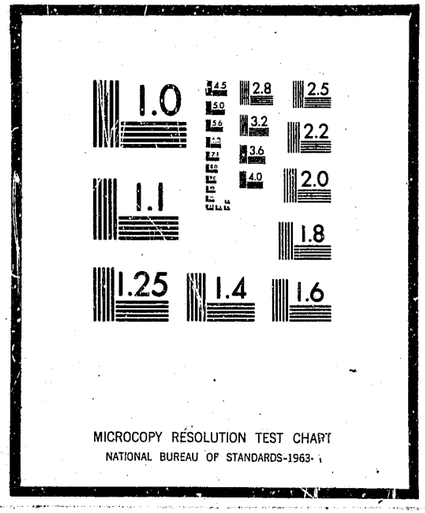

SOUTH CAROLINA LAW ENFORCEMENT ETV TRAINING PROGRAM

PROBABLE CAUSE For ARREST

PART I

prepared by SOUTH CAROLINA LAW ENFORCEMENT DIVISION • in cooperation with SOUTH CAROLINA EDUCATIONAL TELEVISION NETWORK

South Carolina LAW ENFORCEMENT - ~~E.T.V.~~ Educational Television TRAINING PROGRAM — From Crime to Court —

PROBABLE CAUSE FOR ARREST,

PART I

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Sponsored by:

South Carolina Law Enforcement Division

in cooperation with

South Carolina Educational Television Network

Endorsed by:

South Carolina Governor Robert E. McNair
South Carolina Sheriffs' Association
South Carolina Law Enforcement Officers' Association
South Carolina Police Chiefs' Executive Association
South Carolina F.B.I. National Academy Associates
South Carolina Southern Police Institute Associates

Program Objective:

This material will present circumstances and procedures relative to "Probable Cause" for planned arrests.

THE FEDERAL LAW ON PROBABLE CAUSE FOR ARREST (Part I)

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(OUTLINE)

THE FEDERAL LAW ON PROBABLE CAUSE FOR ARREST

1. The Fourth Amendment To The Constitution of The United States Requires That All Arrests Be Made On Probable Cause For Belief of Guilt

The Supreme Court of the United States now has the last word on the legality of every arrest made by any law enforcement officer in the United States, if a convicted defendant wants to take his case that high. The Fourth Amendment to the Federal Constitution says, in part, that ". . . no Warrants shall issue, but upon probable cause. . ." This language is interpreted by the Supreme Court to mean that no arrest shall be made, with a warrant or without, unless there is, at the moment the arrest is made, probable cause or reasonable grounds for believing that the person arrested has committed, or is committing, a criminal offense. If you are accustomed to using the term "reasonable grounds, just remember that it means the same thing in law as the term "probable cause."[1]

2. The Requirement of Probable Cause Applies to State Arrests As Well As To Federal Arrests

During almost our entire national history the Fourth Amendment requirement of probable cause for every arrest was applied to federal arrests only. But in the famous case of Beck v. Ohio[2] the Supreme Court decided in 1964 that from now on the same requirement applies to all state, county and city arrests. Be sure you understand what this means. It does not mean that your state law of arrest is null and void. You will continue to make your arrests

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

[2] 379 U. S. 89 (1964)

according to the law of your state. It does mean that one extra requirement has been added. This is that the information on which this arrest is made must be strong enough to make probable cause for belief of guilt under the Supreme Court's definition of "probable cause" in the Fourth Amendment.

3. An Illegal Arrest Is A Primary Illegality Which Makes All Evidence Obtained As A Direct Result of The Arrest Inadmissible In Court

It seems safe to say that probable cause for arrest has now become the most important subject in the criminal law because in so many cases the entire case hangs on the legality of the arrest. This is usually a matter of whether there was or was not enough information to make probable cause for belief of guilt. It is not uncommon to obtain a conviction without a confession of guilt, or without evidence obtained by search and seizure; the officer has found enough evidence to convict from other sources. But an illegal arrest spoils so much evidence that in many cases, or most, there just is not enough left to obtain a conviction.

The Supreme Court held in 1963 that an arrest made without probable cause is a "primary illegality," and that all things obtained as a direct result of this "primary illegality" are excluded from use as evidence in court.[3] To illustrate, suppose a man seated in his automobile is arrested for bootlegging. Incidental to the arrest, the officers search the car and find

[3] Wong Sun v. U. S., 371 U. S. 471 (1963)

bootleg whiskey. They carry the man to the police station and take his fingerprints, which may yield good evidence when compared with latent prints found on bottles in this case. They obtain from him a sample of his handwriting for the FBI Laboratory to compare with other writing on a piece of paper pertinent to this case. Then, after a few questions, the man gives a confession of guilt. Conviction seems certain. But if the defendant's lawyer can convince the judge that the arrest was made without enough information to make probable cause for belief of guilt, none of these things can be used as evidence. All of them-the bootleg whiskey,[4] the fingerprints,[5] the handwriting samples,[6] the confession[7] - are thrown out of court. Why? Because all of them were obtained as a direct result of a "primary illegality," an arrest made without probable cause. The case is lost.

