NOTES

HEARSAY EVIDENCE AS A BASIS FOR PROSECUTION, ARREST AND SEARCH

Pre-trial criminal procedure in the form of instigation of prosecution, arrest and search contains the threat of harm to the suspect even before trial. The instigation of prosecution results in a trial with its attendant publicity and injury to reputation. Arrest causes a restraining of physical liberty, while a search involves the invasion of private premises and the possibility of property seizure. Although these actions are taken without affording the injured party an opportunity for a hearing, each involves an ex parte decision by an official or official body as to whether the particular action should be taken. The grand jury decides if an indictment should be returned. A peace officer decides if an arrest should be made without a warrant and if the arrested person should be searched. A magistrate decides if a criminal information is sufficient for prosecution, if a warrant for arrest should be issued or if a search warrant should be allowed. The severity of the harms to the individual involved argues against the exercise of untrammeled discretion in such decisions, however, the public interest in swift capture and prosecution of suspected offenders argues against the erection of elaborate safeguards from these harms. The evidentiary standards which have evolved from this clash of interests constitute a legitimate subject of inquiry to determine; first, whether the courts will review the evidence on which a prosecution, arrest or search is based, and if so whether second or third-hand information is capable of supplying sufficient probabiilty of guilt to justify these actions. In each situation, reconciling the public interest against the private determines the boundaries of the discretion of the official or official body, and as a corollary, the evidentiary requirement to be applied.

Instigation of Prosecution

Prosecution is begun either by the return of an indictment by the grand jury after deliberation in secret session[1] or by the filing of an information by the prosecutor.[2]

1. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 135-193 (1946).
2. *Id.* at 194-265.

(1) *Grand Jury*

Since the members of the grand jury do not themselves observe the commission of offenses, they must depend upon the testimony of witnesses to give them a second-hand view of the events as they actually occurred. If the witness claims to have observed the commission of the offense himself then the grand jury, like all triers of fact, receives the information second-hand. However, if the witness before the grand jury testifies not that he observed the offense himself, but merely that he talked with another person who claimed to have observed the offense then that information, which would be characterized at a trial as hearsay, gives the grand jury only a third-hand view of the facts.

In reference to the review of the evidence presented to the grand jury, the courts have generally taken one of two positions:

1. The return of an indictment is conclusive proof that evidence of guilt of the accused was heard at the inquest.[3]

2. Although the grand jury need not be presented with evidence sufficient for a conviction, if the accused can show that no evidence of guilt was presented at the inquest, then the indictment should be quashed.[4]

In the recent tax evasion case of *Costello v. United States,*[5] the only evidence offered before the federal grand jury was a net worth summary of Costello's expenditures which had been prepared by internal revenue agents from information given them by persons with whom Costello had done business. Since the agents could testify only to what others had told them about Costello's expenditures, the information was third-hand when it reached the grand jury. Costello moved to dismiss the indictment on the ground that only hearsay evidence was presented to the grand jury. The United States Supreme Court sustained the indictment on the ground that for reasons of expediency in criminal proceedings it was beyond the province of the court to question the sufficiency of the evidence presented before the grand jury. Justice Black said, ". . . if indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. . . . [A]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if

3. Stephenson v. State, 205 Ind. 141, 179 N.E. 633 (1933); Mack v. State, 203 Ind. 355, 180 N.E. 279 (1931); Pick v. State, 143 Md. 192, 121 Atl. 918 (1913); Smith v. State, 61 Miss. 754 (1884); ORFIELD, *op. cit. supra* note 1, at 163.

4. Brady v. United States, 24 F.2d 405 (8th Cir. 1928); see cases collected annot., 59 A.L.R. 567 (1929); ORFIELD, *op. cit. supra* note 1 at 163-166; *contra.* N.Y. CODE CRIM. PROC. § 258 (1938), People v. Nicosia, 164 Misc. 152, 289 N.Y. Supp. 591 (1937).

5. 350 U.S. 359 (1956).

valid on its face, is enough to call for a trial of the charge on the merits."[6]

The Costello case indicates that at present the only protection in the federal courts against an unfounded indictment rests in the collective conscience of the grand jury. If the grand jury is satisfied that an indictment should be returned, their decision cannot be questioned. The court reasoned that the validity of the indictment did not affect the fairness of the trial, and that the private interests invaded by an unfounded trial were less important than the public interest in swift prosecution of suspected offenders.[7]

Prior to the *Costello* case, the circuit courts had generally agreed with the majority of the state courts that an indictment not founded on some evidence of guilt should be quashed.[8] When the *Costello* case was before the Second Circuit Court of Appeals, the indictment was sustained.[9] However, Judge Hand adopted the position that "[I]f it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed, . . . but that this is in no sense true hearsay . . . [I]t may be as dependable a reliance at a trial as any other evidence, the only condition being that the opposite party shall not object to it," and since "the accused is normally not present at an inquest and cannot cross examine . . . we hold that it is immaterial that only hearsay was adduced at the inquest in support of the allegations of the indictment. . . ."[10] Thus, the Second Circuit, while reviewing the evidence presented to the grand jury, held that hearsay was capable of rationally establishing the facts and supporting the indictment. Judge Hand's test of the evidence would be one of relevancy[11] and credibility[12] rather than strict admissability. However, saying that the indictment will not be quashed when it is founded on hearsay is not saying that *any* hearsay evidence is sufficient. In the *Costello* case the grand jury received its information third-hand since the testimony of the government agents was founded on interviews with business people who did not testify and examinations of their records which were not produced at the inquest. To require that the originals of the records be brought to the inquest would have involved great inconvenience and delay. Likewise, because of the lack of motive to falsify and the small amount of

6. *Id.* at 363.
7. *Id.* at 364.
8. See cases collected annot. 59 A.L.R. 567 (1929).
9. United States v. Costello, 221 F.2d 668 (2d Cir. 1955); see notes, 43 CAL. L. R. 859 (1955); 104 U. PA. L. REV. 429 (1955); 65 YALE L.J. 390 (1956).
10. United States v. Costello, 221 F.2d 668 at 677-679 (2nd Cir. 1955).
11. The evidence before the grand jury must be relevant to the commission of a crime by the accused. Dong Haw v. Superior Court, 81 Cal. App. 2d 153, 183 P.2d 724 (1947).
12. See note 14 *infra*.

information to which each could testify, the increased probability of truth afforded by requiring direct testimony from all the persons interviewed would not have justified that increased time required to hear their testimony. Even though part of the evidence in the *Costello* case might not have been admissable at a trial there was substantial probability of its truth since the internal revenue agents had no apparent reason for testifying falsely. As Judge Hand pointed out, it was the relevancy and credibility and not the admissability of the evidence that determined its sufficiency to support the indictment.

