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COMMENTS

PROBABLE CAUSE FOR ARREST IN INDIANA: A PROSECUTOR HOIST WITH HIS OWN KINNAIRD

F. THOMAS SCHORNHORST†

For 'tis the sport to have the enginer
Hoist with his own petar....

HAMLET, ACT III, SCENE IV

A judicial decision that an arrest warrant must be supported by an affidavit alleging facts and circumstances sufficient to justify a magistrate's finding of probable cause in order to make lawful an arrest and incidental search based on that warrant would not seem worthy of law journal commentary in 1969. One would think that this issue had been settled in the stormy period following Mapp v. Ohio in Ker v. California, Beck v. Ohio, Wong Sun v. United States and Aguilar v. Texas.

What is worth comment, however, is that such a holding by the Indiana Supreme Court in the late 1968 case of Kinnaird v. State provoked a dissenting judge to assert that "the implications of this holding are enormous;" caused the Attorney General of the state to file an extraordinary petition requesting the court to instruct prosecutors and lower courts how to perfect lawful arrest warrants; created "turmoil among prosecutors, police and judges;" and finally impelled the Supreme Court to go far out of its way to find a case in which it could clarify the "new" rule established in Kinnaird.

A number of conclusions might be drawn from the phenomenal response to this seemingly simple and straightforward ruling. First, there may be more to the Kinnaird holding than meets the eye. Second, the

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7. Id. at ———, 242 N.E.2d at 507 (Judge Arterburn, dissenting).
8. See text accompanying notes 71-72 infra.
parties did an inadequate job of framing the issue for the court, and the
court did not make this fact clear in its opinion. Third, the adverse
reaction to the decision was, at least in part, motivated by political
considerations. Fourth, Indiana has been appallingly dilatory in im-
plementing a basic constitutional mandate in the field of search and
seizure. All of these conclusions are valid.

I. THE KINNAIRD CASE

A. Facts and Proceedings

Charles Anthony "Sonny" Kinnaird, the proprietor of Sonny's Used
Furniture Store in Jeffersonville, Indiana, was a suspected fence. On the
afternoon of March 3, 1967, the county prosecutor, the chief of police and
four policemen arrived at Kinnaird's combined living and business
quarters armed with a warrant for his arrest. The police took him into
custody in his first floor business quarters and proceeded immediately to
conduct an extensive search of the three-story building, including his
living quarters on the second floor.

The arrest warrant signed by the clerk of Clark Circuit Court was
issued on the strength of an affidavit signed by the chief of police and
approved by the prosecutor. The affidavit (the formal charging paper
referred to in other jurisdictions as an "information") merely alleged
that the defendant, with intent permanently to deprive the owner, had
received specified items of property with the knowledge that they had been
stolen by two individuals named in the affidavit. Aside from the bare
charge, there were no allegations indicating any factual basis for the
chief's conclusion and the prosecutor's decision to approve the affidavit.

The stolen items that Kinnaird was alleged to have received were
listed in the affidavit: a radial arm saw, a grinder, two paint spray guns,
a set of acetylene torches and gauge, a transit and a tripod, and a sabre.

11. The state legislature was in session in early 1969 and had before it a number
of "law and order" bills submitted by the newly-elected Republican administration.
See e.g., S.88, ch. 226, now IND. ANN. STAT. §§ 9-1048 to 9-1050 (Burns Supp. 1969)
giving "stop and frisk" powers to police); S.390, ch. 312, now IND. ANN. STAT. § 9-1635
(Burns Supp. 1969) (confessions not inadmissible merely because not preceded by
Miranda warnings); S.469, ch. 163, now IND. ANN. STAT. § 10-1817 (Burns Supp. 1969)
misdemeanor to flee from police officer even though police officer has no lawful power
to compel person to stop).

12. The facts stated are derived either from the opinion, the transcript of the Hear-
ing on Defendant's Motion to Suppress Evidence, [hereinafter cited as Hearing Tran-
script] or the Trial Transcript. Citations to these sources are included only in cases of
direct quotations.

13. This procedure is authorized by IND. ANN. STAT. § 9-908 (Burns Supp. 1969)
and § 9-909 (Burns 1956 Repl.).

14. As indicated at text accompanying notes 33-36 infra, this peculiar terminology
was a major source of the confusion that later developed.
saw. However, police seized not only these, but also several items that were not listed in the affidavit. There was no search warrant authorizing the seizure of any property from Kinnaird's premises. According to the chief of police, the additional items seized "were very similar to [those described] in the latest reports of burglaries that we had had." The chief admitted that, when the officers entered to arrest Kinnaird, they had intended to search for property other than that listed in the affidavit.

All of the property seized was found on the second floor. The "haul" was of sufficient bulk to necessitate the use of a truck to help transport it to headquarters. While the police apparently kept a record of the property seized, they did not give the defendant an inventory or any receipts. Defense counsel's request, in open court, for a copy of the police inventory was denied, thereby precluding any test of the chief's assertion that the additional items seized fit the description of stolen property contained in police reports. The chief did admit, however, that not all the property seized from Kinnaird's premises was later identified as having been stolen.

Kinnaird filed a motion to suppress the seven items that formed the basis for the formal charge of knowingly receiving stolen property. During the hearing on the motion, defense counsel did not challenge the warrant on its face but instead attempted to probe the police witnesses to determine the source and quality of the information that led to their conclusion that Kinnaird had committed an offense. The question as to the sufficiency of the affidavit to support the warrant had been raised, inappropriately, by a motion to quash the affidavit.

Kinnaird's motions were denied. He was found guilty and received a sentence of one-to-ten years and was fined 900 dollars. On appeal to the Indiana Supreme Court, he renewed his attack on the legality of the search and seizure and challenged the constitutionality of the statutory scheme which permitted Indiana prosecutors to initiate prosecutions by affidavit and further provided that

15. The affidavit and warrant are reproduced in full in 242 N.E.2d at 501-02.
16. These included two sump pumps, a propane cook stove, a movie projector, a daylight screen, two microscopes, an AM-FM radio, a tape recorder, a camera and a work table. All of these items were admitted into evidence over the objection of defense counsel, even though defendant was not charged with having knowingly received as stolen property any of this material.
17. Hearing Transcript at 35.
18. Id. at 47.
19. The record reveals no information as to whether additional charges were filed with respect to the seized property which was not listed in the affidavit.
20. See text accompanying notes 41-45 infra.
21. IND. ANN. STAT. § 9-908 (Burns Supp. 1969) and § 9-909 (Burns 1956 Repl.).
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[w]hen an indictment is found or an affidavit filed against a person charging him with the commission of an offense, the court or a judge thereof shall, . . . direct the clerk to issue immediately a warrant of arrest returnable forthwith. 22

Literally interpreted, these statutes would allow the prosecutor to make a determination of probable cause and permit an arrest warrant to issue without judicial intervention.

