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SUFFICIENCY OF WARRANTS UNDER THE FOURTH AMENDMENT

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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, 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. Of the three recent cases, Giordenello v. United States 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.

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

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.
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. 363 (1914).
PROCEDURE, section c, 18
v. United States, 273
448
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there is probable cause to support the
issuance of the warrant exists, that is, whether
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complaint of violation of the law and request a
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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 judi-
ciary 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
5 78 S. Ct. 1245; 1250 (1958).
6 See infra p. 614.
8 Ibid, p. 1192; see also, Ex parte Burlford, 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.

him the oath of the original accuser, either by per-
sonal examination or in the form of a sworn affidavit.11 Personal examination is frequently not practical, and the courts have gone a long way
in 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 ex-
ceptions14 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 de-
termining 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 be-
lieving 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 dis-
tinction was made between the terms “probable
cause to believe” and “probable cause to suspect”;
in fact they were used interchangeably.16 Chief

11 In re Rule of Court, 20 Fed. Case 1337, No. 12,126 (1877).
12 Schencks v. United States, 2 F. 2d 185 (1924).
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, fn. 11.
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, Li-
censing 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." Yet Mr. Justice Washington, sitting as a circuit judge in Munns v. Dupont de Nemours, 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." This definition, which is something of a hybrid between suspicion and belief, was picked up by several later cases. In fact, in Stacy v. Emery 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".

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'." 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 accused lays himself open to a charge of perjury. 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." 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."

Dumbra v. United States 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.

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."

**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...
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. 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.

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.

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." 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. 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. The affiant stated that Giordenello received and concealed narcotic drugs in violation of the law, "... 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. 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. 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.
32 Previous lower federal court decisions have held hearsay information insufficient to support, arrest or search, e.g. Conte 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. 716, 720 (1931); contra, United States v. Li Fat Tong, 152 F. 2d 630 (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.
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.”

In United States v. Michalski 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 unworn third party. Similarly, in Worthington v. United States 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 accused was 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 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.

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.” 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. 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.

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 that a “search warrant may issue only upon evidence which be competent in the trial of the offense before a jury.” However, in 1949 in a footnote to Brinegar v. United States 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, while some degree of personal knowledge

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20 265 Fed. 841 (1919).
21 166 F.2d 557, 560 (1948).
22 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.
26 237 U.S. 124 (1914).
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

50 This was essentially the position taken by the Court with regard to evidence in support of indictments 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 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