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Technical Defects in Federal Search Warrants (United States v. Burke)

Brian E. O'Connor

the double jeopardy guarantee, perhaps losing sight of the important balance that must be struck between the interests of a defendant and the interests of society as a whole.[52]

Nina Shreve

TECHNICAL DEFECTS IN FEDERAL SEARCH WARRANTS

United States v. Burke

In addition to guaranteeing freedom from "unreasonable searches and seizures," the fourth amendment declares that no "[search] Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Rule 41 of the Federal Rules of Criminal Procedure, which implements this constitutional mandate, specifies a number of technical requirements with which a federal warrant must comply before evidence procured pursuant thereto can be introduced as such in a prosecution for a federal crime. These technical requirements must be complied with both when a warrant is issued pursuant to rule 41 by either a state or federal magistrate and when a validly issued state warrant is treated as a federal warrant in a federal criminal proceeding because "federal officials participated in its procuration or execution."[1]

There are, however, circumstances in which noncompliance with rule 41 may be overlooked. Notwithstanding the specificity of the rule, there appears to be a growing awareness of the need to disregard those requirements which are not constitutionally mandated, thus limiting the extent to which evidence seized pursuant to a defective federal warrant must be suppressed.[2] Adopting this

[52] In his dissent in United States v. Jenkins, 490 F.2d 868 (2d Cir. 1973), *aff'd*, 420 U.S. 358 (1975), Judge Lumbard spoke of the public interest which must be considered when a defendant raises the double jeopardy defense. In his view, the individual's interest in escaping the anxiety of a second trial must be weighed against the equally important societal interest in public justice. 490 F.2d at 884 (Lumbard, J., dissenting).

[1] United States v. Sellers, 483 F.2d 37, 43 (5th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974).

[2] A number of recent cases indicate the judiciary's growing tolerance for technically defective search warrants. *See* United States v. Sturgeon, 501 F.2d 1270 (8th Cir.), *cert. denied*, 419 U.S. 1071 (1974); United States v. Sellers, 483 F.2d 37 (5th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974); United States v. Soriano, 482 F.2d 469 (5th Cir. 1973), *aff'd in part and rev'd in part on rehearing en banc*, 497 F.2d 147 (1974). In line with this approach, the American Law Institute (ALI) recommends exclusion of seized evidence only where the alleged "defect is of constitutional dimension." ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 290.2, comment at 563 (Proposed Official Draft, Apr. 15, 1975). In other words, the ALI advocates denial of a motion to suppress when the defects cited as giving rise

view in a potentially far-reaching decision, the Second Circuit, in *United States v. Burke*,[3] held that when noncompliance with rule 41 is not of itself of constitutional import, exclusion of the evidence seized is not required unless either prejudice to the defendant resulted from the noncompliance or the rule was intentionally and deliberately disregarded.[4]

Martin Burke, after pleading guilty in the trial court, was convicted of unlawful possession of an unregistered sawed-off shotgun in violation of the National Firearms Registration Act.[5] Notwithstanding his plea, Burke moved to suppress the weapon, alleging, among other things, the technical invalidity of the search warrant pursuant to which the shotgun was seized.[6] Despite Burke's allegations, the district court, without an evidentiary hearing, denied his motion to suppress.[7] Renewing his argument that the warrant's noncompliance with rule 41 required suppression of the evidence seized,[8] Burke appealed his conviction to the Second Circuit.[9] Intent on having the conviction upheld, the Government met Burke's argument with the contention that the warrant was not necessarily a federal warrant, and that even if it were a federal warrant, the violations of rule 41 established by the defense were not of a nature requiring exclusion of the evidence obtained.[10]

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to the alleged infirmity of the warrant are not "of such magnitude as to trigger the 'probable cause' and 'particularly describing' limitations of the Fourth Amendment." *Id.* at 564.

[3] 517 F.2d 377 (2d Cir. 1975).

[4] *Id.* at 386-87.

[5] 26 U.S.C. §§ 5861(d), 5871 (1970).

