# The Champion

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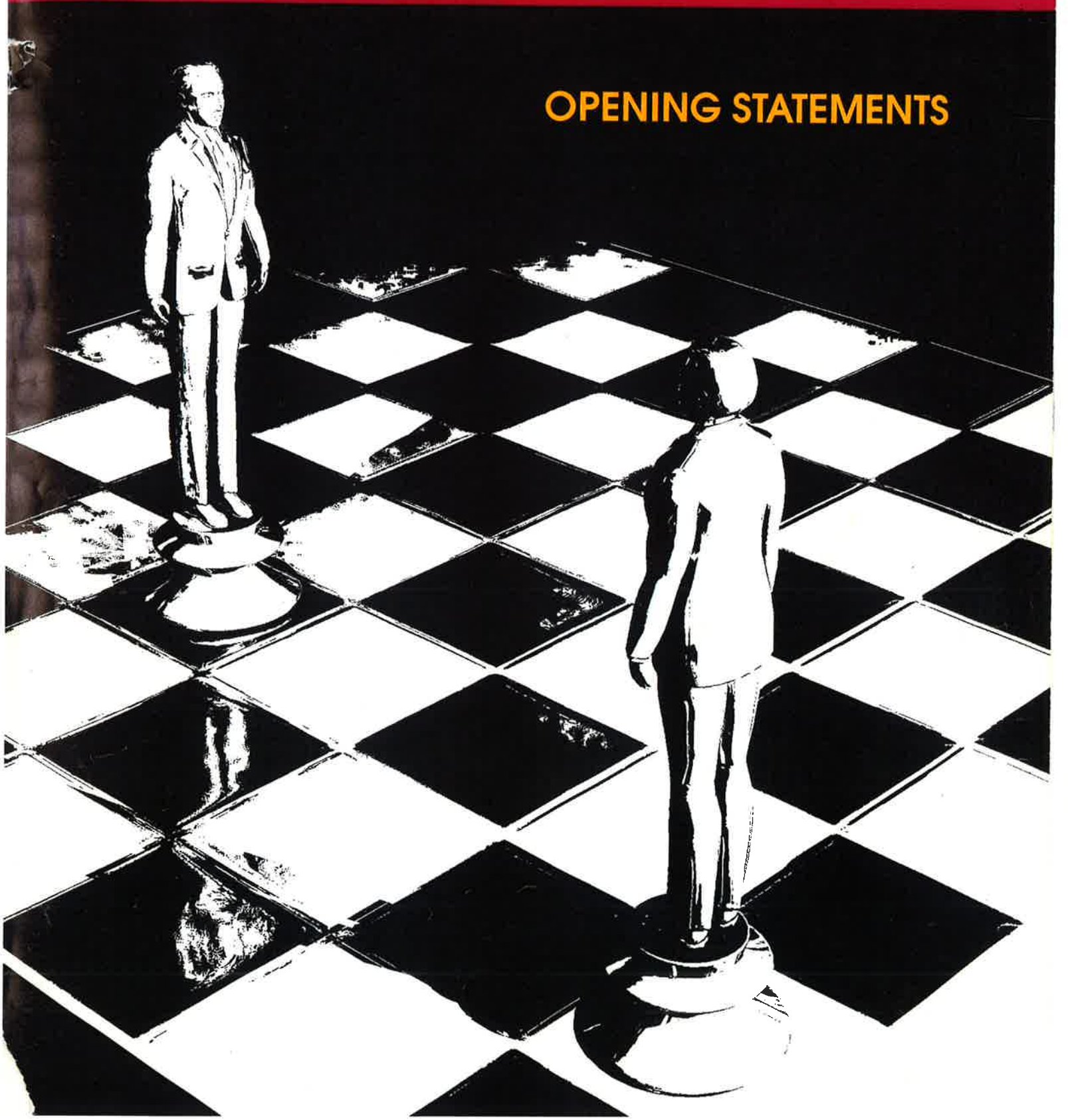
## OPENING STATEMENTS



# FOURTH AMENDMENT FORUM

## Who Dunnit? Identity Determinations within 48 Hours of Arrest

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The B.O.L.O. (Be On the Look Out) identifies the assailant as John Doe. No physical description, no date of birth, no Social Security number. The constable, a deputy marshal, or Tommy Lee Jones himself, apprehends the fugitive from justice and promptly brings him before the magistrate for a probable cause determination. The arresting officer swears out a complaint, the magistrate reviews it and determines that probable cause exists to believe that a John Doe has committed a crime. The magistrate appoints the public defender, sets bail at $100,000 corporate surety bond, and the defendant is whisked away to the local detention facility. Just another day in "mag. court."

