Nebraska Standards
On Search and Seizure

I. INTRODUCTION

Last summer, in *Stone v. Powell* and *Wolff v. Rice,* the United States Supreme Court held that habeas corpus relief is no longer available to state prisoners who allege that their convictions were based upon illegally-seized evidence. The major effect of that ruling was to make state law controlling on questions of search and seizure.2

It is clear from *Powell* and *Rice* that the Supreme Court no longer will require states to adhere to "federal standards" on fourth amendment questions.4 In both cases, state courts had found valid searches5 and lower federal courts had held those same searches invalid.6 The Supreme Court's opinion had the effect of reinstating the state decisions.

1. 428 U.S. 465 (1976). The two cases were decided together. For commentary on the cases, see 37 La. L. Rev. 289 (1976); KAMISAR, LAFAVE, & ISRAEL, MODERN CRIMINAL PROCEDURE 33, 67, 130, 170 (Supp. 1977).
2. In sum, we conclude that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. 428 U.S. at 494.
   Since an exhaustion of state remedies has traditionally been required before a petition for habeas could be brought, it is hard to see how any state prisoner will be able to qualify for habeas relief on a fourth amendment question. No other form of relief is available to get a federal order releasing one from state imprisonment.
3. That is, standards set by federal courts.
4. Constitutional protection against unreasonable searches and seizures derives from the fourth amendment of the United States Constitution:
   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 searched.
   See notes 11-17 and accompanying text infra.
5. 428 U.S. at 471; State v. Rice, 188 Neb. 728, 199 N.W.2d 480 (1972).
Because, at least in the immediate future, state law can be expected to control the search and seizure area, now is an appropriate time to discover how the courts of Nebraska interpret fourth amendment rights and the rules instituted to enforce them. This comment will discuss those interpretations and rules, largely through an examination of Nebraska Supreme Court decisions of the last ten years.

In the search and seizure area, boundaries are hard to find. One can list many things the police may do—very few that they may not. In the last decade, the Nebraska Supreme Court has listened to fourth amendment arguments in approximately fifty cases. Of those, it reversed a conviction on fourth amendment grounds only in two—a 1975 case where blood was drawn for an alcohol test while the subject was unconscious and had not been placed under arrest, and a 1976 case in which police forcibly entered a locked camper without a warrant, or probable cause to suspect a crime had been committed, or incriminating evidence in "plain view."

II. THE FEDERAL UNDERPINNINGS

Although state courts now may be free to fill in the details, the basic framework of the constitutional protection from unreasonable searches and/or seizures must be found in decisions of the United

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7. If state decisions begin to diverge too greatly or state reviews of fourth amendment questions become too cursory, the court might reverse itself. Of course the makeup of the court itself could change also.

8. The main rule with which this comment is concerned is the so-called exclusionary rule which prevents illegally seized evidence from being admitted at a trial. See notes 14-17 infra; note 210 and accompanying text infra.


Since this comment was prepared, the court reversed a conviction in a third case, State v. Colgrove, 198 Neb. 319, 253 N.W.2d at 20 (1977). By a 4-3 vote, the court held invalid a search of an automobile and its occupants made by a police officer who allegedly smelled "a slight odor of burned marijuana" on Colgrove's breath. Id. at 323, 253 N.W.2d at 22. The officer and a companion, searching for two women, had stopped the car, occupied only by Colgrove and two other men. "[The police officer] acknowledged at trial that his only purpose in stopping the car was to serve warrants on the Arapahoe sisters and that when he got out of his own car he knew that they were not in the Colgrove vehicle." Id. at 322, 253 N.W.2d at 22.

It is difficult, at this point, to assess the significance of Colgrove. The case was argued twice—once before the appointment of Justice C. Thomas White and once after. The new justice voted with the majority and joined in Justice McCown's slightly stronger concurring opinion. The case, viewed in conjunction with Howard and Aden,
States Supreme Court. The landmark case of Mapp v. Ohio, is of particular importance. It reiterated the fact that the fourth amendment applied to the states, and expanded the protection provided by that amendment to include the "exclusionary rule."

The "exclusionary rule" is a constitutionally-based rule of evidence that makes the fruit of an illegal search and/or seizure inadmissible in court. At the time of Mapp, such evidence had been excluded from federal courts for nearly fifty years. Some twelve years earlier, the Court had refused to apply that rule to the states, holding that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."

Mapp was as unequivocal an overruling of a previous decision as one could ask for. There, the court said:

Today we once again examine Wolf's constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozens of years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.

Attempts to apply that rule in specific cases inevitably lead to the metaphysical argument of how much federal "baggage" was foisted upon the states along with the constitutional principle enunciated in Mapp. In other words, is there a "pure" or "basic" right to be free from unreasonable searches and seizures that exists apart from the body of federal case law that has interpreted that right in
federal courts? Powell and Rice suggested an affirmative answer and, perhaps, a promise that as long as state courts respect that "pure" or "basic" right, the federal courts will not push their baggage through the state courts' doors.

However, the problem of defining that "basic" right is complicated by the fact that federal fourth amendment law, especially that dealing with the exclusionary rule, is in flux. The broad outlines of fourth amendment protection, drawn by the Warren Court and generally followed in Nebraska, are becoming blurred. Powell and Rice questioned federal supremacy in the fourth amendment area. Chief Justice Burger's concurring opinion in those cases, like his dissents in Coolidge v. New Hampshire, and Bivens v. Six Unknown Named Agents, challenged the very validity of the exclusionary rule. A case decided the same day as Powell and Rice may indicate a return to the "silver platter" doctrine.

19. Nebraska law, as outlined in this comment, generally follows at least the language of the United States Supreme Court's decisions. Two major departures are that, in Nebraska, the defects in an affidavit for a search warrant may be cured by subsequent police testimony at a suppression hearing, and the Nebraska courts are more restrictive on the question of standing. In addition, Nebraska is somewhat less permissive regarding blood tests in drunk driving cases. These departures will be discussed in more detail later.

For a somewhat dispairing view of the state of the federal law, see Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349 (1974).

20. See note 225 and accompanying text infra. See also note 11 supra.


23. United States v. Janis, 428 U.S. 433 (1976), held that evidence illegally seized by Los Angeles police could be used by the Internal Revenue Service in a suit to collect wagering excise taxes. The Court distinguished earlier cases, noting that two separate sovereignties were involved and that the Internal Revenue Service prosecution was civil in nature. The one case clearly on point, Suarez v. Commissioner, 58 T.C. 792 (1972), which had not been appealed to the Supreme Court, was overruled.

Thus, at least in a proceeding denominated "civil," evidence unconstitutionally seized by a state officer was admitted in a federal proceeding. This revived the "silver platter" doctrine, earlier discredited in Elkins v. United States, 364 U.S. 206 (1960). As the court noted in a helpful footnote, it was Justice Frankfurter in Lustig v. United States, 338 U.S. 74, 78-79 (1949), who gave the doctrine its name. 428 U.S. at 444 n.13.

In a dissenting opinion, Justice Stewart termed the civil-criminal distinction of the Janis majority "irrelevant" in an area where civil and criminal proceedings are commingled. He said:

To be sure, the Elkins case was a federal criminal proceeding and the present case is civil in nature. But, our prior decisions make it clear that this difference is irrelevant for Fourth
III. THE NEBRASKA VIEW

The Nebraska Supreme Court has accepted the premise that both the fourth amendment and the exclusionary rule apply in the state. From time to time, also, it has looked to federal case law to interpret both the amendment itself and the extent of the exclusionary rule. However, cases in this area tend to be very fact-oriented and, on the whole, the Nebraska court—like all state courts—has been left to its own devices in trying to guess how a particular rule applies in a particular situation. Occasionally, a guess has been wrong enough to merit federal reversal. More often, the federal courts have either not been asked to review the issue or they have refused. In one case that must have pleased Nebraska's justices, the Eighth Circuit termed the state's rule "anamolous" but the Nebraska Supreme Court, in a later case, adopted the same rule as its own.

Any case dealing with the constitutional rights of criminal defendants presents difficult and very fundamental questions to a court. Nowhere are two essential values of a democracy in such open and insoluble conflict. Over and over again, courts are faced with the problem of how to deal with a probably guilty person whose guilt was established by illegal means. They must decide whether it is more important to keep dangerous persons off the streets or to preserve the integrity of constitutional rights. On

Amendment exclusionary rule purposes where, as here, the civil proceeding serves as an adjunct to the enforcement of the criminal law.