[6] The alleged invalidity of the search warrant stemmed from its failure: (1) to be directed to a civil officer of the United States; (2) to provide that the search be carried out within a specified time no more than 10 days after issuance; and (3) to require that return be made to a designated federal magistrate. 517 F.2d at 381-82.

[7] *Id.* at 378.

[8] *Id.*

[9] Before reaching the merits, the court dealt with whether the defendant had a right to appeal the alleged erroneous denial of his motion to suppress after having pleaded guilty to the charge in the trial court. The court first recognized the basic principle that "[a] plea of guilty to an indictment is an admission of guilt and a waiver of all non-jurisdictional defects." 517 F.2d at 379, *quoting* United States v. Doyle, 348 F.2d 715, 718 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965), *quoting* United States v. Spada, 331 F.2d 995, 996 (2d Cir.), *cert. denied*, 379 U.S. 865 (1964).

The *Burke* court further noted, however, that notwithstanding a plea of guilty, it is possible for a defendant to preserve his right to appeal an adverse decision if his express reservation of this right is "accepted by the court with the Government's consent." 517 F.2d at 379, *quoting* United States v. Doyle, 348 F.2d 715, 719 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965). The facts presented in *Burke*, however, did not lend themselves to reflex application of this principle. Although the trial judge had approved Burke's express reservation of "his right to appeal the denial of his suppression motion," 517 F.2d at 379, the prosecution had remained silent. Rather than take the position that the Government's express consent was an indispensable prerequisite for this method of mitigating the usually final nature of the guilty plea, the court concluded that "silence on [the part of the Government] is sufficient assent." *Id.*

[10] 517 F.2d at 385.

In reviewing the trial court's apparent disregard of the technical defects raised by Burke, the Second Circuit resolved the threshold issue as to the nature of the warrant, *i.e.* whether it was a federal or a state warrant.[11] As prescribed by the Federal Rules of

[11] Prior to determining the nature of the warrant, the court considered the defendant's additional contention that a sufficient showing of probable cause had not been presented to justify issuance of a search warrant. The allegations of probable cause found in the affidavit were based upon an informant's written statement that he had been inside the defendant's apartment and had "seen a sawed-off shotgun," *id.* at 379, the informant's claim that he had "been told by Burke that the shotgun was stolen in a burglary," *id.*, and a registration check which had revealed that the defendant was not the registered owner of any firearm. *Id.* Nevertheless, the defendant contended that probable cause did not exist because the affidavit failed to state that the informant was known to the affiants to be reliable. *Id.* at 380.

The quest for a concrete test for determining what constitutes probable cause has not met with simple resolution. In Nathanson v. United States, 290 U.S. 41 (1933), the Supreme Court explained that probable cause should be determined from the facts or circumstances presented to the issuing officer "under oath or affirmation. Mere affirmance of belief or suspicion," the Court declared, "is not enough." *Id.* at 47. Whether the affiant's knowledge was required to be based upon his personal observations or whether it was permissible to base an affidavit upon the hearsay of an informant was later settled in Jones v. United States, 362 U.S. 257 (1960). There, the Supreme Court concluded that affidavits based upon hearsay evidence may constitute probable cause as long as there exists a "substantial basis for crediting the hearsay." *Id.* at 272. *Accord,* United States v. Harris, 403 U.S. 573 (1971); United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973); United States v. McCoy, 478 F.2d 176 (10th Cir.), *cert. denied,* 414 U.S. 828 (1973).

In Aguilar v. Texas, 378 U.S. 108 (1964), the Supreme Court attempted to define the substantial basis necessary to support an affidavit based upon hearsay. A two-pronged test was developed. Compliance with this test required that the affidavit inform the magistrate of some of the "underlying circumstances" explaining how the informant came by his information, *id.* at 114, and justifying why the affiant concluded "that the informant . . . was 'credible' . . . ." *Id.* Five years later, in Spinelli v. United States, 393 U.S. 410 (1969), the Supreme Court again applied the *Aguilar* test, this time adding a new twist to its probable cause standard. If an affidavit based upon hearsay, including, for example, an informant's tip, did not relate the "underlying circumstances" revealing how the informant obtained this information, probable cause might still be established if the affiant could bolster the hearsay with corroborative evidence, such as that obtained by police surveillance. *Id.* at 416, 418.