4. The Definitions of Probable Cause

A. The Legal Definitions

An understanding of probable cause begins with the definitions

[4] Beck v. Ohio, 379 U. S. 89 (1964)

[5] Bynum v. U. S., 262 F2d 465 (1958)

[6] U. S. v. Middleton, 344 F2d 78 (1965), Result suggested but not decided.

[7] Wong Sun v. U. S., 371 U. S. 471 (1963)

given by the courts. One of the best definitions is this: "Probable cause exists if the facts and circumstances known to the officer would warrant a prudent man in believing that the offense had been committed."[8] Another definition says, "The substance of all the definitions of probable cause is reasonable grounds for belief of guilt."[9] Combine these two decisions and this is what you get - if an officer is a man who is careful in drawing a conclusion, a man who doesn't go off half-cocked, so to speak, and he has enough information to convince him that the man to be arrested has committed a felony, or is committing a felony, the officer has probable cause to arrest.

B. A Practical Illustration of Probable Cause

The first fact to be understood about probable cause is that it is not legal hocus-pocus which can be understood only by those trained in the law. In deciding whether he has probable cause the officer uses the same thought processes which careful and reasonable men everywhere use in drawing conclusions on any problem in everyday life. To illustrate this fact,

[8] Henry v. U. S., 361 U. S. 98 (1959)

[9] McCarthy v. DeArmit, 99 Pa. (St.) 63 at 69

suppose the people who believe in a long lunch period got the upper hand politically and passed a law making it a felony to eat lunch in a restaurant - everyone must go home for lunch. The next day you see a man coming out of a restaurant at 3:00 p. m. Does a careful officer, acting on these facts alone have reasonable grounds or probable cause to believe that the man ate his lunch in that restaurant? No, he does not. The man could have gone to buy a cigar, pay or collect a bill, see a friend, or do something else having no connection with lunch. The officer may legitimately suspect that the man ate lunch there, but suspicion is never strong enough to be probable cause for arrest.[10]

Now change the facts. Make it 12:30 p. m. - a common lunch period - when the man comes out of the restaurant. And as he comes out you see that he is (1) belching quite happily, (2) picking his teeth, and (3) counting his change. Does a careful officer have probable cause to arrest this man for the felony of eating lunch in a restaurant? Yes, he does. Putting all these facts together, they add up to only one sensible conclusion - the man probably ate lunch in that restaurant. To prove the offense in court you would need more evidence, of course, such as the man's confession or the testimony

[10] U. S. v. DiRe, 332 U. S. 581 (1948)

of eyewitnesses who saw him eating there. But probable cause for arrest does not require as much information as that needed to convict.[11] If there is enough information to convince a careful officer that the man probably committed the crime there is probable cause to arrest.[12] An arrest made on that basis is forever legal, regardless of whether the man eventually is convicted or acquitted.[13]

5. A Landmark Case On Probable Cause

The Supreme Court said long ago that probable cause is to be found from the same factual and practical considerations of everyday life on which reasonable men act, and it seems to be following its own advice. The proof is found in several recent cases, such as Draper v. U. S.,[14] a narcotics case. In that case a confidential and reliable informant told a federal narcotics officer in Denver that a man named James Draper was living at a certain place in the city and peddling narcotics. The officer sent the informant back for more facts. Four days later the informant came back to report that Draper had gone to Chicago to get more narcotics and would return to Denver by train on the morning of September 8 or 9. The informant described Draper by race, complexion, age, height, weight, style of dress, what he would carry, and how he walked. Two officers met the train from

[11] Brinegar v. U. S., 338 U. S. 160 (1949)

[12] Brinegar v. U. S., supra.

[13] Henry v. U. S., 361 U. S. 98 (1959), Feguer v. U. S., 302 F2d 214 (1962), cert. den 371 U. S. 872

[14] Draper v. U. S., 358 U. S. 307 (1959)

Chicago on September 8 but no person of this description got off. They met the train again on September 9, and when they saw a man meeting this description get off the train and start toward the exit they arrested him. They found the narcotics on his person.