In the embezzlement case of *United States v. Farrington,*[13] the indictment was quashed when an attorney representing creditors of a bank who were interested in seeing the accused prosecuted appeared before the grand jury and urged the return of an indictment. He was allowed to quote entries picked at will from the companies' books, as well as excerpts from testimony which the accused had given before the commissioner. The fact that the witness had a personal interest in testifying in a manner that would encourage the return of an indictment destroyed the credibility of his testimony, making it incapable of rationally establishing the facts.[14] The indictment was quashed for there was no other evidence to support it.

Although before the *Costello* case, the courts may have been thinking in terms of Judge Hand's test of evidence that rationally established the facts, the standard that many courts purported to impose was that of "some legally competent evidence" at the inquest.[15] Although this rule paid lip service to admissability, it is obvious that its real purpose was to protect the accused from an unwarranted trial—an end that could best be served by applying the rules of relevancy and credibility. An example of the extension of this test to reach much the same result as the *Costello* test is seen in *Murdick v. United States,*[16] a prosecution for mail theft. There the only witnesses before the grand jury were two postal inspectors, neither of whom had witnessed any aspect of the crime, but both of whom had talked to the witnesses and to the defendant. The defendant moved to quash the indictment on the ground that it was based solely on hearsay. The court sustained the indictment saying that since at the trial the inspectors had testified to certain admissions made by

13. 5 Fed. 343 (N.D.N.Y. 1881).

14. *Accord,* People v. Nicosia, 164 Misc. 152, 289 N.Y. Supp. 591 (1937) (confessed perjurers testimony before grand jury not sufficient); People v. Nitzberg, 289 N.Y. 523, 47 N.E.2d 37 (1943) (accomplices under indictment whereby prosecutor could exert pressure for testimony favorable to return of indictment).

15. *E.g.,* Holt v. United States, 218 U.S. 245 (1910); Cox v. Vaught, 52 F.2d 562 (10th Cir. 1931); ORFIELD, *op. cit. supra* note 1 at 162-164.

16. 15 F.2d 965 (8th Cir. 1926).

the defendant, it was to be presumed that they had also so testified at the inquest, and that the indictment could not be quashed since it was presumed to be founded on some competent evidence. By applying a presumption that a witness capable of introducing competent evidence had done so before the grand jury, the court avoided quashing an indictment which the words of the "some legally competent evidence test" would seem to have demanded.[17]

In view of the Supreme Court's decision in the Costello case, although the objection that no evidence of guilt was heard by the grand jury is still very much alive in state courts, it is no longer valid in federal courts, and if an indictment is returned, regardless of the evidence before the grand jury, the accused must stand trial.

(2) *Information*

As Justice Black's dictum indicates, much of what has been said of the indictment also applies to the information filed by the prosecutor. Although prosecution in the federal system must be by indictment unless waived,[18] many states offer the alternative of prosecution by information. The offenses which may be so prosecuted differ greatly among the states, some allowing the information to be used for misdemeanors only, others permitting its use for major felonies.[19] A preliminary examination before a magistrate is usually required for the filing of an information.[20] If the person appearing before the magistrate claims to have personally witnessed the offense, then the magistrate's information is second-hand. If, however, the witness claims only to have talked with a person who witnessed the offense, the magistrate, like the grand jury in the *Costello* case, is dealing with third-hand information. Since the preliminary examination is designed to offer much the same protection as the grand jury inquest, the courts have usually taken similar positions as to the evidentiary requirements of the indictment and the information. In some states no preliminary examination is required and the filing of an information is enough to call for a trial.[21] Others would agree that the insufficiency of the evidence before the magistrate is not a ground for quashing the information, but that if *no* evidence indicating the guilt of the accused was presented to the magistrate, the information should

17. *Accord,* Zacher v. United States, 227 F.2d 919 (8th Cir. 1955).

18. FED. R. CRIM. P. 3, 4, 41.

19. See ORFIELD, *op. cit. supra* note 1 at 209-210; Moley, *The Use of the Information in Criminal Cases* 17 A.B.A.J. 292 (1931).

20. ORFIELD, *op. cit. supra* note 1 at 214.

21. Arkansas, Connecticut, Florida, Indiana, Iowa and Louisiana require no preliminary examination. See ORFIELD, *op. cit. supra* note 1 at 215.

be quashed.[22] Since the proceedings before the magistrate are not secret and the accused is present, some degree of protection from totally unfounded prosecution is afforded; however, when no preliminary examination is required this protection is lost. It has been argued that since it is not politically expedient for unfounded trials to be begun by the prosecutor, the accused is still effectively protected.[23] It can also be argued that the interests invaded by unfounded prosecutions deserve greater protection than the conscience of the prosecutor, and that since cases are occasionally dismissed by magistrates, it is evident that prosecutors sometimes do attempt to instigate unfounded prosecutions.[24] It seems doubtful that the protection offered an accused in a preliminary examination before a minor public official is as great as that offered by the collective conscience of a grand jury, but even assuming that a preliminary examination affords the same degree of protection as a grand jury inquest, in those jurisdictions which require no formal preliminary proceedings, but leave the determination in the hands of the prosecutor, all protection vanishes. The accused must stand trial regardless of the evidence on which the information is based.

