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A DIALOGUE ON THE APPLICATION OF FEDERAL STANDARDS TO MISSOURI CRIMINAL LAW*

Edward H. Hunvald, Jr.**

Editor: It's time again for your review of criminal law. However, is there very much to discuss? It's been a fairly quiet year in criminal law—except, of course, for the Escobedo case.¹

Reviewer: That's a little like saying that 1929 was a stable year for the stock market—except for the crash.

E: What I mean is that Missouri's criminal law has not undergone any drastic changes, in spite of the decisions of the United States Supreme Court. As a matter of fact, isn't it true that Missouri's criminal law has not been drastically affected by any of the decisions of the Court over the past decade? The two most important decisions are probably Mapp v. Ohio² and Gideon v. Wainwright.³ Mapp imposed the "exclusionary rule" on the states, but Missouri adopted the exclusionary rule in 1924.⁴ Gideon imposed the requirement of counsel as a matter of due process, but Missouri has had provisions for the appointment of counsel for indigents in felony cases practically since statehood.⁵

R: You are correct up to a point. Certainly the adjustment to those two cases is a great deal easier in Missouri than in those states which did not have similar procedures. But this easier adjustment is misleading you if you conclude that there are no problems in these areas in Missouri.

E: Granted there were some problems; haven't they been taken care of? For example, the problem of providing counsel for the indigent. In

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*The format is not original. Cf., e.g., Kamisar, The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused, 30 U. Chi. L. Rev. 1

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5. § 22, RSMo 1825, p. 319 provided for appointment in capital cases. § 3, RSMo 1835, p. 485 provided for appointment in all felony cases. See Webb, Right to Counsel in Missouri, 28 U. Kan. City L. Rev. 160 (1960).

(350)
light of United States Supreme Court decisions, the Missouri Supreme Court has amended its rules on appointment of counsel, and now counsel can be appointed for indigents from before trial all the way through appellate review. I have heard that some defendants were better off in their appeals before the Missouri Supreme Court without counsel than they are with counsel, but at least as far as complying with the requirements of the federal constitution, what is left to be done?

R: Now that it is clearly accepted that indigent defendants are entitled to adequate representation, and this apparently means as good as what they could get if they could pay for it, there is still the problem in Missouri of how to provide such counsel and who is to pay for it. As you know, outside of those areas which have a public defender, indigents are represented by lawyers appointed to that task. While this may be a satisfactory method in theory, in practice it suffers from one great deficiency. The lawyer appointed to defend an indigent is not paid anything for his services, and is not even reimbursed for his out-of-pocket expenses. As a result the cost of defending the indigent falls upon the individual members of the bar, and then only upon those who are appointed to defend. It should be self-evident that the problem of providing justice for the indigent is a community problem and the cost, or at least a good part of it, should be borne by the community. This could be done either by paying the appointed lawyer something for his time and reimbursing him for his expenses or by having paid public defenders. We are not going to have truly adequate representation for indigents until the state adopts a system for financing it.

E: I won't argue with you about that.

R: And there are the additional problems of deciding in what cases and at what point the indigent is entitled to counsel, the problem of de-
fining and determining indigency, the problem of what other services to provide in addition to counsel.  

E: All right, that area still has a lot of work left in it. But how about search and seizure? The Mapp case hasn't changed Missouri law, has it?

R: The importance of the Mapp case for Missouri is not that the states are now required to follow the exclusionary rule and exclude from evidence materials taken in an unlawful search and seizure. As you pointed out, Missouri has had that rule for some time. The serious question is what standards are to be used to determine whether the materials were seized unlawfully. As long as the states were free to admit or exclude evidence illegally obtained, there was no way of raising the question in a state court of whether the seizure violated the federal constitution, and the states which did follow the exclusionary rule were free, as a practical matter, to decide whether or not there had been an illegal seizure. The states developed their own standards and there was no federal review of those standards. However, the United States Supreme Court has now made it clear that "the standard of reasonableness is the same under the Fourth and Fourteenth Amendments. . . ."

The States are not . . . precluded from developing workable rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain.  

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12. Id. at 34. The court pointed out at 33 that "the demands of our federal system compel us to distinguish between evidence held inadmissible because of our supervisory power over federal courts and that held inadmissible because prohibited by the United States Constitution." It is not easy to tell the difference. Some rules began apparently as applicable only to the federal system, but later were declared to be constitutional requirements. The most notable example is the exclusionary rule. See Weeks v. United States, supra note 4; Wolf v. Colorado, 338 U.S. 25 (1949); Mapp v. Ohio, supra note 2.
E: That’s all very interesting, but how does it affect Missouri? Is our law “unreasonable”?

