search upon its authority is illegal. A defendant, therefore, vulnerable to a legal search, may be the incidental beneficiary of the enforcement of a constitutional standard designed to prevent the use of general warrants to the detriment of innocent parties.[33]

II. The Items to Be Seized

A. Per Se *Seizability*

A threshold issue in all cases involving the specification of items to be seized is whether the enumerated items are subject to seizure at all.[34] In 1920 in *Gouled v. United States*,[35] the Supreme Court held that property could not be seized, even though particularly described in a search warrant, which was merely of evidentiary value in a criminal proceeding. Rather, a search warrant could be resorted to only

> when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful, and provides that it may be taken.[36]

The *Gouled* holding, referred to as the "mere evidence" rule, meant essentially that the only evidence subject to seizure was instrumentalities

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U.S. 987 (1969). *Cf.* People v. Estrada, 44 Misc. 2d 452, 253 N.Y.S.2d 876 (1964), *cert. denied* 384 U.S. 992 (1966); People v. Brown, 40 Misc. 2d 35, 242 N.Y.S.2d 555 (1963).

33. "If innocent people were actually subjected to an unjust search under the warrant in question here, as might well be the case, it could still be argued that the defendants were not harmed thereby and, thus, should not be able to challenge the warrant because its coverage was too broad. The cases already cited make it clear that this argument has not been accepted by the courts because they are determined to discourage the practice of issuing warrants without a sufficient showing of cause, or, as in this case, when the cause shown does not cover as broad an area as the command to search." United States v. Hinton, 219 F.2d 324, 326-27 (7th Cir. 1955). *See also* People v. Royse, 477 P.2d 380 (Colo. 1970). *But cf.* Sasser v. United States, 227 F.2d 358 (5th Cir. 1955); Shore v. United States, 49 F.2d 519 (D.C. Cir.), *cert. denied* 283 U.S. 865 (1931); United States v. Ramos, 282 F. Supp. 354 (S.D. N.Y. 1968); United States v. Gomez, 42 F.R.D. 347 (S.D. N.Y. 1967); People v. Garnett, 6 Cal. App. 3d 280, 85 Cal. Rptr. 769 (1970).

34. This question is not, of course, unique to warrant searches. Warden v. Hayden, note 46 *infra*, was itself a warrantless search.

35. 255 U.S. 298 (1931).

36. *Id.* at 309.

of crime, contraband, and items that could not be legally possessed. The *Gouled* rule was a curious anomaly in the law since it, for not particularly persuasive reasons, excluded from potential seizure items that were concededly relevant to criminal conduct.[37] Furthermore, there was nothing in the language of the fourth amendment that compelled such a restriction.[38]

Because of the inhibiting effect of the *Gouled* rule on searches, there was a clear tendency to construe the category of seizable items as broadly as possible. In *Marron v. United States,*[39] incident to an arrest for violations of prohibition laws, the officers seized "a ledger showing inventory of liquors, receipts, expenses, including gifts to police officers," and also a number of bills for gas, electric, water and telephone service. The Court found all these items within the concept of instrumentalities of the crime.[40]

Lower courts were similarly prone to be generous in their interpretations. In *Harried v. United States*[41] a piece of cardboard with blood stains of the same type as the deceased was admitted as an instrumentality of the crime. In *United States v. Guido*[42] where the footprints of the defendant had been found at the scene of the crime, the court held his shoes were not mere evidence.[43] And in *State v. Chinn,*[44] the

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37. *Accord,* Harris v. United States, 331 U.S. 145 (1947); United States v. Lefkowitz, 285 U.S. 452 (1932).

38. *See* People v. Thayer, 68 Cal. 2d 635, 408 P.2d 108, 47 Cal. Rptr. 780 (1965), *cert. denied* 384 U.S. 968 (1966): "We hold that the mere evidence rule is not a constitutional standard and has no application in California." *See also* Elder v. Board of Medical Examiners, 241 Cal. App. 2d 246, 50 Cal. Rptr. 304 (1966), *cert. denied* 385 U.S. 1001 (1967).

39. 275 U.S. 192 (1927).

40. "[I]f the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. . . . The bills for gas, electric light, water and telephone services disclosed items of expense; they were convenient, if not in fact necessary, for the keeping of the account; and as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on." *Id.* at 199. *See also* Matthews v. Correa, 135 F.2d 534 (2d Cir. 1943); United States v. Durkin, 41 F.2d 851 (M.D. Pa. 1930).

41. 389 F.2d 281 (D.C. Cir. 1967).

42. 251 F.2d 1 (7th Cir.), *cert. denied* 356 U.S. 950 (1958).

43. "It is not logical to place in different categories a mask and a hat which might have been worn and pulled down upon the face of the robber to make identification more difficult. It is likewise difficult to place in different categories a pair of gloves worn on the hands and a pair of shoes worn on the feet. Surely, the latter would facilitate a robber's getaway and would not attract as much public attention as a robber fleeing barefooted from the scene of the hold-up." *Id.* at 3-4. *See also* State v. Herring, 77 N.M. 232, 421 P.2d 767 (1966), *cert. denied* 388 U.S. 923 (1967). *Cf.* Galliher v. United States, 362 F.2d 594, 600 (8th Cir. 1966): "There is a very narrow and hazy line between the instrumentalities used in the commission of a crime and pure evidence. It is in this

court found empty beer bottles, a camera and bed linens to be seizable in connection with a prosecution for rape.[45]

The *Gouled* rule was finally disposed of in *Warden v. Hayden*.[46] There at the defendant's trial for armed robbery, the prosecution introduced certain items of clothing that were seized during the search of his home. The Court noted that the "mere evidence" rule had been the subject of considerable criticism,[47] and concluded "nothing in the language of the Fourth Amendment supports the distinction between 'mere evidence' and instrumentalities, fruits of crime, or contraband."[48] Noting the shift in emphasis in interpreting the fourth amendment from property to privacy,[49] the Court concluded that the *Gouled* rule had

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undefined and hazy area that many courts have been able to find refuge when presented with a problem of seizing evidence. . . . [E]vidence directly and intimately connected with the crime for which an accused is arrested and is actually on the person of the accused at the time of his arrest is subject to search and seizure incident to his lawful arrest. Nothing but increased confusion would be gained by attempting to indulge in a fiction that a man's shirt is an instrumentality used in the commission of a nighttime burglary, and we shall not attempt to do so here."