B. The Decision

The Indiana Supreme Court reversed the conviction and remanded for a new trial holding that

[w]here, as here, an arrest is required to be made on a warrant that warrant can only issue on the basis of an affidavit setting forth facts and circumstances constituting probable cause, and . . . the determination of probable cause must be made by a 'neutral and detached magistrate.' 23

This language is not unambiguous. In the sentence immediately preceeding his attempt to state a narrow holding, Judge Jackson wrote: "It is not our intention to limit the authority of law enforcement officials to make lawful arrests without warrants in those instances where warrants are not required." 24 Is the court holding that under the circumstances, as revealed by the record, Kinnaird could have been arrested only pursuant to a warrant and not by an officer having probable cause but no warrant? If so, then how is it to be determined when a warrant is or is not required for purposes of lawful arrest? 25

Noting that Article I, Section 11 of the Indiana Constitution is identical to the fourth amendment to the Constitution of the United States, the court applied the constitutional principles which permit search and arrest warrants to be issued only by neutral and detached magistrates after a finding of probable cause and which require the finding of probable cause to be based upon allegations of facts and circumstances which would lead a prudent man to conclude that the defendant had committed an


23. See text accompanying notes 89 to 93 infra.

24. Ind. 242 N.E.2d at 506.

25. Id. [Emphasis added.]
offense. 26 Mere conclusions or charges that a person has committed an 
offense, such as those contained in the Kinnaird affidavit, are insufficient 
to establish probable cause. 27 The court held that the statute purporting 
to authorize the issuance of an arrest warrant solely on the basis of a 
prosecutor's formal charging paper (affidavit) 28 can be constitutional 
only if construed to include the requirements of probable cause and 
magisterial screening. 29 

What is there in this decision, solidly based upon some of the most 
elementary and well established principles of constitutional law, that could 
stir a fuss such as that described at the beginning of this comment? The 
answer to this question lies in careful examination of some rather amazing 
documents that were produced in the wake of Kinnaird.

C. Judge Arterburn's Dissent

Judge Arterburn filed a brief but vigorous dissent in which he seemed 
genuinely appalled by the majority's conclusion that 

a warrant issued on the basis of an affidavit filed and approved 
by the prosecutor in due form, charging one with knowingly 
receiving stolen property (a felony) is invalid for all purposes, 
including the arrest and any search following from the arrest. 30

After all, he continues, an Indiana statute provides for the issuance of an 
arrest warrant upon the filing of a prosecutor's affidavit. Judge Arterburn 
professes to see a paradox, in that a prosecutor's affidavit could be held 
"valid for charging the crime and trying the defendant yet invalid to make 
an arrest or to search his home where he was arrested and where the 
stolen goods were found." 31 This was stretching "so-called constitutional 
principles . . . too thin" for him to see. 32

Judge Arterburn's basic error is his failure to differentiate an 
affidavit submitted in support of a warrant from a prosecutor's formal 
charge. The former is employed for the purpose of permitting a magistrate 
to determine whether

27. Riggan v. Virginia, 384 U.S. 152 (1966), rev'd per curiam Riggan v. Common-
28. IND. ANN. STAT. § 9-1001 (Burns 1956 Repl.).
29. See Mancusi v. DeForte, 392 U.S. 364 (1968) (prosecutor not considered a 
neutral and detached magistrate); State v. Pauliek, 277 Minn. 140, 151 N.W.2d 591 
(1967) (holding unconstitutional a statute permitting a court clerk to issue warrants); 
State ex rel. White v. Simpson, 28 Wis. 2d 590, 137 N.W.2d 391 (1965) (prosecutor 
may not issue warrants).
30. —— Ind. ——, 242 N.E.2d at 506-07.
31. Id. at ——, 242 N.E.2d at 507.
32. Id.
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The latter is the state's pleading which marks the beginning of the formal criminal process and which is necessary to give the defendant notice of the precise nature of the charge against him.

The affidavit in this case was "valid for charging the crime and trying the defendant." But, however valid the prosecutor's charging paper may be in terms of discharging its notice-giving function, it simply cannot do double duty in the manner Judge Arterburn seems to suggest. In order to try an individual, the state must obtain custody of his person; and in a criminal case that usually means that he must be arrested. To effect that arrest lawfully by warrant there must be a showing of probable cause which cannot be satisfied by the prosecutor's draft of a formal charge. If, by merely charging someone with the offense of receiving stolen property, the prosecutor can confer upon the police the power not only to arrest him but incidentally to search his person and his premises as well, then fourth amendment protections are meaningless. Even assuming the prosecutor would always act in good faith, "[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police," or, in this instance, the prosecutor. He too is an "officer engaged in the often competitive enterprise of ferreting out crime" and therefore not equivalent to the "neutral and detached magistrate" who must make the warrant decision within the meaning of the fourth amendment.

In addition, Judge Arterburn suggests that the majority based its federal constitutional findings upon Giordenello v. United States which, he claims, was an exercise of the Supreme Court's supervisory power over the criminal process in the federal system rather than an expression of constitutional doctrine. While it is sometimes difficult to determine whether pre-Mapp and pre-Ker Supreme Court rulings were based on

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38. In Ker v. California, 374 U.S. 23 (1963), the Court recognized that the constitutional standard of probable cause is the same whether the search or the seizure be conducted by federal or state officers.
constitutional or supervisory grounds, no such difficulty arises with respect to Giordenello insofar as its expression of probable cause requirements is concerned. These requirements were recognized as "guiding principles" of constitutional law by the Supreme Court in Aguilar v. Texas. 39

II. THE PROSECUTOR GETS "HOIST"

A. The Motion to Quash and the Hearing on the Motion to Suppress Evidence

Judge Arterburn does make one point not mentioned in the majority opinion which, if it could be supported by the record, might have been employed to sustain the validity of the search. He states that "the evidence shows that one of the two purveyors of the stolen goods gave a statement to the police that he stole the goods and then sold them to the appellant, after telling the appellant they were stolen goods." 40 Development of this point requires a re-examination of the pre-trial proceedings.