R: The question is whether the search and seizure is unreasonable, and whether there is probable cause to issue a warrant. If you mean has Missouri law approved practices which do not meet the Supreme Court’s standards for a valid search and seizure, I think the answer is yes. For example, there is the recent United States Supreme Court decision, *Aguilar v. Texas*. A conviction for illegal possession of narcotics was reversed because of the insufficiency of the affidavit used in applying for a search warrant. The affidavit stated that the police officers who were seeking the search warrant had received “reliable information from a credible person” and believed that narcotics were located at a specified place. After pointing out that the standard of “probable cause” for obtaining a search warrant was the “same under the Fourth and Fourteenth Amendments,” the court ruled the affidavit inadequate because it did not provide the magistrate with sufficient information to make an independent determination of the existence of probable cause. Although such an affidavit may be based on hearsay,

the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed . . . was “credible” or his information “reliable.” Otherwise, “the inferences from the facts which lead to the complaint” will be drawn not “by a neutral and detached magistrate,” as the Constitution requires, but instead, by a police officer “engaged in the often competitive enterprise of ferreting out crime,” . . . or, as in this case, by an unidentified informant.

E: Just a minute; do you mean to say that the present Missouri procedure for issuing search warrants does not meet this standard? The Supreme Court Rule states that the application (the complaint) is sufficient if it is verified by oath or affirmation of the complainant and states the necessary facts “positively and not upon information and belief; or

14. Id. at 109.
15. Id. at 110, citing *Ker v. California*, supra note 11.
17. Mo. R. Crim. P. 33.01.
if the same be supported by written affidavits verified by oath or affirmation stating evidential facts from which . . . [the] judge or magistrate determines the existence of probable cause." That seems to me to be consistent with *Aguilar*.

*R:* If the portion of that rule stating that the application is sufficient if the complaint states the necessary facts "positively and not upon information and belief" means that the statement is based upon the personal knowledge of the complainant, then it does meet the requirements of *Aguilar*. If it merely means a complaint in the form of "positive" statements of fact cannot be questioned by the magistrate, then it would seem to be unconstitutional.18

A more serious problem arises as to Missouri procedure for the issuance of warrants for arrest. In Missouri an arrest warrant may be issued upon a complaint filed by a prosecuting attorney on information and belief. If the complaint charges that an offense has been committed, then an arrest warrant must issue. The warrant may even be issued by the clerk.19 This does not appear to meet the requirements of *Aguilar*.

*E:* But *Aguilar* deals with search warrants, not arrest warrants. Might not the standards be different?

*R:* They might be, but according to the Supreme Court, they are the same. In *Giordenello v. United States*20 the court ruled that an arrest warrant had been improperly issued because the application was insufficient.21 The deficiency was quite similar to that in *Aguilar*. *Giordenello* involved a federal conviction and so the court did not deal with the question of whether the same standards applied to the states. But in *Aguilar* the court relied upon *Giordenello* and indicated that in determining probable cause, the standard was the same for both search warrants and warrants for arrest.22

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21. "The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime." *Id.* at 486.

E: I have another question. Both Aguilar and Giordenello dealt with warrants being secured by police officers. The Missouri procedure allows the issuance of the arrest warrant on the information and belief of the prosecuting attorney. He is a lawyer, and presumably able to judge from the material presented to him whether or not a sufficient basis exists to file a complaint and charge the defendant with a crime. Why isn’t his determination of “probable cause” sufficient? He is not a member of the police force and is not engaged in the competitive business of “ferreting out crime” (television and radio portrayals to the contrary). What is wrong with leaving the choice of issuing the arrest warrant up to him?

R: Recent studies indicate that in practice the decision to issue an arrest warrant has been the decision of the prosecutor,23 and there is merit to your argument. Certainly we entrust the prosecuting attorney with a tremendous amount of discretion in the area of law enforcement. However, I suspect that the answer to your question will be that the prosecuting attorney is not a judicial officer, but an administrative one. The United States Supreme Court places considerable emphasis on the decision of whether to issue a warrant being in the hands of an independent judicial officer who is to make an objective and impartial decision.24

E: All right, so there may have to be changes in the procedures for issuing warrants. Has the Missouri law on what is an “unreasonable” search and seizure been affected? Most searches and arrests are made without a warrant, and this seems to me to be the important area. The changes we’ve been discussing are important, but they seem to be mainly questions of form, not substance.

R: All criminal procedure can be classified as “form,” though what good the classification serves, I don’t know. I would not consider what you call “form” unimportant. But as to changes in Missouri law as to the validity of arrests and searches, there have been changes and there will be more.


24. But see United States v. Giordenello, supra note 20, at 487, where the court distinguishes the issuance of a warrant for arrest after the return of an indictment by a grand jury from the issuance of a warrant for arrest upon complaint by the police. The court stated that the grand jury’s determination of probable cause for the indictment establishes probable cause for the purpose of issuing a warrant. It could be argued that similarly, the determination of probable cause by the prosecuting attorney to file a complaint establishes probable cause for an arrest warrant to issue. Cf. State v. Halbrook, 311 Mo. 664, 678, 279 S.W. 395, 399 (1925); Scurlock, Arrest in Missouri, supra note 18, at 143-45.
For example, take the situation where a person is arrested in or near an automobile. Apparently it was not an uncommon procedure for the police to take the automobile to a police garage and there conduct an extensive search without a warrant. The United States Supreme Court ruled this practice an unlawful search and consequently any evidence discovered in the search is inadmissible. The Missouri Supreme Court in State v. Edmondson followed suit and reversed a conviction because of the admission into evidence of material taken in such a search.

