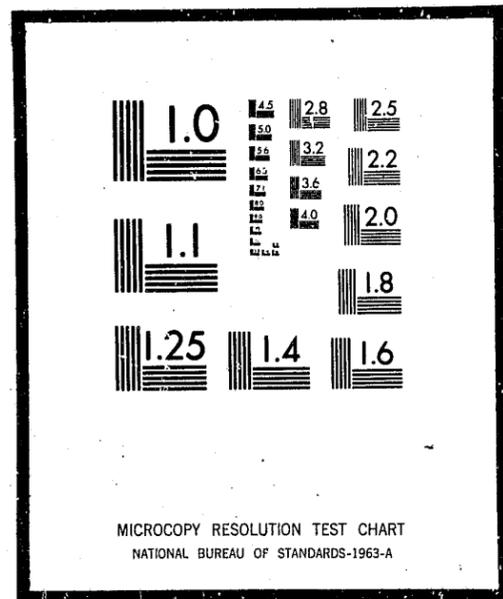


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## SOUTH CAROLINA LAW ENFORCEMENT ETV TRAINING PROGRAM

# PROBABLE CAUSE For ARREST PART II

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

South Carolina LAW ENFORCEMENT - <sup>Educational Demonstration</sup> ~~TRAINING~~ TRAINING PROGRAM -  
From Crime to Court -  
PROBABLE CAUSE FOR ARREST,

PART ~~1~~ 2

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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 emergency arrests.

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

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THE FEDERAL LAW ON PROBABLE CAUSE  
FOR ARREST - PART II

1. The Emergency Arrest Is The Imperfect Case - It Presents The Most Difficult Problem of Probable Cause

The planned arrest, which allows the officer to follow a systematic plan in building probable cause, is the perfect case. The emergency arrest is the imperfect case. It is imperfect because the officer has little control over the facts upon which he must act. He must make his decision on probable cause, which is his decision to arrest or not arrest, without the benefit of careful investigation between the time he first learns of the offense and the time when he must decide the question of arrest. This type of case requires a special formula for use in determining probable cause. It is a simple formula, short on rules and long on good judgment.

2. Some Typical Emergency Arrest Cases In Which The Courts Found Probable Cause For The Arrest

The use of the probable cause formula for emergency arrest can best be illustrated by showing how it worked in a few actual police cases in which the Federal courts agreed with the officer's decision that he had found probable cause to arrest without a warrant.

A. Bell v. U.S., 280 F2d 717 (1960)

In the first case, two District of Columbia police officers, using an unmarked robbery squad car, were parked in a residential area at 4:30 a. m. They heard a woman's continuing screams. Then they saw a man run out of an alley in the area in which the screams seemed to originate. When the man saw the officers he slowed to a walk. An officer stopped the man, identified himself by showing his badge, and asked the man to explain. The man said he was going home from a party. The officer asked him where he lived, and the man gave an address in the opposite direction from that which he was taking when stopped by the officer. The man was arrested and convicted of housebreaking and larceny. On appeal, he claimed that the arrest was illegal because the officers acted without enough information to make probable cause for belief of guilt. But the appeals court agreed with the officers. Here is a part of what they said:

"When the officers heard screams for help at 4:30 a. m. and at once saw appellant running near the point from which the cries came, minimum prudence and diligence dictated that the person in seeming flight be stopped and interrogated. When his statement that he was on his way home from a party was found not to coincide with the direction of his travel, further investigation was called for to determine whether appellant's seeming flight was connected with the cries for help. At this juncture, there was abundant probable cause for arrest. Indeed, it would have been an astonishing lack of sound judgment for the police to act otherwise."<sup>55</sup>

<sup>55</sup>Bell v. U. S., 280 F2d 717 (1960)

B. Bell v. U.S., 254 F2d 82 (1958), cert. den. 358 U.S. 885

In the second interesting case of probable cause for emergency arrest, two District of Columbia officers cruising at 3:30 a. m. saw a car pull away from the curb in front of a grocery store and drive two blocks without lights. The officers stopped the car and asked to see the driver's license and registration. One officer flickered his flashlight toward the rear seat and saw about forty cartons of cigarettes. He asked the men where they got the cigarettes. One man replied "At a place in Maryland." The man opposite the driver made a motion to reach under the seat, and the officers then arrested them.

