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EVALUATION OF AFFIDAVITS AND INSSUANCE OF SEARCH WARRANTS: A PRACTICAL GUIDE FOR FEDERAL MAGISTRATES

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INTRODUCTION

While the critical role played by magistrates in securing the liberties granted by the fourth amendment has long been recognized,[1] several recent decisions by the United States Supreme Court have reemphasized that wherever possible government searches and seizures must be conducted only after sanction by a neutral and detached magistrate. For example, in *United States v. United States District Court for the Eastern District of Michigan*,[2] which dealt with the constitutionality of warrantless wiretaps of alleged subversive activities, Mr. Justice Powell referred to Lord Mansfield's observations of some two centuries ago:

> It is not fit that the receiving or judging of information ought to be left to the discretion of the officer. The magistrate ought to judge, and should give certain directions to the officer.[3]

Mr. Justice Powell concluded:

> Lord Mansfield's formulation touches the very heart of the Fourth Amendment directive: that, where practical, a government search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation. Inherent in the concept of a warrant is its issuance by a 'neutral and detached magistrate'.[4]

On the same day that the decision in the wiretap case was announced, the Court also defined the concept of a neutral and detached magistrate in *Shadwick v. City of Tampa*:[5]

> . . . [A]n issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search.[6]

The opinion by Mr. Justice Powell further suggests at least one hallmark of the "neutral and detached" magistrate:

> Whatever else neutrality and detachment might entail, it is clear that it requires severence and disengagement from activities of law enforcement. There has been no showing whatever here of partiality, or affiliation of these clerks with prosecutors or police. The record shows no connection with any law enforcement activity or authority which would distort the independent judgment the Fourth Amendment requires.[7]

Thus, while magistrates must recognize and protect legitimate law enforcement objectives, they must also remain on guard against becoming a participant in the overzealous efforts of law enforcement officers. The purpose of this article is to focus on certain problems which face federal magistrates today, and to offer some suggestions to aid them in the proper exercise of their critical function.

GROUNDS FOR ISSUING A SEARCH WARRANT: THE BALANCING OF PROBABILITIES

Although the information submitted to a magistrate must set forth sufficient grounds for the issuance of a search warrant, factual statements in an affidavit need not establish proof beyond a reasonable doubt, nor even by a preponderance of the evidence. What is required is a balancing of

* United States Magistrate, United States District Court, Washington, D.C. B.A., Howard University; L.L.B., New York University School of Law, 1958.

[1] *See, e.g.*, Johnson v. United States, 333 U.S. 10, 13–14 (1948), where Mr. Justice Jackson noted:
> The point of the fourth amendment, which is not often grasped by zealous officers, is not that it denies law enforcement officers the support of the usual inferences which reasonable men draw from the evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

[2] 407 U.S. 297 (1972).

[3] *Id.* at 316, quoting Leach v. Three of the King's Messengers, 19 How. St. Tr. 1001, 1027 (1765).

[4] 407 U.S. at 316. *See also* Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971).

[5] 407 U.S. 345 (1972). The case upheld the constitutionality of municipal court clerks issuing arrest warrants for petty offenses under Tampa, Florida municipal ordinances.

[6] *Id.* at 350.

[7] *Id.* at 350–51.

the probabilities.[8] Employing a mathematical concept, the magistrate must be at least fifty-one percent satisfied after reading the affidavit and considering everyday factual experiences on which reasonable and prudent men act, that the factual assertions justify the conclusion that a search of the premises will uncover the items sought.[9]

For the purposes of balancing these probabilities, the United States Supreme Court has established certain rules which magistrates are required to follow when evaluating the information contained within an affidavit. If an affiant comes before a magistrate with information based on his own observations, the Court has clearly indicated that the affiant must support any suspicions and beliefs he might have with adequate supporting facts from which the magistrate can make an independent judgment about probable cause. In *Nathanson v. United States*[10] the Court enunciated the appropriate rule:

> Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefore from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough.[11]

If the affiant is seeking a search warrant on the basis of information provided by an informant, he must supply the magistrate with details sufficient to credit this hearsay testimony. In *Aguilar v. Texas*[12] the Supreme Court held that an affiant must inform the magistrate of (1) the underlying circumstances from which the informant concluded that illegal activities were occurring, (2) the circumstances which lead him to believe that his informant was reliable.[13]

Detail Required in an Affidavit: The First Prong of Aguilar

In evaluating an affidavit a magistrate must first determine how the affiant or his informant acquired his information. The matter is quite simple when the affiant asserts that he or his informant actually saw the criminal activity. Where personal observations of a crime occur, the first prong of *Aguilar* is met and the issue is reduced to whether the informant is credible.[14]

While probable cause can be established even though the informant did not observe the illegal activity, the information must be sufficiently detailed for the magistrate to draw an inference of personal knowledge; otherwise the informant's tip may be merely rumor or gossip.[15] If there is no