Soon after *Spinelli,* in United States v. Harris, 403 U.S. 573 (1971), the Supreme Court again spoke on the import of *Aguilar.* In *Harris,* the Court declared that an affidavit requesting a search warrant would not always have to aver the prior reliability of the informant. It was the Court's opinion that to determine the reliability of an informant's tip a magistrate could rely on a policeman's knowledge of a suspect's reputation. *Id.* at 583.

Much of the confusion encountered in the application of these tests appears to have stemmed from the different types of informants revealing information. As a result, courts began to distinguish between a professional informant and an eyewitness bystander or victim. For example, in United States v. Bell, 457 F.2d 1231 (5th Cir. 1972), the Fifth Circuit concluded that the *Aguilar-Spinelli* requirement that an affidavit supporting the application for a warrant contain an allegation of credibility should be confined to the professional informant situation and should not apply to an eyewitness bystander or victim. *Id.* at 1231, 1238-39; *accord,* Cundiff v. United States, 501 F.2d 188 (8th Cir. 1974) (per curiam); United States v. Unger, 469 F.2d 1283 (7th Cir. 1972), *cert. denied,* 411 U.S. 920 (1973); United States v. Rajewich, 470 F.2d 666 (8th Cir. 1972); United States v. Mahler, 442 F.2d 1172 (9th Cir.), *cert. denied,* 404 U.S. 993 (1971).

Examining the affidavit in the instant case in light of the requirements of the modified *Aguilar-Spinelli* test, the *Burke* court found it sufficient to constitute probable cause. 517 F.2d at 381. As the court pointed out, it was evident from the affidavit that the informant was alleged to have been an eyewitness because he was alleged to have visited Burke's apartment and to have seen the shotgun. The affidavit also alleged that the informant had spoken to the defendant about the shotgun. Based upon this information, the court concluded that a "substantial basis" for giving credit to the hearsay clearly existed. *Id.*

Criminal Procedure, a warrant is deemed a federal warrant if it is issued in either of the following instances: (1) by a federal magistrate "upon request of a federal law enforcement officer or an attorney for the government";[12] or (2) by "a judge of a state court of record within the district wherein the property sought is located, upon the request of a federal law enforcement officer or an attorney for the government."[13] Further complicating the distinction between federal warrants and state warrants is the principle, established by the courts, that a validly issued state warrant will be treated as a federal warrant if the search made pursuant to the warrant is subsequently joined in by federal officers.[14]

In *Burke,* an examination of the circumstances attendant to the issuance of the warrant revealed that the application and affidavit were submitted on state forms and that the warrant, also on a state form, was issued by a state court judge.[15] The affidavit and application, however, had been signed and sworn to by an agent of the United States Treasury Department as well as two state policemen.[16] And, it was asserted in both of these documents that the property to be seized had been or might be used in the commission of a federal crime.[17] In concluding that the warrant in question was issued by the state court as a federal warrant[18] pursuant to rule 41, the court primarily relied on the fact that it was a federal crime alone for which the issuing magistrate was asked to find probable cause.[19]

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[12] FED. R. CRIM. P. 41(a).

[13] *Id.*

[14] In Byars v. United States, 273 U.S. 28 (1927), state officers acting pursuant to a state search warrant were joined by a federal agent. There, the Court concluded that exclusion is required where evidence is obtained "under color" of federal office in a search that is "in substance and effect," a joint federal-local activity. Twenty-two years later, in Lustig v. United States, 338 U.S. 74 (1949), Justice Frankfurter firmly established the *Byars* principle:

> The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter. . . . It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it.

Id. at 78-79. *Accord,* Gallegos v. United States, 237 F.2d 694 (10th Cir. 1956) (where no evidence of federal participation, evidence falls within "silver platter" rule).

[15] 517 F.2d at 379.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 384.

