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IN THE

Supreme Court of the United States

October Term 1977

Nos. 76-1484, 76-1600

JAMES ZURCHER, et al., *Petitioners,*
v.
THE STANFORD DAILY, et al., *Respondents.*

LOUIS P. BERGNA, et al., *Petitioners,*
v.
THE STANFORD DAILY, et al., *Respondents.*

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, INC., AMICUS CURIAE, IN SUPPORT OF THE POSITION OF RESPONDENTS

Interest of Amicus

The National Association of Criminal Defense Lawyers, Inc. is a District of Columbia non-profit corporation whose membership is comprised of approximately 1600 lawyers who are citizens of every State in the Union and

all of whom are primarily engaged in positions bringing them into daily contact with the Criminal Justice System either as advocates, law professors or judges of the state and federal courts. Among its stated objectives is to promote the proper administration of criminal justice and to thereby concern itself with the protection of individual rights and the improvement of criminal law, its practices and procedures. This Brief is tendered in the discharge of that organizational objective. It is filed with consent of all parties as is evidenced by written consent of all parties in compliance with United States Supreme Court Rule 42 filed concurrently herewith with the Clerk of this Court.

Amicus believes that the scope of the question involving the issuance of a search warrant authorizing seizure from a non-suspect, innocent third party of evidence which is neither contraband nor the fruits or instrumentality of a crime and which inevitably interferes with a law abiding citizen's trust in government and rights of privacy necessarily implicates issues of special concern to Amicus. This is particularly true when considered in light of the historical role of counsel in representing persons who have been served with subpoena to appear as witnesses before grand juries or who have been contacted by government investigators for purposes of obtaining evidence or investigative leads. This Brief is limited only to such issues.

Amicus supports the Respondents' prayer that the judgment of the courts below be affirmed but proposes a somewhat different rationale than was expressed in those opinions.

ARGUMENT

SEARCHES OF THIRD PARTY NON-SUSPECTS, PURSUANT TO A WARRANT, FOR TANGIBLE OBJECTS WHICH ARE NEITHER INHERENTLY ILLEGAL NOR THE FRUITS OR INSTRUMENTALITIES OF A CRIME ARE UNREASONABLE, ABSENT AN AFFIRMATIVE SHOWING, UNDER OATH, TO THE ISSUING MAGISTRATE, THAT EXIGENCIES RENDER LESS INTRUSIVE MEANS OF OBTAINING THE OBJECTS IMPRACTICAL.

A. Probable Cause Not In Issue

For purposes of expressing the position of Amicus, it is not necessary to contest the existence in the case *sub judice* of sufficient allegations in the affidavit pursuant to which the instant search warrant issued and upon which the magistrate could have found "probable cause" in its traditional sense. Amicus believes that *Warden v. Hayden,* 387 U.S. 294, 18 L.Ed.2d 782 (1967), established the procedure which must be adhered to by a magistrate where authority for a search for things innocent in themselves is being sought. There the Court stated:

> The requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for 'mere evidence' or for fruits, instrumentalities or contraband. There must, of course, be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or

> conviction. *In so doing, consideration of police purposes will be required.* Cf. *Kremen v. United States,* 353 U.S. 346, 1 L.Ed.2d 876, 77 S. Ct. 828. *Warden v. Hayden,* supra, 387 U.S. at 306-307. (emphasis added)

The instant case presents this Court with its first opportunity to examine the "reasonableness" of the search of a third party for "mere evidence" where the problem of standing is not a barrier. See *Alderman v. United States,* 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). While any attempt to assess a reason for this is inherently speculative due to the lack of empirical data, historically police and prosecutors have always either requested such materials informally or had a grand jury or court issue a subpoena duces tecum and served it upon the subject. An examination of recent case law indicates that the procedure used in the instant case is gaining in popularity in the context of seizures of persons or property. See *People ex rel Carey v. Covelli,* 61 Ill. 2d 394, 336 N.E.2d 759 (1975), *United States v. Manufacturers National Bank of Detroit, Livernois-Lyndon Streets, Safety Deposit Box #127, Detroit, Michigan,* 536 F.2d 699 (6th Cir., 1976); see also, *J.E.G. v. C.J.E.,* 360 N.E.2d 1030 (Ind. App., 1977), *State v. Klinker,* 85 Wash. 2d 520, 537 P.2d 268 (1975), *Bacon v. United States,* 449 F.2d 933 (9th Cir., 1971).