[8] United States v. Harris, 403 U.S. 573, 579n.1 (1971). At this point it should be noted that while Rule 41(b) of the Federal Rules provides that a warrant may be issued to search for and seize any property constituting evidence of a criminal offense in violation of the laws of the United States, one important limitation has been set forth in several recent cases. In VonderAhe v. Howland, 13 Crim. L.R. 2096 (May 2, 1973), the ninth circuit, relying on Boyd v. United States, 116 U.S. 616 (1886), held that the massive seizure by the Internal Revenue Service of business and personal records during the execution of a search warrant in connection with a tax investigation for their possible communicative and testimonial content violated the self-incrimination privilege of their possessors. *See also* Hill v. Philpott, 445 F.2d 144, 149 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971). *Contra*, United States v. Blank, 459 F.2d 383, 385 (6th Cir. 1972), *cert. denied*, 409 U.S. 887 (1972), where worksheets of a sport and horse-book betting business were held not subject to suppression on fifth amendment grounds, even though in the defendant's handwriting, since they were not personal communications but rather business acounts rendered extraordinary only by the fact that the business was itself illegal. It might be argued that *Blank* can be distinguished from *VonderAhe* in that the items seized in *Blank* could be considered seized for their corporeal value as physical items manifesting the criminal offense itself rather than for their communicative value and content with reference to past criminal conduct.

[9] *See* Brinegar v. United States, 338 U.S. 160, 175 (1949). *See also* United States v. Ventresca, 380 U.S. 102, 108 (1965), in which Mr. Justice Goldberg, after reviewing the Court's prior holdings under the fourth amendment, stated:

> These decisions reflect the recognition that the Fourth Amendment commands, like all constitutional requirements, are practical and not abstact. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

[10] 290 U.S. 41 (1938).

[11] *Id.* at 47.

[12] 378 U.S. 108 (1964).

[13] *Id.* at 113.

[14] *See, e.g.*, United States v. Harris, 403 U.S. 573, 579 (1971); United States v. Suarez, 380 F.2d 713 (2d Cir. 1967); Coyne v. Watson, 282 F. Supp. 235 (S.D. Ohio 1967).

[15] Spinelli v. United States, 393 U.S. 410, 417 (1969). A problem does arise when the informant is basing his assertions on hearsay information. Thus, where an affiant's source relates that friends and associates of principals involved in an interstate gambling operation have furnished him with information concerning the principal's operation, it has been held that this fails to meet the *Aguilar* requirements, since the real issue is the credibility of the so-called friends and associates,

indication in the affidavit as to how the informant received his information, a search warrant should not be issued, unless other facts within the affidavit support a finding of probable cause.

Should the affidavit state that the informant has "personal knowledge" of criminal activities, the magistrate should require the affiant to indicate clearly how the informant obtained his first-hand information. In *United States v. Lynwood Long*[16] the Court of Appeals for the District of Columbia held a search warrant invalid in an interstate gambling case because the affiants merely stated that the informants had "personal knowledge" of gambling activities. The court concluded that even though the tip was based on what the affidavit called personal knowledge:

> [T]his is only a conclusion, however, and standing alone, it does not cure the lack of specificity inherent in the affidavit. There is no indication of the source of the informant's 'personal knowledge', nor are their tips sufficiently detailed to allow a magistrate to infer that the informant had gained information in a reliable way.[17]

A somewhat related problem arises when an affiant makes a statement in the form of a factual assertion, which is in effect a conclusion of the affiant. For example, in *Berger v. Commonwealth*[18] law enforcement officials sought a search warrant based on an affidavit which alleged that after observing a rural farm house for over two months they "further observed persons in the tent smoking a substance which required use of a great number of matches to remain lighted and the substance being smoke appeared to be used in such a manner as that of Cannabis Sativa L. . . . "[19] The Virginia supreme court held that this statement lacked those details which would enable the magistrate to determine for himself what was actually being smoked. The court concluded: "The number of matches used is insignificant without the detection of an odor or description of some observed method of use peculiar to the smoking of marijuana."[20]

Although an affiant does not have to name his informant in the affidavit,[21] in some cases an affiant may be reluctant to provide any information which might reveal the identity of his informant, and possibly endanger his life. As described by one court:

> . . . [O]fficer-affiants should be encouraged to furnish to the magistrate as specific 'underlying circumstances' as possible. . . . We realize the reluctancy of officer-affiants from being more specific than absolutely necessary for fear of giving away the identity of the informer which for one reason or another they may feel the need to protect. Unless there is a real necessity for doing so they may well compound the problems of the probable cause assessing magistrate, the trial court and this court.[22]

Since the Federal Rules of Criminal Procedure do not specifically require that affidavits be attached to federal search warrants, nor that the

and the circumstances under which they obtained their information. *See* United States v. DeCesaro, 349 F. Supp. 549, 550 (E.D. Wis. 1972). Indeed, there has been some questioning of the use of double hearsay even when the affiant's source is another law enforcement agent. Taking the position that double hearsay is not to be encouraged, the second circuit recently commented:

> Where an informant speaks to an agent, it is that agent who should normally relay that information to the magistrate evaluating the search warrant application. Informants' tips relayed through two agents and then to the magistrate, however accurately reported, unnecessarily reduce the magistrates ability to make an independent determination of the information's reliability.

United States v. Fiorella, 468 F.2d 688, 692 (2d Cir. 1972). However, when the information originates from named citizens who are eyewitnesses or have other direct knowledge, such as statements or admissions by a suspect, and the affiant relates the collective information received through other law enforcement agents' interviews with these witnesses, it has been held that the double hearsay does not preclude a finding of probable cause. *See* United States v. McCoy, 478 F.2d 176 (10th Cir. 1973). Apparently, the ultimate test is whether the information, taken in light of the totality of the circumstances, can reasonably be said to be reliable. These two cases also suggest a distinction between information originating from confidential police informants and private citizens. *See* note 51 *infra*.

