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The liberal protection of personal privacy under the Fourth Amendment again appears to have the support of a majority of the members of the United States Supreme Court. After a narrow construction of the Amendment under the *Vinson* Court,[1] the *Warren* Court has now handed down three search and seizure cases that are more in conformity to the liberal construction of the Amendment which the Court has traditionally asserted since the days of the classic *Boyd* case.[2] Of the three recent cases, *Giordenello v. United States*[3] concerns one of the most basic elements of the Fourth Amendment, and that is the element of probable cause in arrest, search, and seizure. The Fourth Amendment reads:

> 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, particularly describing the place to be searched, and the persons or things to be seized.

In the *Giordenello* case an agent of the Federal Bureau of Investigation obtained an arrest warrant for Giordenello. The warrant was based on the sworn complaint of the agent, which read, in part, as follows:

> The undersigned complainant being duly sworn states: That on or about January 26, 1956, at Houston, Texas, . . . Giordenello did receive, conceal, etc. narcotic drugs, to wit: heroin hydrochloride with knowledge of unlawful importation. . . .

On January 27 the agent arrested the petitioner as he emerged from a residence. At the time of arrest the agent made an incidental search of Giordenello which resulted in the seizure of a brown paper bag containing heroin. The petitioner challenged the sufficiency of the warrant, asserting that its issuance lacked the requirement of probable cause. If the petitioner was correct in his assertion, then under the federal exclusionary rule with respect to illegally seized evidence the heroin should not have been used as evidence and a reversal of the conviction was mandatory.[4] The Supreme Court agreed with the petitioner that the warrant lacked a sufficient basis upon which a finding of probable cause could be made and reversed the conviction. Mr. Justice Harlan, speaking for the six man majority of the court, said:

> The purpose of the complaint . . . is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists. 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. When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed. The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made. We think these deficiencies could not be cured by the Commissioner's reliance upon a presumption that the

[1] See United States v. Harris, 331 U. S. 145 (1947); United States v. Rabinowitz, 339 U. S. 56 (1950).

[2] Boyd v. United States, 116 U. S. 616 (1887); the three recent cases are: Jones v. United States, 78 S. Ct. 1253, 1958, no degree of probable cause will allow search of a home without a warrant; Miller v. United States, 78 S. Ct. 1190 (1958), the use of force in arrest, search or seizure is valid only when officer meets with resistance after informing the occupant of his authority and purpose.

[3] 78 S. Ct. 1245 (1958).

[4] See Rules 3-4, FEDERAL RULES OF CRIMINAL PROCEDURE, 18 USCA, for the statement on probable cause for the issuance of an arrest warrant, also Rule 41 for warrants for search and seizure, 18 USCA 461. As regards the exclusionary rule generally, see Weeks v. United States, 232 U. S. 383 (1914).

complaint was made on the personal knowledge of the complaining officer.[5]

Mr. Justice Clark, with Justices Burton and Whittaker concurring, dissented from the majority opinion. Mr. Justice Clark maintained that if the agent swore to the statement he made before the commissioner, then the statement constituted sufficient grounds for probable cause. This assertion by the dissent is indeed strange as it would amount to allowing magistrates to issue "information and belief warrants", a type of warrant that American courts have long held to be in violation of the Fourth Amendment's requirement that no warrant shall issue except upon probable cause supported by oath or affirmation.[6]

Requirements of Probable Cause: General Meaning

The *Giordenello* decision was not precise as to the meaning of probable cause; however, many previous decisions of the Court do spell out with some exactness the meaning of this phrase. One of the earliest pronouncements of the federal judiciary on this point was in a case which arose out of the Aaron Burr fiasco. In the treason case of *United States v. Bollman*,[7] the circuit court stated that probable cause means, "... a probability that the crime has been committed by that person. Of this probability the court or magistrate issuing the warrant must be satisfied by facts supported by oath or affirmation. The facts ... must induce a reasonable probability that all the acts have been done which constitute the offense charged".[8]

The normal procedure for the issuance of the warrant is for the law enforcement officer to appear before a judge or commissioner and file a complaint of violation of the law and request a warrant, just as was done in the *Giordenello* case.[9] Upon the presentation of sworn affidavits the judicial officer is to determine whether grounds for issuance of the warrant exists, that is, whether there is probable cause to support the warrant.[10]

Probable Cause and Third Party Affidavits

In carrying out the above judicial function it would seem desirable that the judge have before him the oath of the original accuser, either by personal examination or in the form of a sworn affidavit.[11] Personal examination is frequently not practical, and the courts have gone a long way towards assisting executive officers in the prosecution of violations of the law by allowing probable cause to be established on a broader basis, that is, by the use of third party affidavits.[12] If the courts allowed the executive officer merely to swear to an affidavit whose contents were based on the unsworn information of third parties, then this would amount to allowing an information and belief warrant. The facts which must be sworn to are those within the knowledge of the parties making them.[13] Thus, except for certain well-defined exceptions[14] the Fourth Amendment requires a sworn statement of facts within the personal knowledge of the party making the allegation of probable cause of a crime.