Draper was convicted. He then took his case all the way to the Supreme Court, the same as any defendant in a state case now can do, claiming that the arrest was illegal because the officers did not at the time of arrest have enough information to make probable cause for belief of guilt. The court ruled against him and in favor of the officers, with only one dissenting vote.

Analyzing the Draper decision, what information did the arresting officers have to make probable cause? When they went to the railroad station in Denver, the officers had no information at all about crime in this case except the hearsay report of a reliable and confidential informant. This is generally considered not enough for a warrant. The informant's report said, roughly, three things: (1) that Draper was peddling narcotics in Denver; (2) that he had gone to Chicago and would return by train, on either of two certain days, with more narcotics, and (3) that he was described in a certain way. The officers did not know for sure whether any part of the report, or all of it, was true or false. But when they saw a man meeting the informant's description of Draper arrive in Denver on a train coming from Chicago, on one of the two days named

by the informant, they knew that at least a substantial part of what the informant told them was true. They then reached the reasonable and sensible conclusion that since this much of the informant's report was true, then the rest of his report - which was that Draper was peddling narcotics and would have narcotics with him - must surely be true also. The Supreme Court approved this conclusion when it said the officers had probable cause for arrest.

6. Finding Probable Cause For The Planned Arrest
A. In General

The facts of each felony case differ from the facts of all other cases, of course, but the Draper case and some recent judicial decisions in other cases reveal methods of investigation which any officer can use in developing enough information to make probable cause.

The planned arrest is the perfect case in theory. It is the type of case worked by federal investigators and many city, county and state detectives. The officer receives a hearsay report of crime. It is strong enough to require investigation but too weak to make probable cause. This is not a problem. The officer is not required to make an arrest today, next week or even next month. He has time to plan his investigation and then work his plan.

To illustrate a planned arrest, reenact the Draper case but handle it in a different way. The officers there probably had good reason

to arrest Draper on the spot, but many an officer who is investigating a crime that is being committed repeatedly in the same way and in the same area will not arrest as soon as he has the minimum amount of information to make probable cause. He will delay the arrest and continue the investigation. He runs some risk that his investigation will be discovered, but he also has a chance of discovering a great deal more about this type of crime and the people who are involved.

B. Probable Cause Is Built Like A Stack of Blocks - By Piling One Fact Indicating Guilt on Top of Another

In reenacting Draper, the officers will not arrest the man in the railroad station. They will let him go, but place a loose surveillance on him to learn where he goes and what he does. In doing so, they will build up the facts of probable cause like a stack of blocks, one on top of the other. They already have two blocks. The bottom block is the report of the reliable and confidential informant that this man is peddling narcotics here. The second block is the fact, to which the officers can testify, that they saw this man come back from Chicago on a train just as the informant said he would. The Supreme Court said this is enough. But the officers want more blocks - more facts - for reasons which I shall explain later. And note that each additional fact of probable cause shown here is one which some officer actually has developed and used in a case of probable cause which has been approved by the federal courts. The loose surveillance

placed on this man will reveal the location of this man's home and his place of business, if any. In some cases it has shown that in his home or place of business there is an unusual pattern of activity. For example, in narcotics and counterfeiting cases the officers have found that during the hours of the day when people normally are up and around the place is dead but later at night, when most people are in bed, the place is alive with activity.[15] This information, when considered against the report of crime previously received, is another fact of probable cause.

Continuing surveillance of the man may show, as it has in many cases, that he is associating with other persons who are known to the police to be involved in this type of crime. If he is peddling narcotics, or bootleg whiskey, or lottery tickets of any kind the people who buy those things may come to his place or he may meet them on the street or elsewhere. The officer can testify to having seen these meetings, and his testimony to each of these meetings adds another fact to the stack of facts making up probable cause.[16]

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[15] U. S. v. Sharpe, 322 F2d 117 (1963)
Newcomb v. U. S., 327 F2d 649 (1964),
cert. den. 377 U. S. 944

[16] U. S. v. Santiago, 327 F2d 573 (1964)
U. S. v. Thomas, 319 F2d 486 (1963)

Sometimes the officer can see, hear or smell the evidence of the crime. Suppose he is investigating a report that a still is being operated in a barn. Standing in the open fields outside the barn on a dark night he uses binoculars to look through an open door and sees the still in operation. At the same time he hears the familiar sound of a still in operation and the breeze brings him the aroma of sour mash. The officer's testimony to what he saw is a fact of probable cause,[17] his testimony to what he heard is another,[18] and his testimony to what he smelled is still another.[19] This method of building up probable cause can be used in many cases. The aroma of opium in a hotel room may be smelled in the public hallway outside,[20] an officer walking past a bootlegger's car on the street may see that it contains Mason jars or other equipment commonly used by bootleggers in the area,[21] or an officer investigating a burglary which involved breaking through a wall may see brick and mortar dust on the trousers of the suspect.[22]