[16] 439 F.2d 628 (D.C. Cir. 1971).

[17] *Id.* at 630.

[18] 213 Va. 54, 189 S.E.2d 360 (1972).

[19] *Id.* at 361.

[20] *Id.*

[21] United States v. Ventresca, 380 U.S. 102, 108 (1965); Aguilar v. Texas, 378 U.S. 108, 114 (1964); Rugendorf v. United States, 376 U.S. 528, 533 (1963); Jones v. United States, 362 U.S. 257, 271–72 (1960). Some federal courts have applied the same rule of nondisclosure in both warrant and nonwarrant cases. *See* Smith v. United States, 358 F.2d 833 (D.C. Cir. 1966); Jones v. United States, 326 F.2d 124 (9th Cir. 1963), *cert. denied*, 377 U.S. 956 (1964); United States v. One 1957 Ford Ranchero Pickup, 265 F.2d 21 (10th Cir. 1959). Other federal courts have distinguished these two classes of cases and have required the identification in nonwarrant cases. *See* United States v. Robinson, 325 F.2d 391 (2d Cir. 1963); Cochran v. United States, 291 F.2d 633 (8th Cir. 1961). *See also* McCray v. Illinois, 386 U.S. 300 (1967), where the Supreme Court held that an informant's identity need not be disclosed at a preliminary hearing to determine the sufficiency of an arrest or search.

[22] Adair v. State, 482 S.A.2d 247, 252 (Tex. Crim. App. 1972).

search warrant contain the facts recited in the affidavit which establish probable cause,[23] an appropriate solution to this problem is the use of a "supplemental affidavit," separate from the primary affidavit, setting forth all the available information. This special affidavit can then be sealed and preserved for review should any claim arise that the warrant was improperly issued.[24]

A similar problem arises when the government claims that it cannot reveal certain facts in an affidavit because it does not want to compromise classified information. In *United States v. United States District Court for the Eastern District of Michigan*,[25] Mr. Justice Powell answered this contention by stating:

> Nor do we believe prior judicial approval will fracture the secrecy essential to official intelligence gathering.... Moreover, a warrant application involves no public or adversary proceeding: It is an *ex parte* request before a magistrate or judge. Whatever security dangers clerical and secretarial personnel may pose can be minimized by proper administrative measures, possibly to the point of allowing the Government itself to provide the necessary clerical assistance.[26]

In addition to the measures suggested by Mr. Justice Powell, the magistrate can utilize the supplemental affidavit to serve as a record of his reasons for issuing the search warrant.

In connection with the factual assertions required in an affidavit, an affiant will frequently lapse into the passive voice in setting forth information, after initially stating that he had interviewed an informant. Although the implication might be that the informant supplied the information, the affiant may be setting forth facts unrelated to his conversation with the informant. For example, in *United States v. Nelson*[27] a motel clerk had observed burglary tools, money, guns and a cutting torch in one of his rooms. Later, information concerning blank postal money orders and a Bank Americard was obtained through two warrantless entries by police officers into the same room. In applying for a search warrant, the police commingled the results of the two entries. Judge Miller, concurring in finding the search warrant invalid, stated his belief that the officer involved was not satisfied that the information supplied him by the room clerk would support a warrant and, therefore, used the information gathered in both entries in hopes of establishing probable cause.[28] To avoid the situation described by Judge Miller, magistrates should be skeptical of affidavits which begin with such phrases as "investigation disclosed," "it was learned that," "information received disclosed," or "observations made disclosed," since they do not indicate the source of the information or the reliability or trustworthiness of that source.[29]

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[23] The relevent subsections of Rule 41 provide:
(c) A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witness he may produce, provided that such proceedings shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified....
(d) The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for property taken or shall leave the copy and receipt at a place from which the property was taken....
FED. R. CRIM. P. 41(c), (d).
In Ledbetter v. United States, 211 F.2d 628 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 977 (1954), the defendant, convicted of violating the District of Columbia's lottery law, argued that the execution of the search warrant was invalid because no copy of the affidavit was attached to the copy of the warrant served upon him. The defendant contended that since the offense was a crime under the D.C. code, a copy of the affidavit pursuant to the D.C. code had to be attached. The warrant, however, was issued by the United States Commissioner upon application of a United States marshall. The court held that the D.C. code provision was inapplicable and that the federal officials had complied with the federal requirements under rule 41 (c).

[24] There are some practical reasons for attaching affidavits to search warrants prior to execution. First, it furnishes the accused with the reasons for the intrusion on his privacy. Second, it avoids any possible claim that the affidavit later located in the official file was in fact inserted after the search. Thus, whenever possible magistrates should attach all affidavits to the search warrant. *See eg.* Moore v. United States, 461 F.2d 1236 (D.C. Cir. 1972).

[25] 407 U.S. 297 (1972).

[26] *Id.* at 320–21.

[27] 459 F.2d 884 (6th Cir. 1972).

[28] *Id.* at 895.