Amicus only concern in this case is the Fourth Amendment aspect. To determine the Fourth Amendment issue in this case will require a balancing of the individual's right of privacy and security in the sense best expressed in *Katz v. United States,* 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), against the valid law enforcement objectives of apprehending and prosecuting those believed

guilty of criminal conduct. However, traditional approaches as announced by prior decisions of this Court can be only tangentially helpful because of the novelty of considering the rights under the Fourth Amendment as presented by an innocent person. Thus, while the standard must be "reasonableness" of the search, a consideration of each "third party - mere evidence" case on its own facts and circumstances as mandated by *Go-Bart Importing Company v. United States,* 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374 (1931), requires more than just an examination of probable cause. What must be decided is whether the decision to interrupt and invade the sanctuary of Fourth Amendment protected privacy is left to the unbridled discretion of the police once they can establish to a magistrate that probable cause exists to believe that a non-suspect has tangible objects which will aid them in apprehending or convicting someone. Or to state it differently, can the magistrate require more than this showing before issuing the warrant where a non-suspect is the target—i.e. does he have the authority to refuse to issue a warrant in these situations in which a less intrusive means has not been demonstrated to be unavailable?

This Court has examined cases in the past in which it has held that even though probable cause existed and the search warrant was valid, the search was "unreasonable", but Amicus recognizes that these have been cases in which the Court has been sitting in its role as final arbiter of the Federal Rules of Criminal Procedure. See *Sgro v. United States,* 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed. 260 (1932). However, the evolution of the Fourth Amendment has occurred almost entirely within the framework of the review by this Court of criminal cases, and yet

this Court has never held that "reasonableness" and "probable cause" are synonymous. It is respectfully submitted by Amicus that they are not, and that the case *sub judice* presents a good vehicle for announcing it. Affirming the judgment below will also go a long way toward reaffirming the "popular trust in government" which is at the very foundation of our democracy and giving meaning to the concept that the Chief Justice has recognized as a necessity to "protect *innocent* persons aggrieved by police misconduct". (emphasis added) *Stone v. Powell,* 428 U.S. 465, 500, 49 L.Ed.2d 1067, 1091 (1976); see also, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 411-427, 91 S.Ct. 1999, 20 L.Ed.2d 619 (1971).

B. Historic Use Of Subpoenae In Third Party Cases Is Indicative Of The Intent Of The Framers Vis-A-Vis The Fourth Amendment

The parties to the case *sub judice* have conducted exhaustive research into the issue involving third party searches and have informed this Court and the courts below of the dearth of available precedent. As a "friend of the Court", Amicus suggests that the historical absence of the use of a search warrant in such cases is of great significance. It is to be noted that the timing of the adoption of the Bill of Rights was greatly (perhaps primarily) affected by the concern over the delay of the States of Virginia, Rhode Island, New York, North Caroline and New Hampshire in ratifying the Constitution. Richard Henry Lee of Virginia, one of the most distinguished and influential opponents of the Constitution, was quite vocal in articulating his belief that a Bill of Rights was needed before Virginia would ratify. In his

Letters from the Federal Farmer to the Republican, he wrote on October 8, 1787:

> . . . [W]hen we are making a constitution, it is to be hoped, for ages and millions yet unborn . . . [t]here are other essential rights (besides freedom of religion) which we have justly understood to be the rights of free men—as freedom from hasty and unreasonable search warrants, warrants not founded on oath and not issued with due caution . . .
>
> *Pamphlets on the Constitution of the United States, Published During Its Discussion by the People,* 1787-1788. (Edited by Paul L. Ford. Brooklyn, 1888.)

Lee's concern for warrants being issued too hastily reflects not only the intent of the framers of the Bill of Rights when considering the problems to which the Fourth Amendment was directed, but also is indicative of why, from the outset, the unarticulated basis for the use of the subpoena process has been that a search warrant would be too intrusive, not that probable cause is absent. Although the petitioners and their amici argue that the choice is solely a discretionary one for the law enforcement agency to make, to state the premise is to compel its rejection. Valid privacy interests of law abiding citizens could never be safe-guarded by such a gossamer shield. There is no room for such arbitrariness in Fourth Amendment jurisprudence. The right of personal security and privacy is one's own lawful affairs, as it has been historically perceived and enjoyed, would be rent and cast asunder were this Court even to imply that such discretion was possessed by the prosecution function.