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[17] U. S. v. Shew, 324 F2d 733 (1963), cert. den.
376 U. S. 909

[18] U. S. v. Shew, 324 F2d 733 (1963), cert. den.
376 U. S. 909

[19] U. S. v. Young, 322 F2d 443 (1963), cert. den.
375 U. S. 952

[20] Johnson v. U. S., 333 U. S. 10 (1948)

[21] U. S. v. Haley, 321 F2d 956 (1963)

[22] Muschette v. U. S., 322 F2d 989 (1963)

In many types of cases, including rape, robbery and burglary, the physical description of the suspect as seen by the officer may match that of unknown persons previously reported as having committed similar offenses in the same area. This fact is another block in the stack of probable cause.[23]

Once the officer has learned the name of his suspect he can check the records of his own law enforcement agency and other agencies. Sometimes he finds that this man has been arrested previously, or both arrested and convicted, for this type of offense or one related to it. A record of this kind is another fact of probable cause,[24] and a particularly strong one where the record shows a conviction.

If the officers surprise the man by meeting him on a public street or highway, and he knows who they are, he may make an obvious attempt to hide his face so they will not recognize him. This has happened in bootlegging and burglary cases, and has been considered by the courts as another fact of probable cause.[25]

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[23] Mares v. U. S., 319 F2d 71 (1963)

[24] U. S. v. Santiago, 327 F2d 573 (1964)
U. S. v. Moriarity, 327 F2d 345 (1964)

[25] Grogan v. U. S., 261 F2d 86 (1958), cert. den. 359 U. S. 644
Schook v. U. S., 337 F2d 563 (1964)

Perhaps the officers now feel sure that they have enough facts indicating guilt to stop the man, and they do so. If he has some small and illegal thing in his possession, such as narcotics, a bottle of bootleg whiskey or something he has stolen he may drop it to the ground in a way which he hopes the officers will not notice. He abandons the thing and the officers have a right to pick it up and examine it. If the thing is illegal for any reason, the officers have added another fact to their stack of probable cause.[26]

The next step which the officers usually take is to ask the man questions about the reported crime and his conduct. Sometimes a person questioned in this manner will give confused and conflicting answers, or no answer at all under circumstances which an innocent man would be glad to explain. A confused or conflicting answer, or no answer at all, has often been another fact of probable cause in an actual case.[27]

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[26] U. S. v. Price, 345 F2d 256 (1965)
Vincent v. U. S., 337 F2d 891 (1964), cert. den. 380 U. S. 988

[27] Grogan v. U. S., 261 F2d 86 (1959), cert. den. 359 U. S. 644
Bell v. U. S., 254 F2d 82 (1958), cert. den. 358 U. S. 885
Dixon v. U. S., 296 F2d 427 (1961)

C Build A Strong Case of Probable Cause When You Can

The object of this discussion is not to suggest that every case, or even any particular case, can be worked in such a way that probable cause is as high as it is here before an arrest is made. Circumstances have a lot to do with determining how much information, and the kind of information, that an officer can obtain. This imaginary case does illustrate, however, two important points on developing probable cause for arrest.

The first point is that the investigation in almost any case of the planned arrest type can be worked in such a way that when the officer does make an arrest it will be made on a large quantity of probable cause rather than on the minimum amount acceptable, or not enough. The objective of the good investigator is to work each case until there is a good strong structure of probable cause.

D. The Law Allows The Officer To Use A Wide Variety of Facts And Circumstances To Show Probable Cause - Mulligan Stew

The second point is that probable cause for arrest can be made from all kinds of facts, provided only that the collection in this case is strong enough to convince a careful and reasonable officer that the man to be arrested has committed, or is committing, a felony. Consider the number of felonies on the statute books, and the number of different things which human beings can do in planning those crimes, committing them, and then making a getaway and disposing of the loot. The total number of facts which can show probable cause runs into the thousands. Any experienced officer can think of many which have not been mentioned here, such as the fact that a thief will attemp to pawn the thing he has stolen, or sell it at a ridiculously low price, a bootlegger's car sometimes rides low on the rear springs because of the heavy load carried, and numbers writers have a certain time schedule of operations.

