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Searches and Seizures - Arrest - Motor Vehicle Exception to Warrant Requirement - Limits? People v. Dumas

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CRIMINAL LAW—SEARCHES AND SEIZURES— ARREST—MOTOR VEHICLE EXCEPTION TO WARRANT REQUIREMENT—LIMITS?

People v. Dumas, 9 Cal. 3d. 871, 512 P.2d 1208,
109 Cal. Rptr. 304 (1973).

If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or for the individual.¹

ON MAY 11, 1970, officers of the Los Angeles Police Department approached the apartment of Clay Dumas. Based on a report from a reliable informant, whose information had been corroborated by independent police investigation, the police had obtained a warrant to search Dumas' apartment and "all trash cans, storage areas, garages and carports which are assigned to and/or used by occupants of the aforesaid apartment."² The objects of the search were certain stolen bonds and bank checks which, according to the police informant, Dumas had been in possession of for about eight weeks; also narcotics and narcotics gear.

The police "forcibly entered without announcing their authority or purpose,"³ finding Dumas, who they immediately arrested, and a young woman. The following search failed to uncover the contraband but revealed a set of car keys and an automobile registration certificate belonging to a car parked in the street about 100 feet from Dumas' apartment building. An immediate search of the car's trunk revealed the stolen securities and some narcotics.

Dumas appealed his conviction of receiving stolen property, basing his appeal on the Superior Court's denial of his motion to suppress

¹ Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

² *People v. Dumas*, 109 Cal. Rptr. 304, 307 (1973).

³ *Id.* The informant had reported that Dumas always answered the door with a loaded gun in his hand. The court held that this knowledge, combined with no occurrences at the scene which allayed the officers' apprehensions, excused compliance with California's knock and announce requirement. CAL. PENAL CODE § 1531 (West 1970). For a survey of state statutes in this area, see *Miller v. United States*, 357 U.S. 301 (1958). Since the right of privacy in a man's home seems as much damaged by a forcible unannounced entry as by a search itself, it seems the same standard of probable cause might apply. However, the officers in *Dumas* were not required to produce any corroboration of the informant's warning. See *Sabbath v. United States*, 391 U.S. 585 (1968); *Keiningham v. United States*, 109 App. D.C. 272, 287 F.2d 126 (1960); *State v. Johnson*, 102 R.I. 344, 230 A.2d 831 (1967).

the evidence seized in the search.⁴ The California Supreme Court affirmed the Superior Court conviction. After first concluding that the warrant could not validate the search, since it described neither the vehicle nor the site of the vehicle, the court held:

[T]he police officers had probable cause to search defendant's automobile under *unforeseeable circumstances in which the securing of a warrant was impracticable*. The search was consequently *reasonable*, and the trial court did not err in denying defendant's motion to suppress the evidence discovered therein.⁵ (Emphasis added).

Analysis must begin with the fourth amendment's prohibition against "unreasonable searches and seizures,"⁶ extended to the states in 1961 by *Mapp v. Ohio*.⁷ The language of the fourth amendment at least impliedly states a preference for searches pursuant to a warrant, and searches without a warrant are presumed unreasonable, subject to certain recognized exceptions.⁸ Determination of whether the search of Dumas' automobile was pursuant to a search warrant centers on the fourth amendment's requirement that warrants particularly describe the place to be searched.⁹

The court in *Dumas* is in accord with constitutional requirements in holding that a warrant authorizing a search of stated premises does not authorize the search of a vehicle, parked on the street, which is not

⁴ CAL. PENAL CODE § 1538.5 (West 1970) provides in pertinent part:

A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

- (1) The search or seizure without a warrant was unreasonable.
- (2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any other violation of federal or state constitutional standards.

⁵ *People v. Dumas*, 109 Cal. Rptr. 304, 314 (1973).

⁶ U.S. CONST. amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

⁷ 367 U.S. 643 (1961).