Of course, in most cases law enforcement investigators will informally request a third party, non-suspect's co-

operation and voluntary submission of statements or tangible objects helpful to their cause when the existence of such becomes known. In other cases, particularly when a grand jury investigation is in progress, a subpoena will be served upon the third party requesting whatever tangible objects are desired by the grand jury. Amicus does not argue with the fact that there are circumstances under which a search warrant would be necessary and reasonable *ab initio,* for it would require blindness to the realities of life to say the contrary. However, such a decision should be made by the issuing magistrate if we as a nation are to continue to respect individual privacy rights and the sense of national well-being which flows therefrom. Any contrary inference which could be taken from this Court's opinion in this case will necessarily be a message to every law-abiding person in America that he possesses even the most inocuous books, papers and tangible objects at his own risk, and has no reasonable expectation of privacy in his own home or office. The previous statement by this Court that "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society" will be merely empty words. *Wolf v. Colorado,* 338 U.S. 25, 69 S.Ct. 1359 (1949). It is difficult to conjure up a situation which could be more arbitrary.

C. The Prior Determination Of Reasonableness Will Not Overburden The Prosecution And Will Provide Protection For Privacy Rights Of The Law Abiding

This Court is not required to mandate that a state utilize a grand jury procedure and all of the incidentals

thereto as practiced in the federal system whenever such a problem as occurred in this case arises. However, the precise procedure to be utilized can be left to the state to determine, once this Court declares that the Fourth Amendment is not satisfied by a procedure such as that employed in the instant case. Such a position was taken by this Court in the case of *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), and it would seem to Amicus that the same approach would be in order in the instant case. While the Court need not declare by its opinion that third parties do not always have to be afforded those rights and privileges which we have come to assume in federal grand jury investigations, for example, advice of counsel, common law testimonial privileges, etc., it can certainly declare that the minimum standard of "reasonableness" applies to third parties as well as suspects where a search warrant is involved. And it can also enunciate the tests which will be applied to determine if the standard has been met.

Amicus submits that the tests must be much more stringent when the prosecutor is seeking the warrant as opposed to the grand jury seeking a piece of evidence pursuant to a subpoena, based not only upon the nature of the intrusion, but also upon the breadth allowed to the the grand jury's investigations. See generally, *United States v. Calandra,* 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), *United States v. Morton Salt,* 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1951), *Oklahoma Press Publishing Company v. Walling,* 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946).

The protection to the right of privacy provided by the Fourth Amendment should only give way in a third party

"mere evidence" situation in which the evidence is likely to be destroyed, secreted or removed from the jurisdiction. *Cf. Ker v. California*, 374 U.S. 23, 37-41, 10 L.Ed.2d 726, 740-742; *see also, Katz v. United States,* supra, 389 U.S. 347, 355 (fn. 16). While this state of affairs can reasonably be presumed when the possessor or custodian and the suspected offender have some articulable identity or alliance, it should nevertheless be incumbent upon the seeker of the warrant to demonstrate that the possessor-custodian is likely to destroy, secrete or remove the evidence if the subpoena procedure is used prior to a warrant. Without such a showing, any search, even based upon probable cause, is unreasonable in third party situations.

As mentioned earlier in this brief, Amicus does not believe that the United States District Court or the United States Court of Appeals rulings as to probable cause requiring such a showing were necessarily correct. This Court does not have to add another element to the quantum of probable cause considerations to resolve this case. However, "reasonableness" in its traditional Fourth Amendment applications certainly has acquired a different meaning when the search warrant procedure is being used against a third party who ordinarily would be served with a subpoena. Amicus suggests to this Court that the test of "reasonableness" in such cases should be administered by the magistrate at the time of application for the warrant. Any such application should contain, under oath, sufficient facts for the magistrate to determine that the person for whom the authority to search is sought bears a relationship with a criminal suspect (not necessarily identified) which would suggest a manifest probability that the evidence will be destroyed, secreted or

removed from the jurisdiction. To do otherwise would result in a presumption that an innocent person should not be trusted to obey the law.

CONCLUSION

> The poorest man in his cottage may bid defiance to all the forces of the Crown. It may be frail, its roof may shake, the wind may blow through it, the storm may enter, the rain may enter, but the King of England cannot enter. All his forces dare not cross the threshold of the ruined tenements.
>
> William Pitt the Elder, c. 1750

Amicus suggests that Pitt's concept has particular application to a law-abiding citizen who is believed by law enforcement to have "mere evidence" of a crime in his possession. Such protection against the arbitrary use of a search warrant instead of a subpoena or some other less intrusive means is an American birthright and an essential ingredient to peace of mind for all law-abiding people. We fought a war with England for it; our history dictates that it has been silently honored as inviolate since then, and we should not discard it in the absence of a strong, demonstrated necessity made under penalty of perjury.

The judgment should be affirmed.

Respectfully submitted,

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