Probable cause for arrest can be remembered as the "Mulligan Stew" of law enforcement. Mulligan stew is a dish which seems to have vanished with the advent of the affluent society, but it once was eaten by many. Webster's Dictionary defines it as "a stew of vegetables, meat or fish, and other available foodstuffs." The wide definition shows how the stew was made. Into one pot the cook put almost anything and everything that was

edible and available in the kitchen, the garden or anywhere else. Probable cause is made in the same way. The officer can throw into the pot almost any fact and every fact which, taken either by itself or in connection with other facts, sensibly indicates to a reasonable officer that the crime, which he already has reason to suspect, is being committed or has been committed.

The only exception to the Mulligan Stew Rule is that poison cannot be used. The cook never put rat poison in the stew; it is not edible. For the same reason, the officer must not throw into the probable cause pot any information which he has obtained illegally. Information of that kind is poison in the law. Such information can be used, however, if it is obtained from two or more separate and distinct sources, one of which is perfectly legal.[28]

The Mulligan Stew Rule on making probable cause is easy to illustrate. One of the best illustrations is found in a counterfeiting case. Agents of the Secret Service met an unidentified informant who told them that three named men were counterfeiting ten dollar bills at a certain address. The informant added a great deal more information. His report is the hambone - there it goes into the pot. The Agents started a surveillance and other investigation. They learned that three

[28] Burke v. U.S., 328 F2d 399 (1964), cert. den. 379 U.S. 849

men having the names given by the informant were conducting some kind of operation at the address stated by the informant. There goes an onion into the pot. The business had to be unusual because the doors to the place were locked during usual business hours, the front blinds were drawn, the lights were on until well past midnight, and the people inside were not doing the kind of business which the company advertised. There go some small potatoes into the pot. Two of the men named by the informant were found to have previous felony convictions. There goes a carrot into the pot. Police records revealed that one of the men was a lithographer, which showed that he knew something about the type of printing used to make paper money. There goes a turnip into the pot. Surveillance showed that the men were driving cars like the informant described. Throw some cabbage into the pot. Investigation revealed that the company had recently purchased two different kinds of paper used by counterfeiters. This is a particularly good ingredient. Throw a pound of country ham into the pot. Just before the arrest, one of the men left the premises carrying a box, put the box in his car and prepared to drive away. Throw a radish in the pot and call it a Mulligan Stew. You might not like a stew made that way, but taking it as a legal proposition, the Federal judges thought it was excellent. They voted for the officers all the way up.[28a]

[28a] Newcomb v. U.S., 327 F2d 649 (1964), cert. den. 377 U.S. 944

If you prefer a bootlegging case, here is how Federal alcohol tax officers made a Mulligan Stew good enough to give them probable cause to search a bootlegger's car. While checking on illegal stills in a certain area, one of the agents was told by a man whom he knew that on that same evening a certain suspect, who became the defendant in the case, would drive a Buick car into a certain bootlegging area. That is the hambone in the pot. One of the agents knew the suspect and knew that he had a reputation as a bootlegger. The agent had arrested this man for bootlegging three times before and on several occasions had seen the suspect's car parked at the home of known violators. Put several potatoes in the pot. The agents concealed themselves along the road that the informant said the suspect would use and saw him drive into the area shortly after 5:00 p.m. in a Buick. Put an onion in the pot. About an hour later, he came back out in the same car and the car appeared to be overloaded. Put a tomato into the pot. That makes a stew not nearly so rich as the one in the counterfeiting case, but the agents stopped the car, searched it and found moonshine whiskey in the trunk. The Federal court said the agents had good probable cause for the search of the car and they upheld the conviction.[28b]

[28b] U.S. v. Thomas, 319 F2d 486 (1963)

7. The Advantages of Building Up Probable Cause For A Planned Arrest

The whole point of the argument in favor of this systematic and methodical buildup of probable cause for arrest in the planned arrest type of case is that it brings the officer and his case a good half-dozen special advantages. Each of these advantages is sufficiently important to command special attention.

A. To Make Sure The Arrest Is Legal

The first advantage, obviously, is to make sure that the arrest is legal, no matter whether it is made with a warrant or without. A legal arrest protects the officer personally. Remember that any person in this country now has a Federal constitutional right to not be arrested without probable cause for belief of guilt.[29] A person arrested without a warrant and without probable cause can sue the officer personally in Federal court for damages,[30] or he can sue him in state court for false arrest. A legal arrest also protects the case. Remember that an illegal arrest is a "primary illegality" which makes illegal every scrap of evidence obtained by the officer as a direct result of the illegal arrest,[31] no matter whether the evidence came from searching the prisoner, from his confession, or otherwise. But if the arrest is legal, it sets the stage for the officer to legally obtain evidence of guilt by search and seizure, by confession of the prisoner, by taking the prisoner's fingerprints, and so on.