[19] *Id.* The prosecution contended that the affidavit recited facts which also constituted a violation of state law for which the warrant could just as easily have been issued. Thus, argued the Government, since a state or federal warrant could have been obtained on the facts as alleged, the "officers' hasty selection of a particular statute should not result in 'an iron-clad characterization' of the warrant as a federal one." *Id.* The court rejected this argument, however, because the issuing judge had only been asked to find probable cause

Having decided that the warrant in question was issued by a state court as a federal warrant, only one issue was left to be resolved: To what extent could the format of the warrant deviate from the requirements of rule 41 which authorized its issuance? Judge Friendly, writing for a unanimous court,[20] recognized that under rule 41 the search warrant was technically defective in a number of respects. First, rather than being directed to a civil officer of the United States,[21] the warrant was addressed to "any Police Officer of a regularly organized police department or any State Policeman to whom these presents shall come . . . ."[22] Second, rather than commanding the officer to make the search "within a specified period of time not to exceed 10 days,"[23] the language employed merely required that the search be made "within a reasonable time."[24] Finally, instead of designating a "federal magistrate to whom [the warrant should] be returned,"[25] it "contemplated that the return be made to the issuing judge."[26]

Attempting to minimize the impact of these technical defects, the Government contended that the resulting violations of rule 41 were not serious enough to warrant exclusion of the evidence obtained.[27] In support of this position the prosecution urged adoption of the "blueprint" test formulated by the Fifth Circuit in *United*

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that a federal crime had been committed. Had he been asked to find probable cause that a state crime had been committed, the court reasoned, it could not be certain the warrant would have been issued. *Id.*

[20] Judge Friendly was joined by Judge Feinberg and District Judge Lasker of the Southern District of New York who was sitting by designation.

[21] *See* FED. R. CRIM. P. 41(c).

[22] 517 F.2d at 381.

[23] FED. R. CRIM. P. 41(c).

[24] 517 F.2d at 381.

[25] FED. R. CRIM. P. 41(c).

[26] 517 F.2d at 382.

[27] *Id.* at 385. As the *Burke* court noted, there is little case law on the extent to which noncompliance with rule 41 mandates operation of the exclusionary rule. *Id.* Whereas in *Burke* the noncompliance was obvious from the face of the warrant, noncompliance may also result from improper execution of an otherwise valid search warrant. With respect to the latter situation, a line of cases may be found indicating that evidence obtained in the course of such improper execution need not be excluded unless prejudice resulted therefrom.

For example, in United States v. Cafero, 473 F.2d 489 (3d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974), the Third Circuit stated:

> In the context of traditional search warrants, a failure to comply with certain procedural requirements of F.R.Cr.P. 41 has been held not to amount to deprivation of Fourth Amendment rights necessitating suppression.

Id. at 499. *Accord,* United States v. Moore, 452 F.2d 569 (6th Cir. 1971), *cert. denied*, 407 U.S. 910 (1972) (since return of search warrant is ministerial task, failure to include seized item on inventory attached to return does not, absent prejudice, require exclusion); United States v. Harper, 450 F.2d 1032, 1043 (5th Cir. 1971) (absent prejudice failure to execute in reasonable time does not require exclusion); United States v. Averell, 296 F. Supp. 1004 (E.D.N.Y. 1969) (failure to promptly file search warrant with clerk of court is ministerial task and, absent prejudice, does not require exclusion).

States v. Sellers.[28] Unlike *Burke*, where the court initially determined that the warrant in question was issued as a federal warrant,[29] *Sellers* involved the extent to which in a federal criminal proceeding a validly issued state warrant must comply with rule 41 because of federal participation in the search.[30] The *Sellers* court drew the following distinction:

> If the warrant was issued under authority of Rule 41 as a federal warrant clearly it must comply with the requirements of the rule. If, however, the warrant was issued under authority of state law then every requirement of Rule 41 is not a *sine qua non* to federal court use of the fruits of a search predicated on the warrant, even though federal officials participated in its procuration or execution.[31]

Having noted this distinction, the court in *Sellers* concluded that the warrant in question was of the latter type. More importantly, the court ruled that evidence obtained pursuant to such state warrants, deemed federal because of subsequent federal participation, is admissible if the warrant "satisfies constitutional requirements and does not contravene any Rule-embodied policy designed to protect the integrity of the federal courts or to govern the conduct of federal officers."[32] The "proper test" to be utilized in determin-

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[28] 483 F.2d 37 (5th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974).