44. 231 Ore. 259, 373 P.2d 392 (1962).

45. A vigorous dissent argued violation of *Gouled*. *And see* United States v. Margeson, 246 F. Supp. 219 (D. Me. 1965) *cert. denied* 385 U.S. 830 (1966) (holding the mere evidence rule inapplicable to searches incident to arrest).

46. 387 U.S. 294 (1967).

47. *Cited were* People v. Thayer, 63 Cal. 2d 635, 408 P.2d 108, 47 Cal. Rptr. 780 (1965), *cert. denied* 384 U.S. 908 (1966); *and* State v. Bisaccia, 45 N.J. 504, 213 A.2d 185 (1965).

In *Thayer* the court said: "The rationale for this curious doctrine has never been satisfactorily articulated. It creates a totally arbitrary impediment to law enforcement without protecting any important interests of the defendant. . . . The rule seems to have its basis in property concepts, in a theory that the sovereign may assert a claim because they have been wrongfully obtained or used. . . . The modern view, however, is that the exclusionary rules of evidence exist primarily to protect personal rights rather than property interests, and that common-law property concepts are usually irrelevant." 63 Cal. 2d at 637-38, 408 P.2d at 109, 47 Cal. Rptr. at 781.

In *Bisaccia* it was observed, "The right-to-possession rationalization of the law of search and seizure is too feeble and too contrived to endure. . . . It would demean the law to vindicate a search and seizure in terms of proprietary interest where everyone knows the quest is usually for evidence of guilt and nothing else. It must be that the right-to-possession thesis is quite irrelevant and that the Fourth Amendment does permit the search and seizure of things for their inculpatory worth." 45 N.J. at 508-09, 213 A.2d at 187. *Accord* State v. Raymond, 142 N.W.2d 444 (Iowa 1966).

See also LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . .Run Smooth,"* 1966 ILL. L.F. 255, 257-59; Newton, *The Mere Evidence Rule: Doctrine or Dogma?* 45 TEXAS L. REV. 526 (1967); Comment, 20 U. CHI. L. REV. 319 (1953); Comment, 13 So. DAK. L. REV. 183 (1968). *Cf.* United States v. Poller, 43 F.2d 911 (2d Cir. 1930).

48. 387 U.S. at 301.

49. "We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers based on property concepts." *Id.* at 304.

outlasted its utility.[50] The issue now would appear to be simply whether the items seized are relevant to the offense charged.[51]

B. "Things"

Dating from the decision in *Olmstead v. United States*,[52] and presently reflected in the dissenting opinions of Justice Black,[53] is the notion that the fourth amendment is not applicable to intercepted conversations, because spoken words are not "things", in the language of the amendment. While such interceptions now unquestionably fall within the ambit of the constitutional protection,[54] the fourth amendment remains inapplicable to the seizure of real property.[55]

An arrest, or a seizure of the person, is explicitly within the amendment, but the protection is personal to the individual. In *State v. Hunt*,[56] the defendants objected to an officer taking their child into custody, pursuant to a statute,[57] whom they were accused of assaulting. The court summarily rejected the contention that the child could only be taken from her parents pursuant to a warrant, observing that "[a]ny idea that a child is the personal 'property' of its parent is patently absurd."[58]

See United States v. Burnett, 409 F.2d 888 (2d Cir.), *cert. denied* 396 U.S. 852 (1969), acknowledging the relevance of Katz v. United States, 389 U.S. 347 (1967), to the problem.

50. "The survival of the *Gouled* distinction is attributable more to chance than considered judgment." 387 U.S. at 308. Justice Douglas dissented arguing that the *Gouled* rule was essential to protect the right of privacy.

51. "In the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." *Id.* at 307. "Elaboration by the Court on that pregnant remark may afford whatever new boundary the death of Gouled may demand." United States v. Bennett 409 F.2d 888, 897 (2d Cir.), *cert denied* 396 U.S. 852 (1969). *See also* Clarke v. Neil, 427 F.2d 1342 (6th Cir. 1970); United States v. Munroe, 421 F.2d 644 (5th Cir.), *cert. denied* 400 U.S. 851 (1970); Application of Commercial Investment Co., 305 F. Supp. 967 (S.D. N.Y. 1969); Crawford v. State, 9 Md. App. 624, 267 A.2d 317 (1970).

"Arresting officers, being neither lawyers nor judges, cannot be expected to make subtle distinctions between the degrees of relevancy of any evidentiary item which is not clearly irrelevant to the issue of the guilt of the accused. This is a problem capable of taxing the minds of the most experienced and learned jurists, and the remedy, if any, to be afforded a defendant in such circumstances is by way of suppression of such evidence before or during trial." Huber v. State, 2 Md. App. 245, 261, 234 A.2d 264, 274 (1967).

52. 277 U.S. 438 (1928).

53. *See* Berger v. New York, 388 U.S. 41, 70 (1967); Katz v. United States, 389 U.S. 347, 364 (1967).