428 U.S. at 463 (dissenting opinion).

24. This acceptance has not always been with good grace. See, e.g., notes 217-24 and accompanying text infra. Some other states, notably California and Ohio, have begun to ignore Supreme Court decisions interpreting the Constitution and turn to the language of their state constitutions to provide a greater degree of protection to criminal defendants. See Kamisar, LaFave, & Israel, supra note 1, at 1-4.


27. There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "(t)he criminal is to go free because the constable has blundered."
the whole, the Nebraska court seems to see the obvious danger posed by the presence of criminal defendants on the streets as more threatening than the somewhat, subtler danger of eroding constitutional rights. On close questions, federal courts have tended to go the other way—which is why prisoners attempt collateral attacks on their convictions and why the Powell and Rice decisions have changed the rules for Nebraska criminal defendants and prisoners.

IV. THE LAW IN NEBRASKA

Before discussing the Nebraska rules, it will be useful to review the procedure governed by those rules and to note where constitutional questions may arise. Much of that procedure is governed by sections 29-812 to 817 of the Nebraska Revised Statutes.

Typically, a police officer, acting on a tip or his own observation, seeks a court warrant authorizing him to make a search. In order to get that warrant, he prepares an affidavit setting out the facts that justify his request. Armed with that warrant, he searches the premises described, seeking the evidence described. In the course of that search, he also may seize contraband, or evidence not described by the warrant, but in plain view.

Even when that typical pattern is followed, problems arise.

In some cases this will undoubtedly be the result. But, as was said in Elkins, "there is another consideration—the imperative of judicial integrity." The criminal goes free, if he must, but it is the law which sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. Mapp v. Ohio, 367 U.S. at 659 (citations omitted).

28. There is also an acute awareness of this balance in the Powell and Rice decisions, both the majority's and the dissent's.
29. The choice, of course, is not entirely philosophical. Of necessity, the prisoner will run out of state judicial remedies before turning to the federal courts.
30. The Powell and Rice majority speaks of a full and fair litigation in state court but does not seem concerned with more than procedural fullness and fairness.

Because of its requirement of state action, the exclusionary rule—and, indeed, the fourth amendment itself—is generally applied only in criminal cases. A similar rule of law keeps illegal wiretap evidence out of all trials.

32. "Classical" might be a better term. The author has no knowledge of whether police officers habitually seek warrants before making searches.
The affidavit might not be sufficient to justify the warrant. The search might exceed the authorization of the warrant. There might be disagreements about the meaning of "contraband" or "in plain view."

Of course, not all searches are made pursuant to search warrants. There are searches incident to arrests, searches made when exigent circumstances make it impossible to get a warrant, searches made on the basis of a police officer's reasonable suspicions, and searches that start out not to be searches at all. Any of those searches may or may not be legal.

Once the search is over and the evidence seized, the ball shifts to the defendant. Before his trial, he can move to suppress the evidence—that is, ask for a court order keeping it out of his trial, on the ground that it was illegally seized. That is the first time the exclusionary rule comes into play.

In Nebraska, a refusal to suppress may not be appealed, but the issue may be raised again at trial and, if the defendant is convicted, on appeal. If the motion to suppress is granted, the state may appeal.

On an appeal to the state supreme court, it is not enough to show that illegally-obtained evidence was admitted at trial; it must also be shown that one would not have been convicted without that evidence. Previously, an appeal to the state supreme court and a petition for certiorari to the United States Supreme Court were required before a petition for writ of habeas corpus could be brought. Such a petition, also referred to as a collateral attack, would argue that the prisoner was illegally imprisoned because he had been convicted on the basis of illegally-obtained evidence and he should, therefore, be freed. That is the avenue that has been explicitly closed by the Powell and Rice decisions.

34. In a sense, the issuing judge can suppress evidence by refusing to issue a warrant.
36. See notes 217-27 and accompanying text infra.
37. Rules for exhaustion of remedies have been eased since Henry Hawk was forced to spend 18 years in litigation before he could convince a federal district court that he had exhausted his state remedies. He apparently exhausted more than his state remedies because he died months after a writ of habeas corpus was finally granted. The order was vacated by the Eighth Circuit because Hawk's death made the issue moot. The writ was granted in Hawk v. Hann, 103 F. Supp. 138 (D. Neb. 1952), vacated, Hann v. Hawk, 205 F.2d 839 (8th Cir. 1953).
38. The authority is 28 U.S.C. § 2241 (1970). However, the granting of
A. Search Warrants

Nebraska’s statutory law on search warrants is set out in sections 29-812 to 817 of the state’s revised statutes. The statutes are very specific on some points, such as the fee to be paid to the issuing court, but uninformative on others, particularly the grounds upon which a warrant may be issued.

Warrants “may be issued” to search for and seize property which has been:

(1) stolen, embezzled, or obtained under false pretenses in violation of the laws of the State of Nebraska, (2) designed or intended for use or which is or has been used as the means of committing a criminal offense, or (3) possessed, controlled, designed or intended for use or which is or has been possessed, controlled, designed, or used in violation of any law of the State of Nebraska making such possession, control, design, or use or intent to use, a criminal offense. . . . [or] property which constitutes evidence that a criminal offense has been committed or that a particular person has committed a criminal offense.

The next section provides that:

A warrant shall issue only on affidavit sworn to before the judge or magistrate and establishing the grounds for issuing the warrant. If the judge or magistrate is satisfied that grounds for the application exist or that there is reasonable cause to believe that they exist, he shall issue a warrant identifying the property to be seized and naming or describing the person or place to be searched.

Presumably, the phrase “grounds for the application” refers to the previous section and means that the property that is the object of the proposed search and seizure fits one of the categories enumerated in section 29-813.

1. The Sufficiency of the Affidavit

Many cases focus on the issue of whether the person seeking the warrant, usually a police officer, provided enough information in his affidavit to justify issuance of the search warrant. In a sense, they review the magistrate’s or judge’s decision.

habeas does not automatically mean freedom—the court may order a new trial. However, if the illegal evidence was actually necessary to the conviction, a new trial would be tantamount to release.

40. Id. § 29-812.
41. Id. § 29-813.
42. Id. § 29-814.
43. See text accompanying note 39 supra.
Problems tend to arise when a warrant is based upon information supplied to the police by an informer. The Nebraska Supreme Court at one point adopted a fairly stringent test, essentially that of *Aguilar v. Texas*,

in which the United States Supreme Court first held explicitly that states would be subject to the same standard of reasonableness used to test the validity of federal search warrants. Among other things, *Aguilar* required that an affidavit set out facts to allow the magistrate to judge the reliability of the informer, and not give a mere conclusory statement that the informer is reliable. Search warrants may be based upon hearsay, according to *Aguilar*, so long as the magistrate is given reason to believe the hearsay is reliable.

In a 1971 Nebraska case, *State v. Holloway*, Justice McCown defined the test:

In passing on the validity of a search warrant the court may consider only information brought to the attention of the magistrate. For the affidavit of a tip from the informant to be sufficient the magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the articles were located where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible.

Holloway found the affidavit insufficient because it "alleged that the sole and only reasons for his belief that the guns were concealed or kept on the described premises was 'information received from an informant whose information has been reliable in the past.'" This was so much like the *Aguilar* affidavit, that it would seem all but inevitable that it would be found inadequate. However, the decision did not even mention *Aguilar*. It cited as authority for the test quoted above two previous Nebraska cases in which warrants had been upheld.

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45. 378 U.S. at 113.
46. *Id.* at 114.
47. 187 Neb. 1, 187 N.W.2d 85 (1971).
48. *Id.* at 4-5, 187 N.W.2d at 89.
49. *Id.* at 2-3, 187 N.W.2d at 88.
50. That affidavit read:

Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of law.

In the Holloway opinion, the court also held that Holloway lacked standing to raise the fourth amendment issue and that consent had been given for the search. Consequently, Justice White, in a concurring opinion, dismissed McCown's opinion on the validity of the search warrant as "pure dictum." "As such," he noted, "it is not binding on the court, in my opinion, and can only serve to becloud similar issues in future cases."

One could speculate that the court adopted McCown's relatively stringent test because it did seem at the time to be "pure dictum." It still seemed like pure dictum when the federal district court reviewed the validity of the search on Holloway's petition for habeas corpus. That court agreed with McCown on the standing issue and did not see any need to review his opinion on the validity of the search warrant. However, Holloway was a tenacious soul and the case went to the Eighth Circuit where "pure dictum" suddenly became the "holding" of the case.