[29] *See* text accompanying notes 18-19 *supra*.

[30] In Navarro v. United States, 400 F.2d 315 (5th Cir. 1968), the Fifth Circuit, recognizing that a search is a federal search if federal officers have a hand in it, earlier ruled that a warrant issued under authority of state law had to satisfy rule 41 whenever federal officers joined in the subsequent search. *Id.* at 316, 319. The technical defect at issue in *Navarro* involved noncompliance with the provision of rule 41(a) which mandates that the state court from which a warrant issues be a court of record. *Id.* at 316. For other cases involving this defect see United States v. Hanson, 469 F.2d 1375 (5th Cir. 1972), and United States v. Coronna, 420 F.2d 1091 (5th Cir. 1970) (per curiam).

In *Sellers* the allegation that a technical deficiency existed was prompted by a recent decision, United States v. Brouillette, 478 F.2d 1171 (5th Cir. 1973), which held that a showing of probable cause that a federal crime had been committed was necessary before a United States Commissioner could issue a warrant to federal officers. *Id.* at 1176. In light of *Brouillette*, Sellers argued that since at the time the state warrant was issued there was no probable cause that a federal crime had been committed, the evidence obtained could not be used in a subsequent federal prosecution. Distinguishing between the different types of warrants, the Fifth Circuit declared:

> The federal crime essential of *Brouillette* is a recognition of the inherent limits of the authority granted by Rule 41 to federal and state magistrates to issue federal search warrants. It does not exist to limit the activities of federal officers when they cooperate with state officers. We decline to apply this particular Rule 41 requirement to state warrants.

483 F.2d at 44.

[31] 483 F.2d at 43. It should be noted that in addition to the two warrants distinguished in *Sellers*, there exists a third type: a purely state warrant. Where evidence is obtained pursuant to a validly issued state warrant by state officers without participation by federal officers in its procuration or execution, evidence obtained may be admitted in a federal prosecution so long as the warrant satisfies the fourth amendment's mandate. United States v. Burke, 517 F.2d 377, 382 (2d Cir. 1975).

[32] 483 F.2d at 43.

ing whether a provision of rule 41 does in fact embody such important federal policy, the court declared, is whether it is designed to "assure reasonableness on the part of federal officers, or whether the provision merely blueprints procedure for the issuance of federal warrants."[33]

Strictly adopting the reasoning of the *Sellers* court would have led the *Burke* court to conclude that since "the warrant was issued under authority of Rule 41 as a federal warrant clearly it must comply with the requirements of the rule."[34] The Second Circuit, however, implicitly rejected this portion of the *Sellers* reasoning and, without further discussion, went on to consider application of the "blueprint" test — a test designed for use in evaluating a warrant validly issued under authority of state law — to a warrant which was issued by a state court as a federal warrant.[35]

In deciding whether to adopt the *Sellers* approach, the *Burke* court conceded that the provisions at issue "were included . . . for some policy reasons," but pointed out that these policy reasons did not approach the level of importance exemplified by "probable cause or particularity of description."[36] Thus, while the court concluded that the provisions in question were "rule-embodied" policies, which, under the rule of *Sellers,* would trigger operation of the exclusionary rule, the court refused to adopt this formulation because it was ultimately persuaded by the Government's argument that the technical defects in the warrant were of insufficient magnitude to mandate exclusion of the evidence seized.[37] Judge Friendly warned that courts should be cautious in applying the

[33] *Id.* at 44.

[34] United States v. Sellers, 483 F.2d 37, 43 (5th Cir. 1973).