As noted above, defense counsel originally attempted to challenge the warrant by filing a motion to quash the affidavit on the grounds that it did not state facts sufficient to support a finding of probable cause. This was the right reason but the wrong motion, and presentation of the issue in this inappropriate manner contributed to the distress among the state's prosecutors that followed Kinnaird. 41

In Indiana, a motion to quash an indictment or affidavit is proper only to test its sufficiency as a pleading. The relevant statute provides:

The defendant may move to quash the indictment or affidavit when it appears upon the face thereof either:

First. That the grand jury which found the indictment had no legal authority to inquire into the offense charged.

Second. That the facts stated in the indictment or affidavit do not constitute a public offense.

Third. That the indictment or affidavit contains any matter which, if true, would constitute a legal justification of the offense charged or other legal bar to the prosecution.


40. — Ind., 242 N.E.2d at 507.

41. See note 9 and accompanying text supra.
Fourth. That the indictment or affidavit does not state the offense with sufficient certainty.\textsuperscript{42}

Counsel, too, seems to have failed to distinguish between an affidavit as a pleading and an affidavit as a basis for an arrest warrant. There was nothing on the face of the affidavit which made it subject to a motion to quash, and the trial court was correct in overruling the motion insofar as it attempted to bring in matters \textit{dehors} the face of the pleading, such as the illegality of the defendant’s arrest.\textsuperscript{48}

Since counsel was challenging the admissibility of evidence, the appropriate motion by which to raise the issue of the legality of the arrest and search, including the validity of the warrant, would have been a motion to suppress evidence.\textsuperscript{44} Counsel did file a motion to suppress, but apparently he did not at the hearing on that motion renew his attack upon the sufficiency of the affidavit to support a warrant. Defense counsel began immediately to examine the police witnesses as to source of their information regarding to the defendant’s criminal activities. This could have been a very serious tactical error.\textsuperscript{45} However, the prosecutor not only failed to exploit his advantage but actually assisted the defendant in avoiding the pitfall.

\textsuperscript{42} \textit{IND. ANN. STAT.} § 9-1129 (Burns 1956 Repl.).

\textsuperscript{43} See generally EWBANK’S INDIANA CRIMINAL LAW 135-38 (Symmes ed. 1956).

\textsuperscript{44} Conceivably a motion to quash the warrant also would lie. While there seems to be no express statutory authority, Indiana courts seem to entertain such motions. See \textit{State ex rel. French v. Hendricks Super. Ct.}, Ind., 247 N.E.2d 519 (1969).

\textsuperscript{45} The hearing seems to have proceeded upon the assumption that defendant, the moving party, had the burden of proving the illegality of the arrest and subsequent search. Consider \textit{AMSTERDAM, SEGAL & MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES} § 253 (1967):

Although the burden of going forward with showing an illegal search and seizure on a motion to suppress rests upon the defense . . . , that burden is carried in the first instance by showing merely that the search and seizure were conducted without a warrant. \textit{McDonald v. United States}, 335 U.S. 451, 456 (1948); \textit{United States v. Jeffers}, 342 U.S. 48, 51 (1951); \textit{Wrightson v. United States}, 222 F.2d 556 (D.C. Cir. 1955). Counsel should therefore seek a stipulation from the prosecutor that the search and seizure were warrantless; and, when the stipulation is made, should insist that the prosecutor proceed with his witness, allowing subsequent opportunity for rebuttal testimony by the defense. . . .

\textit{Compare} B. GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 129-30 (1969). It makes sense to place upon the prosecution the burden of proving the legality of an arrest, search and seizure without a warrant. Since the power to search incidental to an arrest is an exception to the warrant requirements of the fourth amendment, the prosecutor ought to be made to assume the burden of demonstrating that his case comes within that exception. This seems to follow quite logically from the Supreme Court’s oft-expressed preference for police compliance with the warrant requirements. United States v. Ventresca, 380 U.S. 102 (1965) and Beck v. Ohio, 379 U.S. 89 (1964). See also \textit{Terry v. Ohio}, 392 U.S. 1 (1968).

For a recent and thoughtful opinion on this point, see United States v. Schipani, 289 F. Supp. 43 (E.D.N.Y. 1968).
Generally, the affidavit in support of a search or arrest warrant should constitute the exclusive record for a review of the warrant-issuing authority's determination of probable cause.\(^{46}\) It would have been proper for the defense to press the trial court for a ruling on this point before the examination of witnesses began. However, it is quite possible that defense counsel regarded any further argument as to the sufficiency of the affidavit pointless in view of the court's ruling on his motion to quash.

During his examination of the chief of police, counsel was able to establish that the police went to Kinnaird's quarters with the intention of conducting a wide-ranging search for an unspecified amount of stolen property. Under cross-examination by the prosecutor, the chief testified that he knew that Kinnaird had been convicted of assault and battery on a prior occasion; that Kinnaird had been known to associate with felons; that the police had been suspicious of Kinnaird because persons had been observed (by whom is not specified) going in and out of Kinnaird's premises "at all hours of the night;" and that the police had had "many" reports that Kinnaird was selling stolen goods.\(^{47}\) It was then revealed that the decision to seek a warrant for Kinnaird's arrest was based upon information supplied by informers:

Prosecutor: Had you had prior ... information from this informant, or these informants, regarding this case, had you had information from them regarding this case?\(^{48}\)

Witness: Yes, we have.