[29] Federal magistrates must also guard against the possibility that information in an affidavit may have

Another problem facing the magistrate in evaluating the factual assertions in an affidavit is the determination of whether the information is currently accurate. In *United States v. Harris*[30] the Supreme Court held that an informant's report that he had purchased whiskey within the past two weeks was sufficiently current, especially since these purchases were part of a history of purchases over a two year period.[31] Mr. Justice Harlan, in his dissenting opinion, also rejected the contention that the information was too stale, observing that, "the totality of the tip reveals that the informer purported to describe an on-going operation which he had claimed he had personally observed over the course of two years." [32]

Although the permissible lapse of time between the finding of the evidence and the application for the search warrant will vary with each case,[33] the facts submitted to the magistrate should specify the time at which the evidence was gathered,[34] and must convince him that the property which is the object of the search is probably on the person or the premises to be searched at the time the warrant is issued.[35] Federal magistrates will have to consider the totality of the circumstances surrounding the requested search such as the nature of the items to be seized, the type of criminal activity involved, and the nature of the premises to be searched.

Establishing an Informant's Reliability: The Second Prong of Aguilar

The second prong of *Aguilar* requires that an affiant set forth information in the affidavit which will allow the magistrate to make an independent judgment about the informant's reliability. The magistrate cannot rely solely on the affiant's assertion that his informant is trustworthy, truthful, prudent, reliable or credible.

The informant's trustworthiness can be established in two ways. First, an affiant can set forth in the affidavit an informant's record of past performance, which might indicate that he has provided information in the past which has lead to the seizure of illegal materials or resulted in the arrest of persons who were later convicted.[36] Second, an informant's trustworthiness can be established through independent corroboration of the informant's claims by law enforcement investigation or surveillance activities.[37]

The United States Supreme Court has elaborated on these methods for crediting an informant's tip. In *Spinelli v. United States*[38] the Court discussed the proper guidelines for evaluating an affidavit which contains among other things an informant's tip, corroborating evidence of matters contained within the tip, and information unrelated to the tip itself compiled by independent law enforcement investigation.[39] According to the Court, the

been obtained in an illegal manner. If such information constitutes a material part of the affidavit, the search warrant is invalid, and what is seized pursuant to the warrant will be suppressed. *See* United States v. Nelson, 459 F.2d 884 (6th Cir. 1972); United States v. Rosenberg, 416 F.2d 680 (7th Cir. 1969). However, where the untainted information in an affidavit is sufficient, the fact that other information in the affidavit was obtained as a result of illegal means will not invalidate the search. *See* James v. United States, 418 F.2d 1150 (D.C. Cir. 1969); Chin Kay v. United States, 311 F.2d 317 (9th Cir. 1962). A search warrant will not be invalidated even though predicated upon information obtained through entrapment. *See* Harness v. Kentucky, 475 S.W.2d 485 (Ky. Ct. App.), *cert. denied*, 409 U.S. 844 (1972).

[30] 403 U.S. 573 (1971).

[31] *Id.* at 579 n. 1.

[32] *Id.* at 589.

[33] In Schoeneman v. United States, 317 F.2d 173, 177 (D.C. Cir. 1963), the court observed that "the Government could cite, and we could find, no case which sustained a search warrant issued more than 30 days after finding of the evidence which constituted the basis of the search." In *Schoeneman* the court held a 107 day delay invalid. *See also* Dandrea v. United States, 7 F.2d 861 (8th Cir. 1925) (42 days—invalid); United States v. Sawyer, 213 F. Supp. 38 (E.D. Penn. 1963) (107 days—invalid); United States v. Long, 169 F. Supp. 730 (D. D.C. 1959) (11 days—valid); United States v. Allen, 147 F. Supp. 955 (E.D. Ky. 1957) (16 days—valid).

[34] The failure to include within an affidavit the time the affiant received his information will normally invalidate a search warrant. *See* Rosencranz v. United States, 356 F.2d 310 (1st Cir. 1966); United States v. Bosch, F. Supp. 15 (E.D. Mich. 1962). *But see* Rider v. United States, 355 F.2d 192 (5th Cir. 1966), where the court held that narration in the present tense was sufficient to conclude that the information was current.

[35] See Procedures Manual for United States Magistrates 7-3 and 7-4 (1972):

> A showing to the effect that the property to be seized was at the place to be searched a substantial time before the application is made does not justify the issuance of a search warrant, for the reason that during the intervening period the property may have been moved away. The facts must show that the property to be seized was known to be at the place to be searched so recently as to justify the belief that the property is still there at the time of the issuance of the search warrant. It is advisable to indicate the time of issuance upon the warrant.

[36] *See, e.g.*, United States v. Dunnings, 425 F.2d 836 (2d Cir. 1969), *cert. denied*, 397 U.S. 1002 (1970); United States v. Stallings, 413 F.2d 200 (7th Cir. 1969).

[37] *See, e.g.*, United States v. Roman, 451 F.2d 579 (4th Cir. 1971), Schulgz v. United States, 432 F.2d 25 (10th Cir. 1970).

[38] 393 U.S. 410 (1969).