Stop a minute. How does the magistrate know that the man standing before him is the wanted man? What in the officer's sworn statement provides any assurance that the defendant brought before the court is the same man named in the B.O.L.O. Consider an arrest on a warrant out of a far away jurisdiction. The marshal who arrests the fugitive probably does not know this man from Adam. Sure, a crime was committed by someone named John Doe, but is there probable cause to believe that the man standing before the court is *the* John Doe? Doesn't the Constitution require that a neutral and detached magistrate determine that the cops arrested the right bad guy?

At first blush, the issue seems elementary. Any first-year law student can tell you that an arrestee is entitled to a probable cause determination by a neutral and detached magistrate whenever the arrestee will be subject to extended pretrial restraint (such as bail). *Gerstein v. Pugh*, 95 S. Ct. 854, 863 (1975). This determination must be made without unreasonable delay, ordinarily within 48 hours of arrest. *County of Riverside v. McLaughlin*, 111 S. Ct. 1661,1670 (1991). The judicial officer making the determination, usually a magistrate judge, must be satisfied that there is "probable cause to believe that the suspect has committed a crime." *Gerstein*, 95 S. Ct. at 866. The proceeding need not be an adversarial hearing. Nor is the accused entitled to the voice of counsel. Indeed, the defendant hasn't even the right to be present for the determination. Rather, like the issuance of an arrest warrant, the magistrate may rely exclusively on the *ex parte* submissions of the government, usually a written statement laced with hearsay, in deciding whether probable cause exists. *Gerstein*, 95 S. Ct. at 868-69.

What procedural safeguard exists, one should wonder, to insure that a defendant brought before the court is the same person named in the complaint/indictment? Ordinarily, this "identity" requirement — probable cause to believe that the arrestee committed the crime alleged in the complaint — is not particularly difficult to establish. Where the arrest is made without a warrant, for example, the arresting officer, familiar with the facts and circumstances surrounding the crime and the identity of the perpetrator, swears out a complaint naming the arrestee as the perpetrator. The complaint thereby provides the magistrate with a factual basis for concluding both that a crime has been committed and that the arrestee committed the crime.

The issue becomes more complicated when the arresting officer does not know the arrestee, as is typical when the arrestee is picked up on a warrant from a different jurisdiction. The warrant may identify the subject by name only, providing no descriptive information about him. In the federal system (and probably in many state systems), the arrestee is not entitled to a post-arrest probable cause determination, because probable cause has already been determined by the judicial officer who issued the warrant. *See* Rule 5, Fed.R.Crim.P.; *Gerstein*, 95 S. Ct. at 865 n.19. But the pre-arrest, probable cause determination assumes that the officers executing the valid arrest warrant

will arrest the person identified in the warrant. Of course, there is a risk that the police will arrest the wrong person, in which case the arrestee can be detained or bailed pretrial without any post-arrest determination by a judicial officer that s/he is the person named in the complaint.

### The *Cannon* Case

Consider *Cannon v. Macon County*, ___ F.2d ___, Case No. 92-6200, Slip op. 3274 (11th Cir. Sept. 17, 1993), in which Mary Cannon was arrested in Georgia on a Kentucky warrant, spent five days in a Macon County Jail and several more travelling to Kentucky courtesy of the Kentucky authorities, until someone finally realized that she was not the wanted person after all. Her repeated assertions of misidentification fell on deaf ears.

Cannon was initially arrested because a Macon County deputy who was offering her road assistance radioed her name ("Mary Rene Parrott" at the time) into the Sheriff's office and got back a "hit" from the National Crime Information Center (NCIC). NCIC indicated that a "Mary E. Mann, a.k.a. Mary E. Parrott" was wanted in Kentucky for the heinous crime of theft by deception. The "Mary" wanted in Kentucky was a 38-year-old female with brown eyes who stood 5'5" tall and weighed 120 pounds. The arrestee was 26 years old, had blue eyes, and had a different Social Security number than the wanted person. A careless deputy botched up the arrest form by relying on the NCIC report rather than the actual physical description of the arrestee. (The deputy also had the arrestee's driver's license upon which he could have relied.) The deputy prepared a "fugitive warrant" attesting that he believed that the arrestee was Mary Parrott wanted in Kentucky, ignoring Cannon's repeated protestations that she was not.