Facts and Circumstances: Prudent Man Theory

The federal courts have accepted what might be called the "prudent man theory" as a basis for determining the existence of probable cause. Under this theory the courts have held that if the facts and circumstances before the judge are such as to warrant a man of prudence and caution in believing that the alleged offense has been committed, then there is sufficient cause for the issuance of a warrant.[15] However, in the early development of the federal law of search and seizure little distinction was made between the terms "probable cause to believe" and "probable cause to suspect"; in fact they were used interchangeably.[16] Chief

[5] 78 S. Ct. 1245; 1250 (1958).

[6] See *infra* p. 614.

[7] 24 Fed. Case 1189, No. 14,622 (1807).

[8] *Ibid*, p. 1192; see also, Ex parte Burford, 3 Cranch 448 (1806).

[9] Warrants issue also upon indictments, see Albrecht v. United States, 273 U.S. 1 (1927).

[10] See, Rule 41, Federal Rules of Criminal Procedure, section c, 18 USCA 461.

[11] In re Rule of Court, 20 Fed. Case 1337, No. 12,126 (1877).

[12] Schencks v. United States, 2 F. 2d 185 (1924).

[13] United States v. Michalski, 265 Fed. 841 (1919).

[14] The names of confidential sources of executive information are generally exempt in the requirement of a sworn affidavit, Segurola v. United States, 275 U.S. 106, 113 (1927); Scher v. United States, 305 U.S. 251 (1938); however if the name of the informant is essential to the defense's case, then the executive must be prepared to produce it, United States v. Keown, 19 F. Supp. 639 (1937) and Cannon v. United States, 158 F. 2d 952 (1946), United States v. One 1941 Oldsmobile Sedan, 158 F. 2d 818 (1947); *contra*: United States v. Li Fat Tong, 152 F. 2d 650 (1945). See also, "Refusal to Name Informant as Contempt of Court," 46 Harv. L. Rev. 343 (1932); "Privilege to Conceal Informer's Identity," 32 Col. L. Rev. 1245 (1932) and McCormick, Evidence (1954), ch. 14, §148, f.n. 11.

[15] Stacey v. Emery, 97 U.S. 642, 645 (1878).

[16] A similar lack of distinction between the two terms can be seen in the early English law on this subject. See, 13 and 14 Char. II, ch. 33, sec. 15, Licensing Act of 1662.

Justice Marshall, sitting as a committing magistrate in the *Aaron Burr* case defined probable cause in the following manner: "I understand probable cause to be a cause made out by proof, furnishing good reason to believe that the crime alleged has been committed by the person charged with having committed it."[17] Yet Mr. Justice Washington, sitting as a circuit judge in *Munns v. Dupont de Nemours*,[18] defined probable cause as "... a reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged."[19] This definition, which is something of a hybrid between suspicion and belief, was picked up by several later cases.[20] In fact, in *Stacy v. Emery*[21] the Supreme Court first stated a definition of probable cause which centered around the word belief and then went on to quote the *Munns* case on suspicion as in conformity with its own definition. In *most* of the areas of the law of search and seizure, the courts have come to use the standard of "probable cause to believe" and if suspicion is allowed as a standard it is limited to a "well-grounded suspicion".[22]

There is probably some justification for assuming that any prolonged discussion of the distinctions which may be implied from the words "suspicion" and "belief" would only result in an imaginary duel of legal semanticists. Yet it should be recognized that the law does attempt "... to draw some distinction between a low grade of knowledge and a high grade of belief; somewhere mixed up in that content of mental operation is what is called 'suspicion'."[23]

Turning now to a more concrete topic, what facts are sufficient to sustain a finding of probable cause? First, the facts are those which must be placed before the courts in a sworn statement, and if the affidavit is based on a fiction, then the accuser lays himself open to a charge of perjury.[24] Secondly, the facts necessary are those which will conform to the general definition of probable cause arrived at in the above discussion, that is, facts which, when the law "... is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right."[25] This does not mean that the facts necessary are those which would be required for a conviction, but it does mean that the evidence presented to sustain the issuance of the warrant "... would be competent in the trial of the offense before a jury and would lead a man of prudence and caution to believe that the offense has been committed."[26]