54. Berger v. New York, 388 U.S. 41 (1967).

55. Levin v. Blair, 17 F.2d 151 (E.D. Pa. 1927); United States v. 63,250 Gallons of Beer, 13 F.2d 142 (D. Mass. 1926); In re Crescent Beverage Co., 297 F. 1009 (W.D. Pa. 1923); Melet & Nichtar Brewing Co. v. United States, 296 F. 765 (E.D. Pa. 1923).

56. 2 Ariz. App. 6, 406 P.2d 208 (1965).

57. ARIZ. REV. STAT. § 8-221 (1956).

58. 2 Ariz. App. at 12, 406 P.2d at 214.

C. *Specification of Items*

The constitutional standard for the specification of items to be seized[59] was stated in *Marron v. United States*[60] as follows:

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.[61]

If the affidavit upon which the warrant is issued is attached thereto, a sufficient enumeration in it will satisfy constitutional requirements.[62]

This aspect of particularity was a central issue in *Stanford v. Texas,*[63] where the warrant called for the seizure of "books, records, pamphlets, cards, receipts, lists, memoranda, and other written instruments concerning the Communist Party of Texas." Pursuant to this warrant, the police seized some three hundred books and pamphlets, including "works by such diverse writers as Karl Marx, John Paul Sarte, Theodore Draper, Fidel Castro, Earl Browder, Pope John XXIII, and Mr. Justice Hugo Black." Also taken were the defendant's marriage certificate, his insurance policies, and miscellaneous household and personal papers. Without exploring the question of whether the items seized fell within the enumeration of the warrant,[64] the Court held the search unreasonable on the basis that the warrant itself was defective since it was a general warrant, and such devices were among the greatest fears of the framers of the fourth amendment.[65]

Nevertheless, decisions generally have not demanded a high degree of specificity in the description of items to be seized. Courts have approved such descriptions as "lottery tickets and other paraphernalia,"[66] "letters, tickets, papers, records and books,"[67] "instruments of the

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59. *See generally* Mascolo, *Specificity Requirements for Warrants Under the Fourth Amendment: Defining the Zone of Privacy,* 73 DICK. L. REV. 1 (1968).

60. 275 U.S. 192 (1927).

61. *Id.* at 196.

62. Vinto Products Company v. Goddard, 43 F.2d 399 (D. Minn. 1930); United States v. Snow, 9 F.2d 978 (D. Mass. 1925); People v. Hendricks, 45 Misc. 2d 7, 256 N.Y.S.2d 78 (1965).

63. 379 U.S. 476 (1965).

64. *See* text accompanying notes 89-91 *infra.*

65. The Court provided an extended discussion of the historical background of the amendment. 379 U.S. at 481-85. *See also* Marcus v. Search Warrant, 367 U.S. 717 (1961).

66. Merritt v. United States, 249 F.2d 19 (6th Cir. 1957).

67. United States v. Clancy, 276 F.2d 617 (7th Cir. 1960), *rev'd on other grounds,* 365 U.S. 312 (1961).

crime,"[68] "narcotics consisting of dangerous drugs, heroin and marijuana, together with paraphernalia instrumental in the use of said contraband,"[69] "cooking utensils,"[70] and "blood stained clothes."[71]

If, however, the court feels the warrant vests the executing officer with too wide an area of discretion it will be declared void. Courts have found authority to "enter said premises . . . to investigate and search into and concerning said violations,"[72] "to search and ascertain if any fraud upon the internal revenue service has been or is being committed in or upon or by use of said premises,"[73] to seize "certain property designed for . . . unlawful manufacture of intoxicating liquor,"[74] "paraphernalia which could be used to violate" certain code provisions,[75] "any evidence pertaining to the felonious killing of" a named individual,[76] "$150,000 in merchandise,"[77] and "furniture and household goods"[78] constitutionally inadequate.[79]

A notable exception to the requirement of the specification of items is found in the judicial authorization of so-called administrative searches. Typical are inspections by municipal officers to detect and prevent fire and health hazards. To maintain minimum standards of acceptability, it is essential that the officer be empowered to examine all premises within a designated area.[80] Under the authority of *Frank v. Maryland*[81] the problem of particularity had been avoided by the simple expedient

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68. United States v. Robinson, 287 F. Supp. 245 (N.D. Ind. 1968); State v. Ferrari, 80 N.M. 714, 460 P.2d 244 (1969). *See also* Frey v. State, 3 Md. App. 38, 237 A.2d 774 (1968).
69. People v. Walker, 257 Cal. App. 2d 424, 58 Cal. Rptr. 495 (1967), *cert. denied* 389 U.S. 1038 (1968). *See also* Katz v. United States, 369 F.2d 130 (9th Cir. 1966), *rev'd on other grounds* 389 U.S. 347 (1967); People v. Leahy, 484 P.2d 778 (Colo. 1971); People v. Henry, 482 P.2d 357 (Colo. 1971); United States v. Ketterman, 276 A.2d 243 (D.C. App. 1971); Griffin v. State, 232 Md. 389, 194 A.2d 80 (1963); State v. Stewart, 274 A.2d 500 (Vt. 1971).
70. State v. Walker, 202 Kan. 475, 449 P.2d 515 (1969).
71. State v. Seefeldt, 51 N.J. 472, 242 A.2d 322 (1968).
72. Giles v. United States, 284 Fed. 208 (1st Cir. 1922).
73. Rice v. United States, 24 F.2d 479 (1st Cir. 1928).
74. United States v. Quantity of Extracts, Bottles, etc., 54 F.2d 643 (S.D. Fla. 1931).
75. State v. Johnson, 160 Conn. 28, 273 A.2d 702 (1970); State v. Taylor, 28 Conn. Supp. 19, 246 A.2d 898 (1968).
76. Brown v. State, 45 Ala. App. 265, 229 So. 2d 40 (1969).
77. Lockridge v. Superior Court, 275 Cal. App. 2d 612, 80 Cal. Rptr. 223 (1969).
78. People v. Coletti, 39 Misc. 2d 580, 241 N.Y.S.2d 454 (1963).
79. *See also* Honeycutt v. United States, 277 F. 939 (4th Cir. 1920); In re Hale, 139 F. 496 (2d Cir. 1905), *aff'd* 201 U.S. 43 (1906); United States v. Baldwin, 46 F.R.D. 63 (S.D.N.Y. 1969); Lipschintz v. Davis, 288 F. 974 (E.D. Pa. 1922); Thompson v. State, 206 So. 2d 195 (Miss. 1968).
80. *See* authorities in Camara v. Municipal Court, 387 U.S. 523, 536 n.12 (1967). *See generally* Schwartz, *Crucial Areas in Administrative Law*, 34 G. WASH. L. REV. 401 (1968).
81. 359 U.S. 360 (1959).