[39] In Spinelli the affidavit contained the following allegations:

proper method is to look first at the informant's tip and the affiant's assertions about the reliability of his informant to see if they alone establish a reliable factual basis from which the magistrate can make an independent judgment about probable cause.[40] If the reliability of the tip is not established through this procedure, the magistrate must then look at the corroborating evidence to see if it credits the tip.[41] If the magistrate decides that the tip cannot be credited in either of these two ways, the magistrate must then look to other parts of the affidavit to determine if the information compiled by independent police investigation sufficiently establishes probable cause.[42]

More recently, in *United States v. Harris*,[43] Chief Justice Burger, speaking for a plurality of the Court,[44] indicated that a magistrate should not evaluate an affidavit in a highly technical manner in order to determine whether an informant's tip is reliable.[45] According to the Chief Justice, the affidavit must be considered as a whole to determine whether there is a "substantial basis" for crediting an informant's tip.[46] The Court also indicated that a declaration against penal interest by the informant would meet the requirement of the second prong of *Aguilar*.[47]

Although the decision in *Harris* appears to give the magistrate broad discretion in determining the reliability of the informant,[48] federal magistrates should nevertheless insure that *facts* contained within an affidavit, whether of the informant's past record or of corroborating evidence of the informant's claims, establish a sufficient basis for crediting a tip. Both Chief Justice Burger and Mr. Justice Harlan, who wrote the dissent in *Harris*, agreed that a bare statement by an affiant that he believed the informant to be truthful without any supporting evidence would not provide a basis for crediting the report of an unnamed informant.[49]

In some cases law enforcement officials may indicate in an affidavit that the information was provided by a citizen-informant. Unlike police informants, who often receive some consideration for their information, the citizen-informant may have less reason to make statements which are self-serving.[50] Consequently, there may be more justification for crediting their tips. Nevertheless, the magistrate should require the affiant to indicate the demeanor, age, occupation, reputation, any arrest or conviction record, or any employment record of his citizen-informant as well as the underlying circumstances surrounding the citizen-informant's knowledge of the alleged illegal activities.[51] While the absence of such information

(1) The FBI had kept track of Spinelli's movements on five days during the month of August 1965. On four of these occasions, Spinelli was seen crossing one of two bridges leading from Illinois into St. Louis, Missouri. On four of the five days, Spinelli was also seen parking his car in a lot used by residents of an apartment in St. Louis. On one day, Spinelli was seen to enter a particular apartment in the building.
(2) An FBI check with the telephone company revealed that this apartment had two listed phones.
(3) Spinelli was known to agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers.
(4) The FBI has been informed by a confidential reliable informant that Spinelli is operating a wagering operation by means of the two listed phone numbers.
Id. at 413–14.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 417.

[43] 403 U.S. 573 (1971).

[44] Chief Justice Burger's opinion was divided into three parts. Part I held there was sufficient information in the affidavit to find the informant reliable. Part II criticized the ruling in Spinelli as being too technical. In Part III the Court held that a declaration against penal interest was sufficient to credit the informant's tip. Justices Black and Blackmun concurred in all three parts. Justice Stewart concurred in Part I and Justice White concurred in Part III. Justices Harlan, Brennan, Douglas and Marshall dissented.

[45] In Harris the affidavit alleged:
(1) The accused had been known as a trafficker in whiskey.
(2) Another officer had seized whiskey on the premises before.
(3) An unnamed person, fearing for his life, revealed that he had purchased whiskey from the accused within the past two weeks.
(4) The affiant found this person to be prudent.
Id. at 575–76.

[46] The "substantial basis" test was first enunciated by Mr. Justice Frankfurter in Jones v. United States, 362 U.S. 257, 272 (1960):
We have decided that, as hearsay alone does not render an affidavit insufficient, the Commissioner need not have required the informants or their affidavits to be produced, or that Didone have personally made inquiries about the apartment, so long as there was a substantial basis for crediting the hearsay.

[47] 403 U.S. at 583.

[48] *See, e.g.*, United States v. Unger, 469 F.2d 1283 (7th Cir. 1972); United States v. Guinn, 454 F.2d 29 (5th Cir. 1972); United States v. Roman, 451 F.2d 579 (4th Cir. 1971); United States *ex rel.* DiRienzo v. Yeager, 443 F.2d 228 (3rd Cir. 1971).

[49] *Id.* at 578, 590–91.

[50] *See* United States v. Unger, 469 F.2d 1283, 1287 N.Y. (7th Cir. 1972); People v. Hoffman, 45 Ill.2d 221, 258 N.E.2d 836 (1970); State v. Paszek, 50 Wis.2d 619, 189 N.W.2d 836 (1971).

[51] *See* Adair v. State, 482 S.W.2d 247, 250 (Tex. Crim. App. 1972), in which the Texas court noted the problem facing the magistrate in the case of a citizen-informant:

may not be fatal, it will enable the magistrate to determine that the affiant is in fact dealing with a citizen-informant, and also help him make a more precise judgment about the reliability of this particular citizen-informant.[52]

Truthfulness of Facts Contained Within The Affidavit

Although the sufficiency of the factual assertions supporting the issuance of a search warrant is clearly open to attack, the law is somewhat unsettled as to whether the truthfulness of facts set out in an affidavit can also be challenged at a hearing to suppress evidence. The position that the substance of the assertions within an affidavit cannot be attacked was very recently set forth by the New Jersey supreme court:[53]

> In our view the constitutional safeguards are met when the impartial judge finds the affidavit for the warrant credible and legally sufficient. Compliance with the requirement for an oath by the officer must be regarded as a procedurally adequate manifestation of his veracity. That oath followed by the judge's determination that the facts vouched for show probable cause are all the Constitution demand and guarantee to our citizens. If the police officers lie, the truth of the accused's alleged criminal activities as revealed by the evidence seized under the warrant will not be diluted. In that event . . . the accused will have to meet nothing more nor worse than the 'truth' at plenary trial. . . . Further, so far as the untruthful officers are concerned, they expose themselves to the sanction of indictment for perjury or false swearing, a charge of criminal contempt, and assessment of monetary damages in a civil action.[54]