Dumbra v. United States[27] can be taken as an example of the application of the "prudent man theory." Here the plaintiff held a permit under the National Prohibition Act to manufacture and sell wines on his premises for non-beverage purposes. On two occasions an agent of the Prohibition Bureau had negotiated the purchase of wine from the members of the Dumbra family in their grocery store which adjoined the registered winery. On neither occasion did they inquire of the agent whether he was authorized under the law to purchase wine for sacramental-religious purposes. The agent applied for a search warrant and set forth in his sworn statement the facts of his past negotiations with the members of the Dumbra family. Mr. Justice Stone, in his opinion for the majority, held that:

> the apparent readiness of members of the family of a person in control of the suspected premises to sell intoxicating liquors to casual purchasers without inquiry as to their right to purchase and the actual production of the liquor sold, in one instance from the premises suspected and in the other from the vicinity of those premises, ... give rise to a reasonable belief that the liquors on the suspected premises were possessed for the purpose and with the intent of selling them unlawfully to casual purchasers.[28]

These facts were sufficient to find the necessary probable cause and in fact and "absence of a well-grounded belief that such was the fact could be ascribed only to a lack of intelligence or a singular lack of practical experience on the part of the officer."[29]

Information and Belief Warrants

In the *Dumbra* case it will be noted that the agent had to give his oath upon the basis of facts

[17] 1 Burr's Trial 11 (1807).
[18] 17 Fed. Case 993, No. 9,926 (1811).
[19] *Ibid.*, p. 999.
[20] Sanders v. Palmer, 55 Fed. 217, 220 (1893); United States v. The Recorder, 27 Fed. Case 723, No. 16 (1830); Wilmarth v. Mountford, 30 Fed. Case 70, No. 17,774 (1821).
[21] 97 U.S. 642, 645 (1878).
[22] See Wilmarth v. Mountford, 30 Fed. Case 70, No. 17,774 (1821).
[23] 1 Alexander, Law of Arrest in Criminal and Other Proceedings (1949) 451.
[24] Veeder v. United States, 252 Fed. 414, 418, (1918).
[25] *Loc. cit.*
[26] Grau v. United States, 287 U. S. 124, 128, (1932); see also, Giles v. United States, 284 Fed. 208, (1926).
[27] 268 U. S. 435 (1925).
[28] *Ibid.*, p. 441.
[29] *Loc. cit.*

either within his personal knowledge or from his experience. The courts have held that mere suspicion or unsupported belief is not sufficient to call into operation such a drastic measure as the issuance of a search or arrest warrant. This was what the Supreme Court was directing its attention to in the *Giordenello* case, as the warrant had been issued only upon the belief of the agent, unsupported by the facts to support his allegation of the crime. The so-called "information and belief" warrant has continually been held to be void under the Fourth Amendment for it smacks of the infamous general warrants, that is, the writs of assistance, which the framers of the Fourth Amendment wished to outlaw.[30] The obvious intention of the Fourth Amendment is to protect the individual from unwarranted invasions of his privacy and an invasion of this privacy, to be warranted, must be based on more than the mere suspicion of a police officer.[31]

Personal Knowledge and the Hearsay Rule

One aspect of the recent *Giordenello* case which merits some examination is the relationship between the requirement of personal knowledge to that of the so-called "hearsay rule." While the Court specifically stated that it was not deciding the issue of the sufficiency of warrants based *entirely* on hearsay information, yet the reasoning of the Court came close to the hearsay rule.[32]

One of the allegations of the petitioner was that the warrant was insufficient because it was based on hearsay information rather than personal knowledge. But the Court stated that it would not decide the hearsay issue "... for in any event we find the complaint defective in not providing a sufficient basis upon which a finding of probable cause could be made."[33] The Court noted that while the warrant did not give the sources of the affiant's information, yet it was apparent from his subsequent testimony that he had received his information entirely from statements made to him by his fellow officers. The court continued,

> The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made. We think these deficiencies could not be cured by the Commissioner's reliance upon a presumption that the complaint was on the personal knowledge of the complaining officer.[34]

In the strict sense of the rules of evidence this is an objection based on lack of first-hand or personal knowledge rather than an objection based on the hearsay rule.[35] The affiant stated that Giordenello received and concealed narcotic drugs in violation of the law, yet, "... what the witness represents as his knowledge must be an impression derived from the *exercise of his own senses*, not from the reports of others; in other words, it must be founded on personal observation."[36] The agent did not place before the Commissioner in support of his allegation in any form, sworn or unsworn, the prior declarations of his fellow officers. If he had attempted to prove the truth of his allegation by the mere repetition of what he had heard others say, then the question of hearsay could have been validly raised.[37] Yet the *Giordenello* decision, while it disposed of the case on the basis of a lack of probable cause based on the personal knowledge of the affiant, it did not indicate whether this personal knowledge could in any degree be combined with some hearsay information. But while the Court might allow some hearsay information to come before the commissioner or magistrate in support of a warrant, the implication of the instant decision is that there still must be present sufficient personal knowledge to support probable cause independently of any hearsay information.