The Eighth Circuit found that Holloway did, indeed, have standing to raise the fourth amendment issue, even though the apartment searched was that of a friend. The court also found that the friend did not consent to the search until it was all over. The court affirmed the "holding" that the Holloway warrant did not conform to the standard established in Aguilar.

The Eighth Circuit apparently was too sanguine. The first sentence of McCown's "holding" lasted barely a year before the Nebraska court, in State v. Rice held that information could be offered at a suppression hearing that had not been included in the affidavit accompanying the warrant application as long as that information was discovered before an arrest was made.

52. See notes 177-98 and accompanying text infra.
53. See notes 125-42 and accompanying text infra.
54. 187 Neb. at 8-9; 187 N.W.2d at 91.
55. Id.
57. Holloway v. Wolff, 482 F.2d 110 (8th Cir. 1973).
58. "The Supreme Court has recently reiterated its position that the '[p]resence of the defendant at the search and seizure was held in Jones, to be a sufficient source of standing in itself.'" Id. at 112 (emphasis added by the Eighth Circuit) (citations omitted).
59. Id. at 113-15.
60. In passing on the validity of a search warrant the court may consider only information brought to the attention of the magistrate. See note 48 supra.
61. 188 Neb. 728, 199 N.W.2d 480 (1972).
62. A suppression hearing is a hearing on a pre-trial motion asking the court to rule that certain evidence is inadmissible. Its civil equivalent is a motion in limine.
While Rice was wending its way through the federal courts, that portion of its decision was appearing in other Nebraska cases. By 1975, Nebraska's federal district court and the Eighth Circuit both had held in their Rice decisions that federal constitutional standards only allow examination of information that was made available to the issuing magistrate.\(^6\) Meanwhile, the Nebraska court, citing its Rice decision as authority, was allowing deficient affidavits to be cured at suppression hearings.\(^6\)

Arguably, the law in Nebraska today is that defective affidavits may be "cured" by supplying additional information at a suppression hearing as long as that information was acquired before the search was made. Because the Nebraska court ignored the lower federal courts' Rice decisions before the United States Supreme Court spoke, it is unlikely that it will heed them now.

As far as the affidavit itself is concerned, the Nebraska court apparently still requires information corroborating that given by the informer and some factual basis for the police officer's conclusion that the informer is reliable. It is unclear whether that is still the federal test as well. A 1969 case, *Spinelli v. United States*,\(^6\) seemed to require either a detailed tip or corroborating police information as well as some of the underlying circumstances that led the police to believe that the informant was reliable. In that case, however, the affidavit was found deficient because there was nothing in it to support the affiant's characterization of the tipper as "reliable" and the recounting of the tip itself lacked any underlying circumstances that would lead one to the informer's conclusion.

In Nebraska, there were several cases where police received very detailed tips—what clothing a person would wear, what airplane flight the person would take, and what luggage the person would carry. In one such case,\(^6\) the police arrested the person described and seized his luggage. Then, they made out their affidavit, got their warrant, and searched the previously seized luggage. Although the Nebraska Supreme Court has held that the standards for search and arrest are essentially the same\(^6\)—and those for search and seizure are certainly the same—the court upheld the police actions.

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67. Id.
Holloway is the only Nebraska case in which a warrant was found to be invalid because the underlying affidavit was insufficient. That case, however, is unsatisfying as precedent because there is serious doubt whether all members of the court meant the decision to act as precedent on the affidavit issue. On the other hand, until last November there were no cases other than Holloway where an affidavit was as clearly insufficient as the one in Aguilar, which is still the federal touchstone.

In the November, 1976, case of State v. Bernth, the court was faced with a situation where:

The affidavit stated that the defendant had informed a concededly reliable informant that he had ‘pounds of grass for sale.’ The affidavit further stated that the informant had identified defendant’s place of residence and that affiant believed the controlled substance was situated there.

The court found that “the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe the property sought was on the premises described,” and that the affidavit was sufficient to justify a warrant to search the defendant’s home even though there were no facts in it to allow the magistrate to decide whether it was likely that the material sought was at the residence. The affidavit only stated the police officer’s belief that the drugs were at the home, not the facts underlying that belief.

The court cited one of its favorite United States Supreme Court cases, United States v. Ventresca, with its language about testing warrants in a common sense and realistic fashion. “Common-sense probabilities,” the decision concluded, would lead one to agree with the affiant’s belief that the drugs were at Bernth’s home.

69. Id. at 815, 246 N.W. at 601.
70. Id.
72. Affidavits for search warrants must be tested and interpreted by magistrates and courts in commonsense and realistic fashion, and technical requirements of elaborate specificity once exacted under common-law pleadings have no proper place in the area. Where circumstances are detailed in affidavit for search warrant, and where reason for crediting source of information is given, and where magistrate has found probable cause, courts should not invalidate warrant by interpreting affidavit in hypertechnical rather than in common sense manner.
73. Id. at 817, 246 N.W.2d at 602.
McCown, the author of the Holloway opinion, dissented, as did Justice Clinton. Both indicated that the affidavit was insufficient to justify the warrant. McCown based his two-and-a-half-page dissent on previous case law, including Aguilar and Holloway. Clinton, apparently unwilling to adopt a McCown search-and-seizure opinion as his own, dissented briefly and separately: "I dissent because the affidavit recites none of the underlying circumstances from which either the informer or the affiant concluded that the marijuana was located in the residence of the defendant".74

McCown, in his dissent, accused the majority of going "far beyond any prior decisions of this court, or of any other court, in emasculating the Fourth amendment protection against unreasonable searches and seizures."75

If the majority's opinion was as McCown characterized it, not only may defective affidavits be cured after a warrant is issued, but the standards for a sufficient affidavit, as recited in Holloway, are essentially gone. The majority spoke of a "concededly reliable informant"76 and McCown noted that it was "conceded in this case that the informer was reliable."77 Therefore, the court never

74. Id. at 821, 246 N.W.2d at 604.
75. Id. at 819, 246 N.W.2d at 603.
76. Id. at 815, 246 N.W.2d at 601.
77. Id. at 819, 246 N.W.2d at 604.
reached the question of whether it is still necessary to recite facts that would persuade the magistrate that the informer was, indeed, trustworthy. However, the other part of the Holloway test, whether the affidavit recited "some of the underlying circumstances from which the informant concluded that the articles were located where he claimed they were," was completely swallowed by the "common sense" rule. In Bernth, it appeared that the informer wasn't even the authority cited—it was merely the police officer's "belief" that was offered to the magistrate.

In its eagerness to allow this search, perhaps in its well-meaning belief that drug traffic and other crimes had to be stopped at any cost, the court lost sight of one fact:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. It seems clear that, dictum or holding, the portion of Holloway which set a standard for affidavits is no longer controlling in Nebraska. The substitute is a loosely-defined "common sense" test, in which the common sense of the magistrate is viewed by a court whose hindsight is biased by the knowledge that the challenged search was a fruitful one.

2. The Extent of a Warrant's Authorization

When interpreting the warrants themselves, cases are even harder to follow. One problem is that, as soon as the extent of a warrant has been exceeded, the court tends to find other justifications for the search. The one intriguing exception is the 1976 Aden case that may signal a break with the law as it had been stated in the past ten years or may just represent a situation that so shocked the conscience of the court that it felt compelled to find its standard exceeded. Before discussing Aden, it will be useful to look at a few cases that preceded it.

A fairly simple problem was posed by a 1966 case, State v. McCreary. Police officers, believing that McCreary had burglar-

81. 179 Neb. 589, 139 N.W.2d 362 (1966).
ized a telephone coin box, got a warrant to search his apartment. The affidavit stated that the police expected to find burglary tools and equipment and the coin box. When they arrived at the apartment, they also found and seized piles of coins, evidence that was later admitted at McCreary's trial.

McCreary was convicted and appealed to the Nebraska Supreme Court, contending, among other things, that evidence of the money should have been suppressed. If the court agreed that, in effect, "the constable had blundered," McCreary might have gone free. Instead, it found that the money, because of its condition and denominations was clearly an "instrumentality of the crime" and could be seized even if not included in the warrant. Thus, the warrant became an admission ticket and, once on the premises, the police were free to seize anything that appeared relevant.

A few years later, in State v. Harding, police had a warrant to search an apartment. The search of the apartment was fruitless but a search of a car parked outside produced a cache of marijuana. At a suppression hearing, the warrant for the apartment search was found to be invalid because of an insufficient affidavit and that evidence was suppressed. However, the search of the car was valid, as a warrantless search, because there was probable cause for Harding's arrest at the time.