E: But isn't what the police did in Edmondson done quite often as a search incident to a valid arrest?

R: It may be done quite often but that does not make it a valid practice.

E: But the constitutional prohibition is in terms of "unreasonable" searches and seizures; and if it is customarily done, isn't this some indication that it is "reasonable"?

R: You're ignoring the proposition that the search without a warrant is legally the exceptional situation, and there has to be some reason for acting without a warrant. Practically, of course, there are far more arrests and searches without warrants than with, but these are still, legally, the exceptional situations. The most common exception to requiring a warrant is the search incident to an arrest. The justification is that there needs to be a search in order to take from the person arrested any weapons, or any items he might use to make an escape, and to take from him any evidence which he might destroy. Those purposes require a search at the time of arrest, and so there is a necessity to make a search without a warrant. Any search that goes beyond these purposes would seem not to be incidental to the arrest.

25. For example, compare the search described in State v. Edwards, 317 S.W.2d 441, 443 (Mo. En Banc 1958).
27. 379 S.W.2d 486 (Mo. 1964).
28. The search was not made by Missouri law enforcement officers, but rather by officers of the police department of Albuquerque, New Mexico, who made the arrest in response to a request from the sheriff of Greene County, Missouri. The evidence obtained from the search was a piece of paper which had been inside a money bag taken in a robbery in Springfield, Missouri.
29. Preston v. United States, supra note 26, at 367; Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits or implements used to commit the crime. Weeks v. United States, 232 U.S. 383, 392 (1914); Agnello v. United States, 269 U.S. 20, 30 (1925). This right to search and seize without a warrant extends to things under the accused's immediate control, Carroll v. United States [267 U.S. 132, 158 (1925)]. . . .
E: What about the Rabinowitz case, and the Missouri cases that allow not only a search of the defendant when he is arrested but also a thorough search of the place of arrest? Doesn’t that go beyond the necessities you mentioned?

R: The claimed justification for those searches is that the areas searched are within the control of the person arrested, and therefore, the search is necessary to prevent him from destroying incriminating evidence within his control. To allow the search of an entire house after the defendant has been taken into custody is giving an artificial and technical meaning to “control.” To allow such searches where there is no danger of the destruction or disappearance of the material sought and there is ample time to secure a search warrant is inconsistent with the proposition that searches incident to arrest are based upon the necessity of acting at once.

Of course, there can be no hard and fast rules as to what areas may be searched upon an arrest, and considerable weight must be given to the police officer's judgment as to what area it is necessary to search, but I do not see how this allows indiscriminate searches of an area simply because the defendant is arrested there. I admit that the present law is somewhat out of tune with this view, but I suspect that Rabinowitz will be sharply limited if not repudiated. The Missouri court in Edmondson gave no indication of making any such limitations, however. They decided only that:

"Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest."

E: The search in Edmondson was of an automobile. Isn't there an exception that allows searches of automobiles without warrants, even when the search is not incident to an arrest?

R: Yes, there is. This exception is also based upon necessity. If an officer has probable cause to believe that property which is subject to seizure, such as contraband, is located at a specific place, he still has no authority to seize it without first securing a search warrant. The existence of probable cause must be tested by a judicial officer. There is a different approach as to arrests without a warrant. An arrest without a warrant by a police officer is permissible if there is "probable cause" to believe that a crime has been committed and that the person arrested has committed it. To require the officer to secure an arrest warrant could give the suspect an opportunity to escape. There are reasons to act at once. This necessity is not usually present in the case of property. The same urgency may exist

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32. Cf. United States v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926). After pointing out the evils of general warrants of search, Learned Hand stated:

After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home.


34. State v. Edmondson, supra note 27, at 488, quoting from Preston v. United States, supra note 26, at 367.

35. The rule is usually stated to be limited to "felonies."
when the property is in an automobile or other conveyance as there is often a danger that if the officer takes time to secure a search warrant, the automobile may be gone by the time the warrant is obtained. So if the officer has probable cause to believe the property is located in an automobile and there is a danger of loss if he waits to get a warrant, he may search and seize without first securing a search warrant. The necessity is not present when the automobile is in police custody or when, for any reason, there is no danger of loss. All of this is based upon the idea that before the state, through its law enforcement officers, can interfere with a person's liberty or property, the justification for the interference should be tested by an impartial judicial officer. The exceptions are those situations where there is a necessity of acting at once.

E: Then is it a general rule that whenever there is time to secure a warrant, any action without a warrant in arresting or searching is unreasonable?