The standards applied to the indictment and information demonstrate that if any protection is to be given the interests invaded by unwarranted prosecution, it is at most the protection from entirely arbitrary prosecution initiated prior to any showing that evidence of the guilt of the accused is in existence. The public expense of an unfounded trial is probably as great an incentive toward such a rule as is any private interest served. If review is allowed Judge Hand's test indicates that for purposes of prosecution hearsay evidence, if relevant and credible, is capable of rationally establishing the facts. If the Hand test is adopted in the state courts, then a distinction will in all probability be drawn, as it has in the arrest and search cases, between that hearsay which is capable of rationally establishing the facts and that which is not.

Arrest

Although not all courts will review the informational basis supporting instigation of prosecution, all courts afford an opportunity for the review of the information on which an arrest is based. Arrest causes an invasion of the interest of freedom of activity as well as the harm to reputation involved in criminal prosecution. An arrest may be made

22. Ramirez v. State, 55 Ariz. 441, 103 P.2d 459 (1940); State v. Hunt, 57 Idaho 122, 62 P.2d 1372 (1936); State v. Gottwalt, 209 Minn. 4, 295 N.W. 67 (1940). *Contra.*, People v. Schuber, 71 Cal. App. 2d 773, 163 P.2d 498 (1945); People v. Lee, 231 Mich. 607, 204 N.W. 742 (1925); Ex. parte Brewer, 75 Okla. Crim. 150, 129 P.2d 199 (1942).

23. ORFIELD, *op. cit. supra* note 1 at 99.

24. *Id.* at 97.

on the basis of a warrant issued by a magistrate to whom it has been demonstrated that there is probable cause to believe the accused guilty of an offense.[25] An arrest may also be made by a peace officer without a warrant when a misdemeanor is committed in his presence or when he has probable cause to believe that a felony has been or is being committed by the person arrested.[26]

(1) *Arrest Without A Warrant*

Although, in view of his mobility, it might be possible to require that a peace officer personally witness the facts on which he bases his decision to arrest, such personal knowledge is not required. The officer, like any trier of fact whose determination rests upon testimony from witnesses, may base an arrest on second-hand information.

It is well settled that a report from a credible informant who claims to be an eyewitness to a felony is sufficient to establish probable cause for an officer to arrest without a warrant.[27] In *Budreau v. State,*[28] a minister told a constable that he had seen the defendant, who was apparently intoxicated, driving a car, and that the defendant had invited him to the car for a drink. These facts were sufficient to allow the constable to arrest for illegal transportation of liquor. Likewise, in *People v. De Cesare,*[29] the arrest was sustained when a meat market proprietor told the sheriff that the defendant had offered to sell him whiskey which he had said he had in his car. These cases also illustrate that the informant need not be an eyewitness to the actual commission of the offense by the arrested party. He need only witness facts which point toward guilt of the accused, not establish it.[30]

In *Grow v. Forge,*[31] when a fifteen year old boy positively identified the plaintiff as a man who had attempted to rob him, the arrest was sustained.[32] Here, the informant, while of good character, was of question-

25. FED. R. CRIM. P. 3; ORFIELD, *op. cit. supra* note 1 at 9-11.

26. ORFIELD, *op. cit. supra* note 1 at 14-23; CORNELIUS, SEARCH AND SEIZURE 93 (1926).

27. See CORNELIUS, *op. cit. supra* note 26 at 120-132 and cases cited therein. One writer asserts that the opposite is the rule in federal law. FRAENKEL, *Search and Seizure Developments in Federal Law Since 1948,* 41 IOWA L. REV. 67, 70 (1955).

28. 197 Ind. 8, 149 N.E. 442 (1925).

29. 22 Mich. 417, 190 N.W. 302 (1922).

30. *Accord,* Johnson v. Collins, 28 Ky. L. Rep. 375, 89 S.W. 253 (1905); Brish v. Carter, 98 Md. 445, 57 Atl. 210 (1904). Naturally, if the informant does not charge the accused with a crime, his information is of no value. Cunningham v. Baker, 104 Ala. 160, 16 So. 68, 53 Am. St. Rep. 27 (1894). Nor is the information of value if the facts reported do not indicate the guilt of the accused. Harness v. Steele, 159 Ind. 286, 64 N.E. 875 (1902); Filer v. Smith, 96 Mich. 347, 55 N.W. 999, 35 Am. St. Rep. 603 (1893).

31. 183 Ky. 521, 209 S.W. 369, 3 A.L.R. 642 (1919).

32. *Accord,* Bushardt v. United Investment Co., 121 S.C. 324, 113 S.E. 637, 35 A.L.R. 637 (1922).

able reliability, but the officer, being face to face with his informant, could make a reasonable evaluation of the probability of the accuracy of the information. Also the informant claimed to have witnessed the actual commission of the crime by the accused. These two factors combined were sufficient to justify the arrest.

The claim of a credible informant that he has witnessed the commission of the offense seems to carry great weight toward establishing probable cause. But what if the informant does not claim to be an eyewitness? In *Elardo v. State*,[33] the arrest was not sustained when one Weir told the deputy sheriff, "I have information that there is a load of liquor stuck over by Mr. Vardaman's house" and that the defendant was in charge of it. The court said that the information communicated must be of facts within the informant's personal knowledge. Although second-hand information from a credible informant is capable of giving the arresting officer the required probable cause, apparently third-hand information is not, and in this sense the discretion of the officer is more limited than that of the grand jury which could return an indictment based on third-hand information.

It is probably not required that the informant actually have witnessed the facts which he reports, only that he claim to have witnessed such facts. It is also required that the officer assure himself prior to the arrest that the informant does claim his information to be first hand.

In *United States v. Clark*,[34] narcotics agents saw the defendant, a known addict, leave a store which was suspected of being a front for illegal narcotics sales. Her companion, a previously reliable informant, gave a signal indicating that the defendant was carrying narcotics, but since the narcotics agents, when they made the arrest, did not know whether their informant claimed to have seen the narcotics on the defendant's person, the arrest was not sustained. If the officer is to be allowed any freedom of action, a finding of probable cause cannot depend on the true state of the facts, but only on their apparent state at the time of the arrest.[35] The requirement that the officer determine only that a credible informant claims personal knowledge of the facts affords as much protection to the arrested party as the circumstances will allow.