It would seem that any reasoning that could justify searching the car would also justify searching the apartment. One can only surmise that the state did not fight that motion because the police had found nothing useful in the apartment. On the other hand, there was no attempt to explain why the car was not included in the warrant at the start. The court only noted that because of the "inherent mobility" of the car, it would be unrealistic to expect the police officers to return to the magistrate for a new warrant.

Similar gymnastics were required in State v. Brooks, a 1973 case. There, police had a warrant to search Brooks' home. As they approached the house, armed with the warrant, they saw through a screen door what appeared to be a drug sale. They entered the house, made their arrest, and then served and executed

82. This is the basic dilemma presented by exclusionary rule cases and the problem the United States Supreme Court focuses upon in much of its Powell and Rice decision. As noted earlier, he may not go free; he may only receive a new trial.
83. 179 Neb. at 594, 139 N.W.2d at 366.
85. It is not explained why there was a motion to suppress if no evidence was found.
86. 189 Neb. 592, 204 N.W.2d 86 (1973).
the search warrant. The warrant did not authorize the police to enter the house without knocking or otherwise giving notice to the occupants.\textsuperscript{87} Again, the court ignored the warrant. It found that the arrest was justified because the police observed the crime being committed. Therefore, their no-knock entry also was justified.\textsuperscript{88}

In \textit{State v. Aden},\textsuperscript{89} the stage was set for another warrant/no-warrant metamorphosis. There, police had a warrant to search a farm in rural Lancaster County where they believed a marijuana party was in progress. Aden was stopped on his way to the farm, driving a pick-up truck with a camper on the back.\textsuperscript{90} A dog was in the camper which was locked. Aden refused to allow a search, whereupon, the police officers broke into and searched the camper, finding 12 pounds of marijuana. After the search, they arrested Aden.

Justice Clinton, writing for the court, found that there was no probable cause for the search and that the warrant to search the farm did not cover vehicles believed to be headed for the farm. Aden's refusal alone did not create the needed probable cause for a warrantless search:

If a refusal, for whatever reason, to permit a search constitutes reasonable grounds for search, then it is plain enough that we write off the Fourteenth Amendment to the Constitution of the United States and the comparable provisions of our own Constitution.\textsuperscript{91}

There was nothing distinctive about the appearance of the camper or its contents and the nature of the vehicle itself was not enough to justify the search.\textsuperscript{92}

What was it about the Aden situation that pushed the court over the line? It appears to have been the forced entry in the face of an unequivocal refusal of consent that led it to look critically at the probable cause issue and to construe the warrant narrowly. The court appeared to be applying the "shock-the-conscience" test of

\textsuperscript{87} Id. at 593, 204 N.W.2d 87.
\textsuperscript{88} This issue was disposed of rather quickly in the opinion. The main issue in the case, which defendant lost on also, was prosecutorial misconduct. The prosecutor commented in his closing argument upon Brooks' failure to take the stand.
\textsuperscript{89} 196 Neb. 149, 241 N.W.2d 669 (1976).
\textsuperscript{90} A study of Nebraska cases would lead one to believe that a truck-top camper is standard equipment for anyone dealing in illegal drugs.
\textsuperscript{91} 196 Neb. at 157-58, 241 N.W.2d at 673.
\textsuperscript{92} In other camper cases, there also appeared to be nothing distinctive about the nature of the vehicle. However, in those cases, the pick-ups were stopped for other reasons. See notes 156-66 and accompanying text infra.
Rochin v. California\textsuperscript{93} which the United States Supreme Court used in pre-Mapp reviews of state fourth amendment decisions.

It appears that standards for affidavits in Nebraska will be loosely enforced and defective warrants can be cured by bringing additional information before the magistrate or judge, even as late as the suppression hearing or the trial itself. Furthermore, the limits of a warrant will be viewed flexibly and Nebraska courts often will find reasons to justify a search that exceeds the limits of the warrant. Not only does the Nebraska Supreme Court favor the validity of a warrant,\textsuperscript{94} but the court has said it will uphold the validity of a search with an invalid warrant where a warrantless search would not be permitted.\textsuperscript{95}

B. Warrantless Searches

Given such a situation, one would expect searches to be conducted without warrants only in the most exigent of circumstances. One would also expect the court to take a somewhat strict view of the validity of those searches.\textsuperscript{96} Yet, the vast majority of the search and seizure cases which have come before the court involved warrantless searches, often in circumstances where the police officers could have sought a warrant, and, with one exception, every one of those searches also was upheld.

The authority to search without a warrant is derived in part from statute, but the language of the statute has been fleshed out by the court. The statutory provision\textsuperscript{97} speaks of the "constitutional right" of an officer to search without a warrant in some circumstances. This probably means that the legislature intended Nebraska police officers to be allowed to make any search allowed by the Constitution, as interpreted by the courts. The relevant statutory provision\textsuperscript{98} seems to create two requirements: (1) that

\textsuperscript{93} 342 U.S. 165 (1952).
\textsuperscript{94} State v. McCreary, 179 Neb. at 593, 139 N.W.2d at 366 (quoting United States v. Ventresca, 380 U.S. 102 (1965)).
\textsuperscript{95} For the authority usually cited, see United States v. Ventresca, 380 U.S. 102, 106 (1965).
\textsuperscript{96} United States Supreme Court cases would seem to mandate the stricter view. Ventresca, for example, expresses a strong preference for searches pursuant to a warrant. Katz v. United States, 389 U.S. 347, 359 (1967), terms warrantless searches "presumptively unreasonable" (concurring opinion).
\textsuperscript{97} NEB. REV. STAT. § 29-817 (Reissue 1975).
\textsuperscript{98} Nothing in Sections 29-812 to 29-821 shall be construed as restricting or in any way affecting the constitutional right of any officer to make reasonable searches and seizures as an incident to a lawful arrest nor to restrict or in any way affect reasonable searches and seizures authorized or consented to by the
the search be reasonable and (2) that it be incident to an arrest or
that there be consent. The Nebraska Supreme Court, on the other
hand, has presumed reasonableness when it found consent, or an
arrest, or probable cause for an arrest. The final, catch-all clause
has included investigation and seizure of items “in plain view,”
emergency searches, “stop and frisk” situations, and the stopping
of vehicles ostensibly for license and registration checks.

Many of the cases include more than one possible justification
for searches and seizures. In *State v. Wood*, for example, a
police officer stopped a truck-top camper because the front license
plate was not visible. A check of the registration led the officer
to suspect that the vehicle was stolen. In his search for “indicia of
ownership,” the officer detected an aroma of marijuana and saw
sawdust and “fresh carpenter markings.” At that point, he
asked for and received permission to search the camper.

As with the warrant cases, a court is in a position where it only
hears cases in which the warrantless search was fruitful. Only
Hollis Compton knows how many truck-top campers stopped in
Ogallala are legally owned and driven and contain no drugs—or
even the whiff of drugs.

Some general rules can be drawn from such cases. First, if the
police officers have probable cause to make an arrest, they may
make a search and do not seem to be restricted to the body of the
defendant and the area under the defendant’s control. If there
is something “in plain view” to arouse the police officer’s suspi-
cions, he may make a search. Searches made while a person is
under “temporary detention” are also valid. The concept of “exi-
gent circumstances” has been stretched to cover parked cars as well
as those about to be driven away.

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100. If, as Justice McCown contended, *Colgrove* overruled *State v. Romonto*, 190 Neb. 825, 231 N.W.2d 672 (1973), a case with similar
facts, it also overruled this case.
101. 195 Neb. at 354, 238 N.W.2d at 228.
102. See note 100 supra.
103. NEB. REV. STAT. § 29-404.02 (Reissue 1975).
1. Searches Incident to Arrest

It is not necessary to actually make an arrest before beginning the search, but reasonable grounds for an arrest should exist. There is often a bootstrap effect: the search yields the grounds for the arrest and the arrest provides the justification for the search. The test has been stated in these terms: "Would the facts available to the officer at the moment of the search or the seizure warrant a man of reasonable caution in the belief that the action taken was appropriate?"

If there is an arrest, the charge need not result in a valid conviction. In one case, State v. McFarland, the defendant was arrested for shoplifting. He was accompanied from the store to a car he was using. A search of the car yielded a small cache of drugs. The shoplifting conviction was later reversed and dismissed. However, the drug charges that grew out of the search resulted in a revocation of McFarland's probation.