[29] Beck v. Ohio, 379 U.S. 89 (1964)

[30] Monroe v. Pape, 365 U.S. 167 (1961); Stringer v. Dilger, 313 F2d 536 (1963); Nesmith v. Alford, 318 F2d 110 (1963), cert. den. 375 U.S. 975

[31] Wong Sun v. U.S., 371 U.S. 471 (1963)

B. To Obtain The Advantages of An Arrest Warrant

The second advantage to this buildup of probable cause is that it gives the officer the facts necessary to obtain an arrest warrant, assuming that time and other circumstances allow him to do so. An arrest warrant has definite advantages. First, an arrest made on a warrant is in less danger of successful attack by the defense than an arrest made without a warrant. As any good defense lawyer knows, there is a presumption of legality running in favor of a warrant.[32] To upset a warrant, the defense must show that the magistrate who issued the warrant did so arbitrarily, without having any reasonable basis for issuing the warrant. This is hard to do. The Federal courts, including the Supreme Court, have made it clear that they prefer arrests and searches made on a warrant, and that in a close case where there is a serious question whether the officer had sufficient probable cause, they will be more inclined to favor the officer if he acted on a warrant.[33] Another advantage of a warrant is that it probably reduces the chances of physical resistance to the arrest. This conclusion is indicated by a recent study of arrest problems in three different states. When the person to be arrested is told that there is a warrant of arrest outstanding for him, he is more inclined to believe that the law really means business in

[32]Irby v. U.S., 314 F2d 251 (1963), cert. den. 374 U.S. 842; U.S. v. Nicholson, 303 F2d 330 (1962), cert. den. 371 U.S. 823

[33]Johnson v. U.S., 333 U.S. 10 (1948); U.S. v. Ventresca, 380 U.S. 102 (1965); Ford v. U.S., 352 F2d 927 (1965)

his case and that the officer is simply doing his sworn duty to arrest when commanded by higher authority.[34]

Another important point here is that a warrant of arrest may be an absolute necessity in some cases. The Supreme Court made it clear a few years ago that it had not yet decided whether the Federal Constitution permits officers to break into a dwelling at night to arrest someone inside without a warrant where no reason appears for not obtaining a warrant.[35] This is another good reason for getting a warrant, when the circumstances allow, for any nighttime arrest which may be made in a dwelling.

C. To Backstop A Defective Arrest Warrant

The third advantage in building up a large quantity and quality of probable cause is that probable cause developed to this degree will act as a back-stop for an arrest warrant that is technically defective. If the magistrate or judge who issues the warrant makes a mistake in the form of the warrant, a reviewing court may declare the warrant void. This does not, however, automatically make the arrest illegal. The view of the Federal courts is that if there was sufficient probable cause for this arrest, then the arrest was legal as one made on probable cause alone and it is not illegal because

[34]La Fave, Arrest, The Decision To Take A Suspect Into Custody, American Bar Foundation, Administration of Criminal Justice Series; Little, Brown and Company, 1965, page 45

[35]Jones v. U.S., 357 U.S. 493 (1958)

of the defective warrant.[36] And, of course, the decision that the arrest was legal as one made on probable cause despite the defective warrant is easier for the court to reach in a case in which probable cause has been well built up.

D. To Protect The Confidential Informant

The fourth advantage to be obtained from systematically building up probable cause for a planned arrest is in protection for the confidential informant. As every experienced officer knows, a reliable and confidential informant is extremely valuable to law enforcement and to the innocent who need protection. But a good informant must remain confidential - his identity must be kept secret both for his own protection and for his future usefulness.

The fundamental rule here is that if the informant's identity is necessary to show probable cause, the government either must tell who he is or abandon prosecution.[37] To give a concrete example, if an officer makes an arrest on nothing more than the hearsay report from a confidential informant and a very little other information, the court may say that there is not enough information for probable cause unless the informant is brought

[36] Stallings v. Splain, 253 U.S. 339 (1920); Hagans v. U.S., 315 F2d 67 (1963), cert. den. 375 U.S. 826; U.S. v. White, 342 F2d 379 (1965), cert. den.; U.S. v. Hall, 348 F2d 837 (1965), cert. den. 382 U.S. 910

[37] U.S. v. Robinson, 325 F2d 391 (1963); 354 F2d 109 (1965)

into court to show who he is and what he told the officer. This result can be avoided by using the informant's report of crime as only the starting point in the investigation, and proceeding from there to build up an independent case of probable cause from what the officers can learn in other ways. If the officers can get enough other information to build up a good case of probable cause entirely outside what the informant told them, then the arrest is legal in the Federal courts without naming the informant, producing him in court or identifying him in any other way.[38] The value of this result to an officer or a law enforcement agency having good confidential informants is obvious.