Prosecutor: Have they been reliable?
A. Yes, they have.\(^{49}\)

The prosecution developed no additional points either as to the nature and reliability of the information received from the informants or as to the basis for the chief's conclusion that the informants were themselves reliable. This was the time for the defense counsel to rest, to rely on the inadequacy of the affidavit to support the warrant and to argue that the information available to the police, as revealed by the record, was insufficient to authorize an arrest with or without a warrant. As to the latter point, the oblique references to the late night activities at Kinnaird's premises and the general police suspicion of Kinnaird could not by themselves constitute probable cause to believe that Kinnaird was receiving

\(^{46}\) A. AMSTERDAM, B. SEGAL & M. MILLER, supra note 45, § 241.
\(^{47}\) Hearing Transcript at 54-55.
\(^{48}\) [Emphasis added.] The information supplied by the informant(s) in the instant case is hardly competent to establish reliability which must be based upon past experience with the informant. Aguilar v. Texas, 378 U.S. 108 (1964).
\(^{49}\) Hearing Transcript at 52-53.
stolen property. Further, although an arrest with or without a warrant may be made on the basis of hearsay attributed to reliable informants, the references to the unnamed informant by the chief of police do not meet the "two pronged" test of Aguilar v. Texas which would require that the court be informed of both the underlying circumstances from which the informant concluded that Kinnaird had received stolen property, and "some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.'"\(^\text{51}\)

However, the defense continued to question the police witness, who then revealed that the defendant had in 1966 been accused by two unnamed persons of receiving stolen property but that no arrest had been made on that information. The re-direct examination continued:

Q. Well, isn't it a matter of fact you took action in this case on the same type of information?
A. No, sir.
Q. No. Will you tell the court in what respects the informants were different in this case?
A. The informant told us exactly where the merchandise would be located in the building.

Q. And as a matter of fact these people that gave you information in the present case, when was the last time they saw the merchandise in the premises?
A. I don't have that information.
Q. All they know is they disposed of this merchandise in the premises to Mr. Kinnaird, right?
A. Yes.

Q. Sheckles and Redd;\(^\text{52}\) these are your informants, aren't they?
A. That's what you say.\(^\text{53}\)

The chief later admitted that the two named individuals were his informants. The prosecutor objected to the naming of the informants and the court sustained the objection,\(^\text{54}\) but the cat was out of the bag. At this point the prosecutor should have brought out the circumstances under

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52. These were the persons named in the formal charge as those who stole the property that Kinnaird was alleged to have knowingly received.
53. Hearing Transcript at 57-59.
54. The objection seems to have been based upon McCray v. Illinois, 386 U.S. 300 (1967).
B. Did the Record Show Probable Cause?

An evaluation as to whether the complete record made during the suppression hearing would have supported a finding of probable cause for an arrest without a warrant requires an examination of the recent case of *Spinnelli v. United States.* In that case FBI agents obtained a warrant to search certain premises they believed were being used for gambling operations. The affidavit in support of the application for the warrant described several occasions on which Spinnelli was observed traveling from Illinois to a particular St. Louis apartment. The affidavit alleged that telephone company records showed that the apartment contained two telephones with separate numbers listed in a woman's name. The affidavit went on to recite that Spinnelli was "known" to the affiant as a gambler and bookmaker and that the FBI had been informed by a confidential reliable informant that Spinnelli was operating a hand- book and accepting wagers and disseminating wagering information by means of the telephones in the apartment. Mr. Justice Harlan delivered the opinion of the Court that the affidavit was insufficient to establish probable cause and that the search was therefore unlawful. First, Justice Harlan discounted the relevance of Spinnelli's daily trips to the apartment building as being innocent in themselves. He then observed that there is nothing unusual about having two telephones and that

the allegation that Spinnelli was "known" to the affiant and to other federal and local law enforcement officers as a gambler and an associate of gamblers is but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision.

This left for consideration the allegation repeating the informer's assertion that Spinnelli was running a bookmaking operation in the apartment. Mr. Justice Harlan developed a two-step test to determine whether affidavits such as the one filed by the agents in Spinnelli are sufficient to support a finding of probable cause:

The informer's report must first be measured against *Aguilar's* standard so that its probative value can be assessed. If

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55. 393 U.S. 410 (1969). Although *Spinnelli* was decided after *Kinnaird,* it is relevant in that it undertakes to explain the meaning of *Aguilar,* which was one of the basic authorities relied upon by the majority in *Kinnaird.*

56. 393 U.S. at 414.
the tip is found inadequate under Aguilar, the other allegations which corroborate the information contained in the hearsay report should then be considered. At this stage as well, however, the standards enunciated in Aguilar must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass Aguilar's tests without independent corroboration.57

In other words, the reliability of the informer or the reliability of his information, or both, may be determined from surrounding circumstances including observations by police which tend to corroborate the informant's tip.

Justice Harlan first determined that the informer's tip standing alone was insufficient to meet the "two prongs" of the Aguilar test; it did not inform the magistrate of any underlying circumstances or of the source of the informer's information58 nor reveal any underlying circumstances from which the officer applying for the warrant concluded that the informant was reliable.60 Proceeding to the second stage of his analysis, Justice Harlan found that the separate allegations based on independent observations and investigation by the FBI were insufficient to make the tip as trustworthy as a tip that would pass Aguilar's tests without independent corroboration. Other circumstances—the telephones, the trips, the flat statement that Spinnelli was "known to the FBI and others as a gambler"—were not enough, even when coupled with the tip, to support a finding of probable cause to believe that Spinnelli was engaged in gambling activities.60

What types of corroborating allegations would be sufficient under Justice Harlan's standard? His use of the questionable precedent of Draper v. United States61 to illustrate a situation where probable cause could be found from a combination of an informer's tip and corroborating circumstances leaves the line of distinction very difficult to perceive. In Draper, a named informer,62 claimed by the FBI to be reliable on the

57. Id. at 415.
58. For example, this part of the Aguilar text could be satisfied by attributing to the informer the statement that he had placed a bet with Spinnelli (or with someone in the apartment) by calling one of the two numbers, or that he had been inside the apartment and had observed the gambling operations.
59. This part of the Aguilar test could be satisfied by an allegation that the informer had several times in the past furnished information and that such information proved reliable. See generally Gutterman, The Informer Privilege, 58 J. Crim. L.C. & P.S. 32 (1967).
60. But see the dissenting opinion of Mr. Justice Fortas, 394 U.S. at 435.
62. The informer died four days after Draper's arrest. 358 U.S. at 310.
basis of his having furnished accurate information in the past, told federal agents that Draper was selling narcotics in Denver, that he had gone to Chicago and that he would return to Denver by train on one of two specified days carrying three ounces of heroin. The informer described the clothes that Draper would be wearing and said that he would be carrying a tan zipper bag and that he was a fast walker. Agents arrested Draper when he appeared in the Denver railroad station as predicted and as described by the informer. A search of his person revealed narcotics. The Court upheld the validity of this arrest and search without a warrant, reasoning that since the informer had been correct in his description of Draper's conduct and dress that he also could be believed in his assertion of Draper's criminal activity.