In another bootstrap situation, police arrived at a house after receiving a tip that there was a drug party in progress. The defendant refused to let the police into the house but the informer, who was a guest at the party, opened the door. Inside the house, the police were greeted by the smell of burning marijuana. There was some question whether the defendant then consented to a search but it was made before the arrest and appeared to provide some of the grounds for the arrest.

The court first looked at the arrest:

An arrest based upon probable cause derived from facts and circumstances within an officer's knowledge or of which he has reasonable information sufficient to warrant a man of reasonable caution in believing an offense has been or is being committed may be made without a warrant.

Then the court found that the search that preceded the arrest was also valid: "A search and seizure incident to a lawful arrest is not violative of the Fourth Amendment." Nowhere did the

106. Id. at 167, 165 N.W.2d at 728 (quoting State v. Dillwood, 183 Neb. 360, 160 N.W.2d 195 (1968)).
108. The car appears to have been borrowed from a friend, possibly without explicit consent, but not stolen in the usual sense.
109. The rules for a revocation of probation and a criminal conviction, including the rules of evidence, are not identical. Therefore McFarland may not have great precedential value.
111. Id.
court ask why the police arrived uninvited at the party with neither arrest nor search warrant.

Because the case was decided a year before *Chimel v. California*,\(^{112}\) the more expansive rules of *Harris v. United States*\(^{113}\) and *United States v. Rabinowitz*\(^{114}\) would have controlled, and a thorough search of the house would have been justified as an incident to the arrest.

This same approach was used in a 1976 misdemeanor case, *State v. Thompson*.\(^{115}\) In *Thompson*, police stood in an alley and looked through binoculars into the defendant's living room. They saw someone smoking a cigarette which was held with a pair of scissors. From time to time the smoker appeared to pass the cigarette to another person, not visible to the police officers. Concluding that they were witnessing a marijuana party, the police entered the house and saw the defendant, scissors and handrolled cigarette in hand, cigarette papers in plain view, and the smell of burning marijuana permeating the air.

The arrest was justified, the court concluded, because the police saw a misdemeanor occurring in their presence and the evidence was rapidly disappearing: "The evidence shows the officers observed a marijuana party in progress and then arrested the participants. The officers had a right to be in the alley and there was nothing unlawful in their use of binoculars."\(^{116}\)

Justice Clinton, who dissented, would not have permitted the search. He was not persuaded that a misdemeanor occurred "in presence" of the officers nor did he find the necessary probable cause plus exigent circumstances required for a warrantless entry into a person's home.\(^{117}\)

Judge Grant, a district judge sitting on the court when *Thompson* was decided, returned to basic principles. He found that Thompson and his companion had exhibited the very "expectation of privacy" that the fourth amendment protects and saw no countervailing justification for the "warrantless government intrusion into his home."\(^{118}\)

\(112\). 395 U.S. 752 (1969). This case limits the area of search to that within the defendant's immediate control, that is, the area from which he could reasonably draw a weapon or reach and destroy evidence.

\(113\). 331 U.S. 145 (1947).

\(114\). 339 U.S. 56 (1950).

\(115\). 196 Neb. 55, 241 N.W.2d 511 (1976).

\(116\). *Id.* at 57, 241 N.W.2d at 513.

\(117\). *Id.* at 58-63, 241 N.W.2d at 513-16.

\(118\). 196 Neb. at 58, 241 N.W.2d at 213. The often-quoted "reasonable expectation of privacy" formulation is from Justice Harlan's concur-
It is unclear whether both probable cause and exigent circumstances are required. In *State v. Pope*,\(^1\) as in *Thompson*, the court found both. In others, such as *State v. Jefferson*,\(^2\) only the probable cause element was discussed. In other cases, only the exigent circumstances seemed to be relevant.

Similar rules seem to apply to brief detentions as to full arrests. In *State v. Robinson*\(^3\) for example, police held a car for 27 minutes while they checked to see if the meat in the back seat was stolen. In *State v. Brown*,\(^4\) police did not have enough information to justify a search warrant but stopped the defendant's pickup anyway. When talking to Brown, they noticed marijuana on the seat of the pick-up, arrested Brown, and searched the entire truck—not just the area within Brown's control.\(^5\) Evidence found under the seat and in the bed of the pickup was held admissible as the result of a valid search incident to an arrest.\(^6\)

2. **Consent Searches**

Generally, if one voluntarily consents to a search, he cannot later complain that the search was invalid. However, problems arise in such cases also. First, there is the issue of voluntariness. Second, there is the issue of whose consent is valid. Third, there are special cases, such as tests for drunkenness, where consent is implied.

The Nebraska Supreme Court has held repeatedly\(^7\) and unequivocally that police need not tell someone that he has the right to

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\(^5\) *State v. Brown* was decided in 1976, while *Chimel* was decided in 1969.
\(^6\) *Police found heroin cut with Dorman and rat killer. Brown told them he was on his way to clean out a rat-infested apartment.*
\(^7\) *Police found heroin cut with Dorman and rat killer. Brown told them he was on his way to clean out a rat-infested apartment.*
refuse to consent to a search. The case usually cited is *Schneckloth v. Bustamonte*,\(^{126}\) a 1973 United States Supreme Court case involving consent given before an arrest. The Court there held that there was no constitutional requirement of a Miranda-type\(^{127}\) warning but its presence or absence will be a factor weighed in determining if consent was given voluntarily.\(^{128}\)

Consent may be given grudgingly or following threats and still be valid. In *State v. Rathburn*,\(^{129}\) for example, Rathburn refused to allow police to search the trunk of his car. He had been stopped for speeding and a police officer "testified that when he approached appellant's car to inform him that he had been speeding, he smelled the odor of 'burned marijuana.'"\(^{130}\) Before asking to search the car trunk, the officer frisked Rathburn, took several items from him, and searched the car.

The officer said he would get a warrant to search the trunk and returned to his patrol car. Rathburn then said: "All right, you son-of-a-bitch, I will open it,"\(^{131}\) and did so. The threat to get a warrant, in the court's view, was not enough to constitute duress or coercion and, therefore, the consent was voluntary.\(^{132}\) The test, the court, said, was whether the statement was coercive in the fact situation. The court said it was not.

Questions of who may give a valid consent often lead courts into issues of interpersonal relations and the finer points of the law of real property. Thus, a landlord who rents a field with a barn on it may consent to a search of the barn;\(^{133}\) a father may authorize the

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While I concede that protection from unreasonable searches and seizures is fully as important and imperative as the guarantees provided by the Fifth Amendment to the Constitution of the United States and is basic to a free society, I do not agree with the trial court's premise. So far as I have been able to determine, the United States Supreme Court has not applied the Miranda test to searches and seizures. Until it does so, if it ever does, we should not further shackle law enforcement.


127. Id. at 222.
128. The trial court had sustained a motion to suppress on the grounds that the consent given by Forney was not voluntary because he did not know that he had the right to refuse.
130. Id. at 487, 239 N.W.2d at 255.
131. Id.
132. Id. at 490, 239 N.W.2d at 256.
search of his daughter's apartment;¹³⁴ and if someone plans a trip with his girlfriend, shares a suitcase with her, and they are on the way to the airport in her car, she may consent to a search of both car and suitcase.¹³⁵

To the extent that there is a rule, it is that anyone connected with the property may validly consent to a search of it.¹³⁶ As the court has said:

When the prosecution seeks to justify a warrantless search by proof of voluntary consent it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.¹³⁷

In a line of drunk driving cases, where no specific consent was given to a blood test, the Nebraska Supreme Court consistently upheld the implied consent statute¹³⁸ to find that no consent was needed. The one exception was State v. Howard,¹³⁹ where blood was drawn while Howard was unconscious.¹⁴⁰ This offended the court's sensibilities and it held that blood could not be drawn without consent unless the person suspected of drunk driving had been arrested.

In reaching its conclusion, the court asserted that Schmerber v. California,¹⁴¹ the United States Supreme Court case that upheld the taking of blood for a drunkenness test from a suspect who refused to consent, should be limited to its facts, which included the fact that Schmerber was under arrest at the time the blood was taken. However, one of the cases upon which Schmerber was based involved a situation almost identical to that of Howard—an alleged driver unconscious from injuries.¹⁴² Thus, Schmerber, on its face, is not limited to its own facts but applies, at the least, to the facts of Howard as well.

In any case, this appears to be one area where Nebraska's standards are more stringent than federal decisions require.