⁸ *Coolidge v. New Hampshire*, 403 U.S. 443, 454 (1971); *Katz v. United States*, 389 U.S. 347, 357 (1967); *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967); *United States v. Ventresca*, 380 U.S. 102, 105-07 (1965); *Stoner v. State of California*, 376 U.S. 483, 486 (1964); *Jones v. United States*, 357 U.S. 493, 498-99 (1958); *United States v. Jeffers*, 342 U.S. 48, 51 (1951); *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

⁹ U.S. CONST. amend. IV.

mentioned or described in the warrant.¹⁰ However, it is well established that the insufficiency of a search warrant is immaterial when the search and seizure may be otherwise justified under one of the exceptions normally recognized.¹¹

There are several established exceptions to the warrant requirement: the "Carroll moving vehicle search," where exigent circumstances and probable cause exist;¹² a search incident to a valid arrest;¹³ a search during "hot pursuit" of a dangerous suspect;¹⁴ border searches;¹⁵ the seizure of evidence in "plain view";¹⁶ and a search with express consent.¹⁷ Only the first two exceptions have possible application to the search made in *Dumas*.

Chimel v. California,¹⁸ which concerned the search of a home incident to an arrest therein, limited the permissible scope of an "incident search" to the area within the arrested person's "immediate control," defined as the area from which the arrested person might obtain a weapon or destroy

¹⁰ *United States v. Stoffey*, 279 F.2d 924 (7th Cir. 1960); *United States v. Barton*, 282 F. Supp. 785 (D. Mass. 1967); *United States v. Darby*, 201 F. Supp. 317 (W.D. Pa. 1962); *State v. Penna*, 4 Conn. Cir. 421, 233 A.2d 708 (1967); *People v. Montgares*, 336 Ill. 458, 168 N.E. 304 (1929); *Perkins v. Commonwealth*, 383 S.W.2d 916 (Ky. 1964); *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); *People v. Dumper*, 28 N.Y.2d 296, 270 N.E.2d 311 (1971); *O'Neil v. State*, 65 Okla. Crim. 398, 88 P.2d 380 (1939); *Dolen v. State*, 187 Tenn. 663, 216 S.W.2d 351 (1948). *Contra United States v. Thoresen*, 281 F. Supp. 598 (N.D. Calif. 1967) (moving van parked on street in front of described premises containing articles taken from inside) *rev'd on other grounds*, 428 F.2d 654 (9th Cir. 1970). *But cf.* where warrants authorizing search of premises were held to authorize search of vehicles on the premises. *People v. Fitzwater*, 260 Cal. App. 2d 478, 67 Cal. Rptr. 190 (1968), *cert. denied*, 393 U.S. 953 (1968); *Alexander v. State*, 108 So.2d 308 (Fla. Dist. Ct. App. 1959); *McCissel v. Commonwealth*, 305 S.W.2d 756 (Ky. 1957); *Massey v. Commonwealth*, 305 S.W.2d 755 (Ky. 1957); *Commonwealth v. Fancy*, 349 Mass. 196, 207 N.E.2d 276 (1965); *Leslie v. State*, 294 P.2d 854 (Okla. Crim. App. 1956); *Lindley v. State*, 294 P.2d 851 (Okla. Crim. App. 1956); *Lawson v. State*, 176 Tenn. 457, 143 S.W.2d 716 (1940).

¹¹ *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Marron v. United States*, 275 U.S. 192 (1927); *United States v. Jones*, 204 F.2d 745 (7th Cir. 1953), *cert. denied*, 346 U.S. 854 (1953); *United States v. Babich*, 347 F. Supp. 157 (D. Nev. 1972), *aff'd*, 477 F.2d 242 (9th Cir. 1973); *United States v. Lassoff*, 147 F. Supp. 944 (E.D. Ky. 1957).

¹² *Carroll v. United States*, 267 U.S. 132 (1925).

¹³ *Chimel v. California*, 395 U.S. 752 (1969).