While the United States Supreme Court has not clearly decided the issue,[55] the Court of Appeals for the Second Circuit has acknowledged that under certain circumstances a defendant can challenge the substance of assertions in an affidavit.[56] In *United States v. Dunnings*[57] the court indicated that upon a proper preliminary showing by a defendant of falsehood or imposition on a magistrate, a district judge can conduct a hearing to determine whether these claims are justified.[58] In this context, the court went on to place the responsibility of insuring that the information is accurate on the magistrate reviewing the affidavit:

> The interposition of an independent judicial officer whose decision, not that of the police, [will] govern whether liberty or privacy is to be invaded . . . goes a long way toward accomplishing the objectives of the Fourth Amendment. True, the objectives are not accomplished if the judicial officer is put upon by the police. But it is the responsibility of such officers, particularly in light of their new dignity as United States magistrates and the requirements for their membership in the bar and periodic training . . . to see to it that they are not deceived.[59]

Prior to the issuance of a search warrant, there are several methods available to a magistrate to

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The police are often confronted with the first time informer sometimes referred to as a 'walk in' who is unknown to the police and with whom the police have had no previous experience. When they give information as to criminal activity their information should not become unusuable because there has not been a previous instance of reliability. When citizens are involved it cannot be expected that they would have past transactions or dealings with the police. And while in many cases less reason may exist for failing to disclose the informer's identity to the magistrate than where the ordinary police informer is involved, nevertheless, many citizens prefer to cooperate in ananymity with the police or fear possible retribution by the accused. Certainly where sufficient 'underlying circumstances' are presented to the magistrate so he can make an independent determination as to the credibility of the informer, the use of such informers is not to be excluded.

See also United States v. Brooks, 350 F. Supp. 1152 (E.D. Wis. 1972).

[52] Some of the underlying circumstances will also help the magistrate to determine whether the *present* information is reliable. See Harris v. United States, 403 U.S. at 582.

[53] State v. Petillo, 61 N.J. 165, 293 A.2d 649 (1972).

[54] *Id.* at 174, 293 A.2d at 653–54. *See also* Kenney v. United States, 157 F.2d 442 (D.C. Cir. 1946); United States v. Burnett, 53 F.2d 219 (W.D. Mo. 1931); State v. Anselmo, 260 La. 306, 256 So.2d 98 (1971), *cert. denied*, 407 U.S. 911 (1972).

[55] In Steele v. United States, 267 U.S. 498, 501 (1925), Chief Justice Taft stated in dicta:

> If the grounds on which the warrant was issued be controverted, the judge . . . must proceed to take testimony in relation thereto, ... If it appears . . . that there is no probable cause for believing the existence of the grounds on which the warrant was issued . . . must cause the property to be restored to the person from whom it was taken.

[56] The Fourth Circuit had previously taken a similar position. *See* King v. United States, 282 F.2d 398 (4th Cir. 1960), in which the court indicated that a search warrant could be challenged on such grounds, and that false facts given by an affiant could vitiate a warrant and a subsequent search. *See also* Theodor v. Superior Court, 104 Cal. Rptr. 226, 501 P.2d 234 (1972), where the California supreme court held that under the California Penal Code a defendant may on a motion to suppress challenge the factual accuracy of statements in an affidavit.

[57] 425 F.2d 836 (2d Cir. 1969).

[58] *Id.* at 840.

[59] *Id.*

reduce the possibility that the warrant will be issued on the basis of false assertions in the affidavits. First, the magistrate can analyze the affidavit for internal consistency. If there are reasonable grounds to question some of the factual representations, he should question the affiant under oath,[60] and include this testimony in the affidavit, or perhaps in a supplemental affidavit if appropriate.[61] If the magistrate has suspicions about assertions made by an informant to the affiant, he might require that the informant be produced for further questioning under oath. If these procedures do not resolve the questions the magistrate might have concerning the veracity of the affiant, the magistrate should warn the affiant about the consequences of perjury or contempt of court, as well as possible liability for civil damages.[62] As a last resort, the magistrate can, of course, refuse to issue the search warrant.

Nighttime Search Warrants

Although there has been strong reluctance in the past to allow nighttime searches,[63] recent changes in federal law have abandoned the "positivity" standard,[64] and substituted a standard which requires that the affiant show that "reasonable cause" exists for the execution of a warrant at night. Rule 41 (c) of the Federal Rules of Criminal Procedure now provides in part:

> The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime.[65]

Significantly, Congress has also abandoned the positivity rule in enacting the "District of Columbia Court Reform and Criminal Procedure Act of 1970." The D.C. code sets forth the following grounds for permitting the execution of a search warrant during nighttime:

> The application may also contain— (1) a request that the search warrent be made executable at any hour of the day or night, upon the ground that there is probable cause to believe that (A) it cannot be executed during the hours of daylight, (B) the property sought is likely to be removed or destroyed if not seized forthwith, or (C) the property sought is not likely to be found except at certain times or in certain circumstances.[66]

While the provisions within the new federal rule do not provide clear-cut standards for determining when a nighttime warrant would be appropriate, the provisions within the D.C. code suggest workable guidelines which are consistent with the federal rule. Under the D.C. code, for example, a nighttime warrant would be justified if a narcotics dealer maintained "lookouts" during the day to warn of police approach, and a police-affiant claimed that he needed the "cloak of darkness" to enter the premises before the narcotics were destroyed.[67]

It should also be noted that the federal rules now define "daytime" to mean the hours between 6:00 A.M. and 10:00 P.M.[68] This definition reflects the increasing urbanization of our society in which most persons infrequently retire for the night prior to 10:00 P.M. and usually arise sometime around 6:00 A.M. It also reflects a judgment concerning law enforcement needs in coping with an ever-increasing volume of crimes associated with our population shift. The choice appears to strike a reasonable balance between the needs of law enforcement and the right of special privacy

[60] Rule 41(c) of the federal rules provides in part:
> Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witness he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit.