¹³⁶. Compare this with the rules on standing to complain of an illegal search. See notes 177–98 and accompanying text infra.
¹³⁷. See notes infra.
¹³⁸. NEB. REV. STAT. § 39-669.08(1) to .08(5) (Reissue 1974).
¹⁴⁰. He was apparently unconscious from injuries suffered in an automobile accident.
3. Emergencies and Other Special Cases

Often, police exercise their common law right to make a search and seizure without a warrant due to an emergency only when evidence is about to be lost or destroyed. The issue is not whether such entries may be made, but when a genuine emergency exists. *State v. Patterson,*143 presented a classic fact pattern. There, police received a tip from the owner of a building that one of his tenants was preparing heroin for sale. A search of the trash cans outside the building revealed large numbers of Dormin144 containers and some paper bags with traces of heroin. Police leased the apartment next door to the suspected heroin processing facility and conducted a surveillance for about 24 hours.

Toward the end of the period, while an officer at police headquarters was preparing an affidavit for a search warrant, the police at the apartment house became persuaded that there was heroin next door and that the occupants were about to leave before the warrant could be obtained. So, they went next door, without a warrant, arrested nine persons and seized more than 1,000 "hits" of heroin. Two of the nine were convicted, partly on the basis of the seized evidence.

In its opinion, the Nebraska Supreme Court noted that "exigent circumstances" existed, the search was "limited" and only contraband was seized.145

The court held that (1) a search of a residence without a warrant is justified only when there are both probable cause and exigent circumstances, (2) where police reasonably believe a felony to be in progress and that there is a great likelihood that evidence will be lost or destroyed, probable cause and exigent circumstances exist, and (3) although it is preferable that police obtain a warrant, a search is not necessarily unreasonable merely because police could have obtained a warrant but did not.146

These holdings formed a stringent test, and one that the facts of *Patterson* met. However, much the same reasoning was used in *Thompson,*147 the "marijuana party" case. There, at most, a misdemeanor was in progress148 and, although the evidence might

144. The court identified Dormin (also spelled "Dorman" in some cases) as a non-prescription drug used to cut and dilute heroin. *Id.* at 310, 220 N.W.2d at 237.
145. *Id.* at 315-16, 220 N.W.2d at 240.
146. *Id.* at 316, 220 N.W.2d at 240.
148. A peace officer may arrest a person without a warrant if the
have been destroyed if the two participants were given time to finish smoking their cigarette, one must question how much of an emergency existed.

Almost any time a car is involved, the court will find "exigent circumstances" because of the "inherent mobility" of automobiles and trucks—even impounded, parked or otherwise immobilized ones.\(^{149}\) In one case, the court confronted the absurdity of that contention and noted that a United States Supreme Court case, *Chambers v. Maroney*,\(^ {150}\) supported the contention that probable cause and exigent circumstances do not disappear when a car is in police custody and the danger of removal or destruction of evidence is gone.\(^ {161}\)

Another set of cases deals with situations where a valid entry is made or a car is stopped for a valid reason that has nothing to do with suspicion of crime. These include investigating a fire,\(^ {152}\) checking license plates or registration of a vehicle,\(^ {153}\) stopping a driver for speeding,\(^ {154}\) or making an inventory search of an impounded car.\(^ {155}\)

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officer has reasonable cause to believe that such person has committed:

\(^{2}\) A misdemeanor, and the officer has reasonable cause to believe that such person either (a) will not be apprehended unless immediately arrested; (b) may cause injury to himself or others or damage to property unless immediately arrested; (c) may destroy or conceal evidence of the commission of such misdemeanor; or (d) has committed a misdemeanor in the presence of the officer.

*NEB. REV. STAT. § 29-404.02* (Reissue 1975).

149. Probable cause for searching a motor vehicle is not treated the same as probable cause to search a fixed structure. *State v. Sotelo*, 197 Neb. 340, 246 N.W.2d 767 (1977).


Fires, reports of fires, the existence of incendiary devices, and fire prevention demand the urgent and emergency response and vigilance of all firemen and law enforcement officers to protect the public. . . .

. . . . Is their duty and right any less when, after entry, their investigation reveals that there is no fire? We think not. Chief Claussen properly performed his duties here; and there was no search and no trespass.

*Id.* at 278-79, 167 N.W.2d at 84-85.


These situations tend to lead to "in plain view" cases, that is, cases where a police officer legitimately stops a car or truck and, lo and behold, he notices marijuana seeds on the threshold, sees apparently stolen furs in the back seat, notices an open whiskey bottle on the floor, sees items in the back of a pick-up truck that look stolen, or smells that pervasive aroma of burning marijuana. In addition, police may be called by the post office to inspect packages "broken in transit."

Some of the stories strain credulity, but the Nebraska Supreme Court repeats them with a collective straight face. For example, State v. Rys began with an apparent motor vehicle violation and ended with a charge against a "minor in possession of alcohol." Police stopped the car because it lacked license plates. The driver showed them a valid title certificate and license.

The marshal, desiring verification of ownership ordered the passengers out of the automobile and proceeded to look for a registration certificate, in-transit plates, or other indicia of ownership. On opening a front door and shining his flashlight in the automobile, he observed a bottle of whiskey lying in plain sight on the right-hand side of the floor in the front seat area. No other indicia of ownership was found.

The court found the marshal’s actions perfectly acceptable:

It is generally held that when a motorist is stopped or arrested for a violation of the traffic or motor vehicle laws, an exploratory search of the vehicle for the purpose of obtaining evidence of other offenses is unwarranted. On the other hand, a search of such an automobile made in connection with the violation for which it is stopped is ordinarily held to be a lawful search although it results in a discovery of evidence of some other offense.

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163. For example, in State v. Holloman, 197 Neb. 139, 248 N.W.2d 15 (1976), police waiting in the defendant’s home while he dressed noticed a sweater and some shoes which they seized. Although the items were neither contraband nor the instruments of a crime, and the defendant was not yet under arrest, the seizure was upheld. The Michigan Supreme Court upheld an almost identical search made in the course of an arrest, in People v. Eddington, 23 Mich. App. 210, 178 N.W.2d 686 (1970), rev’d on other grounds, 387 Mich. 551, 198 N.W.2d 297 (1972).
164. 186 Neb. 341, 183 N.W.2d 253 (1971).
165. Id. at 342, 183 N.W.2d at 254.
166. Id. at 343, 183 N.W.2d at 255.
SEARCH AND SEIZURE

The court stated a conventional rule of law, but applied it to a fact situation that seemed to go beyond the intent of that rule. As Justices McCown and Boslaugh noted in their dissent, once the driver offered a title certificate and valid driver's license, the officer had no further reason to search for "indicia of ownership."

One can easily imagine the scene: a carload of kids, probably rowdy, possibly disrespectful, cruising around town; a police officer not much older than they; an angry confrontation that escalates to the point where the police officer is forced to make an arrest in order to save face. It must happen a dozen times every weekend—and is just the sort of thing the exclusionary rule is meant to prevent.\[167\]

It is difficult to say what police may not do in emergency or other special situations or just what constitutes such an emergency. For example, cars may be stopped at random to check licenses and registration and there is even a statutory provision giving the State Patrol that power,\[168\] which would indicate that no probable cause need be shown in those cases.\[169\] It also is not necessary to have a situation where evidence may be lost or destroyed or driven away, at least in the case of automobile searches.

In State v. Wallen,\[170\] for example, police came across an apparently drunk driver in a stalled automobile. They locked up

\[167\] It is the exclusionary rule, rather than the fourth amendment itself, that is cited as a check on overzealous police officers. See, e.g., Terry v. Ohio, 392 U.S. 1 (1968): "Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct." Id. at 12. This view is also discussed at length in the Powell and Rice opinions, particularly the concurring opinion of Chief Justice Burger.

Another passage of Terry, however, may be more relevant to situations such as that in Rys:

Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal.

Id. at 14.

\[168\] NEB. REV. STAT. § 60-435 (Reissue 1974).

\[169\] See Justice McCown's dissents in State v. Holmberg, 194 Neb. 337, 348, 231 N.W.2d 672, 679 (1975), and State v. Shepardson, 194 Neb. 673, 680, 235 N.W.2d 218, 223 (1975), where he argues that there must be some founded grounds to draw the attention of an officer to a possible violation of the law and his assertion that the then recent United States Supreme Court case, United States v. Brignoni-Ponce, 422 U.S. 873 (1975), allows only fixed point or checkpoint stops.

the driver and had a local service station tow away the car, in which clothing and suitcases were "plainly visible" on the back seat. The car was placed in a fenced lot at the service station, the Gas Market. Later, with the driver still incarcerated, a "patrolman went to the Gas Market and proceeded to inventory the contents of the automobile for the purpose of protecting the defendant against loss of the personal property and to protect himself against false claims of loss upon their return to the defendant." As part of his "inventory," the patrolman unlocked the trunk and glove compartment and examined the contents of the suitcases. Inside one of the suitcases taken from the locked car trunk, he found dice and "other recognized gambling paraphernalia."