The officers may substantiate the fact that the informant's information is first hand by witnessing him in the process of collecting it. In *Matters v. United States*,[36] the officers searched the informant, and find-

33. 164 Miss. 628, 145 So. 615 (1933).
34. 29 F.Supp. 138 (D.C. W.D. Mo. 1939).
35. For example of judicial techniques in examination of facts for determination of probable cause, see United States v. Horton, 86 F.Supp. 92 (D.C.W.D. Mich. 1949).
36. 11 F.2d 503 (9th Cir. 1926).

ing no narcotics, they gave him marked bills and watched him enter the defendant's house. He emerged and handed over a packet of morphine; it was held that the officers had probable cause to arrest the defendant.

A possible exception to the rule requiring that the officer inform himself whether his informant claims first hand knowledge of the facts reported occurs when such information comes from an official source through law enforcement channels. In *United States v. Heitner,*[37] officers were told by police radio that the defendant was operating an illegal still at a given place. On arriving, the officers saw the defendant hastily leaving the building and arrested him. The arrest was sustained.[38] Likewise, in *Bartlett v. United States,*[39] F.B.I. agents who were informed by phone from their headquarters that the defendant was an escaped felon driving a stolen car, had probable cause to make the arrest when they found the car beside the motel in which the defendant was sleeping. This exception to the rule requiring that the informant claim first hand knowledge of the facts may be at least partially explained by the decreased probability of distortion of the information when transmitted through official channels by law enforcement officers. Also, to require that an informant such as the police radio operator personally witness the facts supporting each transmission would destroy all value of communication devices to law enforcement agencies.

Another possible exception to the rule requiring that the informant claim first hand knowledge of facts pointing toward the guilt of the accused occurs when the informant predicts a future offense. Since the offense has not yet been committed, the informant could know of no facts creating suspicion of the present guilt of the accused. In *Wisniewski v. United States,*[40] an informant who had given accurate information four times before told the officers that the defendant was to make a delivery of illegal liquor at a given place using one of two autos. When the defendant arrived in such a car, was seen talking to a known bootlegger, and took a burlap sack and jug from the rear of his car, it was held that the officers were entitled to make the arrest. It is questionable whether such a prediction alone is sufficient to establish probable cause

37. 149 F.2d 105 (2nd Cir. 1945).

38. *Accord,* Gilliam v. United States, 189 F.2d 321 (6th Cir. 1951); State *ex rel.* Brown v. District Court, 72 Mont. 213, 232 P. 201 (1925). *But see,* United States Fidelity and Guaranty Company v. State, 121 Miss. 369, 83 So. 610 (1920) (information from mayor not sufficient). Also in United States v. Clark, 29 F.Supp. 138 (D.C.W.D. Mo. 1939) on petition for rehearing, the prosecution unsuccessfully argued that even though the narcotics agents did not have probable cause, the local police officers who were with them did since the local police got their information from the narcotics agents who constituted a "credible official source."

39. 232 F.2d 135 (5th Cir. 1956).

40. 47 F.2d 825 (6th Cir. 1931).

in the absence of corroborating evidence observed by the officers prior to the arrest, such as seeing alcohol cases in the rear of the suspect's car.[41] It should also be required that the probability of the predicter-informant's accuracy be high. In the *Wisniewski* case, the informant had demonstrated his accuracy by prior performance.[42] In *Davis v. State,*[43] the probability of accuracy was shown by the fact that the predicter was the sheriff of another county who was well acquainted with the suspect's criminal activities.

Since it is required not only that the informant claim first hand knowledge of the facts, but also that the informant be credible, information from a confessed felon[44] or jail prisoners[45] is not sufficient to establish probable cause. However, in *Diers v. Mallon,*[46] the informant, a confessed murderer, told the sheriff that the plaintiff had hired him to commit the killing. The murderer's attorney and a judge also told the sheriff that they had heard the deceased, prior to the killing, make the statement that if he was ever murdered, it would be the plaintiff's doing. Thus the word of an incredible informant found sufficient support from the statements of credible informants to validate the arrest. Information from a known criminal contains little assurance of truth, and if reliance were allowed on such information, no protection would be afforded the accused. Likewise if the identity of the informant is unknown, as in an anonymous telephone message,[47] or his character is unknown as in a reward advertisement in a magazine,[48] then no reliance can reasonably be placed on his information.

(2) *Warrant for Arrest*

In the case of an arrest without a warrant, the court always examines the question of probable cause in retrospect, asking, "Did this officer at the time of the arrest have probable cause?" However, when an arrest warrant is requested, the magistrate decides the justification of an arrest not yet consummated and the question is, "Does the magistrate

41. Davis v. State, 203 Ind. 443, 180 N.E. 595 (1931).
42. *Accord,* Husty v. United States 282 U.S. 694 (1930); *but see* United States v. Hill 114 F. Supp. 441 (D.D.C. 1953).
43. 203 Ind. 443, 180 N.E. 595 (1931).
44. Wills v. Jordon, 20 R.I. 630, 41 Atl. 233 (1898).
45. United States v. Baldacci, 42 F.2d 567 (D.C.S.D. Cal. 1930).
46. 46 Neb. 121, 64 N.W. 722, 50 Am. St. Rep. 598 (1895).
47. People v. Guertins, 224 Mich. 8, 194 N.W. 561 (1923) (dictum).
48. State *ex rel.* Hartley v. Evans, 83 Mo. App. 301 (1900); *accord,* Simmons v. Van Dyke, 138 Ind. 380, 37 N.E. 973, 46 Am. St. Rep. 411 (1894) (telegram from foreign police chief not sufficient, also possible question of extradition procedure); Jones v. Wilson, 119 La. 491, 44 So. 275 (1907) (telegram from private citizen not sufficient). *Contra,* Burton v. N.Y. Central and Hartford R.R. Co., 147 App. Div. 557, 132 N.Y. Supp. 628 (1911).