Fed. R. Crim. P. 41(c).

[61] *See* note 23, *supra.*

[62] In Bivens v. Six Unknown Agents, 402 U.S. 388 (1971), the Supreme Court held that a law enforcement official may be liable for civil damages for an illegal search and seizure.

[63] *See* Monroe v. Pape, 365 U.S. 167, 210 (1960), where Mr. Justice Frankfurter stated:
> Searches of the dwelling house were the special object of this universal condemnation of official intrusion. Night-time search was the evil in its most obnoxious form.

See also Frank v. State of Maryland, 359 U.S. 360, 366 (1959); Jones v. United States, 357 U.S. 493, 498 (1958); Distefano v. United States, 58 F.2d 963 (5th Cir. 1932).

[64] The prior standard under Rule 41(c) provided:
> The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it may be served at any time.

Fed. R. Crim. P. 41(c) (1966).

[65] Fed. R. Crim. P. 41(c) was amended April 24, 1972, eff. October 1, 1972.

[66] D.C. Code Ann. § 23-522 (1970).

[67] For state court rulings under a reasonable grounds standard much like the new federal rule, see People v. Aguilar, 240 Cal. App. 2d 502, 49 Cal. Rptr. 584 (1966); Galena v. Municipal Court, 237 Cal. App. 2d 581, 47 Cal. Rptr. 88 (1965); People v. Watson, 39 Misc. 2d 808, 241 N.Y.S.2d 934 (1963).

[68] Fed. R. Crim. P. 41(h), effective October 1, 1972.

during those hours of repose, rest and sleep, in which an intrusion should only be justified by exceptional circumstances. With this expansion of the hours for daytime warrants, nighttime warrants should only be issued upon a proper showing that execution must be made between the hours of 10:00 P.M. and 6:00 A.M.[69]

Specificity of Area to be Searched

Under the Fourth Amendment a search warrant must describe the place to be searched with particularity. Generally, a search warrant sufficiently describes the place if "the officer with a search warrant can with reasonable effort ascertain and identify the place intended." [70] A single warrant cannot describe an entire building when cause is shown for searching only one apartment therein.[71] Nor can a warrant, describing a business premises on the first floor, be executed to include an apartment on the second floor which is separate and distinct, even though under the control of the same person.[72]

A warrant has been sustained where it specified a premises at a given address, even though there were two separate apartments at that address, where the warrant itself went on to limit its scope to the premises occupied by a named individual and over which he had possession and control.[73] The New Jersey supreme court recently held that even though a warrant failed to indicate by number which of three apartments on the floor of an apartment building was intended, but did indicate that the apartment was the one occupied by the defendant, and, in fact, the defendant's apartment had no number on the door, the description of the premises was adequate and the search warrant was sufficient.[74]

When law enforcement agents prior to executing a search warrant have no notice of internal alterations in a house with attic and basement apartments, a search of the entire premises pursuant to the warrant has been held proper in *Santore v. United States*.[75] In *Santore* the court stated that it was too late, consistent with the mission of law enforcement officials, to retreat to obtain a new warrant.[76] However, when law enforcement officials have prior notice of possible dual occupancy of a premises, they cannot properly seek a warrant for the entire premises but can only seek a warrant for that portion of the premises within the possession and under the control of the person whose alleged criminal activities are the basis of the search warrant.[77]

These cases suggest that magistrates must carefully scrutinize the efforts of police officials in connection with the description of the premises

[69] It should be noted that applications for narcotics violations are now covered by 21. U.S.C. § 879 (1970), a provision of the Comprehensive Drug Abuse Prevention and control Act of 1970, which provides:

> A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States Magistrate is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time.

See United States v. Gooding, 477 F.2d 428 (D.C. Cir. 1973), where Judge Wilkey in the lead opinion concluded that Section 879(a) was merely a re-enactment of 18 U.S.C. § 1405(1) requiring only a showing of probable cause to search for all substances controlled by the 1970 Comprehensive Drug Abuse Prevention and Control Act, regardless of whether the warrant was to be executed in the daytime or at night. While Judge Fahey concurred that Section 879(a) was merely a re-enactment of Section 1405(1), he intimates that the amendment to Rule 41(c) requiring "reasonable cause" for a nighttime search might be considered as requiring some additional showing for a nighttime warrant, noting that no significant burden would be imposed on the magistrate or other officials by requiring special reasons for a search at night even for narcotics. However, he does not formally adopt this position at this time, stating:

> The salutary effect of the modification of subparagraph (c) of the Rule remains for consideration with respect to search warrants issued after its effective date.