After conviction for housebreaking and larceny an appeal was filed, claiming illegal arrest. The appeals court agreed with the officers. The court said the officers had a right to stop a car without lights at 3:30 in the morning, a right to examine the license and registration, and a right to shine the flashlight into the back seat for their own protection. The reply which the men gave to the officer's question on where they got the cigarettes was "less than satisfactory," the court said. And then one man reached under the seat as if to get a weapon. All of this, taken together, made probable cause for arrest.<sup>56</sup>

<sup>56</sup>Bell v. U.S., 254 F2d 82 (1958), cert. den. 358 U.S. 885

C. Dixon v. U.S., 296 F2d 427 (1960)

In the third case, the officers were on patrol about midnight when they saw a car containing two men, one of them known to the officers as a safecracker. An unknown man on the curb beckoned to these two men and they drove over, talked briefly with him and then turned and went down another street. The unknown man walked in the same direction. The officers drove around the block and then into the same street. They saw the car which they had seen first, and another car, parked at the curb, with both trunk lids open. Four men were standing beside the second car, which had the trunk light on. As the officers came up, one man threw something to the ground. Inside the lighted trunk an officer saw a cardboard box containing a piece of clothing with a price tag on it. He then picked up the thing which one man had thrown down and saw that it was a lady's suit with a price tag on it. Twice he asked who owned the suit, but he got no answer. At this point all four men were arrested.

After conviction for receiving stolen property an appeal was filed, claiming illegal arrest because there was not enough information to make probable cause for belief of guilt. Again, the Federal Appeals Court ruled in favor of the officers.<sup>57</sup>

<sup>57</sup>Dixon v. U.S., 296 F2d 427 (1960)

D. Analysis of These Emergency Arrest Cases

Analyzing these three cases, look at the weak spots first. In each case it was not humanly possible for the officers to be positive that any crime had been committed. A woman may scream in the middle of the night because there is a mouse in the house, or for other reasons not connected with any crime. A man can have 40 cartons of legal cigarettes, and people can legally trade clothing at midnight. Second, the officers could not yet know the victim of the crime. Who was the woman in the first case? Who owned the cigarettes and the clothing in the other cases? Third, if a crime had been committed, what crime was it? What was the offense against the woman who screamed? Was it an assault? A burglary of her residence? A larceny? It might be any of these, or something else. The officers could not possibly know at the time of arrest.

Despite these defects, however, the courts approved the arrest in each case. Obviously, the judges found some strong spots. What were they? These strong spots will provide the clue to proper police action in other emergency arrest cases.

The first strong point is a set of facts that tells any sensible and reasonable person that a crime of some kind has been committed. Here we are talking, as the Supreme Court says we should, of probabilities, not possibilities.<sup>58</sup> It is possible for a woman to scream in the middle of the

<sup>58</sup>Brinegar v. U.S., 338 U.S. 160, 175 (1949)

night and an innocent man to run away. It is possible for innocent people to trade clothes on a side street at midnight. It is possible for the legal owner of 40 cartons of cigarettes to pull away from a grocery store at night and forget to turn on his lights. But probable cause for arrest is a matter of probabilities, not possibilities. The probability in each case is that something is wrong here. The common sense distilled from human experience tells us, as it did the officers here, that in nine chances out of ten, so to speak, the correct explanation of this set of facts is that someone is committing a crime here and now.

The second strong point is found in the reasonable and intelligent approach of the officers to the problem which faced them. A rookie officer, for example, might have arrested the man running from the alley where the woman screamed as soon as he saw him. But these officers did not. In this case, as in the others, they first gave the man a fair chance to give an honest and innocent explanation, if he had one. They asked all the questions that were sensible at the moment, they listened to the answers, and they saw what they could legally observe. When they received answers that common sense told them were not quite right, or no answer at all, and saw things pointing toward guilt rather than innocence, they had more reason to arrest than before.

The third strong point is that each case involved a "now or never" situation. The officers could solve the case now, or never. If they had made a note in their notebooks now, and investigated tomorrow, as often can be done in the case of a planned arrest, both the suspect and much of the evidence would disappear. If the public interest is to be protected, the officers must act now.

Summing up these three strong points, probable cause for an emergency arrest is likely to be found where (1) the officers observe someone doing something which common sense tells them is more likely to be criminal than innocent; (2) the circumstances are such that investigation can not wait, and (3) the officers give the suspect a fair chance to come up with an innocent explanation, but what they see and hear points more toward guilt of a crime of some kind than toward innocence.