now have probable cause?" An arresting officer must determine the credibility of his informant. Likewise the magistrate must make such an evaluation. If an indictment has been returned then the magistrate must issue a warrant for arrest.[49] However, if only a complaint or information has been filed, the magistrate must determine if the facts contained therein are sufficient to constitute probable cause.[50]

It has been shown that an arrest without a warrant will not be permitted when the informant remains anonymous,[51] nor will it be permitted when nothing more is known about the informant than his name appearing on a reward advertisement.[52] The officer must have some reasonable basis for a determination of the credibility of the informant, and a name in a magazine does not afford protection from falsity. This same reasoning applies when the magistrate is presented with an information from the prosecutor who swears that another has informed him that the accused has committed an offense. Even though on the basis of such an information prosecution could be instigated, third-hand evidence is not sufficient to allow a warrant for arrest to issue.[53] An affidavit which rests solely on unsworn statements by an informant who does not appear before the magistrate is not sufficient.[54] In *People v. Manzel,*[55] the affiant swore on information and belief that the defendant had sold wood alcohol for human consumption and named the three informants who were the source of his information. The court held the affidavit insufficient for a warrant for arrest. In *United States v. Longsdale,*[56] the affidavit was not sufficient when the assistant United States District Attorney swore that he had reports from named government agents who had examined the books of the defendant.

Although the magistrate may not issue a warrant when the only assurance he has of the credibility of the informant is the affidavit of the officer, it is not required that the informant appear before the court. In the absence of an opportunity for the court to examine the informant, a sworn affidavit from the informant will take the place of such an ap-

49. *Ex parte* United States, 287 U.S. 241 (1932); ORFIELD, *op. cit. supra* note 1 at 264-5.

50. ORFIELD, *op. cit. supra* note 1 at 10-11.

51. See note 47 *supra.*

52. See note 48 *supra.*

53. Albrecht v. United States, 273 U.S. 1 (1926); Keilman v. United States, 284 Fed. 845 (5th Cir. 1922); Vanatta v. State, 31 Ind. 210 (1869). *Contra,* Griffin v. State, 137 Tex. Crim. 231, 128 S.W.2d 1197 (1939); Frick v. State, 58 Tex. Crim. 100, 124 S.W. 922 (1910) and cases cited therein.

54. It is of no significance that the accused could have been arrested by the officer without a warrant on the same information. *Ex parte* Bennett, 258 App. Div. 368, 16 N.Y. Supp. 2d. 901 (1940).

55. 148 Misc. 916, 267 N.Y. Supp. 23 (1933).

56. 115 F.Supp. (D.C.W.D. Mo. 1953).

pearance. In *People v. Flang*,[57] when the district attorney attached the sworn affidavits of his informants as part of his own affidavit on information and belief, the court sustained the warrant. The reliance of the court on the oath and threat of prosecution for perjury as protection from false information is further demonstrated by *People v. Belcher*,[58] where the signed statements of the informants were attached to the affidavit of the officers; the affidavit was held insufficient since the supporting statements were not sworn. Likewise in *Albrecht v. United States*,[59] the affidavit was not sufficient when the supporting statements were sworn before a notary. The courts by imposing the requirement of a sworn affidavit from the informant merely insist that the determination of credibility remain with the magistrate and not be delegated to the affiant. Only by a sworn affidavit from the informant is the credibility of the information proved to the court's satisfaction.[60] Aside from the question of whether the protection from false information afforded by the oath deserves such reliance, it might be possible for the magistrate to determine the credibility of such information in certain circumstances even without sworn statements from the informant, and hence a strict adherence to such a requirement may not be justified. It is probably true that an unsworn oral statement by the informant before the magistrate or a sworn affidavit by the officer setting out facts about the informant's character and reputation could furnish a basis from which the magistrate could intelligently estimate the credibility of the informant. A sworn statement from the officer that his information came from a minister, as in the *Budreau* case,[61] would afford greater probability of truth than a sworn statement from the murderer-informant himself in the *Diers* case.[62]

From a comparison of the prosecution and arrest cases, the following conclusions appear: Although many state courts still allow the accused to question the evidence presented to the grand jury,[63] in view of the *Costello* case such an attack will not be permitted in federal courts. The indictment, if valid on its face, is enough to call for a trial, and the accused may not avoid the harms attendant to trial by showing deficiencies in the evidence presented to the grand jury.[64] Likewise the state courts do not agree on the protection to be afforded the accused from an

57. 188 Misc. 26, 66 N.Y. Supp.2d 254 (1946).
58. 302 N.Y. 529, 99 N.E.2d 874 (1951).
59. 273 U.S. 1 (1926).
60. *Cf.* Beavers v. Henkel, 194 U.S. 73 (1904); where the deponent swore on information and belief that the accused was under indictment in another district and attached a certified copy of the indictment.
61. See note 28 *supra*.
62. See note 46 *supra*.
63. See note 4 *supra*.
64. Costello v. United States, 350 U.S. 359 (1956).

unfounded prosecution by information, some states making no provision whatever for a preliminary hearing,[65] others affording review of the evidence before the magistrate.[66] On the other hand, the arrest cases show that there is general agreement that the arrested party may attack th informational base of an arrest. Although an arrest without a warrant is allowed on the basis of second-hand information,[67] the courts have qualified their approval by requirements running to the credibility of the informant,[68] the claim by the informant of eye-witness knowledge,[69] and the understanding by the officer that his informant does claim such knowledge prior to arrest.[70]

For a warrant for arrest to issue, the magistrate must be presented with sworn affidavits from eye-witnesses before the warrant will be allowed.[71] Thus the magistrate must have much the same sort of evidence before him as is required for the officer to arrest without a warrant. Each of these requirements affords a safeguard from groundless arrest.