The Nebraska Supreme Court asserted that there was no search and, for that matter, no reason for a search and, therefore, no warrant was needed. It stated that contraband was subject to seizure on sight as an incident to an otherwise lawful search.

The Wallen reasoning was severely criticized by the Eighth Circuit:

In Wallen, the Nebraska Supreme Court determined there was no search. It concluded this based upon the fact that "there was no reason to search," and "there was not even a basis existing for obtaining a search warrant." Therefore, the officer's inventory could not be a search. This seems a highly anomalous position. Officers apparently are to be placed in a better position when they have no reason to search, since then a general exploratory "inventory" will be upheld; while if required to get a warrant they would have to describe with particularity the things to be seized. To consider an inventory procedure not to be a "search" does violence to the concept of the Fourth Amendment as a protection of the privacy of the citizenry against unwarranted invasion by government officials.

The Court of Appeals then quoted from Camara v. Municipal Court, a 1967 United States Supreme Court case: "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."

Nebraska's ignominy was short-lived, however. Before its Powell and Rice decision, the United States Supreme Court approved "inventory" searches of impounded cars, so long as the

171. Id. at 46, 173 N.W.2d at 374.
172. Id. at 47, 173 N.W.2d at 374.
175. 487 F.2d at 472 (quoting Camara v. Municipal Court, 387 U.S. at 530).
"inventory" was performed "pursuant to standard police procedures."\(^{176}\)

In short, the bounds of reasonableness are almost non-existent, as long as police stop short of breaking and entering in the face of an unequivocal refusal to consent, or taking blood from an unconscious person without arresting him first. Even if a defendant could clear those hurdles, he would not be home free, either figuratively or literally.

C. "The Criminal Is To Go Free Because the Constable Has Blundered?"

It is not enough to show that the constable did, indeed, blunder. A defendant must also show that he is the proper person to benefit from that blunder—that is, that he has standing to raise the fourth amendment issue. Further, he must be careful not to waive whatever rights he might have. The objection to the search and/or seizure must be made at the proper time. There must be a showing that state action was involved and that the action was in a context to which the federal constitution applied. Furthermore, the defendant must show that he was harmed by the trial court's refusal to suppress the illegally seized evidence. Even then, the evidence is not excluded for all purposes.

1. Standing

As a general rule, one person cannot assert the constitutional rights of another.\(^{177}\) As applied to the fourth amendment, this rule means that one can object to illegal searches of one's own property, or illegal searches of other people's property if he is "legitimately on the premises"\(^{178}\) or is in a place where he has a reasonable expectation of privacy.\(^{179}\) Alternatively, one can gain standing by asserting a legitimate property interest in the property seized\(^{180}\) or because he is charged with a crime with an element dependent on possession of the item seized.\(^{181}\)


177. See Alderman v. United States, 394 U.S. 165 (1969). If the exclusionary rule is a means of disciplining police officers rather than a personal constitutional protection, why not allow one person to complain of an illegal search of another's premises?


The cases which cause trouble in Nebraska are those where a defendant claims that he was legitimately in someone else's home or somewhere else where he would normally expect privacy from governmental intrusion.

The Rice case, for example, had a companion in the early stages, State v. Poindexter and, later, Poindexter v. Wolff. Although Rice appealed to the United States Supreme Court and was close to winning, Poindexter was out of court from the start because he had no standing to object to an illegal search of Rice's apartment.

A less clearcut situation was presented by Holloway, discussed earlier. Both Holloway and the weapons the police sought were at a friend's house at the time of the search. The Nebraska Supreme Court found that he did not fit the Jones category of one legitimately on the premises nor did he have the reasonable expectation of freedom from governmental intrusions that would give him standing under Mancusi v. DeForte, another United States Supreme Court case. The federal district court agreed, noting also that Holloway had the burden of showing that he had the necessary standing and, because he gave no testimony at all at his suppression hearing, he failed to carry that burden.

The Eighth Circuit, taking into consideration testimony given at Holloway's trial as well as that offered at the suppression hearing, reversed, holding that, under Brown v. United States, Holloway's mere presence on the premises gave him standing to raise the fourth amendment issue. "The Fourth Amendment protects the old friend who 'drops in,' as well as the guest who receives a specific invitation," the court said.

On the other hand, if one does normally live in an apartment, but was not home when the police came to call, one also may lack standing. This was a holding in the murder case of State v. Barajas. After his arrest, police searched the "address that

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182. 188 Neb. 728, 199 N.W.2d 480 (1972).
184. Justice McCown, who dissented in Rice, on the question of the sufficiency of the affidavit, concurred in Poindexter.
185. See notes 48-60 and accompanying text supra.
188. Id. at 1037.
190. Holloway v. Wolff, 482 F.2d 110, 113 (8th Cir. 1973).
191. 195 Neb. 502, 236 N.W.2d 913 (1976). Since the court held that Barajas
defendant had given when he was booked into custody" and found the murder weapon. Citing the Brown case upon which the Eighth Circuit based its Holloway opinion and Jones, as well as a Nebraska case, State v. Van Ackeren, the court found that Barajas had no standing to complain of a search of his own home.

Another case where a person lacked standing because he was away from home was State v. Poulson. Poulson was building a house and, while it was under construction, lived in an apartment about two miles away. In the back yard of the house was a garden with some 611 marijuana plants growing in "ten neat rows," watered by a hose. Police photographed and then removed the plants. There was no violation of his fourth amendment rights, the court held: "The Fourth Amendment applies to searches of a person or his house, papers, or effects. This does not encompass a field which is approximately 75 feet behind a house which the defendant had not finished constructing and had not yet moved into." It is not entirely clear from the opinion whether Poulson lacked standing because the incomplete house was not yet his home or because the plants were in an open field. In either case, the court ignored the fact that Poulson was charged with a possessory offense and should have had "automatic" standing to protest the legality of the search and seizure.

2. Waiver, Timing, and State Action

As a general rule, a waiver of a constitutional right must be made voluntarily, intelligently, and knowingly. One's fourth amendment rights, however, may be waived inadvertently, either as part of the package of rights automatically waived by a guilty

was beyond the protection of the Constitution, this part of the opinion appears to be dictum.

192. Id. at 504, 238 N.W.2d at 915.
193. 194 Neb. 650, 235 N.W.2d 210 (1975). In Van Ackeren the challenge was to evidence seized incidentally to the arrest of another person.
194. 194 Neb. 601, 234 N.W.2d 214 (1975).
195. Id. at 603, 234 N.W.2d at 216.
196. The court asserted that the fourth amendment does not apply to open fields, citing a moonshine case, Hester v. United States, 265 U.S. 57 (1924). As a general rule, Hester is still good law. However, the problem is distinguishing an unprotected "open field" from the protected "curtilage" of someone's home. A backyard garden, even a large one, is probably on the borderline.
197. He was charged with possession of marijuana with intent to manufacture.
plea or through failure to make a pre-trial motion to suppress the evidence.

One such failure occurred in State v. Bartlett, a 1975 case. Bartlett was charged with possession of heroin with intent to deliver and with being a habitual criminal. His house and grounds were searched, with a warrant, but among the items seized was some money that was not included in the warrant. There was no pretrial motion to suppress the admission of the money as evidence. That failure, the court held, also constituted a waiver of the right to object to trial testimony about the seized money.

According to a case decided a year before Bartlett, failure to make a motion to suppress or, having made one, failure to have the motion sustained, does not automatically preclude a defendant from raising a search and seizure issue at trial. However, it is within the trial court's discretion to decide whether or not to consider or reconsider the question.

The Nebraska Supreme Court also is strict on the requirement for state action, unless wiretapping is involved, and its decisions appear to be in line with federal standards.

When, for example, the landlady and the owner of some stolen goods searched a rented garage, no state action was involved. Police awareness of the search and possible consultation was not enough to make the private individuals agents of the police. Both the federal district court and the Eighth Circuit agreed. Similarly, the fourth amendment does not apply to an airport employee who opens a suitcase and shows its content to a police officer.