R: The opportunity to secure a warrant is a factor in determining whether the necessity exists, but the courts have never gone so far as to make this an absolute test, especially in regard to searches incident to arrest.

E: You seem to think that searches incident to arrest are going to be more limited in the future, and are going to have to be very close in time and space to the arrest, and you may be right. I don't see really that it makes very much difference. There will be the extra time it takes to get a search warrant, but if there is no danger of losing the evidence in the

38. Cf. United States v. Rabinowitz, supra note 30, at 65:
   A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a sine qua non to the reasonableness of a search. It is fallacious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant. Whether there was time may well be dependent upon considerations other than the ticking off of minutes or hours. The judgment of the officers as to when to close the trap on a criminal committing a crime in their presence or who they have reasonable cause to believe is committing a felony is not determined solely upon whether there was time to procure a search warrant. Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential.

It should be noted that in the Rabinowitz case, a warrant for arrest had been procured but not a search warrant. If the arrest is simply in order to search, the search may be invalid. See Taglavore v. United States, 271 F.2d 262 (9th Cir. 1961).
meantime, the results will be the same. If there is probable cause the magistrate will issue the warrant, and if there isn't probable cause, the search would have been invalid anyway.

_R:_ There are two rather important differences. First, to secure a search warrant, the officers have to state exactly what it is they are looking for and where they expect to find it. One of the attractive qualities of the search incident to arrest, at least for the police, is its exploratory feature. After all, we are not going to require that the officer have "probable cause" to believe that an arrested felon is armed before he searches him. The possibility that he might be is enough when weighed against the potential danger to the officer's life. If the search turns up some unexpected matter, the search was still a valid one. One suspects that a good many arrests are made at a place where the officers want to search, but do not have enough information to secure a search warrant. To limit very closely the searches incident to arrest would reduce searches as a practical matter.

The second difference is peculiar to Missouri law. Our laws limit the items for which a search warrant may be issued. The most glaring and indefensible limitation is that there is no provision whereby a warrant can be issued to seize weapons that were used in the commission of a crime. But such weapons can be seized if they are found during a search without a warrant incident to arrest. The limitations upon search warrants in Missouri may be a factor that has led to the court's liberal definitions of the area that may be searched in conjunction with an arrest. It would be better to revise our search warrant laws to make them more useful and realistic.

_E:_ Most searches are incident to an arrest and most arrests are without warrants. Are Missouri's standards for arrest without a warrant consistent with the constitutional requirements?

_R:_ The difficulties of answering that question can be seen in _State v. Berstein_, a recent Missouri decision. The defendant objected to the admission into evidence of a piece of paper taken from his wallet after his

39. See Scurlock, _Searches and Seizures in Missouri, supranote 18, at 247-51. For the items for which a warrant may issue see Mo. R. Crim. P. 33.01, § 542.280, RSMo 1959. See also §§ 195.135-140 (narcotic drugs), § 542.440 (forged and counterfeited instruments and molds for production thereof), § 417.330 (dairy product receptacles used in violation of trademark laws), § 420.280 (lost or salvaged property), § 252.100 (illegally possessed game and wildlife), § 311.810 (apparatus and materials used in the unlawful manufacture of liquor). I am indebted to Professor Simeone of St. Louis University Law School for this list.

40. 372 S.W.2d 57 (Mo. 1963).
Although the conviction was reversed on other grounds, the court ruled that the arrest and subsequent search were valid. The court begins by setting out an often repeated statement that:

a peace officer may arrest without a warrant anyone who he has reasonable grounds to believe has committed a felony.\(^4\)

The court then added another often repeated phrase:

The officer may arrest any person upon suspicion who is in fact guilty of recent felony, whether the officer be advised of such felony or not.\(^4\)

The first statement is nothing more than a recognition that there must be a basis for a valid arrest. The second attempts to set forth a rule which can be applied. The difficulty is that the rule set forth, if it means what it appears to, is clearly unconstitutional. An arrest cannot be justified (so as to make a resulting search lawful) on the basis of facts not known by the arresting officer. For example, suppose an officer, without sufficient information, arrests a person. In the search that follows, the officer finds the person is carrying a concealed weapon, and so is guilty of a recent felony. To conclude that the arrest is lawful and therefore the search is lawful and the evidence (the gun) can be introduced\(^4\)

\(^{41}\) After his arrest, defendant was taken to police headquarters and "booked." His billfold was taken from him, and a card found in his billfold was photographed. It was the photograph of the card that was admitted into evidence, and supposedly was a listing of amounts which defendant paid for stolen property. In passing on the legality of the search the court does not mention the fact that it occurred as a part of the "booking" rather than the arrest and occurred some time after the arrest. Nor does the opinion mention the possibility that the item taken from the defendant was not subject to seizure as it might be considered purely "evidentiary." See Gouled v. United States, 255 U.S. 298 (1921), United States v. Lefkowitz, 285 U.S. 452 (1932). See also Note, Limitations on Seizure of "Evidentiary" Objects: A Rule in Search of a Reason, 20 U. CHI. L. REV. 319 (1953).