At Cannon's initial appearance, the judge refused to consider any evidence of misidentification, ruling that the only purpose of the hearing was to determine whether Cannon would waive extradition. Cannon initially declined to waive extradition, but later did because the deputy informed her that she would be bounced around like a pinball if she didn't. She arrived in Kentucky several days later, where she was promptly released when it became evident that she was not the wanted person.

Cannon brought a civil rights action and obtained a $50,000 jury verdict against the deputy that prepared the arrest form. On appeal from the district court's entry of a j.n.o.v., the Eleventh Circuit reinstated the verdict, holding that the deputy was liable for failing to take any steps to verify his sworn belief that the arrestee was the wanted person, in the face of the arrestee's assertions of mistaken identity.

The *Cannon* opinion is significant because it holds that an arrestee has a clearly established constitutional right not to be imprisoned without some effort by law enforcement to resolve the dispute over misidentification. *Accord Sanders v. English*, 950 F.2d 1152 (5th Cir. 1992) (Section 1983 action against officer who failed to release suspect after officer knew or should have known that arrestee had been misidentified). The opinion serves as a powerful reminder of the constitutional requirement that someone not be detained without some assurance that s/he is the person wanted in the charging instrument. *See Gerstein*, 95 S. Ct. at 866.

Admittedly, the misidentification in *Cannon* was attributable in large measure to a deputy's deliberate indifference in preparing the arrest form and fugitive warrant, but for his part, the judge did little to rectify the deputy's glaring error. Had the judge simply reviewed the NCIC report and compared it to the arrestee's driver's license, or, better yet, simply looked at Cannon, the judge could have quickly determined that probable cause did not exist to believe that the arrestee was the wanted person. Of course, had Cannon not waived extradition, she would have eventually been afforded a hearing on the issue of identity. But that proceeding was several days (perhaps weeks) away.

In federal court, for example, a person arrested on a warrant from a foreign jurisdiction may not get a "Removal Hearing" until ten days after arrest. At that adversarial hearing, the government must establish, first, that probable cause exists to believe that a crime was committed (a certified copy of the indictment from the foreign jurisdiction satisfies this prong); second, the government must prove, by a preponderance of the evidence, that the arrestee is the same person named in the warrant/indictment. *See* Rules 5, 5.1, & 40, Fed.R.Cr.P. It is the only proceeding under the federal system at which a neutral and detached magistrate is called upon to determine whether there is a basis in fact to believe that the arrestee is the person named in the foreign warrant. *See generally Michigan v. Doran*, 99 S. Ct. 530, 535 (1978) (an arrestee may challenge his extradition on the ground that he is not the person named in the request for extradition).

### *Gerstein* and *Riverside*

*Gerstein* and *Riverside* suggest that this ten-day delay in determining probable cause is constitutionally remiss. The Fourth Amendment confers upon a person arrested without a warrant the right to a determination, within 48 hours, that probable cause exists to believe (1) that a crime was committed, and (2) that s/he committed that crime. Although a pre-arrest warrant suffices to establish the first prong, *Gerstein*, 95 S. Ct. at 865 n.19, the warrant may say nothing to establish that the arrestee is the same individual who committed the crime. *Gerstein* and *Riverside* should be read to require a post-arrest, probable cause determination on the issue of identity in every case, whether the arrest be warrantless or not. If, on the face of the warrant, a neutral magistrate cannot conclude that the arrestee is the person named in the warrant, the magistrate should demand something more of the government before imposing any restraints on the arrestee's liberty. This should occur without unreasonable delay and certainly no later than 48 hours after arrest. *Cf. Riverside*. Like the determination in *Gerstein*, the identity determination contemplated would not require a full blown adversarial hearing.

In the run of the mill case, identity will be established as a matter of routine by the arresting officer, who can, in an affidavit, attest to his/her familiarity with the arrestee. Perhaps the mere fact that the arrestee and the subject of the warrant share the same name will suffice, although "John Smith" and "Jose Rodriguez" might take issue. A date of birth, physical description, or the like, will frost the cake. But some showing is necessary. It is not enough that a marshal, unfamiliar with the arrestee, drags the arrestee into court, and a prosecutor, also unfamiliar with the arrestee, assumes that the arrestee is the person named in the warrant. The magistrate should be required to make an independent probable cause determination, then and there, before imposing a condition of release that restrains the individual's liberty. ■