A similar question was raised by cooperation among a Scotts-bluff, Nebraska, sheriff; El Paso, Texas, police; and Mexican police in Barajas. Barajas was arrested on his way from Mexico back into the United States and charged with a murder in Mexico.

200. The court held in State v. Starr, 186 Neb. 327, 329, 182 N.W.2d 910, 911 (1971), that there need not be a direct waiver of each constitutional right so long as the plea of guilty is itself voluntary and intelligent.
201. 194 Neb. 502, 233 N.W.2d 904 (1975).
202. Recall that the overruling of a motion to suppress may not be appealed until after conviction.
After his arrest, his apartment in Mexico was searched at the request of the Scottsbluff sheriff.\textsuperscript{208}

The Nebraska Supreme Court held that the Bill of Rights only protects American citizens living abroad from the acts of American officials.\textsuperscript{209} The acts of Mexican authorities, even if they are acting in concert with American authorities, are not affected\textsuperscript{210} unless the cooperation is so great as to constitute a joint venture.\textsuperscript{211} Without extensive discussion, the court found that there was no joint venture.\textsuperscript{212}

The one exception to the state action requirement is in the area of wiretapping. However, the laws against wiretapping are general criminal statutes, not constitutional prohibitions on the state. Both federal and state wiretapping statutes have been interpreted as rules of evidence as well as criminal statutes.\textsuperscript{213}

It is also clear that illegally seized evidence is only excluded at trial and then only as substantive evidence. It may be offered at pretrial proceedings\textsuperscript{214} and it may be used at trial to impeach a witness.\textsuperscript{215}

3. "\textit{Harmless Error}"

The most difficult hurdle in any criminal appeal is showing that the errors made at trial were sufficiently harmful to merit reversal of the conviction. The court's philosophy was summed up by Justice Clinton in \textit{State v. Bartlett}:\textsuperscript{216}

No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of

\textsuperscript{208}. It is not clear from the case why the Scottsbluff sheriff requested the arrest or why Barajas was tried in Nebraska for a murder that occurred in Mexico. The Scottsbluff sheriff requested the search through the El Paso police department.

\textsuperscript{209}. 195 Neb. at 505, 238 N.W.2d at 915.


\textsuperscript{211}. 195 Neb. at 505, 238 N.W.2d at 915 (citing Stonehill v. United States, 405 F.2d 738 (9th Cir.), \textit{cert. denied}, 395 U.S. 960 (1968)).

\textsuperscript{212}. Id. at 506, 238 N.W.2d at 916. Apparently there was no federal, collateral appeal in this case.

\textsuperscript{213}. \textit{See, e.g.}, White v. Longo, 190 Neb. 703, 212 N.W.2d 84 (1973), a suit for alienation of affections in which wiretap evidence was held inadmissible even though the plaintiff had tapped the telephone in her own home. In a subsequent suit for damages against a private detective and investigating corporation, the federal district court dismissed, but the Eighth Circuit Court of Appeals reversed, holding that an award of damages would be appropriate. \textit{See} White v. Weiss, 535 F.2d 1067 (8th Cir. 1976).


\textsuperscript{215}. \textit{See} State v. Ross, 186 Neb. 280, 183 N.W.2d 229 (1971).

\textsuperscript{216}. 195 Neb. 502, 233 N.W.2d 904 (1975).
the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire case finds that no substantial miscarriage of justice has actually occurred.\textsuperscript{217}

In a case involving the right to counsel, Clinton's predecessor, Justice Carter,\textsuperscript{218} after protesting that the fourteenth amendment had not been interpreted correctly since the Slaughter-House Cases,\textsuperscript{219} objected to the "ritualistic limitations" placed upon police officers and urged the substitution of civil or criminal sanctions against those who violate the rights of others.\textsuperscript{220} Allowing a criminal conviction to be reversed because of constitutional error, he said, "is a case of burning the house down to eliminate the invading cockroach."\textsuperscript{221}

\textsuperscript{217} Id. at 512, 233 N.W.2d at 911.
\textsuperscript{218} Clinton replaced Carter on the bench in March 1971.
\textsuperscript{219} 83 U.S. 36 (1872). These were the first cases in which the United States Supreme Court construed the thirteenth, fourteenth, and fifteenth amendments to the United States Constitution. The bulk of the discussion of the fourteenth amendment concentrated upon the privileges and immunities clause and attempted to separate the "privileges and immunities of citizens of the United States" and those of citizens of the several states, held that the fourteenth amendment only applied to the former, and found that the former were little more than the right to travel to the seat of the government and be protected while on the high seas. The due process clause, on the other hand, got very cursory treatment:

\begin{quote}
We are not without judicial interpretation, therefore, both State and National, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.
\end{quote}

\textit{Id.} at 80-81.

Virtually all the later cases imposing constitutional restraints upon the states have based their argument upon the due process clause.

"Its [the 14th Amendment's] purpose was to give slaves the same rights as other free men; not to transfer power from the states to the federal government." State v. Johns, 185 Neb. 590, 604, 177 N.W.2d 580, 588 (1970) (Carter, J., dissenting) (citations omitted).

\textsuperscript{220} Justice Carter went on to acknowledge that the supremacy clause requires the Nebraska court to follow the opinions of the United States Supreme Court, but he opposed following those opinions any more than absolutely necessary:

\begin{quote}
But in the absence of specific holdings applicable to factual situations before us, I do not subscribe to the expansion of the ritualistic rules of that court which can only serve to strap down and mitigate the efforts of law enforcement officers in the performance of their duties in enforcing the law.
\end{quote}

185 Neb. at 605, 177 N.W.2d at 589.

\textsuperscript{221} \textit{Id.}
In most criminal cases coming before us, including those related to punishment for crime, the guilt or innocence of the defendant is not an issue. Such is the case here. The issues which confront us are largely whether the constitutional rights of the defendant have been abridged; rights which are such because the Supreme Court of the United States proclaims them to be such, and which then roots them into the due process clause of the Constitution to avoid decisions adverse to their encroachment. . . . The public interest is completely ignored in favor of those who willfully violate the law. 222

Such sentiments did not leave the court with Justice Carter. 223 Regardless, the Nebraska Supreme Court has not embraced the federal rule on constitutional error, despite the United States Supreme Court’s ruling in *Chapman v. California*: 224

> Whether a conviction for crime should stand when a state has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied. 225

*Chapman* found unconstitutional a provision of the California constitution that was almost identical to Clinton’s formulation in *Bartlett*. The major difference was that Clinton spoke of a “substantial miscarriage of justice” and the California provision omitted the word “substantial.” This would seem to make the burden on the prosecution less than that imposed by the former California rule, but might have been an attempted bow to the *Chapman* court’s statement that the “federal rule emphasizes ‘substantial rights’-as do most others. The California constitutional rule emphasizes ‘a miscarriage of justice.’” 226

However, it was not the word “substantial” that was crucial in the *Chapman* holding. The court actually held:

> [T]hat before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless be-

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222. Id. at 605-06, 177 N.W.2d at 589.
223. In recent years the federal courts have tended to go to great lengths to protect the individual malefactor on constitutional grounds and have discounted the public need for protection. As a result the term “obscene” has been to all intents and purposes emasculated. . . . Although we may doubt the logic, and disagree with the permissiveness engendered, we are nevertheless bound by constitutional restrictions as interpreted by the United States Supreme Court.
225. Id. at 21.
226. Id. at 23.
yond a reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test, it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard, although achieving the same result as that aimed at in our Fahy case.227

IV. CONCLUSION

One might speculate whether the “full and fair litigation” of a fourth amendment claim in the state courts requires application of the Chapman standard and other federal standards. However, even if it does, would the United States Supreme Court hear the collateral claims? The Powell and Rice opinion, based as it is upon the alleged futility of habeas corpus relief as a means of disciplining wayward police officers, suggests an implicit abandonment of federal “harmless error” standards as well as federal standards for the legality of the search and/or seizure itself. Indeed, it seems that Justice Harlan, who dissented in Chapman, may have had the last word after all. He said:

I regard the Court’s assumption of what amounts to a general supervisory power over the trial of federal constitutional issues in state courts as a startling constitutional development that is wholly out of keeping with our federal system and completely unsupported by the Fourteenth Amendment where the source of such a power must be found . . . .228

It appears that the “startling constitutional development” of Chapman has been reversed and, possibly, so has that of Mapp v. Ohio.229 It will be interesting to see how much farther from—or closer to—federal standards the Nebraska court will move in response to that reversal.

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227. Id. at 24.
228. Id. at 46-47 (Harlan, J., dissenting).