\(^{42}\) One of the state's witnesses was being held in jail and the prosecuting attorney had ordered the police not to permit the defense counsel to interview the witness. This was held to be reversible error. Cf. State v. Solven, 371 S.W.2d 328 (Mo. 1963), as to the admissibility of evidence that prosecuting attorney told witness not to talk to defense counsel.

\(^{43}\) State v. Berstein, supra note 40, at 59. See also cases cited, Scurlock, Arrest in Missouri, supra note 18, at 164.

\(^{44}\) State v. Berstein, supra note 40, at 59.

\(^{45}\) See State v. Cuezze, 249 S.W.2d 373 (Mo. 1952) where such a search was held invalid. The court, however, made no mention of the rule. Professor Scurlock believes the case indicates that the rule requires some grounds for the officers' action in arresting, but does not require probable cause. He points out, however, "the true explanation of Cuezze may be simply that the court's attention
is blatant bootstrappery.\textsuperscript{46} Probable cause must be based upon what the officer knows at the time of the arrest. It cannot be found from what the search turns up, nor from a subsequent finding of guilt. As the United States Supreme Court has put it, the validity of an arrest without a warrant depends on:

whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment, the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.\textsuperscript{47}

\begin{quote}
\textit{E:} But the Missouri rule doesn’t say any arrest is valid merely because the person arrested is guilty of recent felony, it says that the officer may arrest upon suspicion such a person. Doesn’t this mean there must be some information known to the officer before he can make the arrest?

\textit{R:} If “upon suspicion” means that the officer has enough information to meet the requirement of “probable cause,” then the arrest will be valid whether or not the person arrested is “in fact guilty of a recent felony.” The guilt of recent felony is not needed to justify the arrest.

If “upon suspicion” means that the officer has some information but not enough for “probable cause,” then the arrest will be invalid whether or not the person arrested is “in fact guilty of a recent felony,” for the validity of an arrest without a warrant depends upon the existence of probable cause, and this in turn depends upon what the officer knows or has been informed of. To consider whether the person arrested was “in fact guilty of a recent felony” in ruling on the validity of an arrest is either pointless or is applying an unconstitutional standard. In either case, the statement should never appear in a judicial opinion. Its use is probably due to the legal habit of repeating nice sounding phrases from earlier opinions. Upon analysis, the phrase turns out to be ritual, not reason.\textsuperscript{48}
\end{quote}

\textsuperscript{46} Cf. People v. Brown, 45 Cal. 2d 640, 290 P. 2d 528 (1955).
\textsuperscript{48} See Scurlock, \textit{Arrest in Missouri}, supra note 18, at 182-85. The cases cited in support of this doctrine are not impressive. State v. Whitley, 183 S.W. 317 (Mo. 1916), the earliest case, and State v. Nolan, 354 Mo. 980, 192 S.W.2d 1016 (1946), both involved prosecutions for homicides when the defendants being arrested slew the arresting officer. In both cases, the defendants claimed the defense of resisting an illegal arrest. In addition to other grounds for denying this defense the court
But back to the Berstein case. The court then goes on to quote from an earlier decision:

“What constitutes 'a reasonable and probable ground of suspicion is incapable of exact definition, beyond saying that the officer must not act arbitrarily, but must exercise his discretion in a legal manner, using all reasonable means to prevent mistakes. In other words, he must be actuated by such motives as would influence a reasonable man acting in good faith.'”

Or, in other words, reasonable means reasonable.

The court then proceeds to the case at hand. “Being guided by the cited rule” the court finds the arrest valid. The officers knew that a burglary had occurred at the Langbein home and knew what items had been stolen. In addition:

pointed out that since the defendants were in fact guilty of a recent felony, there was no right to resist the arrest. “The fact of guilt of the recent felony should be held to deprive the defendant of his right to resist.” State v. Whitley, supra at 320. Calling the arrest “lawful” for this purpose does not necessarily make it reasonable so as to justify a search. State v. Williams, 328 Mo. 627, 14 S.W.2d 434 (1929) did involve a search incident to arrest, but the court, in addition to citing the rule, found that there was probable cause. The court cited civil cases holding that conviction of the crime for which a person was arrested is “prima-facie evidence of probable cause” and that in an action for malicious prosecution, proof of guilt is a complete defense “and it matters not whether there was previous probable cause for believing the accused guilty.” 328 Mo. at 630, 14 S.W.2d at 435. The court then concluded, although it was not necessary to the decision, that an officer “is always justified in arresting without a warrant if an offense in fact has been committed, whether he had reason to believe it or not.” 328 Mo. at 631, 14 S.W.2d at 436. See also State v. Raines, 339 Mo. 884, 98 S.W.2d 580 (1936), State v. Brown, 291 S.W.2d 615 (Mo. 1956), and State v. Brookshire, 353 S.W.2d 681, 685 (1962) do not even cite the proposition and in both the court finds probable cause for the arrest. State v. Brown does distinguish State v. Cuezze, supra note 45, and State v. Brookshire is the one case cited which was decided after Mapp v. Ohio. State v. Edwards, 317 S.W.2d 441 (Mo. En Banc 1958) also does not cite the rule and the court there found probable cause. In addition, the search upheld in Edwards (the case was reversed on other grounds) is clearly invalid under State v. Edmondson, supra note 27. State v. Cantrell, 310 S.W.2d 866 (Mo. 1958) is the best authority for the proposition, for, while the court there found probable cause, they did rely on the fact that the defendant had recently committed an offense. The case, however, contains no analysis but merely cites some of the earlier decisions discussed above.