of making a warrant unnecessary for such inspections.[82] In 1967 in *Camara v. Municipal Court*[83] and *See v. City of Seattle*[84] the *Frank* decision was repudiated.[85] The Court rejected the distinction previously drawn between searches for evidence of crime and administrative inspections,[86] and concluded that such inspections could only be carried out pursuant to a warrant, except in those cases where the party in interest gave his bona fide consent. Such a conclusion could well have been the death knell for administrative inspections since, in terms of traditional fourth amendment concepts, it would be a rare case in which the officer seeking the warrant could allege probable cause to believe violations of the law were occurring on particular premises, much less designate particular "items" to be seized. To surmount this difficulty, the Court held that it would not be necessary to allege the probability of an ordinance violation for a warrant to issue. Rather, " 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."[87] As a result, not only is the standard of probable cause relaxed, but the fourth amendment command for specification of items to be seized is ignored or simply dismissed as irrelevant.[88]

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82. The *Frank* court based its holding on such considerations as the absence of a criminal prosecution, the numerous safeguards surrounding the authority to inspect, the long historical use of the practice and the resulting dilution of the fourth amendment standard to accommodate such practices should they come within its purview.

83. 387 U.S. 523 (1967).

84. 387 U.S. 541 (1967).

85. *See generally* LaFave, *Administrative Searches and the Fourth Amendment: the* Camara *and* See *Cases,* 1967 SUP. CT. REV. 1.

86. "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. For instance, even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security." 387 U.S. at 530-31.

87. *Id.* at 538. "Because fires and epidemics ravage large urban areas, because unsightly conditions adversely affect the economic values of neighboring structures, numerous courts have upheld the police power of municipalities to impose and enforce such a minimum standard even upon existing structures. In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of these reasonable goals of code enforcement." *Id.* at 535.

88. The thrust of the dissent by Justice Clark, joined by Justices Harlan and Stewart, was that the Court, by forcing the administrative inspection process into the fourth amendment, had been compelled to dilute the constitutional protection. While here the majority may respond that a diluted constitutional protection is

D. Seizing Items Not Specified

Notwithstanding the constitutional requirement that a warrant specify the items to be seized, decisions are numerous to the affect that when officers are executing a valid search warrant they may seize unenumerated instrumentalities of crime and contraband which they reasonably discover in the process.[89] At first glance, this would appear to fly in the face of the explicit language of the amendment. However, such seizures are actually subject to analytical treatment as warrantless searches meeting the reasonableness standard of the fourth amendment in light of the exigent circumstances.[90] Upon unexpectedly discovering seizable items while engaged in the execution of a warrant, the officers could return to the magistrate and obtain a supplemental warrant. If sought with expedition, there would appear every reason to believe the warrant would be issued. The magistrate has previously found the officer's allegations sufficient to authorize the search of these very premises. Now the officer is in a position to allege his own observations of the presence of particular seizable items. Given these circumstances, the requirement of a second warrant is little more than ritualistic. If emphasis is to be placed upon the protected privacy orientation of the fourth amendment, a greater invasion of privacy would result from a second official intrusion upon the premises.[91] Finally, a delay long

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better than no protection at all, the dissent is concerned with the precedential implications of a fluctuating standard of probable cause. Such fears would appear vindicated by dictum in Davis v. Mississippi, 394 U.S. 721 (1969), citing *Camara* for the possibility of issuing a warrant for the fingerprinting of all persons meeting the general description of a suspect in a serious crime.