The reason given for refusal to review the evidence presented to the grand jury is the delay in criminal proceedings which would be caused by allowing a preliminary trial to re-examine the evidence on which the indictment is founded.[72] No such delay is caused by allowing an attack on the informational base of an arrest, since the question in issue is not whether the prosecution should proceed, but only whether the defendant was taken into custody properly. Also, the harms incident to criminal prosecution have not been traditionally afforded the judicial protection surrounding those suffered in arrest. Prosecution need not entail restraining the physical liberty of the accused; however, such restraint is always attendant to arrest, and physical liberty has long been held in high esteem.

Even if it is admitted that expeditious prosecution of suspected offenders demands a lesser degree of protection from the harms incident to trial, the reasoning is not wholly consistent when applied to the indictment, for an indictment not only serves to institgate prosecution, but also automatically authorizes the issue of a warrant for arrest.[73] An information based upon third-hand evidence, although it may instigate

65. See note 21 *supra.*
66. See note 22 *supra.*
67. See note 27 *supra.*
68. See notes 44 and 45 *supra* and accompanying text.
69. See note 33 *supra* and accompanying text.
70. See note 34 *supra* and accompanying text.
71. See note 53 *supra.*
72. See note 6 *supra* and accompanying text.
73. See note 49 *supra.*

porsecution, cannot support a warrant for arrest.[74] Although it may be justifiable that a review of the evidence before the grand jury should not be allowed for purposes of contesting the validity of the indictment as a means of prosecution, it does not necessarily follow that such review should also be denied for purposes of contesting the indictment as a basis for a warrant for arrest. The grand jury inquest itself affords only an illusory protection from indictments returned on facts insufficient to constitute probable cause for both prosecution and arrest; hence if the interests invaded by arrest are to be afforded substantial protection, the evidentiary base of the indictment, like that of the information, should be subject to scrutiny when the indictment is used as a basis for a warrant for arrest.[75]

Search

A search may be conducted either as an incident to a lawful arrest,[76] or on the basis of a search warrant issued by the magistrate.[77] Facts must be shown before the magistrate indicating that the premises to be searched are in some way involved in a suspected offense and that there is probable cause to believe that a search will disclose evidence of that offense.[78] This determination, like that involved in a warrant for arrest, is based upon an examination of sworn affidavits or testimony presented to the magistrate.[79] If the witness or affiant claims personal knowledge of the facts, then the magistrate receives his information second-hand. If the witness or affiant's statement is based on hearsay, the magistrate's information is third-hand. Even taking into consideration the fourth amendment prohibition against unreasonable searches and seizures,[80] since the private interests invaded by a search are primarily property interests rather than those of the physical person, it would seem that a less stringent standard might be applied to the evidence than that imposed for a warrant for arrest. In addition there is necessity for swift action when a search warrant is requested. If there is excessive delay the sole evidence of a crime may be moved or destroyed in the interim and the only means of convicting the accused lost forever. Courts have taken divergent views of the effect which the interplay of the fourth amendment and the pressure toward haste has upon the evidence required before

74. See note 53 *supra.*
75. *Cf.* ORFIELD, *op. cit. supra* note 1, at 180-181.
76. See CORNELIUS, *op. cit. supra* note 27 at 151-162. ORFIELD, *op. cit. supra* note 1 at 42-43.
77. See CORNELIUS, *op. cit. supra* note 27 at 234.
78. *Id.* at 248-250.
79. *Id.* at 246-264.
80. U.S. CONST. amend. IV.

the magistrate. There is general agreement that the sufficiency of evidence before a magistrate may be re-examined by the court when determining the validity of a search warrant;[81] however, the evidentiary standard applied determines the practical protection such review affords the accused.

Apparently feeling that the different considerations involved do not justify a different degree of protection, some courts would equate the search warrant with a warrant for arrest and would impose the same requirements for each: a sworn affidavit from the informant himself and not merely a report that reaches the magigstrate third-hand.[82] In *Rohlfing v. State*,[83] the affiant swore that one Youngman had told him that he had purchased a certain gun from the defendant and had seen other guns at the defendant's home. Even though the Chief of Police had identified the purchased gun as stolen the warrant was not allowed. Nor was the affidavit sufficient in *Schenks v. United States*[84] where the affiant swore that one Redyns had told him that he had purchased a vial of cocaine from the defendant at his premisis, giving the date of the purchase and the price. By imposing the requirement of a sworn affidavit, the magistrate retains complete control of the determination of probable cause and must be presented with the same proof as an officer who arrests without a warrant. Under such a standard, third-hand evidence would never suffice, the risks involved apparently outweighing the pressure toward quick issue of search warrants.

Other courts apparently feel that the public interest in prompt seizure of evidence demands that a lesser degree of protection be afforded and allow a search warrant to issue in the absence of a sworn statement from the informant if the officer names his informant and sets out the information with particularity in his affidavit.[85] In *Goode v. Common-*

81. See CORNELIUS, *op. cit. supra* note 27 at 295-6.

82. Davis v. United States, 35 F.2d 957 (5th Cir. 1929); People v. Perrin, 223 Mich. 132, 193 N.W. 888 (1925); People v. Woodhouse, 223 Mich. 608, 194 N.W. 545 (1925); People v. Maniscalco, 205 App. Div. 483, 199 N.Y. Supp. 444 (1923); James v. States, 43 Okla. Crim. 192, 277 P. 682 (1929); Cf. Sparks v. United States, 90 F.2d 61 (6th Cir. 1937) (Warrant sufficient when informant testified before magistrate but did not issue affidavit).

83. 227 Ind. 619, 88 N.E.2d 148 (1949).

84. 2 F.2d 185 (D.C. Cir. 1924).