The connection between Draper's dress, habits and travels, and his carrying of narcotics is not exactly a product of ineluctable logic. Nevertheless, Justice Harlan considered Draper to be the paradigm case supporting his Spinnelli rationale in that the "detail" supplied by the informer in Draper was such that "[a] magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way," and that the independent corroboration by the officers of all the details supplied by the informant made it apparent that the informant had not been fabricating his report out of whole cloth; since the report was of the sort which in common experience may be recognized as having been obtained in a reliable way, it was perfectly clear that probable cause had been established.

If we compare the testimony of the police chief during the hearing on the motion to suppress in Kinnaird with the FBI agent's affidavit in Spinnelli, the two situations appear to be strikingly similar. In Kinnaird the chief spoke of the defendant's associations with known criminals, the police suspicions that defendant was a fence, and the late night activity that someone (he didn't say who) had observed at Kinnaird's place. Taken together, these allegations could hardly lead a neutral and detached magistrate to conclude that Kinnaird had or was presently engaged in the commission of a crime. But when we add the chief's assertion that he received information of Kinnaird's criminal activity from a "reliable" informant and that "the informant told us exactly where the merchandise

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63. See the concurring opinion of Mr. Justice White in Spinnelli, 394 U.S. at 423; Barrett, Personal Rights, Property Rights, and the Fourth Amendment, 1960 S. Ct. Rev. 46.

64. 394 U.S. at 417.

65. Id. at 417-18.
would be located in the building," we are presented with a situation that calls for the application of Augilar and Spinnelli.

First, there is nothing in the hearing record to show the underlying circumstances from which the police witness could conclude that the informant was reliable. There is no evidence of any prior occasions upon which the police received trustworthy information from this source. Therefore, the first “prong” of the Aguilar standard has not been met. Second, the only indication as to the credibility of the informant’s claim that Kinnaird had committed the crime of receiving stolen property is that “the informant told us exactly where the merchandise would be located in the building.” Again, the poor quality of the record of the suppression hearing renders this statement too vague to be given much weight. Was the chief referring to the items listed in the affidavit or to other items? Did the informant say whether the merchandise was stolen and how he knew it was stolen? Did he say whether the defendant knew it was stolen? Did he actually see the merchandise? These are all matters that should have been nailed down with precision by the prosecutor. The apparent attempt by the police chief and the prosecutor to play “hide the ball” with the defendant concerning the source and quality of their information produced the situation which caused them to be “hoist” by the decision of the Indiana Supreme Court.

It is obvious that the record would not support an arrest without a warrant and an incidental search under the requirements of Aguilar. Proceeding to the second stage of the Spinnelli test, can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass Aguilar’s tests without independent corroboration? In other words, from the assertion of general suspicion of Kinnaird, the general references to late night activities around his place, and the informer’s word that “the merchandise” would be located at a particular place in the building, could a magistrate have found that the informant was reliable and that his information concerning the commission of an offense by Kinnaird was reliable? In contrast to Draper, there is a decided lack of detail. As indicated above, the merchandise referred to by the informant and the

66. See text accompanying notes 52-53 supra.
67. There have been some suggestions that courts ought to apply a stricter standard of probable cause in cases of arrest without a warrant:

Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed.

chief of police is nowhere in the record of the hearing on the motion to suppress identified as stolen. Nowhere is there any indication that the informer had been in a position to observe the merchandise or whether he was not merely repeating hearsay. The statements attributed to the informer in Kinnaird were entitled to even less weight than those attributed to the informer in Spinnelli, because here the police witness did not say that the informant actually charged the defendant with an offense.

In light of this record the trial court should have granted the defendant’s motion to suppress the evidence on two grounds: first, the warrant was void because not supported by a proper finding of probable cause; and second, the evidence presented during the hearing on the motion to suppress was insufficient to support a finding of probable cause for arrest without a warrant. This assumes that the arrest and subsequent search would have been valid had the record of the suppression hearing revealed that the police had probable cause apart from the warrant. Serious doubts as to the accuracy of such a premise will be discussed below.\textsuperscript{68}

Further supporting a conclusion that simply poor procedure brought about the ultimate result in Kinnaird is the state’s attempt to support the validity of the arrest and search by testimony presented at the trial after the disputed items had been admitted into evidence over counsel’s vigorous objection. On appeal the state argued that the trial testimony of one of the persons named in the affidavit as the thief of the property established that, prior to the defendant’s arrest, he stated to the police that he stole the goods and then sold them to the defendant after telling the defendant that the goods were stolen.\textsuperscript{69} This same evidence could have, and should have, been presented by the prosecution during the motion to suppress or, better yet, included in the application for the arrest warrant. Presented at the trial after admission of the disputed evidence over the objection of defense counsel, it came too late to cure the serious error that had already been committed. When the admissibility of evidence is challenged on the ground of illegal seizure, the accused is entitled to a full determination of that issue before the evidence is admitted. Prosecutors should not be encouraged to try to achieve some tactical advantage by withholding crucial evidence of probable cause at the time the admissibility of evidence is challenged and later to seek to cure, as in this case, the clearly erroneous admission of such evidence by after-the-

\textsuperscript{68} See text accompanying notes 92-115 infra.