89. *See, e.g.*, Adams v. New York, 192 U.S. 585 (1904); Ludwig v. Wainwright, 434 F.2d 1104 (5th Cir. 1970); Woodbury v. Beto, 426 F.2d 923 (5th Cir. 1970); United States v. Barry, 423 F.2d 142 (10th Cir. 1970); United States v. Bridges, 419 F.2d 963 (8th Cir. 1969); United States v. Alloway, 397 F.2d 105 (6th Cir. 1968); United States v. Teller, 397 F.2d 494 (7th Cir.), *cert. denied* 393 U.S. 937 (1968); Vitali v. United States, 383 F.2d 121 (1st Cir. 1967); Johnson v. United States, 293 F.2d 539 (D.C. Cir. 1961), *cert. denied* 375 U.S. 888 (1963); Woo Lai Chin v. United States, 274 F.2d 708 (9th Cir. 1960); United States v. Federal Mail Order Corp., 47 F.2d 164 (2d Cir. 1931); State v. McMann, 3 Ariz. App. 111, 412 P.2d 286 (1966); Skelton v. Superior Court, 1 Cal. 3d 144, 460 P.2d 485, 81 Cal. Rptr. 613 (1969); People v. Superior Court, 95 Cal. Rptr. 114 (App. 1971); People v. Piwtorak, 484 P.2d 1227 (Colo. 1971); Curtis v. United States, 263 A.2d 653 (D.C. App. 1970); People v. Williams, 36 Ill. 2d 505, 224 N.E.2d 225, *cert. denied* 389 U.S. 828 (1969); State v. Wesson, 260 Iowa 781, 150 N.W.2d 284 (1967); State v. Yates, 202 Kan. 406, 449 P.2d 575, *cert. denied* 396 U.S. 996 (1969); Crawford v. State, 9 Md. App. 624, 267 A.2d 317 (1970); State v. Shore, 183 N.W.2d 776 (Minn. 1971); State v. Waito, 185 Neb. 780, 178 N.W.2d 774 (1970); Wyatt v. State, 468 P.2d 338 (Nev. 1970); State v. Carlton, 484 P.2d 757 (N.M. App. 1971); People v. Moss, 34 A.D.2d 986, 312 N.Y.S.2d 417 (1970); State v. Iverson, 187 N.W.2d 1 (N.D. 1971); State v. Spicer, 473 P.2d 147 (Ore. App. 1970).

90. *See* United States v. Harrison, 319 F. Supp. 888 (D. N.J. 1970).

91. *Cf.* Chambers v. Maroney, 399 U.S. 42, 51-52 (1970).

enough to obtain a warrant might in some cases result in a loss of the evidence.

Such warrantless seizures have traditionally been limited to instrumentalities of crime and contraband.[92] The continued validity of this limitation has been challenged by some courts in light of *Warden v. Hayden*[93] eliminating the prohibition against the seizure of "mere evidence."[94] The argument runs that the seizure of non-enumerated items had been inhibited, not by the constitution, but by the common law rule. When the *Hayden* decision repudiated that rule in respect to a search incident to an arrest, it implicitly made any relevant evidentiary item seizable incident to a warrant. For example, in *Morales v. State*[95] the Supreme Court of Wisconsin concluded,

> We see no logical basis for a distinction between seizure of items not named in the warrant, but discovered in the course of the search, and items which are seized in the search incident to an arrest. *Warden* specifically rejects the distinction in a search incident to arrest.[96]

Of coure, if this be an inevitable result of *Hayden,* there remains little point in enumerating items at all, a point virtually conceded by the Supreme Court of Montana in *State v. Quigg*;[97] that court read *Hayden* to permit such sweeping descriptive language in a search warrant as "any other property or evidence they may discover that might connect to the demise of" the victim.[98] At best, it would only be necessary for the affidavit to allege probable cause to believe one particularly enumer-

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92. *See, e.g.,* Cofer v. United States, 37 F.2d 677 (5th Cir. 1930); In re No. 191 Front Street, 5 F.2d 282 (2d Cir. 1924); Honeycutt v. United States, 277 F. 939 (4th Cir. 1921); Aday v. Superior Court, 55 Cal. 2d 789, 362 P.2d 337, 13 Cal. Rptr. 415 (1961); People v. Lujan, 484 P.2d 1238 (Colo. 1971); State v. Bro-Chu, 237 A.2d 418 (Me. 1968); Commonwealth v. Woojcik, 266 N.E.2d 645 (Mass. 1971); State v. Pietraszewski, 285 Minn. 212, 172 N.W.2d 758 (1969); People V. Baker, 23 N.Y.2d 307, 244 N.E.2d 232, 296 N.Y.S.2d 745 (1968); Upton v. Commonwealth, 211 Va. 445, 177 S.E.2d 528 (1970). *Cf.* United States v. Harrison, 319 F. Supp. 888 (D. N.J. 1970).

93. 387 U.S. 294 (1967).

94. *See* prior discussion, text accompanying notes 34-51 *supra.*

95. 44 Wis. 2d 96, 170 N.W.2d 684 (1969).

96. *Id.* at 108, 170 N.W.2d at 690. *See also* Anglin v. Director, Patuxent Institution, 439 F.2d 1342 (4th Cir. 1971); United States v. Teller, 412 F.2d 374 (7th Cir. 1969); Mesmer v. United States, 405 F.2d 316 (10th Cir. 1969); Gurleski v. United States, 405 F.2d 253 (5th Cir. 1968), *cert. denied* 395 U.S. 981, 997 (1969); Dudley v. United States, 320 F. Supp. 456 (N.D. Ga. 1970); Padgett v. State, 45 Ala. App. 56, 223 So. 2d 597 (1969); Bell v. State, 482 P.2d 854 (Alas. 1971); People v. Henry, 482 P.2d 357 (Colo. 1971); Scott v. State, 122 Ga. App. 224, 176 S.E.2d 481 (1970); State v. Bolen, 205 Kan. 377, 469 P.2d 422 (1970); Gerstein v. State, 270 A.2d 331 (Md. App. 1970); Commonwealth v. Murray, 269 N.E.2d 641 (Mass. 1971); State v. Taylor, 187 N.W.2d 129 (Minn. 1971).

97. 467 P.2d 692 (Mont. 1970).

98. *Id.* at 699.

ated item was on the premises. The warrant issued would provide a license to seize anything seizable, at least until the enumerated item was found, at which point any further exploratory search would be unreasonable.