### 3. Danger To The Officer In Finding Probable Cause For Emergency Arrest

Emergency arrests involve unusual danger to the officer. The risk may be greater if they ask questions, listen to answers, and look around to build up probable cause before arresting. There are two answers to this problem. First, in a few states the law provides that if the officer has a reasonable basis for believing, from the facts which are before him, that he is in personal danger if the suspect is carrying a weapon, the officer may legally search the suspect for a weapon before he stops to ask questions.

If the officer finds a weapon and it is illegally possessed, he can arrest for that offense.<sup>59</sup>

The second answer is found, I think, in a recent Federal court decision in a case in which a man was convicted of the state offense of carrying illegal firearms. He petitioned the Federal court from a writ of habeas corpus, claiming that his arrest was illegal because the arresting officer did not have enough probable cause to satisfy the requirements of the Fourth Amendment.

The facts of the case are that a uniformed officer in New York City saw petitioner and another man walking down an avenue at 6:30 a. m. on Sunday morning. They were pausing to look around, peering into store windows, and then continuing on. Petitioner was carrying in his left hand a brown paper bag, commonly used in the numbers and narcotics rackets. The officer approached the men and asked the petitioner what he had in the bag. Without answering, the petitioner made a rapid thrust toward the bag with his right hand as if to remove some object from the bag. The officer started quickly to draw his weapon and petitioner dropped the bag at the officer's feet. The officer ordered the two men against a wall at gunpoint, opened the bag and found a pistol. He then told the men they were under arrest.

<sup>59</sup>See, for example, The Uniform Arrest Act, 28 Virginia Law Review, 315 (1942), enacted into Law, with variations, in Delaware, New Hampshire and Rhode Island. See also the "Stop and Frisk" Law in New York.

The Federal court, like the state court, upheld the officer. The Federal court said the arrest occurred before the officer searched the bag and that the arrest was legal. The fact that tipped the scales in favor of the officer was petitioner's quick move with his right hand toward the bag when he was being questioned. This fact gave the officer probable cause to believe that he was witnessing a crime being committed in his own presence. What was the crime? An assault or attempted assault on the officer himself.<sup>60</sup>

#### 4. The General Rules On Finding Probable Cause In All Cases

There is a set of general rules on probable cause which apply to all types of cases. They make sense, and particularly so to the officer who studies them enough to remember them, and who turns them over in his mind for consideration in connection with his cases.

##### A. Probable Cause Is More Than Suspicion

The first rule is that probable cause for arrest requires more information than suspicion or reason to suspect.<sup>61</sup> Reason to suspect gives an officer a basis for investigation, but he must find more information indicating crime before he has enough to make probable cause for belief of guilt. The reason behind this rule is the known fact that suspicion so often proves to be unfounded and inaccurate. If any person could be arrested on suspicion only, we would all have an arrest record.

<sup>60</sup>U.S. ex rel. Robinson v. Fay, 239 F. Supp. 132 (1965); People v. Davies (Ill.), 188 NE 337 (1933)

<sup>61</sup>U.S. v. Di Re, 332 U.S. 581 (1948); Wong Sun v. U.S., 371 U.S. 471 (1963)

B. Probable Cause Is Less Than The Evidence Needed To Convict

The second rule is that probable cause for belief of guilt is less than the amount of evidence needed to convict. The Supreme Court and lower Federal courts have made this clear many times. They have said that if the officer arrests on probable cause he is protected even though it turns out that the accused is innocent.<sup>62</sup> If you arrest a bootlegger in his car on probable cause for belief of guilt, your arrest is legal even though what you thought to be bootleg whiskey turns out to be distilled water.

C. Probable Cause Is Judged On Facts Known At Moment of Arrest

The third rule is that probable cause is judged by the facts known at the moment of arrest.<sup>63</sup> Information obtained after the arrest may be used to convict if the arrest is legal, but it does not count in deciding whether the arrest itself was legal. For example, if an officer arrests a man for peddling narcotics on suspicion only and finds the man carrying a million dollars worth of opium, the arrest remains illegal simply because the total information available at the time when the arrest was made amounted to suspicion only.<sup>64</sup>

<sup>62</sup>Brinegar v. U.S., 338 U.S. 160 (1949); Henry v. U.S., 361 U.S. 98 (1960); Daly v. U.S., 324 F2d 658 (1963); Feguer v. U.S., 302 F2d 214 (1962), cert. den. 371 U.S. 872