\textsuperscript{69} Brief for Appellee at 6-7. Although this type of statement does not remove entirely the questions of informer reliability, it ought to be capable of supplying the type of detail from personal observation contemplated by Mr. Justice Harlan in Spinnelli.
fact testimony. This is both seriously prejudicial to the accused and contrary to orderly and efficient criminal procedure.70

III. THE ATTORNEY GENERAL'S PETITION AND THE FRENCH CASE

The Attorney General, about a month after the court's decision, filed a most curious, but revealing document. A combination of influences seems to have motivated this action, including Judge Arterburn's dissent, expressions of concern by judges and prosecutors across the state as to the meaning and implications of Kinnaird, and, perhaps, a desire to give the then-sitting state legislature the impression that the new Republican administration was against any further "coddling" of criminals by the courts. Styled "Petition for Instructions in Aid of Mandate," and quoting extensively from the Kinnaird majority opinion, it professed that "the State of Indiana and the Clark Circuit Court are unable to proceed with the new trial as ordered" until certain procedural matters were explained. The petition posed sixteen questions apparently designed to elicit responses that would inform state courts, police and prosecutors how to go about filing affidavits and obtaining arrest warrants.71

The Attorney General, too, showed no appreciation of the essential difference between the prosecutor's affidavit as a pleading and the type of affidavit to be submitted in application for a warrant. Once this error is identified, the petition makes no sense at all. The petition began by asking whether the court's ruling meant that defendant's motion to quash the affidavit should have been sustained. Then, proceeding on the assumption that this was the effect of the court's ruling, the Attorney General asked, basically, whether the new pleading must include allegations of probable cause or whether it is enough that probable cause be established by sworn testimony in an ex parte hearing; whether arrest warrants may issue on hearsay; whether informant's names must be revealed in the affidavit; whether a judge who issues a warrant may also sit as trial judge; and whether

the warrant cannot lawfully issue without a judicial determination of probable cause by a magistrate, even though the prosecuting attorney, a judicial officer,72 has so determined, or a grand jury (if this case is submitted to same) has so determined.

70. For example, had he been aware that the state's proof of probable cause was stronger than that presented at the pre-trial hearing on his motion to suppress, he may have been willing to plead guilty, thereby gaining some advantage for himself in terms of penalty and saving the state the expense of a jury trial and an appeal.

71. One of the most surprising aspects of Kinnaird is that the method of issuing arrest warrants upon prosecutor's affidavits (pleadings) went unchallenged for so long.

72. [Emphasis added.] See notes 29 and 37 supra.
A court unconstrained by protocol could have responded to this petition by suggesting that the Attorney General and his staff read the fourth amendment decisions handed down by the Supreme Court of the United States between 1961 and 1969. It is obvious that the court in *Kinnaird* did not rule on the technical sufficiency of the affidavit as a pleading. All the court held was that the arrest of *Kinnaird* was unlawful for lack of probable cause and that, as a result, the search was unlawful and the evidence obtained was rendered inadmissible under well-known and well-established constitutional principles. The effect of the court's new trial order was simply to require the state, if it desired to pursue the case, to carry forward without the tainted evidence. Obviously no way remained to cure the error and render the tainted evidence admissible, and there would be no need to re-arrest Kinnaird for re-trial since he was already subject to the court's jurisdiction.

The petition also could have been rejected on the ground that it raised questions not presented in *Kinnaird*. While the court did not respond formally to the Attorney General's unusual petition, it apparently noted (no doubt with great surprise) the difficulties that lower courts and some prosecutors were having in grasping basic constitutional principles and sought to clarify *Kinnaird* through the medium of another case. The closest analogy available was an application for a temporary writ of prohibition based upon the untenable ground that a lower court could not proceed with a trial of an accused car thief because the arrest warrant in the record was not supported by a finding of probable cause.

The record in *State ex rel. French v. Hendricks Superior Court* shows that the defendant was arrested by a state police officer on January 12, 1969, and placed in the custody of the Hendricks County sheriff. The following day the prosecutor filed an affidavit (pleading) charging the defendant with theft. An arrest warrant was issued on the strength of the affidavit even though the accused was already in custody in connection with the alleged offense. The defendant, through court-appointed counsel, filed a "Motion to Quash Arrest Warrant" on February 10, 1969. Four days later the prosecutor attempted to correct the record by filing a paper styled "Probable Cause Affidavit" in which the owner of the stolen vehicle alleged:

> On January 12, 1969, I saw a young man take my 1955 Mercury automobile from my driveway. I chased and caught him, recovering the car, but he got away. He was later caught by

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74. Ind. Ann. Stat. § 9-1024 (Burns 1956 Repl.) provides that a person lawfully arrested without a warrant may be detained "until a legal warrant can be obtained."
the Indiana State Police and was identified as Richard Allen French.

The trial court overruled the defendant's motion to quash, finding that the original affidavit (pleading) was a sufficient showing of probable cause for the issuance of the arrest warrant and also that defendant was in lawful custody prior to the issuance of the warrant. The defendant sought a temporary writ of prohibition from the Indiana Supreme Court to restrain the trial court from proceeding with the case.

The court easily could have disposed of the petition on the ground that while an illegal arrest may affect the admissibility of evidence obtained as a result of an incidental search and seizure, it has nowhere been held to deprive a court of jurisdiction to try the accused. But the court, seeing its chance to respond to some of the critics of *Kinnaird*, formulated the issues as follows:

A. Must a showing of probable cause before a neutral and detached magistrate precede the issuance of a lawful arrest warrant?

B. If the answer to A is yes, then who must make the determination of the existence of probable cause, and how may the showing of probable cause be made within the framework of existing constitutional, statutory and case law.

The majority found there could be no doubt that the first question must be answered in the affirmative. As to the second, it was equally clear from both state and federal constitutional decisions that a "magistrate" is the appropriate warrant issuing authority. A "magistrate" includes "the judge of any court of this state authorized to issue process, to accept pleas, to hear and determine cases and to render judgments." He is "neutral and detached" if he has no personal interest in the case other than performing his judicial duty, and his finding of probable cause would, in itself, not disqualify him from trying the case on its merits. The showing of probable cause may be made by affidavit setting forth sufficient facts or by sworn and recorded testimony before the magistrate to whom the warrant application is made. Seeking to dispose of as many of the Attorney General's questions as possible, the court continued:


76. — Ind. —, 247 N.E.2d at 525.

77. *Id.*

78. *Id.* at —, 247 N.E.2d at 526.
However, the affidavit setting forth the showing of probable cause for obtaining the arrest warrant need not be the same affidavit that charges the accused with the crime for which his arrest is sought. Further, there is ... no need for a hearing to determine probable cause when a grand jury has returned an indictment. The return by the grand jury is a showing of probable cause. 

Again, the court in *French* has done no more than state some of the most basic principles of constitutional criminal procedure.