Such results are clearly undesirable in that they return us to the era of the general warrant in one particular, and they are in no way compelled by the Hayden case. Confusion has resulted from a failure to distinguish between *per se* seizability, the isuse in the *Hayden* case, and the constitutional requisites for a valid warrant search. Expanding the range of items subject to seizure is of constitutional significance only insofar as the test of reasonableness is satisfied. To apply this rationale to the execution of search warrants is tantamount to blue-penciling from the fourth amendment the requirement that the items to be seized be particularly described. A few courts, cognizant of this diluting impact on the protection of the fourth amendment, have declined to read *Hayden* in this fashion.[99]

In a pre-*Hayden* case, *Marron v. United States,*[100] the Supreme Court construed the language of the amendment to prevent "the seizure of one thing under a warrant describing another."[101] While the issue has not been confronted by the Court since *Hayden,* the *Marron* decision was cited approvingly in *Berger v. New York*[102] where the Court frowned upon the New York permissive electronic eavesdropping statute for its failure to require a particularization of the items to be seized.[103] This would appear to foreclose the suggestion that *Marron* had been implicitly overruled.[104]

Also worthy of note is *Stanley v. Georgia*[105] where officers entered the home of the petitioner with a warrant for the seizure of gambling materials. In their search they came upon a roll of motion picture film, threaded it onto a projector found on the premises, and subsequently seized the film after having concluded that it was obscene. While a majority of the Court reversed the conviction ostensibly on the basis of first amendment protections, three concurring justices submitted that

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99. United States v. Dzialak, 441 F.2d 212 (2d Cir. 1971); United States *ex rel.* Nickens v. LaVallee, 391 F.2d 123 (2d Cir. 1968); State v. Paul, 80 N.M. 521, 459 P.2d 596 (1969), *cert. denied* 397 U.S. 1044 (1970); People v. Baker, 23 N.Y.2d 307, 244 N.E.2d 232, 296 N.Y.S.2d 745 (1968); State v. Nelson, 169 N.W.2d 533 (S.D. 1969); Smith v. State, 451 S.W.2d 716 (Tenn. Crim. App. 1969).

100. 275 U.S. 192 (1927).

101. *Id.* at 196. "As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Id.*

102. 388 U.S. 41 (1967).

103. *See* text accompanying notes 121-26 *infra.*

104. *Cf.* Morales v. State, 44 Wis. 2d 96, 170 N.W.2d 684 (1969).

105. 344 U.S. 557 (1969).

the case was controlled by *Marron*.[106] Nothing in the majority opinion would appear inconsistent with this analysis.[107]

Nevertheless, the recent decision in *Coolidge v. New Hampshire*[108] indicates a readiness, at least on the part of four members of the Court,[109] to in most instances sanction the seizure of any seizable items when the warrant is valid. While acknowledging that the requirement of specification of items precludes the use of "general warrants", once a legitimate entry has been made, the seizure of non-enumerated items, including "mere evidence", is said to come within the "plain view" doctrine.[110] One limitation of present significance was noted: "[T]he discovery of evidence in plain view must be inadvertent."[111] Thus, if the officers are aware in advance that a certain item of seizable evidence is to be found and yet deliberately fail to list it among the items to be seized, the seizure is illegal.

This restriction is said to emanate from the policy preference favoring warrant searches in all cases except where obtaining a warrant would be impractical. The result in the situation here presented would appear to be little more than a formalistic requirement, affording no additional constitutional protection to the accused, other than the possibility of being the incidental beneficiary of a technical insufficiency. The preference afforded prior judicial authorization is sound where, for example, the central determination for the magistrate is whether the sanctity of a residence should be intruded upon *at all*,[112] or whether an electronic eavesdrop should be used *at all*.[113] No such threshold inquiry arises in the present context, however, in all cases an intrusion has received prior juidicial sanction.[114] The question is simply whether the affiant failed to fully state his case. Indeed, the defendant is put in the anomalous position of arguing that the officers had probable cause to believe the

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106. "To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminant seizures as if armed with all the unbridled and illegal power of a general warrant." *Id.* at 572.
107. *See also* Upton v. Commonwealth, 211 Va. 445, 77 S.E.2d 528 (1970).
108. 403 U.S. 443 (1971).
109. Justices Stewart, Douglas, Brennan and Marshall.
110. "Where, once an otherwise lawful search is in progress, the police inadvertently come upon a piece of evidence, it would often be a needless inconvenience, and sometimes dangerous—to the evidence or to the police themselves—to require them to ignore it until they have obtained a warrant particularly describing it." 403 U.S. at 467-68.
111. *Id.* at 469.
112. *See* Jones v. United States, 357 U.S. 493 (1958).
113. *See* Katz v. United States, 389 U.S. 347 (1967).
114. *See also* the separate opinion of Justice White in *Coolidge*.

challenged item was on the premises searched, and the officer deliberately neglected to list it. Where such an argument is made, the prosecution may be expected to respond that this is a highly improbable argument. If, as the defendant insists, there was probable cause to authorize the seizure of the item, and since, as the record shows, the officer did go to the trouble of obtaining a warrant, what possible reason could he have for *not* listing the item? Either the defendant is wrong in his allegation, or the omission was unintentional; in either case its absence from the warrant is excused. Faced with what may well be an unresolvable factual dispute regarding the state of mind of the officer prior to the issuance of the warrant, the court is likely to absolve itself of the problem by holding that at worst the failure to enumerate the item was harmless error.