85. Hawker v. Queck, 1 F.2d 77 (3rd Cir. 1924); *cert. denied*, 266 U.S. 621 (1924) (sufficient when affidavits from informant sworn before notary); Owens v. Commonwealth, 309 Ky. 478, 218 S.W.2d 49 (1949) (affidavit not sufficient when informant identified only as "a boy by the name of Smith"); Waggener v. McCanless, 183 Tenn. 258, 191 S.W.2d 551, 162 A.L.R. 1402 (1946) (warrant upheld when informant's name given to magistrate although not set out in affidavit); Griffeth v. Commonwealth, 209 Ky. 143, 272 S.W. 403 (1925); Coleman v. Commonwealth, 219 Ky. 139, 292 S.W. 771 (1927) (affidavits insufficient which do not show when informant obtained his information and when he relayed information to affiant); Arnold v. Commonwealth, 206

wealth,[86] the Kentucky court upheld the search warrant when the affiant swore that one Mansfield had told him that he had seen whiskey in bottles and jars at the defendant's home that morning. In *Bland v. State,*[87] the Maryland court which allows search warrants based on sufficient information from "named responsible official sources" sustained the warrant when the affiant, a police Sergeant, swore that he had sent a Cpl. Kessler to watch the defendant's building and that Kessler had reported about thirty persons per day entering defendant's apartment without knocking, all prior to 2 p. m., which was known to be the deadline for "numbers" to be entered each day.[88] Allowing a search warrant to issue on the basis of third-hand information implies either that because of the necessity of haste, a lesser degree of probability of truth is required of the information justifying the issue of a search warrant, or that because the affiant is an officer, the probability of accurate transmission is great enough that the information has substantially the same probative value as if the informant himself were before the magistrate. Even if this latter proposition were true, the magistrate must still have some basis upon which to determine the credibility of the informant. If, as in the *Bland* case,[89] the informant is a law enforcement officer, the magistrate is perhaps afforded some assurance that his information can be believed. However, without such an assurance it is difficult to see how the informant's name alone, in the absence of personal knowledge by the court of the character of the person named, can form the basis for determination of credibility. As was indicated in the arrest cases, a name alone generally carries little guarantee of credibility.[90] Additional facts concerning the character of the informant should be required. If such facts are not required then the determination of credibility of the informant is delegated to the affiant.

Even where the magistrate may receive his information third-hand, it is still required that the informant claim personal knowledge of the facts. In *Pezzerossi v. Commonwealth,*[91] the affiant swore that his daughter said that intoxicating liquors were being manufactured on the defendant's land. The warrant was not sustained since the daughter had merely stated a conclusion and had not relayed the facts on which the

Ky. 347, 267 S.W. 190 (1924) (affidavit insufficient which did not show information connecting premises to be searched with suspected crime).

86. 199 Ky. 755, 252 S.W. 105 (1923).

87. 197 Md. 546, 80 A.2d 43 (1951).

88. *Accord,* Smith v. State, 191 Md. 329, 62 A.2d 287, 5 A.L.R.2d 386 (1948), *cert. denied,* 336 U.S. 925 (1949); Poston v. Commonwealth, 201 Ky. 187, 256 S.W. 25 (1923) (prediction by foreign chief of police not sufficient).

89. See note 87 *supra* and accompanying text.

90. See note 48 *supra.*

91. 214 Ky. 240, 282 S.W. 1097 (1926).

conclusion was based. Even if the magistrate need not be presented with evidence tending to establish the informant's credibility, if facts tending to destroy credibility appear in the affidavit, then the search warrant may not issue. Just as the arrest cases indicate when the affidavit shows that the information came from a burglary suspect,[92] or a drunken derelict,[93] it is not sufficient. In effect, when the name of the informant is given, a presumption of credibility is raised, however, when facts to the contrary appear then the presumption vanishes and the warrant must be denied. Aside from whether the exigencies of law enforcement demand a more relaxed standard of proof in the search warrant area, at least a certain negative protection is afforded since the magistrate may not issue the warrant when it affirmatively appears that there is not sufficient probability that the informant is credible.

If, except for the qualification that the magistrate is given leave to receive his information third-hand, probable cause for the magistrate is like that of a peace officer arresting without a warrant, then it would follow that probable cause could not be found if the name of the informant is not given.[94] Although this is the position taken by most courts,[95] it is not the rule in Texas. In *Luera v. State*,[96] the affiant swore that unnamed informants had told him that they had bought liquor from the defendant at his home within the last twenty-four hours. This statement alone was held sufficient to support the warrant.[97] Even though the affiant swears that his informant claims personal knowledge of the facts, the magistrate has no information before him tending to show that the informant can be believed. Granting the warrant under such circumstances involves a complete delegation to the affiant of the evaluation of the credibility of his informant. When the affidavit is sub-

92. People v. Elias, 316 Ill. 376, 147 N.E. 472 (1925).

93. People v. De Vasto, 198 App. Div. 620, 190 N.Y. Supp. 816 (1921).

94. The identity of the informant who claims to have witnessed the offense need not be given when the officers personally sent the informant into the suspected premesis empty-handed and he emerged carrying illegal property he had purchased. Shore v. United States, 49 F.2d 519 (D.C. Cir. 1931); Schroder v. United States, 53 F.2d 6 (5th Cir. 1931); People v. Woods, 228 Mich. 87, 199 N.W. 603 (1924).

95. DeLancy v. City of Miami (Fla.), 43 So.2d 856, 14 A.L.R.2d 602 (1950); Cooper v. State, 106 Fla. 254, 143 So. 253 (1932); State v. Arregui, 44 Idaho 43, 254 P. 188, 52 A.L.R. 463 (1927); Derefield v. Commonwealth, 221 Ky. 173, 298 S.W. 382 (1927); Hammond v. Commonwealth, 218 Ky. 791, 292 S.W. 316 (1927); Taylor v. Commonwealth, 221 Ky. 216, 298 S.W. 685 (1927); State v. Gooder, 57 S.D. 619, 234 N.W. 610 (1930); King v. State (Tenn.), 174 S.W.2d 463 (1943); Glodowski v. State, 196 Wis. 265, 220 N.W. 227 (1928); Hession v. State, 196 Wis. 435, 220 N.W. 232 (1928).

96. 124 Tex. Crim. 507, 63 S.W.2d 699 (1933).