¹⁴ *Warden v. Hayden*, 387 U.S. 294 (1967).

¹⁵ *See Carroll v. United States*, 276 U.S. 132, 153-54 (1925).

¹⁶ *Harris v. United States*, 390 U.S. 234 (1968). The seizure of evidence in plain view is arguably not an exception to the warrant requirement since, although a seizure occurs, no search precedes it.

¹⁷ *On Lee v. United States*, 343 U.S. 747 (1952). Consent searches are looked upon with disfavor by the courts. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

¹⁸ 395 U.S. 752 (1969).

evidence.¹⁹ The result was to limit the search area incident to arrest to an "arms length" rule.²⁰ This would seem to preclude justifying the search of a vehicle parked 100 feet away on the street as incident to an arrest in a home. Previous to *Chimel*, many searches of vehicles parked in the area had been upheld as incident to arrest in a dwelling,²¹ usually because of court confusion between the warrantless "search incident" and the warrantless "search on probable cause plus exigent circumstances."

Chimel and Supreme Court cases subsequent to *Chimel* dealing with auto searches have clarified the situation concerning what the limits of the "search incident" are; a vehicle parked outside a dwelling in which a defendant has been *arrested and placed in police custody* is outside the defendant's "immediate control," and not subject to a search incident.²² The search of Dumas' automobile can only be justified as a warrantless search based on the "*Carroll* exception" with probable cause and exigent circumstances. The California Supreme Court found such justification to be present.

In *Carroll v. United States*²³ the Supreme Court first recognized as constitutional the warrantless search of a vehicle where there exists probable cause for the search, and "it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."²⁴ The *mobility* of the automobile was the basis for distinguishing it from homes or similar

¹⁹ *Id.* at 763. The search of Chimel's entire house was held to extend far beyond the area of Chimel's "immediate control." Chimel's wife, however, was left entirely free to obtain a weapon or destroy evidence anywhere in the house. 395 U.S. at 775 (White, J., dissenting). The court was apparently recognizing the distinction between searches incident to arrest and searches based on probable cause and exigent circumstances, and finding the presence of the interested third party not sufficiently exigent to forego the warrant requirement, since footnote 9 of the majority opinion squarely reaffirmed the *Carroll* mobility exception as an exigency. 395 U.S. at 764 n.9. See Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968), on the distinction between searches incident to arrest, as opposed to automobile searches based on probable cause plus exigent circumstances.

²⁰ W. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS 271 (1972).

²¹ *Browning v. United States*, 366 F.2d 420 (9th Cir. 1966) (automobile in front of house); *People v. Fritz*, 253 Cal. App. 2d 7, 61 Cal. Rptr. 247 (1967), cert. denied, 392 U.S. 910 (1968); *People v. Carrigan*, 213 Cal. App. 2d 607, 28 Cal. Rptr. 909 (1963); *State v. Watson*, 386 S.W.2d 24 (Mo. 1965) (car in front of apartment); *State v. Hoffman*, 64 Wash. 2d 445, 392 P.2d 237 (1964) (car beside house). *Contra Staples v. United States*, 320 F.2d 817 (5th Cir. 1963); *Conti v. Morgenthau*, 232 F. Supp. 1004 (S.D.N.Y. 1964); *Lucas v. Mayo*, 222 F. Supp. 513 (S.D. Tex. 1963).

²² *Coolidge v. New Hampshire*, 403 U.S. 443, 457 n.11 (1971); *Chambers v. Maroney*, 399 U.S. 42, 47 (1970). See also *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968); *Preston v. United States*, 376 U.S. 364 (1964).

²³ 267 U.S. 132 (1925).