<sup>63</sup>Wong Sun v. U.S., 371 U.S. 471 (1963); Henry v. U.S., 361 U.S. 98 (1960)

<sup>64</sup>Beck v. Ohio, 379 U.S. 89 (1964)

D. The Facts of Probable Cause Are Judged By Their Significance To An Experienced Law Enforcement Officer

The fourth rule is that the meaning or significance of each item of information used to make probable cause must be judged by what it means to an experienced police officer.<sup>65</sup> For example, a part of the probable cause on which you arrest a bootlegger may be the fact that you saw in his car certain containers of a type which you know to be commonly used by bootleggers in your area. Possession of this type of container may mean nothing to a magistrate or judge but it does mean something to an experienced officer, and the courts say that is the fact which counts. Always be sure to explain the significance of each fact to the judge or magistrate who is deciding the question of probable cause.

E. Facts of Probable Cause Differ From One Offense To Another

The fifth rule is that the facts of probable cause vary according to the modus operandi of the offense.<sup>66</sup> For example, one part of the probable cause on which many a bootlegger has been legally arrested is the fact that his car was riding low on the springs. But this fact would be of no value in making probable cause to arrest an opium peddler, simply because opium is never carried in quantities heavy enough to make the springs sag. Sagging springs are no proof at all that the car contains opium, even when a known peddler is in the car.

<sup>65</sup>Bell v. U.S., 254 F2d 82 (1958), cert. den. 358 U.S. 885; Jackson v. U.S., 302 F2d 194 (1962)

<sup>66</sup>Brinegar v. U.S., 338 U.S. 160, 175 (1949); U.S. v. Kancso, 252 F2d 220 (1958)

F. Arrest Without Warrant Requires As Much Probable Cause Information As Needed To Get A Warrant

The sixth rule is that probable cause for arrest without a warrant requires as much information indicating guilt as is needed for an arrest with a warrant.<sup>67</sup> Some officers have made the mistake of arresting without a warrant because they knew they did not have enough facts to get a warrant. This the law does not permit. The reason is obvious. The law prefers, as the Federal courts often have said, that arrests be made on warrant as much as possible.<sup>68</sup> If the courts then turned right around and allowed officers to arrest without a warrant with less information than is required for a warrant, they would be encouraging the officers to never apply for a warrant, which is contrary to the basic policy of the law.

G. Probable Cause Requires Enough Information To Identify The Suspect Before Arrest

Rule number seven is that the probable cause information must be sufficient to identify the suspect before arrest.<sup>69</sup> Probable cause must do two things. First, it must show enough facts to convince a careful and reasonable officer that an offense has been committed or is being committed. Second, it must show enough facts to convince a careful and reasonable officer that the offense was committed, or is being committed, by some person in

<sup>67</sup>Wong Sun v. U.S., 371 U.S. 471 (1963); Beck v. Ohio, 379 U.S. 89 (1964)

<sup>68</sup>Wong Sun v. U.S., 371 U.S. 471 (1963); Johnson v. U.S., 333 U.S. 10 (1948); ~~Beck v. Ohio~~

<sup>69</sup>Wong Sun v. U.S., 371 U.S. 471 (1963); Mangaser v. U.S., 335 F2d 971 (1964)

<sup>68</sup>(continued) Ford v. U.S. 352 F2d 927 (1965)

particular who has already been identified or who will be identified by name or description before the arrest is made. Facts sufficient to indicate that an offense was committed in a certain place do not authorize the officer to arrest any human being whom he happens to find in that place.

H. Probable Cause Is Best Found By Judge Or Magistrate

Rule number eight is that probable cause is best found by a judge or magistrate.<sup>70</sup> The theory of the law is that since a judge or magistrate is neutral and unbiased, he is in the best position to weigh the right of the government to arrest and the right of the suspect to liberty, and decide which must give way to the other in this case. Get a warrant whenever it is reasonably possible to do so without damaging the apprehension of the suspect. A warrant has many advantages for the officer. It gives him more certainty of having probable cause.<sup>71</sup> It tends to protect him against a suit for false arrest. It makes his police work look good to the courts and the public. And some think that a suspect who knows he is being arrested on a warrant is less likely to physically resist the arrest.<sup>72</sup>

<sup>70</sup>Wong Sun v. U.S., 371 U.S. 471 (1963); Johnson v. U.S., 333 U.S. 10 (1948); Ford v. U.S., 352 F2d 927 (1965)

<sup>71</sup>U.S. v. Ventresca, 380 U.S. 102 (1965); Ford v. U.S., 352 F2d 927 (1965); 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. 8

<sup>72</sup>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.