49. State v. Berstein, supra note 40, at 59. The quotation is from State v. Cantrell, supra note 46, at 869, which opinion is, in turn, quoting from an earlier case, Russo v. Miller, 221 Mo. App. 292, 298, 3 S.W.2d 266, 269 (St. L. Ct. App. 1928). The original quotation continues:

and he must proceed upon the basis of a belief in the person's guilt, derived either from the facts or circumstances within the officer's own knowledge, or upon information imparted to him by credible and reliable third parties. (Emphasis added.)

It was common knowledge at the Police Headquarters that defendant was suspected of receiving stolen property; the officers had received an anonymous telephone call that caused them to proceed to defendant's premises (although it does not appear from this record as to what was discussed, objections being sustained as to this subject); upon arrival at defendant's premises, they saw him talking to Gilberti in whose possession the Langbeins' stolen paintings were found upon Gilberti's arrest. In addition, under the evidence presented the jury found defendant guilty of the felony as charged.

The last sentence indicates the court has applied an unconstitutional standard to this case.

E: But the court did state that there was probable cause for the arrest. If we ignore that last sentence, is the decision incorrect? Was the information known to the arresting officers sufficient?

R: If you were a magistrate following the Aguilar and Giordenello cases would you issue a warrant for arrest to police officers who told you that there was "common knowledge" that a certain person was suspected of dealing in stolen goods; and that after receiving an anonymous phone call, the police saw the person talking to a man who was later arrested and found in possession of stolen paintings? Do you think if the police had applied for an arrest warrant on this information that it could have been validly issued?

E: Is the standard of probable cause the same for issuing an arrest warrant as it is for an arrest without a warrant?

R: To quote the United States Supreme Court again:

Whether or not the requirements of reliability and particularity of the information on which an officer may act are more

51. A used car lot, id., at 58.
52. The police observed defendant talking to Gilberti. Gilberti then drove away and was followed by the police. The police then stopped Gilberti, arrested him, searched his car and in the trunk found the stolen paintings. If the arrest and search of Gilberti was unlawful, the pictures would still be admissible against the defendant under the view that even though it would be an unlawful search and seizure, none of defendant's personal or property rights were violated by the arrest of Gilberti and the search of Gilberti's car. See State v. Engberg, 377 S.W.2d 282 (Mo. 1964); cf. Jones v. United States, supra note 22.
54. "We cannot say that the officers acted unreasonably in arresting defendant or without probable cause." State v. Berstein, supra note 40, at 59.
55. There was ample time to secure a warrant. The officers waited one day after arresting Gilberti before arresting the defendant.
strigent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed.\footnote{56}

\textit{E}: Well then, if I were a magistrate I would want to know why the officers suspected the defendant of being a receiver, what the anonymous caller said and what the officers observed when they arrived at the defendant's used car lot; particularly whether what they saw corroborated what the anonymous caller had said.\footnote{57}

\textit{R}: And that is the point. The court in \textit{Berstein} finds probable cause because police officers, in good faith, thought they had grounds for arrest. Without knowing in more detail what facts were known to the officers, there can be no determination "by a neutral and detached" judge that the inferences that the officers drew were proper.\footnote{58} This determination must be made either by the magistrate who issues warrants, or the trial judge who passes on motions to suppress evidence. "Reasonable grounds" or "probable cause" are not words of precision. Abstractly they can be defined only in words equally vague. This is not to say they are without meaning, but the meaning is not precise, nor should it be.\footnote{59} They convey the idea of propriety. It would be impossible to make a specific listing of all the situations that could arise and to state which are reasonable grounds and which are not. The determination of when