III. Electronic Eavesdropping

Nowhere does the language of the fourth amendment apply with greater awkwardness than in the issuance of warrants for electronic eavesdropping. While the place to be searched can be particularly designated, the allegation is that seizable evidence will be there at a time in the future. Even more speculative is the itemization of the matter to be seized—the affiant must allege the anticipated substance of conversations to occur at a later time. Such practical obstacles lend persuasion to the position of Justice Black that the amendment is not equipped to cope with the seizure of intangibles.[115]

In only one case to date has a warrant-authorized electronic eavesdrop survived constitutional scrutiny by the Supreme Court. In *Osborn v. United States*[116] the petitioner hired one Vic to make background investigations on people listed on the panel from which members of a jury would be selected, not knowing that Vic had agreed to report any illegal activities to the police. Information supplied by Vic that the petitioner might attempt to bribe a juror was presented to a federal judge. An order was issued for Vic to conceal a recorder in his clothing and attempt to record further conversations with the petitioner concerning the matter. A recording of a subsequent conversation was introduced at the petitioner's trial. The Court, held that under the facts of the case the recording was permissible since the district judge had a vital interest in preserving the integrity of his court.[117]

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115. *See* note 53 *supra*.
116. 385 U.S. 323 (1966).
117. "As the district judge recognized, it was imperative to determine whether the integrity of the court was being undermined, and highly undesirable that this determination should hinge on the inconclusive outcome of a testimonial contest

The *Osborn* case is frequently cited as an example of the successful use of a warrant-authorized electronic eavesdrop. Ironically, it is questionable whether a warrant was needed at all. The case is comparable to the misplaced confidence cases[118] in which recordings of conversations have been held admissible notwithstanding the absence of a warrant.[119] Nevertheless, the Court did emphasize the procedure followed in obtaining judicial authorization, and these circumstances were reiterated by the Court in the subsequent *Berger* decision.[120]

Berger v. New York[121] involved the constitutionality of the New York permissive eavesdropping statute.[122] The Court found the statute constitutionally defective on several grounds. First, it was noted that the fourth amendment requires that a warrant particularly describe the place to be searched and the person or things to be seized, but the statute did not require such a particularization.[123] The broad scope of the

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between the only two people in the world who knew the truth—one an informer, the other a lawyer of previous good repute. There could hardly be a clearer example of 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment' as 'a precondition of lawful electronic surveillance.'" *Id.* at 330.

118. *See* United States v. White, 91 S. Ct. 1122 (1971); Lewis v. United States, 385 U.S. 206 (1966); Lopez v. United States, 373 U.S. 427 (1963); On Lee v. United States, 343 U.S. 747 (1952).

119. *See* United States v. Missler, 414 F.2d 1293, 1299 n.2 (4th Cir. 1969) ("In Osborn . . . the Court had no occasion to consider whether a warrant is necessary in eavesdropping cases in which one of the parties has consented to the overhearing and said nothing in contravention of its decision in *Lopez*.") *And see* Dash, Katz—*Variations on a Theme by Berger*, 17 CATH. U. L. REV. 296, 312-13 (1968); Greenawalt, *The Consent Problem in Wiretapping and Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 COL. L. REV. 189, 202 (1968).

120. "Among other safeguards, the order described the type of conversation sought with particularity, thus indicating a specific objective of the government in entering the constitutionally protected area and the limitations placed upon the officer executing the warrant. Under it the officer could not search unauthorized areas; likewise, once the property sought for which the order was issued was found the officer could not use the order as a pass key to further search. In addition, the order authorized one limited intrusion rather than a series of a continuous surveillance." Berger v. New York, 388 U.S. 41, 57 (1967).

121. 388 U.S. 41 (1967).

122. N.Y. CODE CRIM. PROC. § 813-a (1958).

123. "It merely says that a warrant may issue on reasonable ground to believe that evidence of crime may be obtained by the eavesdrop. It lays down no requirement for particularity in the warrant as to what specific crime has been or is being committed, nor 'the place to be searched,' or 'the persons or things to be seized' as specifically required by the fourth amendment. The need for particularity and evidence of reliability in the showing required when judicial authorization of a search is sought is especially great in the case of eavesdropping. By its very nature eavesdropping involves an intrusion on privacy that is broad in scope." Berger v. New York, 388 U.S. at 55-56.

See also People v. Grossman, 45 Misc. 2d 557, 257 N.Y.S.2d 266, 277 (1965) ("This factor alone would make any eavesdropping order unconstitutional."); People v. Szymaski, 62 Misc. 2d 1065, 310 N.Y.S.2d 587 (1970) (evidence sup-

statute permitted general searches by electronic devices, one of the primary evils at which the fourth amendment was directed. Second, the statute permitted an eavesdrop to be authorized for a two month period, which was tantamount to sanctioning an extended series of intrusions justified by a single showing of probable cause.[124] Third, the statute did not provide for a termination of the authorization once the conversation sought was seized.[125] And since the statute provided for no notice to the party whose conversation was seized as is required for traditional search warrants, nor did it allow for the showing of special facts to overcome this omission. Further, as there was no requirement for the return of the warrant, there was no subsequent judicial supervision of the seized evidence.[126]

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pressed where name of persons whose conversation was overheard not in warrant); Solomon, *The Short Happy Life of* Berger v. New York, 45 CHI.-KENT L. REV. 123, 133 n.59 (1968).

But see United States *ex rel.* Pugach v. Mancusi, 310 F. Supp. 691, 705 (S.D. N.Y. 1970) ("The eavesdropping warrants in question identify the 'place to be searched' as 'room No. 812, in premises No. 349 East 149th Street, Bronx County,' petitioner had testified, and the State has not denied, that 'room No. 812' was in fact a suite of rooms, housing Mr. Pugach and two law partners, two associates who were also attorneys, another attorney and an assistant district attorney who was not affiliated with petitioner; the suite also included the desks of four secretaries. Thus, it must be conceded that the warrants fail to indicate precisely whose conversations were to be overheard. The court, however, is aware of the practical factors including the need for secrecy, which at this time and place militated against an over-particularization in the warrant of the premises to be searched or the parties whose conversations were to be overheard.")

See also People v. Ruffino, 62 Misc. 2d 653, 309 N.Y.S.2d 805 (1970), involving statutory requirement of amendment to order where additional crimes are revealed.