Id. at 439. Judge Robinson, concurring in the result, concludes that Section 879(a) is not merely a re-enactment of Section 1405(1). According to Judge Robinson, the language ("and for its service at such time") requires something more than simple probable cause. He reasons that Section 879(a) now requires a showing of probable cause for the service of the search warrant at night and that an on-going drug-selling operation is sufficient for this purpose. He concludes:

> [W]here . . . a search is calculated not only to garner evidence of past crime but also to terminate a serious species of ongoing criminality, reasonable cause for a nocturnal intrusion is demonstrated.

Id. at 444. *See also* United States v. Thomas, 294 A.2d 164 (D.C. Cir. 1972).

[70] Steele v. United States, 267 U.S. 498, 503 (1925). *See* United States v. DePugh, 452 F.2d 915 (10th Cir. 1971); United States v. Harmon, 317 F. Supp. 923 (D.C. Tenn. 1970).

[71] United States v. Hinton, 219 F.2d 324 (7th Cir. 1955).

[72] United States v. Kaye, 432 F.2d 647 (D.C. Cir. 1970).

[73] Kenney v. United States, 157 F.2d 442 (D.C. Cir. 1946).

[74] State v. Wright, 61 N.J. 146, 293 A.2d 380 (1972).

[75] 290 F.2d 51 (2d Cir. 1960).

[76] *Id.* at 67.

[77] United States v. Esters, 336 F. Supp. 214 (E.D. Mich. 1962).

to be searched. Should there be any question as to the particularity of the premises arising out of the description in the affidavit, the affiant should be questioned in order to insure that the search warrant, when issued, contains the proper description.

Anticipatory Search Warrants

Federal magistrates have recently been confronted with search warrant applications involving controlled deliveries of marijuana, or tampered or stolen mail, pursuant to the direction of customs or postal officials in which the affiant requests the magistrate to sign the warrant prior to actual delivery. Two recent cases have upheld such warrants. In *United States ex rel. Beal v. Skaff*[78] the Court of Appeals for the Seventh Circuit held such a warrant valid because it found that the warrant could not have been executed until after the contraband was delivered. In sustaining the warrant, the court acknowledged that certain difficulties arise in warrants of these types:

> [A] warrant which antedates the commission of the offense which is relied upon to support its issuance might lack an essential element of judicial control: the requirement that probable cause exist to believe that execution will not precede the commission of the crime or possession of the goods to be seized.[79]

The court concluded:

> There was no danger that the property seized would be other than that specified in the affidavit upon which the warrant was issued. . . . Moreover, the nature of the article to be seized [marijuana]—the very real possibility that delay might have resulted in its disposal or concealment—compelled quick action by the magistrate. Confined to these facts, we are of the opinion that the warrant and its execution were constitutionally valid.[80]

The New York Court of Appeals has gone even further in upholding such warrants. In *People v. Glen*[81] the court sustained a warrant issued one week prior to the time the affidavit indicated that the contraband would be delivered. The court took the position that in most cases possession when a warrant is normally issued is only probative of the likelihood of future possession when the warrant is actually executed. It further observed that even after a warrant is issued an officer has some discretion in delaying execution, with the result that at the time of execution the contraband may no longer be in the suspect's possession. Accordingly, the court concluded:

> The ultimate answer to the problem is that as long as the evidence creates substantial probability that the seizable property will be on the premises when searched, the warrant should be sustained. To be sure, where there is no present possession the supporting evidence for the prospective warrant must be strong that the particular possession of particular property will occur and that the elements to bring about the possession are in process and will result in the possession at the time and place specified. Otherwise, the hated general writs of assistance of Pre-Revolutionary times would be revived, in effect, despite the constitutional limitations. Moreover, the issuing Judge should be satisfied that there is no likelihood that the warrant will be executed prematurely.[82]

Notwithstanding this limited support for the use of anticipatory search warrants,[83] federal magistrates should be very cautious in issuing these warrants. When, with a minimum of inconvenience, law enforcement officials can communicate by radio or telephone with a fellow officer at the judicial official's residence, and the warrant can be issued and executed shortly after delivery of the items to be seized, the magistrate should decline to issue such warrants in advance. Another possible solution would be for the magistrate to include in the warrant itself language restricting the execution of the warrant until law enforcement officials have actually observed the delivery. As an added safeguard, the magistrate should also require execution within a specified number of hours after delivery.[84]

[78] 418 F.2d 430 (7th Cir. 1969).
[79] *Id.* at 433.
[80] *Id.* at 433–34.
[81] 30 N.Y.S.2d 252, 282 N.E.2d 614 (1972).
[82] Id. at 259, 282 N.E.2d at 617.
[83] *But see* State v. Ferrigno, 256 A.2d 795 (Conn. Cir. Ct. 1969), which held that obtaining "advance" search warrants which are executed at the time criminal activity is in progress is unconstitutional.
[84] A recent memorandum by the Administrative Office of the United States Courts dated May 3, 1973 to all Federal Judges, United States Magistrates, and District Court Clerks suggests that in connection with Revised Rule 41(c) providing that all search warrants must be executed within a specified period of time, not exceeding ten days, the issuing magistrate should specify on the search warrant the time period in which the search must be executed endorsing on the warrant: "The search, herein authorized, must be executed within the period of ____."

Conclusion

Because the law of search and seizure has become increasingly complicated, the role of the "neutral and detached" magistrate has never been more critical for the protection of those rights guaranteed by the fourth amendment. With this role in mind, it has been the purpose of this article to identify some of the pressing problems confronting magistrates today. It is hoped that the suggestions made throughout this article will act as working rules to help the federal magistrate perform his function more effectively.