The Federal rule is that the mere fact that the investigation was based on the report of an informant does not require that the informant be identified.[39]

E. To Obtain Additional Evidence of Guilt

The fifth advantage in building up probable cause is that of obtaining more evidence for use in court, or in obtaining a confession. This is particularly true of continuing crimes, such as peddling numbers, bootleg whiskey or narcotics. The criminal continues the crime because there is money in it, but each time he commits another violation, he runs the risk of

[38] U. S. v. Santiago, 327 F2d 573 (1964); Johnson v. U.S., 328 F2d 883 (1964); U.S. v. Konigsberg, 336 F2d 884 (1964), cert. den. 379 U.S. 930, 933

[39] U.S. ex rel. Coffey v. Fay, 344 F2d 625 (1965)

leaving more evidence behind him. A continuing investigation often will reveal some of this evidence. It may lead the criminal to confess when it is shown to him after arrest, and if he does not confess some of it may be useful at the trial.

F. To Make A Good Impression

The sixth advantage of building up probable cause - and there may be more but surely six is enough - is that of making a good impression for the officer and his department with the judges and the public. We value our liberty in this country and no one likes to see someone else arrested unfairly. An officer and a department that get the reputation of arresting only on strong probable cause, whether with a warrant or not, are bound to win more respect for themselves and their work.

8. Using Informants To Build Probable Cause

Much needs to be learned about operating the informant in building probable cause for the planned arrest. Most planned arrests originate in a hearsay report of crime from an informant. The informant can be any human being. He may be a confidential informant,[40] either paid or unpaid. The informant may be a victim or witness of the offense,[41] a police officer of the same agency as the arresting officer,[42] an officer of a different

[40] Draper v. U.S., 358 U.S. 307 (1959); U.S. v. Santiago, 327 F2d 573 (1964); U.S. v. Wai Lau, 329 F2d 310 (1964)
[41] U.S. v. Gearhart, 326 F2d 412 (1964); Cuozzo v. U.S., 325 F2d 274 (1963)
[42] U.S. v. Plemmons, 336 F2d 731 (1964); U.S. v. McCormick, 309 F2d 367 (1962), cert. den. 372 U.S. 911

agency,[43] an accomplice of the person arrested,[44] an unknown person who informs by anonymous telephone call or letter,[45] or any other person. The principal distinction among them for purposes of probable cause is that some are more reliable than others. For example, an informant who is a respected citizen and who will come into court when called obviously is more to be relied upon than one who calls anonymously by telephone.

A. The Informant's Report Alone Usually Is Not Sufficient To Make Probable Cause

An informant's report of crime, no matter how reliable the informant, should not be considered sufficient information to make probable cause. The Supreme Court may some day say that it is enough in a life-or-death type of case on which the officers must act immediately,[47] and some courts already have found probable cause in a report of crime from an informant known to be reliable,[47a] but for most cases the officer should assume that he needs more information to make probable cause, just as the cook needs more than one ingredient to make a Mulligan Stew.

The extra ingredient which the officer needs to make probable cause is some information - the more the better - which tends to

[43] Rogers v. U.S., 330 F2d 535 (1964), cert. den. 379 U.S. 916; U.S. ex rel. Coffey v. Fay, 344 F2d 625 (1965)
[44] Rodgers v. U.S., 267 F2d 79 (1959); U.S. v. Bracer, 342 F2d 522 (1965)
[45] U.S. v. Sharpe, 322 F2d 117 (1963); U.S. v. Mont, 306 F2d 412 (1962), cert. den. 371 U.S. 935, reh. den. 375 U.S. 874
[46] Muschette v. U.S., 322 F2d 989 (1963); Bates v. U.S., 352 F2d 399 (1965)
[47] Jones v. U.S., 362 U.S. 257, 271 (1960)
[47a] Costello v. U.S., 324 F2d 260 (1963), cert. den. 376 U.S. 930; U.S. v. Garnes, 258 F2d 530 (1958); People v. Prewitt, 341 P2d 1 (1959)

show that the informant's report of crime is true; some corroboration of the truth of the report. For example, the officers in the Draper case, which was discussed earlier, found corroboration of the informant's report that Draper was peddling narcotics when they went to the railroad station in Denver and saw Draper, described as the informant said he would be, get off a train from Chicago at the time and place that the informant said he would. The officers then were correct, the Supreme Court said, in believing the rest of the informant's report - which was that Draper would have narcotics with him - and in making an arrest on probable cause.