²⁴ *Id.* at 153. Squarely reaffirmed in *Chimel v. California*, 395 U.S. 752, 764 n.9 (1969).

places; the distinction was not based on any differing expectation of privacy which owners attach to homes versus cars.²⁵

The recent application of *Carroll* in the case of *Chambers v. Maroney*²⁶ has been the source of much confusion. *Chambers v. Maroney* concerned the stop of a vehicle in motion on the highway and the arrest of the occupants, followed by a careful and thorough warrantless search of the auto at the police station. A 7-1 decision of the Supreme Court held the search reasonable and admitted the evidence under the probable cause plus exigent circumstances exception. Justice White for the majority stated that probable cause was a requirement for a reasonable search, that the police may determine probable cause where exigent circumstances exist, and that a movable car presents exigent circumstances justifying an immediate search if based on probable cause.²⁷ White then stated that a car removed to the station house still retains its mobility, therefore exigent circumstances still exist for a warrantless search; a warrantless "seizure" to strip the car of its alleged station house mobility, while a search warrant is obtained, is not to be preferred over the station house search since both are intrusions which cannot be distinguished.²⁸

The green light given the police in *Chambers* turned yellow in *Coolidge v. New Hampshire*,²⁹ which examined more critically the rationale for the *Carroll* exception, and reiterated that it justifies the warrantless search of "an automobile stopped on the highway" where "it is not practicable to secure a warrant because the vehicle can be quickly moved."³⁰ (Emphasis by the court). *Coolidge* made it clear that the inherent mobility of the automobile is not in and of itself significant.³¹

²⁵ The *Carroll* decision concerned a vehicle in motion on the open highway when it was stopped. The court applied convincing statutory precedent: the duty collection act of July 31, 1789, ch. 5, § 24, 1 Stat. 43, passed contemporaneously with the fourth amendment proposal, applied a relaxed warrant standard to searches for goods "concealed in a movable vessel where they readily could be put out of reach of a search warrant." 267 U.S. at 151. It was the mobility of those vessels (now cars) which distinguished them from other "effects" under the fourth amendment's prohibitions. See *Cooper v. California*, 386 U.S. 58, 59 (1967); *Preston v. United States*, 376 U.S. 364, 366 (1964); *Henry v. United States*, 361 U.S. 98, 104 (1959).
²⁶ 399 U.S. 42 (1970).

²⁷ *Id.* at 51.

²⁸ *Id.* at 52. Justice Harlan vigorously dissented, pointing out that a seizure is indeed less intrusive than a search, and that a suspect may consent to an immediate search where he feels the opposite. Where the owners were already in custody, only the convenience of the police was served by the immediate search, not a sufficient reason to bypass the magistrate. 399 U.S. at 55-65. See also *Preston v. United States*, 376 U.S. 364 (1964); *McDonald v. United States*, 335 U.S. 451 (1948).

²⁹ 403 U.S. 443 (1971).

³⁰ *Id.* at 460.

³¹ *Id.* at 461 n.18.

"The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears."³²

The facts of *Coolidge* closely parallel both *Chambers* and *Dumas*. Coolidge was arrested and his car "impounded" under authority of an invalid search warrant,³³ his wife was removed from the scene, and his car towed to the police station for a thorough search two days later. The delayed search was invalid because although probable cause existed, exigent circumstances were not present justifying a search without a warrant, either *at the scene* or later at the station house.³⁴ Since the exigent circumstances of *Carroll* were absent—no fleeing suspect, no "fleeing opportunity" to search the car, no contraband or stolen goods or weapons,³⁵ no confederates, no inconvenience to police to guard the vehicle—it was practicable to secure a warrant, and therefore a warrant was required to validate the search.³⁶

Since *Coolidge* did not overrule *Chambers* the two must be construed together, a situation which does little to clarify the car search doctrine, but does serve to accentuate the major issue. *What constitutes circumstances sufficiently exigent to bypass the warrant requirement?*³⁷ This determination by the police officer on the scene is as crucial, if not more so, than his determination of probable cause. What guidelines exist for him?

People v. Dumas attempted to clear the confusion by ignoring the *Coolidge* decision entirely and following an interpretation of *Chambers* which puts automobiles in a classification of "effects" inherently possessed of a diminished expectation of privacy. The Court also examined the

³² *Id.* at 461.