I. Probable Cause Does Not Require That The Officer Know Exactly Which Criminal Offense Was Committed

The ninth rule is that probable cause does not require that the officer know which specific offense the accused has committed.<sup>73</sup> If the officer has facts enough to reasonably convince him that a felony of some kind has been, or is being committed and that a certain person is the criminal he has probable cause to arrest even though he cannot be sure of exactly which offense. For example, take the case mentioned earlier of a woman screaming in the night and a man running from the alley and then giving the officer a conflicting answer. The officer had probable cause to arrest despite the fact that he could not learn until later whether the offense was murder, robbery or something else.

J. Probable Cause Does Not Require The Officer To List The Correct Legal Charge When Booking The Suspect

The tenth rule is that probable cause does not require that the arresting officers list the correct legal charge when booking the accused. Several recent Federal decisions are authority for this point.<sup>74</sup> Never book a man for "Investigation;" there is no such crime. He should be booked for the charge which the officer thinks most likely. But in any case, the final question is not what he was booked for but whether at the moment of arrest

<sup>73</sup>Dixon v. U.S., 296 F2d 427 (1961); U.S. v. Barone, 330 F2d 543 (1964), cert. den. 377 U.S. 1004; Mares v. U.S., 319 F2d 71 (1963); Bell v. U.S., 280 F2d 717 (1960); Lawton v. Dacey, 352 F2d 61 (1965)

<sup>74</sup>Bell v. U.S., 254 F2d 82 (1958), cert. den. 358 U.S. 885; Ralph v. Pepersack, 335 F2d 128 (1964), cert. den. 380 U.S. 925; Schook v. U.S., 337 F2d 563 (1964); Kuhl v. U.S., 322 F2d 582 (1963)

there was probable cause to believe that he had committed a felony of some kind. If probable cause existed the arrest is legal in spite of the fact that the officer mistakenly booked the man for "Investigation" or for some charge to which the prosecutor did not agree.

K. If Probable Cause Exists The Arresting Officer Need Not Possess It Personally

Rule number eleven is that if probable cause exists somewhere in the chain of police command or investigation, it is not necessary that the arresting officer himself be in possession of all the facts of probable cause, or even of any of them.<sup>75</sup> For example, if the chief of police has enough facts to make probable cause to arrest for a felony and he keeps them all to himself and tells another officer to make the arrest, the arrest is legal. If several officers are working on a case and the arresting officer has some facts and the others have other facts, and all the facts taken together are enough to make probable cause, the arrest is legal.

L. Probable Cause Does Not Require That The Officer Be Absolutely Correct In All of His Facts

The last rule, number twelve, is that probable cause does not require that the officer be correct in all his facts.<sup>76</sup> One or more of

<sup>75</sup>U.S. v. Ventresca, 380 U.S. 102 (1965); Ng Pui Yu v. U.S., 352 F2d 626 (1965); U.S. v. McCormick, 309 F2d 367 (1962), cert. den. 372 U.S. 911; U.S. v. Altiere, 343 F2d 115 (1965); Williams v. U.S., 308 F2d 326 (1962); U.S. v. Juvelis, 194 F. Supp. 745 (1961); U.S. ex rel. Coffey v. Fay, 344 F2d 625 (1965)

<sup>76</sup>Rugendorf v. U.S., 376 U.S. 528 (1964); U.S. v. Bowling, 351 F2d 236 (1965)

the facts on which the officer arrests can prove to be incorrect and yet the arrest is legal if the remaining facts are sufficient in themselves to make probable cause.

5. Knowledge And Skill In Developing Probable Cause

Some officers seem to have a special skill in developing probable cause but this skill of theirs, like ability in any other field of human activity, is the result of nothing more than knowing the job and having the courage to act. There is a case which seems to illustrate this point quite well.