B. The Informant's Report May Be Corroborated In Various Ways

There are several ways to corroborate the truth of an informant's hearsay report of crime. The best way is to start an investigation to find additional evidence of this crime and, if it is successful, build up more facts of probable cause, block on top of block, in the manner described earlier during the imaginary reenactment of the Draper case. Each new fact of any kind which sensibly points toward the crime is additional corroboration of the truth of the informant's report, and the officer can show each fact to the magistrate whom he asks for an arrest warrant or the trial judge who holds a hearing on probable cause after an arrest without a warrant. And always make a note of each fact the

informant told you in his report, so that you can give these facts to the magistrate or judge who must decide whether you have probable cause.[48] The greater the detail of these facts, the stronger the case of probable cause.

A second method of corroborating the truth of the informant's hearsay report of crime is by checking his report against information already existing - information which was developed by previous investigation. For example, in a famous case a city police officer went to the magistrate for a search warrant. The officer told the magistrate that he had a confidential informant, whose identity the officer never revealed at any time during the entire case. This informant, the officer said, was known by him to be reliable because other reports of crime which the informant had made proved to be accurate. In addition, the officer said, the informant told him that two persons, whom the officer named, were peddling narcotics in an apartment of which the officer had the number and address, which he gave to the magistrate. The informant said he had been in the place very recently, and that the narcotics were kept in certain places which he described. The officer then told the magistrate that this report from the informant was corroborated by information from earlier investigations in which these same two people had admitted to the officers that they were narcotics addicts and

[48]Kelly v. Warden, 230 F. Supp. 551, 555, Note 1 (1964)

had displayed the needle marks on their arms. The search warrant was then issued, the narcotics were found, and a conviction was obtained. The case went to the Supreme Court on the question whether the officer had sufficient probable cause for a search warrant. By a vote of 8 to 1 the Supreme Court said the officer had found probable cause.[49]

This case shows that probable cause for a search warrant is like probable cause for arrest. The officer develops and finds probable cause for a search warrant, or probable cause for searching a mobile vehicle, in the same way that he develops and finds probable cause for arrest.

The third method of corroborating the truth of the informant's hearsay report of crime is the officer's testimony before the magistrate or judge to any other reason which he has for believing this report. For example, in some cases the officer can truthfully testify that he has used this confidential informant for a certain period of time - say six months - and that during this period the informant has given him other reports of crime - say ten others - and that most or all of the information has been found to be correct. This is corroboration of the informant's present report; a basis for believing this report to be true.[50] An officer who successfully

[49]Jones v. U.S., 362 U.S. 257 (1960)
[50]Jones v. U.S., 362 U.S. 257 (1960)

uses the same informant again and again can corroborate each successive report to some degree by keeping such records that he can tell the magistrate or judge how long and how successfully he has used this informant.

There is other corroboration to which the officer sometimes can testify. If the informant is known to be a person of good character and reputation, the officer should say so.[51] Good character and reputation in an informant is not necessary, however.[52] The basic fact in which the law is interested is whether there is reason to believe that his report in this case is correct, not whether he goes to church every Sunday. If the informant makes an admission against interest, as by admitting that he is involved in crime, the officer's testimony to that fact before the magistrate or judge is a measure of corroboration of the truth of his report of crime committed by someone else.[53] The law recognizes the fact that a person who makes an admission against his own best interest is not likely to be telling a lie.

A fourth method of corroborating the truth of the informant's report of crime in this case is that of bringing the informant in, personally, before the magistrate or judge. This can be done in some cases but not in those in which the informant's identity must be kept secret for his own safety. The pressure exerted by the defense to reveal the informant will

[51]People v. Coffey, 12 NY2d 443, 452 (1963)
[52]U.S. v. One 1957 Ford Ranchero Pickup Truck, 265 F2d 21, 26 (1959)
[53]U.S. ex rel. Coffey v. Fay, 344 F2d 625 (1965)

be most likely to succeed in those cases in which the officer arrests on the thinnest margin of probable cause - the smallest buildup of facts. The court may hold that there is not enough probable cause unless the informant is brought in so that the judge himself may pass on the informant's reliability.[54] The informant must then be exposed or the arrest will be held illegal for lack of probable cause. This can be avoided, as explained earlier, by building up the facts before arrest, block on top of block, until there are enough facts to make probable cause without using any of the information from this informant.

[54] U.S. v. Robinson, 325 F2d 391 (1963); 354 F2d 109 (1965)