After saying all this, however, the court quite correctly refused to issue the writ on the ground that while the warrant would not have been valid for taking a person into custody on August 13, 1969, and that the prosecution's after-the-fact attempt to revive the defective warrant by a "probable cause affidavit" was futile, the petitioner's arrest on August 12 was, as far as the record showed, a lawful basis for the jurisdiction of the trial court. It is unfortunate that the court did not make clear that the writ of prohibition would not have issued even though the initial arrest had been illegal.

A reader of the *French* majority opinion who is unfamiliar with the background of the *Kinnaird* case and the subsequent petition of the Attorney General would be forgiven if he were to wind up totally confused.

The opinions of Judges Arterburn and Givan in *French* are worth brief comment because they are, to use the current vernacular, "something else." Judge Arterburn does point out correctly that even though the arrest was illegal, it could not affect the trial court's jurisdiction and that the majority had gone beyond what was necessary to dispose of the case. However, these points are lost in his renewed attack upon *Kinnaird*.

Neither Judge Arterburn nor Judge Givan has grasped the constitutional objection to the arrest of an individual upon a warrant issued upon another's mere allegation that the individual has committed an offense. An arrest entails a serious affront to the dignity of a human being. He is whisked off the street or out of his home and carried off to jail where he must post bond to regain his freedom. He will be subject to a search of his person, his automobile or even parts of his home. If the arrest has been made on the strength of a prosecutor's pleading, the formal criminal

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79. [Footnote added.] The court should have added that the state's pleading should not be cluttered with such matters.
80. — Ind. —, 247 N.E.2d at 526.
81. The latter was not a member of the court at the time of the *Kinnaird* decision.
82. The two opinions are labelled as dissents not because either disagreed with the court's holding that the writ of prohibition should not issue but because of their disagreement with *Kinnaird* and the further explanation of that case by the majority in *French*.
PROBABLE CAUSE FOR ARREST

process has been initiated without any meaningful screening by a neutral judge or grand jury. The prosecutor is simply not neutral and cannot be entrusted with the power to cause warrants to issue merely upon the strength of a sworn statement that a specific offense has been committed. The fact that the pleading is signed by the alleged victim of the crime makes no difference. One citizen may not cause the arrest of another simply by charging (albeit under oath) that X did Y.

Moreover, Judge Arterburn is unwilling to accept the full scope of the fourth amendment which, he claims, is applicable only

to search warrants used to seize things which are or persons who are hidden upon private premises. There is a historical purpose for such a provision in the Constitution. It does not refer whatever to arrest warrants. But it does refer to seizure, and this includes seizure of the person whether on public or private premises. It is not surprising that Judge Arterburn cites no authority for his interpretation of the fourth amendment.

There is little to be gained from further analysis of Judge Arterburn's opinion in French. Suffice it to say that, with respect to his criticism of the majority's attempted explanation of Kinnaird, he begins from an untenable premise. I would, to a degree, agree with Judge Arterburn that "the test of a sound legal principle is that in its extensions and application it reaches rational and sound results." I would add, however, that one must first comprehend the nature of the principle before attempting any extrapolation.

In summary, then, French could and should have been decided on

83. Judge Arterburn claims to see no difference between grand jury indictment and a prosecutor's decision to file the formal charge. Both, he says, are "ferreting out crime," so if a warrant can issue on an indictment, why not on a prosecutor's pleading (affidavit)? — Ind. — 247 N.E.2d at 530. This ignores the "screening" function of the grand jury. Presumably, the institution is meant to serve as a check on the prosecutor in the same sense as a magistrate, and the indictment also must be based upon a finding of probable cause. See Wood v. Georgia, 370 U.S. 375, 390 (1962).


It would seem that if grand juries and magistrates are not performing their functions in the manner supposed by a great number of opinions by a great number of judges, then such failure, if proved, may serve as an independent basis for voiding an arrest or a search.

84. — Ind. —, 247 N.E.2d at 529.
86. — Ind. —, 247 N.E.2d at 531.
the narrow ground that even an illegal arrest does not deprive a court of jurisdiction of the person or the subject matter. The only real effect of French is to require that all arrest warrants, whether issued before or after an actual seizure of the person, be supported by an adequate finding of probable cause. Perhaps the real significance of French is that the person arrested without a warrant in Indiana now has some right to post-arrest screening to determine the legality of his continued custody comparable to the preliminary hearing to which arrested persons are entitled in other jurisdictions. 87 This, in itself, would be a step forward in Indiana criminal procedure which does not make this important safeguard generally available. 88

IV. LOOKING FORWARD FROM KINNAIRD

So far an attempt has been made to show that Kinnaird, insofar as it relates to the requirements for a valid arrest warrant, is essentially non-controversial. The fact that members of the legal profession have regarded this aspect of Kinnaird as establishing a new and questionable rule is, in effect, an indictment of the pre-existing state of the criminal process in Indiana.

However, as noted above, there is a certain amount of uncertainty resulting from the court’s statement of its holding:

It is not our intention to limit the authority of law enforcement officials to make lawful arrests without warrants in those instances where warrants are not required. . . . We only hold that where, as here, an arrest is required to be made on a warrant that warrant can only issue on the basis of an affidavit setting forth facts and circumstances constituting probable cause, and that the determination of probable cause must be made by a “neutral and detached magistrate. 89

The obvious question is, when is an arrest warrant required? Indiana law is replete with instances where the court has recognized the authority of a police officer to arrest, without a warrant, a person whom he has probable cause to believe has committed a felony. 90 At least one expression

88. See Ind. Ann. Stat. §§ 9-704, 9-704a (Burns 1956 Repl.). Ind. Ann. Stat. § 49-2503 (Burns 1964 Repl.) can be read to require a preliminary hearing of this type, but no decision has discussed this aspect of the statute. See also Ind. Ann. Stat. § 9-1024 (Burns 1956 Repl.).
89. Wagner v. State, —— Ind. ——, 242 N.E.2d at 506.
of this principle post-dates Kinnaird.91

By reading the following language from the majority opinion in Kinnaird out of context, one might conclude that the court meant to curtail powers to arrest without a warrant:

Thus, only a magistrate may properly make the determination as to the existence of probable cause, and this determination may only be made on the basis of an affidavit apprising him of the underlying facts and circumstances tending to show that there is probable cause.92

However, this statement was made in the context of the court's application of Aguilar v. Texas, and relates solely to the requirements for a valid warrant. There is no hint of any intention to deprive police officers of the power lawfully to arrest pursuant to pre-existing standards for arrests without warrants.93

One plausible explanation of the court's characterization of Kinnaird as a case in which a warrant was required is that the holding implies a finding that the evidence offered during the hearing on the motion to suppress could not sustain a finding of probable cause for arrest without a warrant and that the only way that the arrest and consequent search could be held lawful would be to find that the warrant had been issued lawfully. As a corollary to this, the court might be suggesting that it will, in the future, apply a stricter standard of probable cause where arrests are made without warrants.94 These suggestions are not particularly tenable in light of the majority's failure to discuss the evidence presented at the hearing on the motion to suppress.