Certainly the requirement of personal knowledge by affiant of the facts constituting the alleged crime is not new with the *Giordenello* case. In 1877, Justice Bradley, sitting as a circuit judge, stated that a warrant could not issue upon mere suspicion or belief, but only upon probable cause supported

[30] See Lasson, History and Development of the Fourth Amendment (1937) ch. 2.

[31] Nathanson v. United States, 290 U. S. 41, 47, 1933; Go-Bart Importing Company, 282 U. S. 344, 355, 1931; Medina v. United States, 158 F.2d 955, 1946.

[32] Previous lower federal court decisions have held hearsay information insufficient to support, arrest or search, *e.g.* Contee v. United States, 215 F.2d 324, 327 (1954); Rose v. United States, 45 F.2d 459, 464 (1930), and see United States v. Bianco, 189 F. 2d 716, 720 (1951); contra, United States v. Li Fat Tong, 152 F. 2d, 650 (1945); United States v. Heitner, 149 F.2d 105 (1945); King v. United States, 1 F.2d 931 (1924).

[33] 78 S. Ct. 1245, 1249.

[34] *Ibid*, p. 1250.

[35] See Wigmore, Evidence (1940) §§650–657 and §1361; McCormick, Evidence (1954), §226.

[36] Wigmore, *op. cit.*, Sec. 657; see, Bushel's Case, 6 How. St. Tr. 999, 1003, (1696).

[37] See, Hopt v. Utah, 110 U. S. 574, 576, 1883; Queen v. Hepburn, 7 Cranch 295, 1813 and 1 Greenleaf Evidence, §99 for traditional statements on the essence of the hearsay rule.

by oath or affirmation of the affiant. Additionally, the court ruled that the affidavit must state the facts within the personal knowledge of the affiant, that is, the facts which constitute his grounds for belief. This qualification is incorporated into the Federal Rules of Criminal Procedure. Rule 41-c states in part that, "a warrant shall issue only on affidavit sworn to before a judge or commissioner and establishing the grounds for issuing the warrant. . . . It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof."[38]

In *United States v. Michalski*[39] the court ruled that the facts supporting the affidavit must be within the knowledge of the parties making them, that is, the statement of facts must not be the conclusion of an unsworn third party. Similarly, in *Worthington v. United States*[40] a court of appeals held that not only does the requirement of personal knowledge apply to the issuance of the formal process of a warrant, but it also applies to those instances where the warrant may be validly dispensed with. Additionally, the requirement of personal knowledge applies to the facts constituting the crime and not just to those circumstances which surround the alleged crime. Thus, in a recent district court case it was ruled that the search warrant was unreasonable because it was issued for the arrest of one alleged to have violated the federal gambling tax statute; yet the affidavit in support of the warrant merely established that the complainant believed that the accused was in fact engaged in gambling, not that he had failed to pay the federal tax. Gambling is not a federal crime but rather a state crime. To adequately support the warrant, it would be necessary to show not just that the accused was engaged in gambling activities but also that he had not registered and paid the federal tax as required by law.[41]

Not all of the lower courts have been in agreement on the issue of personal knowledge. In a district court decision in 1953 the court held that while the mere information of a third party, without an effort to check its accuracy, would be insufficient to issue a warrant, still it is not required ". . . that probable cause be established solely by facts within the personal knowledge of the arresting officers . . . . A combination of information and personal knowledge, however, may raise the inference beyond opinion, suspicion, and conjecture to reasonable probability."[42] In the same year a federal court of appeals decision stated that it was not in agreement with the previous *Worthington* decision to the extent that the latter held that personal knowledge of the affiant was a requirement of probable cause. On the contrary the court felt that an officer should be allowed to act on reliable information furnished to him by others, even if the information is not within the personal knowledge of the officer.[43] It is doubtful, however, if the court meant that a warrant could issue merely upon the conclusions of third parties unsupported by any affirmative statements. At least the weight of previous decisions would be against such an interpretation.[44]