[35] It should be noted that the Fifth Circuit, in *Sellers,* was not confronted with a warrant issued pursuant to rule 41. Consequently, the statement in *Sellers* concerning such a warrant must be considered dictum. The bold language utilized by the Fifth Circuit in *Sellers, see* 483 F.2d at 43, *quoted in* text accompanying note 31 *supra,* however, clearly indicates the court's desire to adopt a double standard of compliance for technically defective federal warrants: full compliance for warrants issued pursuant to rule 41 and partial compliance, in accordance with the "blueprint" test, for warrants originally issued pursuant to state law but subsequently deemed to be federal. That this was the intent of the court is also apparent from its initial emphasis on whether the warrant issued by the state court was issued under federal or state authority. If in both cases all of the provisions of rule 41 are not a "*sine qua non* to federal court use of the fruits of a search," 483 F.2d at 43, there would appear to be no need to make any initial determination regarding the type of warrant involved. Consequently, while the conclusion is tenuous in that it is based on dictum, it would appear that if the Fifth Circuit were confronted with the facts in *Burke* they would both exclude the evidence obtained because the warrant did not strictly comply with rule 41 and refuse to evaluate the warrant in terms of their "blueprint" test. *But see* United States v. Soriano, 482 F.2d 469 (5th Cir. 1973), *aff'd in part and rev'd in part on rehearing en banc,* 497 F.2d 147 (1974), *discussed in* note 42 *infra,* where the Fifth Circuit refused to exclude evidence seized pursuant to a warrant issued under rule 41 simply because the warrant failed to comply with the provision requiring that the executing agent be named.

[36] 517 F.2d at 384.

[37] *Id.* at 385.

exclusionary rule to violations which are not per se constitutionally infirm.[38] Although he expressly denied any intent to establish "a definitive formulation,"[39] he concluded that, except where the technical defect in the warrant is so grave that the resulting search is deemed warrantless,

> violations of Rule 41 alone should not lead to exclusion unless (1) there was "prejudice" in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule.[40]

Since the defendant did not claim that he could produce evidence which would bring his case within the two exceptions established by the court,[41] the Second Circuit affirmed the conviction.

Unlike the Fifth Circuit, which would apply different tests depending upon the type of warrant involved, the Second Circuit has adopted one test applicable to all defective warrants which are either originally issued as or are ultimately deemed federal. As a result, the approaches taken by these circuits concerning technical violations of rule 41 will not always produce harmonious results. When a federal warrant issued under rule 41 is involved, a court, utilizing the *Sellers* test, would exclude evidence if the warrant pursuant to which it was seized did not comply with all of the rule's specifications.[42] Under the *Burke* test, however, even if such non-

[38] *Id.* at 386.

[39] *Id.*

[40] *Id.* at 386-87 (footnotes omitted). The logic of the *Burke* decision was foreshadowed 4 years earlier in United States v. Ravich, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970), also authored by Judge Friendly. There, it was held that nighttime execution of a search warrant which did not specifically state that it could be executed at any time did not require suppression of the evidence seized. Although Judge Friendly reasoned that the judge who issued the warrant must have contemplated that it might be executed at night, *id.* at 1201, the *Ravich* court also, it should be noted, enlisted the support of FED. R. CRIM. P. 52(a), which directs that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

[41] It was the prosecution's contention that operation of the exclusionary rule was not justified by the technical defects, *see* text accompanying notes 21-26 *supra*, found in the warrant. To support this claim, the prosecution alleged: that a federal agent, along with the state officials, "set about to execute the warrant;" that it was executed on the same day it was issued; and, that the warrant was returned to the issuing court on the following day. 517 F.2d at 385. Accepting the prosecution's contentions, Judge Friendly concluded that no evidence of prejudice or of deliberate intent to avoid the rule was demonstrated. Consequently, he held that the suppression motion was properly denied. *Id.* at 387.