\footnote{56. Wong Sun \textit{v.} United States, 371 U.S. 471, 479-80 (1963), quoted with approval in Beck \textit{v.} Ohio, \textit{supra} note 47, at 96. (Footnote omitted.)
58. For an opinion which does indicate what information was known to the arresting officers, see State \textit{v.} Tallie, 380 S.W.2d 425 (Mo. 1964). \textit{But see} State \textit{v.} Witt, 371 S.W.2d 215 (Mo. 1963).
59. \textit{Cf.} MELLINKOFF, \textit{THE LANGUAGE OF THE LAW}, 449-50 (1963), who quotes Marshall in McCulloch \textit{v.} Maryland, 17 U.S. (4 Wheat.) 316, 414 (1819): "Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. And goes on to say:
\begin{quote}
All language can be interpreted. All the language of the law is... But the flexible words make that task the easier, the connection with the past the more discernible... The flexibles are the words which make the small, slow changes possible, the gradual adjustment of principle to fact which is the heart of the common law... These are the words which absorb the shock of social change, leaving the law with a semblance of stability impressive to the beholder. And that is a valuable function, as long as the appearance is not mistaken for substance. As long as the distinctive services of the flexible words in the language of the law are not confused with the goals of precision, or intelligibility. (Footnotes omitted.)
it is proper to interfere with liberty is a judicial function under the Constitution. It cannot be delegated to the police.

E: Now, what about Escobedo? What effect will it have upon Missouri?

R: I don’t know. It is very difficult to evaluate the Escobedo case. It is easy to agree that the police acted improperly, in violation of the law of Illinois, and, according to the Supreme Court, in violation of the Sixth Amendment. The court did decide that incriminating statements obtained during an interrogation when the defendant has been deprived of the right to counsel are inadmissible. The problem is knowing when this has occurred. The majority opinion placed such emphasis upon the particular circumstances of the case that it is hard to glean the full significance. The majority accumulates seven factors to find the deprivation of counsel.

We hold, therefore, that where, as here, (1) the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, (2) the suspect has been taken into police custody, (3) the police carry out a process of interrogation [4] that lends itself to eliciting incriminating statements, (5) the suspect has requested [6] and been denied an opportunity to consult with his lawyer, and [7] the police have not effectively warned him of his absolute right to remain silent, the accused has been denied “the Assistance of Counsel” . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

E: Then could the police avoid the effect of this decision by removing one or more of these seven factors?

R: I am sure there will be efforts to do this, but I do not think

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61. See footnote 2; id. at 483. The Illinois police refused to allow Escobedo to talk with his attorney. Cf. Mo. R. Crim. P. 29.05:
   Every person arrested and held in custody by any peace officer in any jail, police station or any other place, upon or without a warrant or other process for the alleged commission of a criminal offense, or upon suspicion thereof, shall be permitted to consult with counsel or other persons in his behalf, and, for such purpose, to use a telephone if one be available.
Cf. § 544.170, RSMo 1959.
63. Neither the majority nor the minority question the proposition that if a denial of the right to counsel has occurred, then the remedy is the application of the exclusionary rule.
64. Supra note 60, at 490-91.
65. See Medford v. State, 235 Md. 497, 201 A.2d 824 (1964) which distinguishes Escobedo.
that a mechanical effort to subtract one of the factors will succeed. If the dissenters are correct, then the application of the case will be quite extensive.

At the very least the Court holds that once the accused becomes a suspect, and, presumably, is arrested, any admission made to the police thereafter is inadmissible unless the accused has waived his right to counsel.66

At the least, the police should advise the person in custody of his right and opportunity to get counsel and his right to remain silent.66a In any event, the decision does indicate that the right to counsel begins at a very early point.67 When you add to the Escobedo case the ideas that indigents are entitled to have counsel appointed in serious cases68 and that in the criminal process, the state cannot discriminate between those with money and those without it,69 then it is at least arguable that the state is required to furnish counsel to indigents upon arrest, and to refrain from interrogation until counsel has been provided.

E: Is that going to be the result of Escobedo?

R: One of the advantages of writing law review articles over writing judicial opinions is that you do not have to come to a definite conclusion. There will be enough speculation about Escobedo without my going into it now.70

E: Does that conclude your review?

R: There are two more recent cases that will have an effect upon Missouri law. The first is Jackson v. Denno.71 Unlike Escobedo, the effects of Jackson v. Denno are clear. Missouri's present procedure for determining the voluntariness of a confession is unconstitutional.

66. Supra note 60, at 495 (dissenting opinion of Justice White).

66a. Missouri has ruled that such a failure to warn does not of itself make a statement obtained afterwards inadmissible, although such will be relevant on the issue of whether the statement was involuntary. Cf. State v. McCullom, 377 S.W. 2d 379, 384-85 (Mo. 1964). See also cases cited, Howard, Admissibility of Confessions of Guilt in Missouri, 23 Mo. L. Rev. 331, 333 (1958). But see State v. Purdin, 377 S.W.2d 335, 339 (Mo. 1964) which notes that an oral confession was excluded by the trial court because it was made "prior to the defendant having been advised of his constitutional rights and on various other grounds."

67. It is clear that counsel ought to be appointed for indigents at the first appearance before a judicial officer, even though there is no specific provision for doing so in Missouri. See note 9 supra.

68. Gideon v. Wainwright, supra note 3.


70. The case has been and will be noted in many law reviews. For an article which is critical of Escobedo, see Enker & Elsen, Counsel for the Suspect: Masiah v. United States and Escobedo v. Illinois, 49 MINN. L. REV. 47 (1964).