In the above discussion of sufficiency of warrants and the problems of hearsay information and personal knowledge there is an obvious danger and that is that one might unwittingly assume that the strict rules of evidence should apply to the *ex parte* proceeding for the issuance of a warrant. Perhaps the Supreme Court was moving in that direction in the *Giordenello* case. Certainly such a position is implicit in the language of some lower federal court cases. In fact the Supreme Court stated in 1932 in *Grau v. United States*[45] that a "search warrant may issue only upon evidence which be competent in the trial of the offense before a jury. . . ."[46] However, in 1949 in a footnote to *Brinegar v. United States*[47] the majority stated that the *Grau* case proposition had ". . . . no authority in the decisions of this Court." Subsequent lower federal court decisions have generally followed the *Brinegar* rather than the *Grau* case, that is, that while some degree of personal knowledge

[38] FEDERAL RULES OF CRIMINAL PROCEDURE, 18 USCA 461; essentially the same requirements apply to arrest warrants, see Rules 3-4, Fed. Rules Criminal Procedure, 18 USCA, n. b. Appendix of Forms, form 15, 18 USCA 618, also, GUANDOLO AND KENNEDY, FEDERAL PROCEDURE FORMS (1949) §36, "Warrants," pp. 610-623.

[39] 265 Fed. 841 (1919).

[40] 166 F.2d 557, 564 (1948).

[41] United States v. Office No. 508, Ricou-Brewster Bldg., 119 F. Supp. 24 (1954); see also Clay v. United States 246 F.2d 298, 1957 where both conditions were supported by the affiant.

[42] United States v. Hill, 114 F. Supp. 441 (1953).

[43] Mueller v. Powell, 203 F.2d 797, 802 (1953).

[44] *E.g.* United States v. Horton, 86 F. Supp. 92 (1949); Brewer v. State, 255 P.2d 954 (Okla., 1950); Rohlfing v. State, Ind., 88 N. E. 2d 148 (1949); United States v. Kennedy, 5 F.R.D. 310, 312 (1946); United States v. Clark, 29 F Supp., 138, 139-140 (1939); United States v. Wisnilwski, 47 F.2d 826 (1931).

[45] 287 U. S. 124 (1932).

[46] Citing Giles v. United States, 284 Fed. 208 and Wagner v. United States, 8 F. 2d 581; accord: Worthington v. United States, 166 F. 2d 557, 564-565 (1948).

[47] 338 U. S. 160, 175, *n. b.* footnote 13 (1949).

of the facts constituting the alleged crime is required in the affidavits in support of the warrant, still the facts do not have to be facts which would be competent before a jury.[48]

At least the *Brinegar* decision has to its credit that it is more consistent with the nature of an *ex parte* proceeding than the *Grau* case. The primary reason why hearsay information is excluded during a trial is the lack of an opportunity for adversary cross-examination of the absent witness.[49] In the *ex parte* proceeding for the issuance of a search warrant there is, of course, no opportunity for adversary cross-examination and thus the primary factor for testing the reliability of evidence is absent.[50] Hence, in the absence of the principal means of eliminating unreliable evidence, hearsay becomes as valid a basis for probable cause as any other evidence. But if the *Grau* rule were carried to its logical conclusion, warrants could never be issued upon the sworn affidavits of third parties, since such affidavits would be inadmissible as evidence in a criminal trial against the accused.

There are several compelling reasons why the *Grau* rule should not be followed. First and foremost is the consideration that such a strict requirement would unnecessarily tie the hands of our law enforcement agencies in the adequate enforcement of criminal law. Secondly, as the *ex parte* proceeding is a preliminary one, the accused is in far less danger than he would be at a trial, and correspondingly, the rules of evidence should be less restrictive. Finally, there is ample opportunity for judicial review of probable cause under the *Weeks* rule of exclusion of evidence illegally obtained.[51]

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[48] *E.g.* Washington v. United States, 202 F. 2d 214 (1953), *cert. den.*, 345 U. S. 956, (1953); United States v. Bell, 126 F. Supp. 612 (1955); United States v. Reynolds, 111 F. Supp. 589 (1953); United States v. Daniels, 10 F.R.D. 225 (1950); see also, "Probable Cause Requirement for Search Warrants," 46 HAR. L. REV. 1307 (1933), and "Probable Cause... for Search Warrants," 13 ST. LOUIS L. REV. 101 (1927).

[49] See, Wigmore, Evidence (1940) §1361 and McCormick, Evidence (1954) §224.

[50] This was essentially the position taken by the Court with regard to evidence in support of indictments in United States v. Costello, 350 U. S. 359 (1955), where the Court held that an indictment was not open to challenge on the basis that only hearsay information was presented to the grand jury.

[51] Weeks v. United States, 232 U. S. 383 (1914).