In fact, the court noted that a search warrant might not even have been necessary to seize the shotgun. *Id.* n.17. At the time the officers were entering Burke's apartment to conduct the search, a gunshot was heard, and, once inside the apartment, the officers found Burke lying wounded on the floor next to the weapon. It is possible, therefore, that the officers' entry was supported by "reasonable cause to believe that a state crime had been committed" in the apartment and that the subsequent seizure was justified since the shotgun was in plain view of the entering officers. *Id.*

[42] United States v. Sellers, 483 F.2d 37, 43 (5th Cir. 1973). Interestingly, in United States

compliance were established, a court would not exclude the seized evidence unless either prejudice resulted from the technical deficiencies or the provisions of the rule were intentionally or deliberately disregarded.[43]

Judge Friendly, in comparing *Burke* and *Sellers*, suggested that the two tests would "in most cases" produce identical results.[44] Indeed, the *Sellers* and *Burke* tests have the greatest potential for similarity where the warrant involved is a state warrant which has become, in effect, a federal warrant because of federal participation in the search. In these situations, most violations of rule 41 provisions deemed to embody policies that cannot be ignored under *Sellers* would probably, under *Burke*, be considered technical infirmities resulting in prejudice. Consequently, the exclusion of seized evidence would be required regardless of which test is applied. It is interesting to note, however, that had *Burke* itself involved a state warrant deemed to be, in effect, a federal warrant because of federal participation in the search, and had the Fifth Circuit agreed with Judge Friendly that the rule 41 provisions violated were "rule-embodied,"[45] the two circuits would have reached contrary results. In other words, evidence admissible in the Second Circuit would have been excluded in the Fifth Circuit.

The test established by the Second Circuit in *Burke* appears to be more flexible than, and, as noted by Judge Friendly,[46] preferable to, that taken by the Fifth Circuit in *Sellers*. Rather than draw somewhat artificial lines between "blueprint" procedure and "rule-embodied policy," the Second Circuit has chosen to confront squarely the two major problems frequently attendant to technically defective search warrants, *viz*, resultant prejudice and deliber-

v. Soriano, 482 F.2d 469 (5th Cir. 1973), decided prior to *Sellers*, but after Navarro v. United States, 400 F.2d 315 (5th Cir. 1968), *discussed* in note 30 *supra*, the Fifth Circuit appears to have strayed from the rigid test it had been formalizing in regard to defective search warrants. In *Soriano*, a federal warrant failed to name the executing agent as required by rule 41, yet the court refused to exclude the evidence seized. 482 F.2d at 478-79. Based upon *Navarro* — and certainly its later decision in *Sellers* — if it was to be consistent the Fifth Circuit should have required full compliance with rule 41 and excluded the evidence in question. It seems, however, that in *Soriano* the Fifth Circuit was actually applying a test similar to that formulated in *Burke*. In fact, the *Soriano* court pointed out that there was testimony alleging that the magistrate had been informed of the identity of the executing agent and that the agent did exhibit his identification when the warrant was served. *Id.* at 479. Thus, it appears that in considering the defects in the warrant the Fifth Circuit here applied a prejudice test rather than demand complete compliance with rule 41. As a result of the clear language in *Sellers*, *see* 483 F.2d at 43, *quoted in* text accompanying note 31 *supra*, and the Fifth Circuit's failure to refer to *Soriano* in the *Sellers* opinion, the precedential value of *Soriano* is questionable.

[43] 517 F.2d at 386-87.

[44] *Id.* at 387 n.15.

[45] *Id.* at 385.

[46] *Id.* at 387 n.15.

ate intent to flout the law. As in *Burke*, defects may unconsciously occur through ignorance of technical procedure.[47] If in such a case no prejudice results to the defendant, evidence seized pursuant to such a warrant should be admissible. Utilized properly, the *Burke* test should mediate between two polar evils: freedom for the guilty criminal and judicial sanction of deliberate abuse of criminal procedure by errant police.

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[47] As was noted by the Fifth Circuit in United States v. Ragsdale, 470 F.2d 24 (5th Cir. 1972), the purpose of the exclusionary rule is to compel respect for the fourth amendment "by removing the incentive to disregard it." *Id.* at 30, *quoting* Elkins v. United States, 364 U.S. 206, 217 (1960). It naturally follows from this premise that unless an enforcement officer conducting an improper search is aware of the improper nature of his conduct, the exclusionary rule will have little, if any, deterrent effect.