³³ The warrants were not issued by a "neutral and detached" magistrate. *Id.* at 453.

³⁴ *Id.* at 464.

³⁵ This singular reference to the "mere evidence" rule is difficult to explain, since the "mere evidence" limitation on searches has been expressly rejected. *Warden v. Hayden*, 387 U.S. 294 (1967).

³⁶ 403 U.S. at 462.

³⁷ The following cases, decided under *Chambers* and *Coolidge*, found exigent circumstances to exist. *United States v. Bozada*, 473 F.2d 389 (8th Cir. 1973) (a tractor trailer which had been under surveillance for nearly two hours, whose owner was at large, and which reportedly contained contraband). *United States v. Menke*, 468 F.2d 20 (3rd Cir. 1972) (although enough officers were present to watch the vehicle while a warrant was secured, relatives of defendant not under arrest were present, and magistrate was not immediately available); *United States v. Pollard*, 466 F.2d 1 (10th Cir. 1972), *cert. denied*, 409 U.S. 1127 (1973) (auto parked outside motel room of arrested person was a "fleeing target"). Compare with *United States ex rel Clark v. Mulligan*, 347 F. Supp. 989 (D.N.J. 1972) (warrant required where battery of auto was dead). The following pre-*Chambers* cases did not find exigent circumstances. *United States v. Stoffey*, 279 F.2d 924 (7th Cir. 1960) (auto searched after defendant detained three hours); *United States v. Barton*, 282 F. Supp. 785 (D. Mass. 1967) (defendant arrested, handcuffed, and in police car with second police car blocking path of defendant's auto); *People v. Lewis*, 34 Ill.2d 211, 215 N.E.2d 283 (1966) (defendant had been arrested and taken into custody by two officers who also took possession of vehicle).

location of the automobile to determine if an increased or decreased expectation of privacy resulted therefrom,³⁸ and found the location not to increase any expectation.

This determination of automobiles as places which carry with them a diminished expectation of privacy is the first indication that the California court is not willing to come to grips with the major issue posed by the juxtaposition of *Chambers* and *Coolidge*—what constitutes exigent circumstances? The nature of the place to be searched is determinative of a warrantless search's validity only as it bears upon the exigencies justifying a bypass of the warrant procedure. It is the inherent *mobility* of the automobile which, manifested in certain circumstances, creates exigent circumstances justifying a warrantless search, and not some inherent expectation of privacy marking automobiles as second-class effects under the fourth amendment.³⁹

Upon turning to the issue of exigent circumstances, the court found them to exist from the presence of the young woman, since the court felt she was in a position to move the car or destroy the evidence. Faced with exigent circumstances, the police were thus justified in making an on-the-spot determination of probable cause, bypassing the magistrate as impractical. The court sustained the police determination of probable cause to search the car, relying on the easily movable nature of the stolen securities, concluding: "When the officers were unable to discover the bonds in the defendant's apartment, his automobile, parked outside on the street, quite naturally became an object of strong suspicion."⁴⁰

The court's finding that probable cause existed glaringly illustrates the importance of the exigent circumstances issue, left open by *Coolidge* and *Chambers*. Both the majority and concurring opinions, despite the complex and circuitous linguistic reasoning of the concurring opinion, in essence find probable cause as a result of the unsuccessful search of the described premises and the "surprise" discovery of additional likely premises. For practical purposes this is not radically different from saying that a search warrant authorizes the search of almost any non-described property with which the defendant has had contact, if the search of the described premises is unsuccessful. The only limits suggested by the court's opinion are the nature of the contraband and the proximity of the non-

³⁸ *People v. Dumas*, 109 Cal. Rptr. 304, 313 (1973).

³⁹ See cases cited note 37 *supra*. See also *Katz v. United States*, 389 U.S. 347, 351 (1967): "[T]he Fourth Amendment protects people, not places."