97. *Accord,* Douglas v. State, 144 Tex. Crim. 29, 161 S.W.2d 92 (1942); Hamilton v. State, 120 Tex. Crim. 154, 48 S.W.2d 1005 (1932); Loftin v. State, 116 Tex. Crim. 244, 33 S.W.2d 1071 (1930); Villareal v. State, 113 Tex. Crim. 442, 21 S.W.2d 739 (1929). *But cf.* Matlock v. State, 155 Tenn. 624, 299 S.W. 796 (1927).

mitted, the question of credibility is closed, and the only determination left to the magistrate is the sufficiency of the facts which the informant purported to have observed. The risk of untruth in such a standard is manifest. However, the Texas position is even more extreme. It is not even required that the affiant set out whether the informant claimed that his information was based on personal knowledge.[98]

In *Schwartz v. State*,[99] the affidavit was held sufficient, when the affiant swore only that reputable persons had told him that whiskey was being made on the defendant's land.[100] Likewise, in *Ruhman v. State*,[101] the affiant swore that he was "reliably informed" that liquors were kept and sold on the defendant's premisis. The warrant was held valid. Such a position gives the officer carte blanche to search since it involves a complete delegation to the affiant of the determination of probable cause and a virtual abdication of the magistrate from his function. Under the Texas rule although the courts purport to grant review, since the evidentiary standard of a search warrant would be equatable to that of an indictment in the federal system, the protection afforded is no more than if no review of the evidence were allowed. The function of the magistrate is mere ritual and the only protection afforded is the conscience of the affiant. If the public interest demanded that searches be accomplished on the basis of any evidence satisfactory to the officer, then the requirements of a display of evidence before a magistrate and the procurement of a warrant should have been abolished long ago as a needless delay. Such is not the case. Although the standards applied to the evidence before the magistrate vary among the courts, only Texas would allow such remote correlation between the facts in the affidavit and the probability of their truth.

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98. *Contra,* Kohler v. United States, 9 F.2d 23 (9th Cir. 1925); United States v. Dzadius, 289 Fed. 837 (D.C.W.Va. 1923); Carroll v. Commonwealth, 297 Ky. 748, 181 S.W.2d 259 (1944); Dunean v. Commonwealth, 298 Ky. 217, 179 S.W.2d 899 (1944); Hyde v. Commonwealth, 201 Ky. 673, 258 S.W. 107 (1924); Register v. Patterson, 13 N.D. 70, 99 N.W. 67 (1904); Hall v. State, 34 Okla. Crim. 334, 246 P. 642 (1932); Cole v. State, 38 Okla. Crim. 396, 262 P. 712 (1928); Johnson v. State, 153 Tenn. 431, 284 S.W. 356 (1925); State v. Ripley, 196 Wis. 238, 220 N.W. 235 (1928); State v. Baltes, 183 Wis. 545, 198 N.W. 282 (1924); *cf.* Church v. State, 151 Fla. 24, 9 So.2d 164 (1942); Wagner v. Commonwealth, 199 Ky. 821, 251 S.W. 1021 (1923) (although informant unnamed, affidavit sworn to personal knowledge of facts substantiating information).

99. 120 Tex. Crim. 252, 46 S.W.2d 985 (1931).

100. *Accord,* Magee v. State, 135 Tex. Crim. 161, 118 S.W.2d 591 (1938); Siragusa v. State, 122 Tex. Crim. 263, 54 S.W.2d 107 (1932); Duncan v. State, 118 Tex. Crim. 253, 37 S.W.2d 1034 (1931); Rozner v. State, 109 Tex. Crim. 127, 3 S.W.2d 441 (1928). *But cf.* Blackburn v. Commonwealth, 202 Ky. 751, 261 S.W. 277 (1924).

101. 113 Tex. Crim. 527, 22 S.W.2d 1069 (1929).

Conclusion

Although the term probable cause is used to describe the rational persuasiveness of the evidence necessary to instigate prosecution, search and arrest, there are significant differences in the evidence needed for each. The public interest protected as well as the private interest invaded by each action influence the granting of judicial review as well as the evidentiary standard to be applied. Although there are major jurisdictional differences as to the capability of hearsay to achieve the required degree of probability for each action, the standards indicate a substantially lower degree of probability required to initiate prosecution than that required for arrest and search. The validity of such standards depends in part on a realistic appraisal of the consequences of criminal prosecution, arrest, and search in contemporary society.

PROVING THE FALSITY OF ADVERTISING: THE McANNULTY RULE AND EXPERT EVIDENCE

In 1902 the Supreme Court, in *American School of Magnetic Healing v. McAnnulty*,[1] set out a principle which prescribed one of the boundaries of a valid Post Office fraud order. In the past half century, respondents in administrative proceedings under several federal statutes have urged the principle as substantiation for such a variety of contentions that considerable confusion has resulted.[2]

At the turn of the century, a number of organizations advocated the proposition that the mind of a human being was largely responsible for the ills of the body, and was a discernible factor in the treating and curing

1. 187 U.S. 94 (1902).

2. An indication of the variety of contentions can be had from noting the several situations for which applicability of the rule has been urged. It was significant in three criminal mail fraud cases: Stunz v. United States, 27 F.2d 575 (8th Cir. 1928); Bruce v. United States, 202 Fed. 98 (8th Cir. 1912); Harrison v. United States, 200 Fed. 662 (6th Cir. 1912). Justice Brandeis, in his dissenting opinion to Pierce v. United States, 252 U.S. 239 (1920), applied the principle of *McAnnulty* to statements made by defendants convicted of violating the Espionage Act of 1917. The rule has also been advanced in argument in various civil and state court cases. Dilliard v. State Board of Medical Examiners, 69 Colo. 575, 196 Pac. 866 (1921) (revocation of doctor's license); Fougera & Co. v. City of New York, 224 N.Y. 269, 120 N.E. 642 (1918) (violation of sanitation ordinance—failure to disclose contents or curative effect of medicine on the label); Moxie Nerve Food Co. v. Holland, 141 Fed. 202 (D. R.I. 1905) (in defense to a suit brought to enjoin the distribution of a product with a confusingly similar name); Weltmer v. Bishop, 171 Mo. 110, 71 S.W. 167 (1902) (suit for libel by partners in an organization similar to the American School of Magnetic Healing; motion for rehearing based on the decision in the *McAnnulty* case, denied).