E: Don't you want to hedge a little—like, "it seems, or it appears, or it is arguable that it is unconstitutional"? You are certain?

R: Jackson v. Denno dealt with the New York procedure. If an objection were raised as to the voluntariness of a confession the judge would make a preliminary determination, but could exclude it only "if in no circumstances could the confession be deemed voluntary." If the evidence were that it could be voluntary, then the judge was required to submit the question of voluntariness to the jury, with appropriate instructions that they could not consider it unless they found it to be voluntary. The United States Supreme Court found this procedure wanting. Not only does due process require that a conviction not be based upon an involuntary confession,

Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession.

There must be a determination by the judge as to whether or not the confession is voluntary, and this must include the "resolution of disputed facts upon which the voluntariness issue may depend." In short, the judge must decide, and his decision, of course, can be reviewed. This was one of the deficiencies of letting the jury decide; one could not tell from a general verdict of guilty whether the jury had found the confession voluntary and used it to convict, found it involuntary and disregarded it, or found it involuntary and used it anyway.

E: And Missouri?

R: Missouri follows the New York rule, and is going to have to change.

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72. Id. at 377.
73. The trial court's instructions are set out in footnote 5 to the court's opinion, id. at 376.
74. Id. at 376-77.
75. For a discussion of this problem and Stein v. New York, 346 U.S. 156 (1953), which is overruled by Jackson v. Denno, see Miller, The Supreme Court's Review of Hypothetical Alternatives in a State Confession Case, 5 Syracuse L. Rev. 53 (1953).
76. State v. Goacher, 376 S.W.2d 97, 103 (Mo. 1964): We need spend little time on the point that the confession was inadmissible. Our recital of the facts shows that the evidence, both on the preliminary examination and before the jury, established prima facie that the confessions . . . were voluntarily made. If the evidence concerning the
E: And the other case?

R: That is Malloy v. Hogan. The United States Supreme Court ruled that protection against self-incrimination is now a part of due process.

The Fourteenth Amendment secures against state invasion the same privilege the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, . . . for such silence.

The standard to be applied for the protection against self-incrimination is a federal standard, as it is for protection against unreasonable searches and seizures, and for denials of the right to counsel.

E: Just a minute now. Granted that Malloy v. Hogan is a very important case; we were discussing the effect of United States Supreme Court decisions on Missouri law. How can Malloy v. Hogan affect Missouri? Missouri already has the privilege against self-incrimination in her constitution. Missouri follows the practice of the federal courts in not allowing the state to comment upon the failure of the defendant to take the stand in a criminal case. Since Missouri has the privilege and does not allow comment, I just don't see how Malloy v. Hogan is going to affect Missouri law.

voluntary nature of a confession is conflicting, the question is for the jury. (Citing prior cases.) See also, State v. McCollum, supra note 66a, and State v. Joyner, 382 S.W.2d 683, 687 (Mo. En Banc 1964):

The rule in Missouri, while recognizing that the state has the burden to prove the voluntariness of a confession which is made to police officers while a defendant is in custody, is that if there is substantial evidence tending to prove that a confession is voluntary the issue of voluntariness is for the jury.

77. The court in Jackson v. Denno, supra note 71, discusses two other procedures used in determining the admissibility of a confession, and indicates both meet the constitutional standards. The "orthodox" rule has the judge pass on the issue of voluntariness and the jury does not consider it at all. Under the "Massachusetts" rule, the judge makes a determination of voluntariness (as opposed to deciding that there is substantial evidence of voluntariness); if he finds the confession voluntary he admits it, but gives the jury an opportunity to disagree with him and find it involuntary. In both the "orthodox" and "Massachusetts" rules there is a ruling by the trial judge that the confession is either voluntary or involuntary.


79. Id. at 8.


81. § 546.270, RSMo 1959: "Our established practice is rigidly to refrain throughout the trial from any reference to the defendant's failure to take the witness stand." State v. Denison, 352 Mo. 572, 581, 178 S.W.2d 449, 455 (1944).
R: If I remember correctly, you said the same thing about *Mapp v. Ohio*. There is a great deal more to the privilege against self-incrimination than not allowing comment upon the silent defendant. Connecticut also recognizes the privilege against self-incrimination, but it was Connecticut's failure to apply the federal constitutional standards that led to the reversal in *Malloy v. Hogan*. The constitutional standards are not completely clear. So long as self-incrimination was not considered as being within due process, the Supreme Court of the United States did not delineate which of its rules regarding self-incrimination were requirements of the Fifth Amendment and which were merely an exercise of the Court's supervisory powers over the federal courts. The important thing to remember is that the right to counsel, the protection against unreasonable searches and seizures, and now the privilege against self-incrimination must meet the federal standards as these are all federally protected rights.

82. See Note, 43 *Texas L. Rev.* 239 (1964).