⁴⁰ *People v. Dumas*, 109 Cal. Rptr. 304, 314 (1973).

described place, rather vague and elastic limits to be applied at the scene by police officers.⁴¹ "Probable cause must be shown in each instance."⁴²

This entire issue of probable cause is largely avoided if decided by a magistrate rather than the police,⁴³ which returns us to the fundamental question of when the search must be accompanied by a warrant. In *Dumas*, the police had the defendant in custody and they had possession of the defendant's car keys. But for the presence of the young woman, the car was effectively immobilized, with sufficient officers present on the scene to guard the vehicle from intrusion. Still, the *Dumas* decision considered the presence of this third party sufficient to justify a warrantless search.

However, the very real possibility of destruction of evidence by a third party existed in *Chimel*, since Chimel's wife was present at Chimel's arrest, and police were refused the authority to make a warrantless search.⁴⁴ Can *Dumas* be distinguished simply because an automobile was involved? *Coolidge* would indicate not,⁴⁵ and *Chimel* would indicate that a separate exception to the warrant requirement where third parties are present does not exist.⁴⁶ Such an exception if it did exist would swallow the warrant requirement, unless very precisely confined.⁴⁷ *Dumas* contains no such confinement, but rather seems to hold that anytime an arrest occurs with a third party alerted, exigent circumstances exist.

Without the car keys in her possession, was the young woman's presence an exigent circumstance making the securing of a warrant impractical? Is the car "mobile" if the officers confiscate the car keys? Does the car become "mobile" at the moment when the young woman makes an overt move to tamper with it? *Coolidge* leaves open these questions encountered in *Dumas*, where the auto was not moving or occupied and under less, though substantial, police control than in *Coolidge*. *Chambers* and *Chimel* combine to further confuse the issue,

⁴¹ See *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

⁴² *People v. Dumper*, 28 N.Y. 2d 296, 299, 270 N.E.2d 311, 312 (1971) (holding that warrant did not justify search of a car which drove up during search). The statement by Associate Justice Sullivan in his concurring opinion in *Dumas* that the warrant was to "search those places over which the defendant had control" is a novel application of the warrant requirement, and one which if viable at all is presumably limited by the *Chimel* "arm's length" rule. 109 Cal. Rptr. at 315. See text accompanying note 19, *supra*.

⁴³ See *Beck v. Ohio*, 379 U.S. 89, 96 (1964); *Wong Sun v. United States*, 371 U.S. 471, 479-80 (1963); LaFave and Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987 (1965).

⁴⁴ See note 19 *supra*. See also Carrington, *Chimel v. California—A Police Response*, 45 NOTRE DAME LAW 559 (1970).

⁴⁵ See text accompanying notes 31 and 32.

⁴⁶ See also *Vale v. Louisiana*, 399 U.S. 30 (1970), particularly Justice Black's dissent at 40.

⁴⁷ The problems would be similar to those encountered under the reasonableness standard of *United States v. Rabinowitz*, 339 U.S. 56 (1950).

with the result that most lower courts, as in *Dumas*, rely heavily on *Chambers* and consider such cars "mobile."⁴⁸ *Chambers*, however, does not stand alone as the law.

Until the Supreme Court re-examines and clarifies the many conflicting precedents, lower courts will continue to hand down decisions without clear guidelines, simply ignoring decisions they disapprove. The recent auto search case of *Cady v. Dombrowski*,⁴⁹ a 5-4 decision with Justices Brennan, Douglas, Stewart, and Marshall joining in dissent, indicates that no re-examination or clarification will soon be forthcoming. Stating that "the decisions of the Court dealing with the constitutionality of warrantless searches, especially when those searches are of vehicles, suggest that this branch of the law is something less than a seamless web,"⁵⁰ Justice Rehnquist reviewed the past decisions and concluded that "very little that we might say here can usefully refine the language of the Amendment itself in order to evolve some detailed formula for judging cases such as this."⁵¹