At 2:35 p. m. one day in 1961, a high-ranking officer of the Metropolitan Police Department in the District of Columbia was on a certain street there and happened to notice a man whom he recognized, and an unknown man, getting out of a cab. The man whom the officer recognized was known to be in the numbers racket and was a suspect at the time. The suspect carried a rather large briefcase. He and the officer passed close to each other and each recognized the other. The officer pretended to see nothing, and went on up the sidewalk for a short distance. Then he turned around and saw the suspect standing between the show windows of a bookstore, but without the briefcase. The officer then walked back and saw the briefcase on the public sidewalk several feet away from the suspect. The officer greeted the suspect by name and the suspect returned the greeting. They

knew each other. Then there was a conversation. The officer asked the suspect what he was carrying, and the suspect replied, "Nothing." The officer asked the suspect about the briefcase, and the suspect denied carrying it from the cab and denied knowing anything about it. After the suspect repeatedly denied any connection with the briefcase and any knowledge of its contents, the officer opened it and discovered money and paraphernalia of the numbers game. At this point the arrest was made. The suspect was convicted and the conviction stood up after an appeal in which the accused claimed that the arrest was made without probable cause for belief of guilt.<sup>77</sup>

The ability of the officer shows through the facts of this case in several places, and in each of those places the officer develops some fact of probable cause. First, the officer was sufficiently well acquainted with the criminal element in his city, and what they were doing, to recognize the suspect as a numbers operator. A rookie officer could have seen the same man without having any basis for distinguishing him from all other men who carry briefcases in the nation's capital. Second, the officer knew the modus operandi - the method of operation - of the numbers racket in that city. He knew that at this time of day certain materials were usually carried from one place to another as a part of the accounting procedure of the racket. This fact made the bulging briefcase significant. To the rookie officer who had no

<sup>77</sup>Keiningham v. U.S., 307 F2d 632 (1962), cert. den. 371 U.S. 948.

knowledge of the modus operandi of the numbers racket this briefcase would have been no sign of crime at all. Third, the officer had the nerve and the imagination to let the case build up a little bit - to give the suspect the opportunity of doing something that an honest man carrying a briefcase for an honest purpose would not do. This was a gamble, but it paid off. When the officer looked back he saw that the suspect was attempting to disassociate himself from the briefcase, just as a narcotics peddler sometimes drops the stuff in the gutter when he suspects that he is being followed by the police. A rookie officer probably would not have thought of this tactic. If he had known the suspect as a numbers operator, and had known that numbers paraphernalia was commonly carried in a briefcase, he would have arrested the suspect on sight. The arrest would have been illegal - not enough probable cause. All he had was a suspicion. Even a known numbers operator may well be carrying a briefcase for an honest purpose. Fourth, the officer had the patience to ask the questions that built his probable cause even higher, something that a rookie officer might not have done. The real meaning of the suspect standing several feet away from the briefcase did not come out until the officer asked his questions and the suspect denied any connection with the briefcase. This made the briefcase an abandoned thing which the officer could legally pick up and examine. When the officer did that, he found the final elements of probable cause - money and paraphernalia of the numbers racket.

The officer who wants to be most efficient in building probable cause should make it his business to know several things. First, he should know the legal definition of as many offenses as possible. If you will pardon a personal reference, I rarely investigated a case without first going back to the statute to see what acts are necessary to make a violation in that type of case. This shows the officer what he must prove in court. He doesn't need all of that to make probable cause, but he needs a good part of it. Second, know by name and face as many of the local criminal characters as possible. By seeing them and knowing who they are, the officer sometimes gets a lead on a crime being committed now. Third, know the modus operandi of as many offenses as possible. An officer who knows the many things which criminals of different types do in preparing for a crime, committing the crime and disposing of the loot often will see special significance in an act which others would overlook. That act becomes a part of the probable cause. Fourth, the officer should know how to devise new investigative approaches. He should use his imagination. For example, a few years ago, some FBI Agents were investigating a bank robbery committed in a medium-sized city early that day. They did not have much to go on. At one Agent's suggestion, they checked the loan companies to see if anyone had paid off loans after the robbery. There were seven loan companies in town, and at six of them

a certain man had paid off his loan. He proved to be the bank robber. Fifth, the officer should know how to take his time and ask the suspect those questions, where safety and other circumstances will permit, that may lead to an admission of crime, confused and conflicting answers, the abandonment of some object connected with the crime, or some other development that adds to probable cause.

The only element not mentioned is the four-leaf clover - a bit of good luck. The officer will have to get that from his guardian angel.