It is clear that where the validity of a search warrant is at issue the search may not be sustained on the basis of facts known to the affiant but not disclosed to the magistrate.95 This follows from the position of the Supreme Court that every search must be conducted pursuant to a validly issued warrant unless it comes within the "incidental to arrest" or

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92. —— Ind. ——, 242 N.E.2d at 506.
93. The most recent formulation of the probable cause standard by the Indiana Supreme Court is as follows:
Probable cause justifying an arrest without a warrant exists where facts and circumstances within the arresting officer's knowledge of which he had reasonably trustworthy information, would lead a reasonably prudent person under the conditions at the time to believe a crime had been committed.
94. See note 67 supra; A. Amsterdam, B. Segal & M. Miller, supra note 45.
"emergency" exceptions to the warrant requirement.  
Perhaps the Indiana court means to apply a rule that if an officer seeks to arrest on the authority of a warrant, he has no alternative source of arrest authority if the warrant does not meet fourth amendment criteria.  
There is, however, some authority that if the officer has independent knowledge of probable cause, the arrest may be sustained on that basis and the invalid warrant disregarded.  
Quite possibly the court was suggesting that, since there was in this cause sufficient time for the police to obtain a valid warrant, an arrest without a warrant would not be valid. The United States Supreme Court never has held an arrest without a warrant unlawful solely because there was time to procure an arrest warrant, but dictum in the recent case of Terry v. Ohio suggests that such a requirement may be recognized: 
We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure ... or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances. . . .  
It would seem that the seizure and jailing of a person ought to be regarded at least as seriously as the invasion of private premises to search for property. The affront to privacy and human dignity is as great if not greater; and, where possible, there should be some objective screening prior to the arrest. 
It is significant that the Court cited Beck v. Ohio, which dealt with the validity of an arrest without a warrant, as well as other cases dealing only with searches preceding arrests in support of its statement in Terry that warrants should be obtained "whenever practicable." 
In support of its second point with respect to "exigent circumstances," the Court mentioned Preston v. United States, 96.

98. Id.; the issue was very recently before the Supreme Court in Chimel v. California, 89 Sup. Ct. 2034 (1969), but the case was decided on other grounds.  
100. Id. at 20.  
104. 392 U.S. at 20.
a case that dealt with the scope of police authority to conduct a search incident to an arrest. In all of these cases, as in Kinnaird, the real issue was the admissibility of the evidence seized. Reading Terry and Preston together, a rule seems to emerge that, while a seizure of the person without a warrant may be allowable if "reasonable," "[t]he scope of the [incidental] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Applying such a principle in Terry, the Court held that a police officer making a reasonable "stop" of a suspect is [when he reasonably perceives danger] entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

In Preston, the Court held that a search without a warrant incidental to an arrest must be carefully limited in time and place and suggested that the scope of the "incidental" search be limited to the need to seize weapons from the arrestee, to prevent his escape or to prevent the destruction of evidence. At the end of its last term, the Court in Chimel v. California consolidated its reasoning in the preceding cases into a rule which severely restricts police power to search without a warrant incident to arrest:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist or effect his escape. . . . In addition it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. . . . There is ample justification, therefore, for a search of the arrestee's person and the area "within his im-

106. Terry v. Ohio, 392 U.S. 1, 19 (1968), quoting Warden v. Hayden 387 U.S. 294, 310 (1967). Prior to Chimel v. California, 89 Sup. Ct. 2034 (1969), discussed in the text accompanying notes 110-11 infra, an argument based upon Cooper v. California, 386 U.S. 58 (1967) could have been made to controvert this theory. Cooper, however, involved the complicating factor of the search of an automobile held "validly" by the police pursuant to a state statute. In any event, it is submitted, that Chimel as discussed infra, validates this statement of the rule.
107. I.e., "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot. . . ." 392 U.S. at 30.
108. Id.
mediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

There is no comparable justification, however, for routinely searching rooms other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The "adherence to judicial processes" mandated by the Fourth Amendment requires no less.111

Since the police in Kinnaird conducted a wide-ranging search of the three-story building,112 the Indiana Supreme Court may have been anticipating the ruling in Chimel. Obviously the search in Kinnaird, if conducted today, would be unlawful simply because of its scope. But, even so, ample basis existed for finding the Kinnaird search unreasonable within the meaning of Preston, Terry and Warden v. Hayden.113

Moreover, since the police went to Kinnaird's establishment intending to conduct a search for items other than those listed in the prosecutor's affidavit, it would be reasonable to require a search warrant.114 Also, the fact that so many items were seized that the police had to employ a truck to remove them suggests that the intensity search was too great to escape the fourth amendment's proscription of general searches.115 It would be anomalous to bar the use of general warrants because of the fear of unlimited rummaging through a man's papers and effects and yet allow an equally intrusive search on the ground that it is incidental to an arrest. Chimel seeks to put a stop to what had become a convenient way around the fourth amendment's search warrant requirements.

V. CONCLUSION

The adverse reaction to the basic and sound principles of constitutional law enunciated in the Kinnaird case should trigger a re-examination of the entire criminal process as currently administered in Indiana.

111. 89 Sup. Ct. at 2040.
112. They even returned a few days later and searched some more. Hearing Transcript at 73-75.
114. In addition to being supported by a finding of probable cause to believe that items connected with criminal activity will be found at a particular place, the items sought must be particularly described, and, generally, only those items may be seized. Stanford v. Texas, 379 U.S. 476 (1965).
If the message of Giordenello and Aguilar did not get through until 1968, in how many other instances are Indiana trial courts ignoring (or remaining unaware of) constitutional mandates?