124. The statute further allowed extensions beyond the two month period with no requirement of an additional showing of probable cause. *See also* People v. Fino, 29 A.D.2d 227, 287 N.Y.S.2d 440 (1968). *Cf.* United States *ex rel.* Pugach v. Mancusi, 310 F. Supp. 691 (S.D. N.Y. 1970) (eavesdrop continuing for six months found reasonable.)

125. People v. Botta, 60 Misc. 2d 869, 871, 304 N.Y.S.2d 362, 363-64 (1969). "The order here authorized a twenty-four hour surveillance for more than two weeks. While the order seems to indicate that it shall terminate at such time as the conversations sought are recorded, this termination is not a termination by the court. It is the termination at the pleasure of the police officers. The vice inherent in such an order is indicated by the return. The police officers continued their wiretap for two weeks after they had intercepted criminal conversations. Since the order violates the limitations prescribed by the Fourth Amendment of the Constitution as interpreted in *Berger* and *Katz*, the motion to suppress is granted."

126. Justice Douglas, in a concurring opinion, argued that any form of electronic eavesdropping violated the fourth amendment as it authorized the seizure of "mere evidence." This argument was rendered moot by a majority of the Court in Warden v. Hayden, 387 U.S. 294 (1967). Justice Stewart concurred, believing that the statute was constitutional but that the affidavits did not provide a showing of probable cause to justify the order. Justice Black dissented, contending that the fourth amendment had no application to electronic eaves-

Finally, in *Katz v. United States*,[127] the Court held that notwithstanding the finding of a fourth amendment violation, had the officers first obtained a warrant authorizing an eavesdrop, their conduct in attaching a listening device to the outside of a public telephone booth would have been reasonable.[128] The result of these several decisions would appear to be that, with the possible exception of the misplaced confidence cases, evidence may be obtained by the use of electronic surveillance only where a valid authorizing court order has first been obtained.[129] Accepting *Osborn* as the model for such authorizations, it will be the exceptional case in which affiants can confidently particularize the sought conversations with the detail which was possible in that case.

IV. Conclusion

When the drafters of the fourth amendment determined that all warrants must particularly describe "the place to be searched and the person or things to be seized," their concern was primarily with the

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dropping. Justices Harlan and White also dissented. *See generally* Comment, 5 San Diego L. Rev. 107 (1968).

Berger and *Katz* have been held to apply only prospectively. Desist v. United States, 394 U.S. 244 (1969); Kaiser v. New York, 394 U.S. 280 (1969). *Cf.* United States *ex rel.* Pugach v. Mancusi, 411 F.2d 177 (2d Cir.), *cert. denied* 396 U.S. 889 (1969).

127. 389 U.S. 347 (1967).

128. "Accepting this account of the Government's actions as accurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place." *Id.* at 354.

129. *See* Clark, *Wiretapping and the Constitution*, 5 Cal. West L. Rev. 1, 2, 6 (1968). There is no reason to believe that statutory authorization is an essential prerequisite to a valid order. *See* In re Telephone Communications, 55 Misc. 2d 163, 284 N.Y.S.2d 431 (1967).

And see Taylor, Two Studies in Constitutional Interpretation 114 (1969): ("The Court's opinion does not say that a clandestine trespass to install a bug may be authorized by an ex parte surveillance order, but such is plainly the consequence of its reasoning. No doubt it is comforting to be told that one's privacy is as fully protected in a public telephone booth as it is at home. But is less reassuring to realize that one's privacy is not better protected at home than in a public telephone booth."); Greenawalt, *The Consent Problem in Wiretapping and Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 Col. L. Rev. 189, 201 (1968) ("There is a certain irony in *Berger's* approval of *Osborn*: the *Berger* Court found it unnecessary to pass on the particularity of orders issued under a defective statute, yet the order in *Osborn* was issued without any statutory authorization. *Katz* leaves it unclear whether court orders issued apart from any statutory scheme can validate third-party eavesdropping."); Scolular, *Wiretapping and Eavesdropping: Constitutional Development from* Olmstead *to* Katz, 12 St. Louis U. L. J. 513, 537 (1968).

security of "persons, houses, papers, and effects" from the unrestrained invasion by agents of the government hoping to uncover evidence of crimes. The command of the amendment was to insure that the authority to search would be carefully confined within the limits of the established probable cause. Subsequent case law concerning the specification of places and items sought to preserve the intention of the amendment while at the same time avoiding hyper-technicality where the designations were fairly stated.

Incongruous processes such as administrative searches were doubtless not within contemplation. Twentieth century urbanization, however, has made the compliance with governmentally prescribed standards in varied areas more the rule than the exception, and administrative inspections have become commonplace. While eavesdropping was nothing new, the employment of electronic devices to surreptitiously invade the privacy of the unsuspecting was far in the future. To view such conduct as beyond the purview of the amendment was hardly unreasonable. Nevertheless, fear of invasions of privacy through increasingly sophisticated devices has, rightly or wrongly, become a subject of national paranoia. The danger being far more insidious than that posed by a conventional search, it is less than surprising that ultimately the Court felt compelled to make the fourth amendment fit, even if it was a classic case of putting a square peg in a round hole.

The endurance of the United States Constitution has been largely due to its magnificent vagaries that have been adaptable to the problems of a changing society. Where the language employed is most precise, the greatest stress is likely to occur. In the case of the fourth amendment, either concessions must be made to expedience and necessity, or conceptions deriving from an overview of the constitution, such as constitutionally protected privacy, must be amalgamated to meet strongly felt societal needs.[130]

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130. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Stanley v. Georgia, 394 U.S. (1969).