#### 6. Probable Cause And The Police Administrator

In ideal circumstances, the chief or other administrative officer understands probable cause better than any of his men. For example, the best garage or machine shop or law office is one in which the top man knows the subject better than any of the employees. He can point out the mistakes they make, and show them how to do a better job. A law enforcement agency is not different. Second, the officer should train his men as well as possible and keep the training up to date. If a high court lays down another interpretation of probable cause, accept that rule and study it like the trained automobile mechanic accepts and studies a new carburetor design from the manufacturer. Third, make it a department rule to use warrants as much as the circumstances of the cases will allow. This may require a conference now and then with the prosecutor, the

magistrate and the judge to work out procedures for getting warrants and getting them in a short time. This can be done. In a large midwestern city, the officers laid their warrant problem on the table a few years ago in a conference with prosecutors and judges and all of them together worked out a better system which resulted in much more frequent use of warrants. It was pointed out earlier that the Supreme Court favors the use of warrants, and that a warrant has many advantages for the officer. He needs every legal advantage that he can get, and should be permitted to have it.

A fourth suggestion is that the administrative officer make sure that his officers take notes and keep them as much as possible. An officer who arrests without a warrant may have plenty of probable cause to justify the arrest, but before the case comes to court he works many other cases and tends to forget some of the facts in this one. When he is called to the witness stand to show the facts on which he based this particular arrest, he may not remember some fact which is particularly important. Many a good case will be lost this way. It would not happen if the officer had a set of notes from which he could again familiarize himself with the case before he went into court. At least one Federal court has openly suggested to a large city police department that it require the investigating officers to keep better notes on the facts that go to make up probable cause.<sup>78</sup>

<sup>78</sup>Kelly v. Warden, 230 F. Supp. 551, 555, Note 1 (1964)

Another suggestion - the fifth - is that the administrative officer make periodic inspections to find out how well each of his officers is doing with probable cause. Which officers lose the most cases on this point? Which officers use the most warrants, and which use the fewest? Which officers keep the best sets of notes? Information of this kind can show where more training is needed, when and why.

One last suggestion is that the officers in each state - such as those who belong to a police or sheriff's association - should keep an eye on what is happening in other states. Officers in other states have had arrest and search problems, too, and in some of those states the legislatures have made some changes in the law in an attempt to help the officers with their problem. Perhaps some of those changes would be desirable in your state, and could be called to the attention of the Governor, the Attorney General or the State Legislature for consideration.

## HOW TO SHOW PROBABLE CAUSE

When the officer applies for an arrest warrant or search warrant, or appears in court to defend an arrest made on probable cause but without a warrant, he must show probable cause by stating facts indicating guilt. His personal conclusion that the suspect was guilty is not probable cause. The difference is illustrated by the affidavits filed by officers in two different search warrant cases.

In the first case the officers filed an affidavit reading as follows:

"Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotics paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law."

The Supreme Court of the United States held the search warrant to be invalid because the affidavit on which it was based failed to show probable cause. Aguilar v. Texas, 378 U.S. 108 (1964). The affidavit failed to show probable cause because it did not show any basis on which the unnamed informant could be believed, such as the length of time he had been used as an informant, the number of cases in which he had been used, or how well his information had turned out in those cases, and the affidavit also failed to state any other fact on which the officers' conclusion of guilt could rest.

In the second case the officers filed an affidavit stating facts indicating guilt. They said as follows, in speaking of a certain house:

"On May 22 (about 9:00 p. m. ), 1963 I was advised by Investigator Bobby Belvin by means of a radio that a distillery was being operated in the residence of John Doe. Investigator Belvin stated that he was on a hill behind the house and that lights were on inside the house and that he could see inside the house through the windows. On May 17, 1963, I was positioned on a hill about 100 feet from the John Doe residence and at this time I smelled the odor of mash. I have been to many distilleries and have smelled the odor of mash many times."

This affidavit is a simple one, but notice how clearly it states the facts of probable cause, and then lets the magistrate draw the conclusion. It names two different officers, shows what information each of them obtained, how he obtained it, when he obtained it, and where he was when he got it. The court said the officers had stated probable cause, and upheld the search warrant. U.S. v. Plemmons, 336 F2d 731 (1964). If one of the sources of the information here had been a reliable and confidential informant, facts to show him reliable could have been given by stating some of the details of the information received from the informant, the approximate time when the informant got this information, how he got it, and the basis for the officer's belief that the informant is reliable, such as the fact that he had been used for a specified length of time, the approximate number and the types of cases in which he had previously given information, and a statement as to the accuracy of that information given by him in past cases. See Jones v. U. S., 362 U.S. 257 (1960), for an example.

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