This author must disagree. Instead of blaming the wording of the fourth amendment for a confusion created by past judicial decisions, the Supreme Court could recognize a simple yet useful distinction as a start toward protection of fourth amendment guarantees. The suggestion is to follow Justice Harlan's dissent in *Chambers v. Maroney*,⁵² and allow a warrantless *seizure* until a search warrant can be obtained, if probable cause and exigent circumstances present themselves to officers sufficient in number to effectuate the seizure of the suspected automobile. Common experience dictates that being detained is less intrusive than being searched and bared; effective law enforcement would not be hindered while individual rights would receive some protection. In *Dumas* a seizure would have eliminated the problem of third-party destruction of evidence, allowed a magistrate to pass on probable cause for a search, and not inconvenienced the defendant, who was already in police custody.

The real significance of *Dumas* is that until guidelines are offered the lower courts, they will continue to grapple inconsistently with the "seamless web" of fourth amendment auto search, resulting in uneven application of the law and compromise of fourth amendment guarantees. Charles Evans Hughes once stated, "We are under a Constitution, but

⁴⁸ *United States v. Bozada*, 473 F.2d 389 (8th Cir. 1973); *United States v. Pollard*, 466 F.2d 1 (10th Cir. 1972), *cert. denied*, 409 U.S. 1127 (1973); *United States v. Leazar*, 460 F.2d 982 (9th Cir. 1972); *United States v. Miller*, 460 F.2d 582 (10th Cir. 1972).

⁴⁹ 413 U.S. 433 (1973).

⁵⁰ *Id.* at 440.

⁵¹ *Id.* at 448.

⁵² *See* note 28 *supra*.

the Constitution is what the judges say it is."⁵³ Regarding the fourth amendment, the judges are having trouble saying what it is. Every person's fourth amendment protection suffers as a result.

GORDON D. ARNOLD

CRIMINAL LAW—EVIDENCE—ADMISSIBILITY
OF STATEMENTS TO PAROLE OFFICER—
MIRANDA WARNINGS

State v. Gallagher, 36 Ohio App. 2d 29, 301 N.E. 2d 888 (1973).

THE OPINION handed down in this recent decision from the Montgomery County Court of Appeals examined a question of first impression in the courts of Ohio. The issue presented was "whether a parole or probation officer is a law enforcement officer within the contemplation of *Miranda* and thus subject to the *Miranda* requirements of constitutional warnings to suspects during custodial interrogation. . . ."¹

The defendant, Gallagher, appealed from a conviction of armed robbery of a 7-11 Store. He was tried without a jury and sentenced to from ten to twenty-five years in the Ohio State Penitentiary. The state's prosecuting witness, an employee of the store, was robbed at gunpoint by two men of approximately \$350.00. Although two patrons were also present in the store at the time of the robbery, neither was able to corroborate the employee's identification of the defendant.² Approximately one month after the robbery, the defendant was arrested, and immediately thereafter fully advised of his *Miranda* rights by the Dayton police. At that time he executed a standard pre-interview form which listed all his rights and which constituted an agreement whereby he agreed that any statements he made thereafter were of his own free will.³ Four days after the arrest, Mr. William Sykes, a parole officer who had been assigned to the defendant after his release from prison on a previous conviction, visited the defendant. During this first visit, the defendant declined to make any statements concerning his arrest. One week later the defendant was again visited by Mr. Sykes. During this meeting the defendant admitted to him that he had participated in the robbery in concert with the other robber.⁴ At the trial of this cause, Mr. Sykes was allowed to testify,

⁵³ Address before the Elmira Chamber of Commerce, May 3, 1907, in ADDRESSES OF CHARLES EVANS HUGHES 185 (2d ed. 1916).

¹ *State v. Gallagher*, 36 Ohio App.2d 29, 30, 301 N.E.2d 888, 889 (1973).

² *Id.*

³ *Id.* at 32, 301 N.E.2d at 890.

⁴ *Id.* at 30, 33, 301 N.E.2d at 889-891.